

Commercial litigation: does quicker mean better?

New court procedures for managing commercial cases have been recently announced by the Chairman of the Board of Grievances with the stated aim of improving efficiency in enforcing commercial contracts, as part of the National Transformation Programme 2020 in line with Saudi Vision 2030.

The decision, which came into force on 25 April 2017, focuses on fixing timescales for each stage of the process, including:

- notifying the defendant of a claim by the day after the claim is filed;
- holding the first hearing within 20 days of filing the claim;
- using the first hearing to address any jurisdiction issues;
- not permitting a hearing to be postponed for the same reason more than once; and
- completing the case with a maximum of three hearings.

Whilst these are clearly promising steps in ensuring matters are handled with efficiency, there will be many commercial cases where the key concern of the parties is quality of decision over speed of judgment.

There is no doubt that the final resolution of commercial cases does take a considerable amount of time – but arguably this is a global issue and Saudi Arabia is not far off in terms of international benchmarks. The World Bank Enforcing Contracts index (2016) puts Saudi Arabia at 575 days for the period from filing a commercial claim to enforcement of a judgment. However,



compared to the USA at 420 days, the UK at 437 days and Canada at 910 days, we do not consider that the total duration of the case is currently the biggest issue.

The judicial system in Saudi faces multiple deeper challenges, one of which is in relation to the training or assisting of judges to determine complex, commercial disputes, particularly given the lack of codification of commercial principles. This requires the judge to act first as a 'legislator' to fill the codification gap, by choosing the appropriate *shari'ah* rule in a given context from an array of conflicting rules even from within the Hanbali school. Only then can he fulfil the traditional judicial function of applying the relevant principles to his findings of facts.

These substantive challenges are compounded by procedural obstacles. The lack of a systematic disclosure regime leads to multiple back and forth submissions between the parties to respond to questions and issues that arise from a review of documents disclosed on an ad hoc basis.

Piled onto this is lack of legal support available for the judiciary. Court support staff are generally not sufficiently trained in legal principles or practices, leaving the judge as the only legal mind in the room, and even many commercial lawyers lack the familiarity with complex commercial matters to be able to assist the judge in analyzing the key issues.

The pressure of a strict time schedule – as per the Board of Grievance's decision – when added to these significant challenges may adversely impact the ability to determine a just solution to the dispute, which is the overriding objective of a

judicial function. So, whilst the decision remains a welcome development to address any laxity in the system, and may particularly benefit the more straightforward cases, justice could be compromised by the time pressures that it brings.

Technically speaking, the decision may also contradict the *Rules of Procedure before the Shariah Courts* which is Saudi's primary legislation governing commercial court procedure and, given its status as a *nithaam* issued by Royal Order, takes precedence over the Board of Grievances Chairman's decision. Relevant provisions include requiring a court to postpone the first hearing if it appears the defendant has not been notified in person; entitling a party to raise jurisdiction grounds at any time in the duration of the case; and permitting a party at any time to request a postponement of a hearing in order to respond to the other party's submissions.

Few commentators would disagree with the importance to economic development of a sound judicial function overseeing the rule of law. Yet Vision 2030 still needs to develop more detailed strategies to target the substantive issues with the judicial system. These include:

- codification of laws, which we understand is an ongoing effort from the reign of King Abdullah;
- more detailed procedural rules on disclosure; and
- emphasis on training court staff and committing the legal industry to a higher standard of assistance of court judges.

Whether these issues will receive the attention they deserve from the policy-makers remains an open question.