



# Practical guidance for creditors of Saudi debtors

Given the financial turmoil of the past 18 months and more recent developments in the Kingdom, creditors of Saudi Arabian debtors should ensure they are in the strongest possible position should a debtor be unwilling or unable to pay. If you are about to enter into a transaction with a Saudi individual or company, this briefing will act as a practical guide to the precautions you should take.

## Have you dealt with the right person?

Courts in Saudi Arabia tend to take a formalistic view of representative authority. The fact that a party appears to speak for a company counts for little, so as a starting point you should check the signatures on your key documents to ensure it is clear who signed.

Establish what kind of evidence you have of the signatories' authority to represent the company in question. You need to be able to establish a clear and unbroken chain all the way from the constitutional documents<sup>1</sup> to the people who signed your documents. Ideally, the signatures should be those of the individuals listed in the company's then-current commercial registration certificate. The certificate should be kept with the transaction documents as it is difficult later to obtain evidence showing the position at a certain past date. If the signing was done on the basis of a power of attorney, it needs to be notarised and the chain of authority to be traceable from the power of attorney to a proper representative.

## Are you prepared for the forgery defence?

A common way of getting out of unwanted contracts is to argue that the signatures on them were forged. There are different ways of verifying the signatures of Saudi debtors. If the documentation was signed before a notary, the notary will have established who the authorised parties and signatories were. In the case of

a power of attorney, notarisation is the rule. However, notaries in Saudi are often unwilling to certify signatures where notarisation is not prescribed by law, meaning that notarisation is rare for loan (and most other commercial) agreements.

Other methods of verification do not afford the same degree of certainty as notarisation, but they can provide some protection. Insisting on a signing ceremony with all parties present and taking copies of signatories' passports is still the method of choice. The local chamber of commerce and industry where the company has to be registered is also able to verify the authenticity of a signature on certain documents, by comparing it to the signature on record. (This is because each local chamber has a signatures registry where the signatures of the managers and directors are maintained.) Some Saudi banks also confirm authenticity on the basis of the sample signatures their customers give them. This provides less assurance than chamber of commerce and industry verification and the Saudi bank will typically disclaim any liability.

## Were all corporate authorisations in place?

Any problems with corporate authority will allow a challenge to the documents' validity. Courts, again, take a formalistic view. If the company's commercial registration certificate issued by the Ministry of Commerce and Industry or its foreign investment licence from the Saudi Arabian General Investment Authority (SAGIA), which is issued if the company has a non-Saudi Arabian shareholder, are not valid or contain relevant

<sup>1</sup> In the case of a Saudi joint-stock company, the memorandum of association and the articles of association comprise the constitutional documents of the company. In the case of a Saudi limited liability company, the memorandum of association is the sole constitutional document.

restrictions, then the company may lack the capacity to enter into the agreements. Likewise, the signatory to the documentation (whether a senior manager, director or otherwise) must be empowered to execute such documents by the constitutional documents, powers of attorney, board and/or shareholders' resolution(s) or by a combination of these.<sup>2</sup> Even when the constitutional documents give signatories the power to enter into the arrangement under consideration, whether generally or specifically, creditors should still seek board or shareholders' resolutions as appropriate, depending on the constitutional documents, and a power of attorney for each signatory. This will ensure there is no doubt about whether a signatory was properly authorised to execute the documents and bind the company.

**If authenticity, representative power and corporate authorisation have not been properly established, is there a solution?**

In this situation, it may be possible to have the agreement or other documents ratified retrospectively by a board or shareholders' resolution, as appropriate. Otherwise, all relevant documents should be re-executed.

**If my documents are in order, where should I go to court?**

You need to check your agreements. They may contain clauses that tie you to a certain court system. Check that the choice made in the documents is logical or, if you have several options, choose the right one when the time comes.

- If the assets of your debtor are located in Saudi Arabia, action needs to be taken in a Saudi court because only decisions by Saudi courts and other Saudi adjudicatory bodies give reliable access to enforcement in the Kingdom. Foreign judgments or arbitral awards are only recognized and enforced if the Saudi courts approve them – which is rarely the case. This applies to arbitration awards despite Saudi Arabia's ratification of the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards.
- When your debtor's assets are located outside Saudi Arabia, legal action in the Saudi courts is problematic. Although as a matter of principle it is possible to have

a Saudi judgment enforced in other jurisdictions (if the foreign jurisdiction and Saudi Arabia are parties to a convention or treaty on enforcement and Saudi Arabia has reciprocated), this is very unlikely.

If you are negotiating agreements with a Saudi counterparty, assess whether you are likely to be the plaintiff or the defendant in a dispute – and where your and your counterparty's relevant assets are – before you choose the governing law and jurisdiction. Before you opt for Saudi law and the Saudi courts, get expert help in ascertaining whether the agreement can be enforced in Saudi Arabia.

**Is a power of attorney from the Saudi counterparty going to help in enforcement?**

Creditors of Saudi debtors often demand powers of attorney as part of a 'security' package along with guarantees, pledges and promissory notes. Although powers of attorney cannot generally be made irrevocable under Saudi law (and can therefore usually be revoked at any later date by the issuer) a creditor should always demand one, as it is valid and enforceable until revoked. It gives the creditor the right to access bank accounts, dispose of assets and perform other useful acts in the name of the debtor. For the power of attorney to be enforceable in Saudi Arabia it must be made before a competent notary public or other official who has such competence (eg a consular official certified by the Saudi Arabian Ministry of Foreign Affairs) and it should not contain a promise to ratify or to agree anything in the future.

**Are promissory notes from the debtor useful?**

The quickest way to enforcement in Saudi Arabia is through a promissory note that complies with Saudi law. Promissory notes are generally treated as independent of their underlying agreements, including their choice of law and jurisdiction clauses. The Negotiable Instruments Committee is the relevant adjudicatory body, which is not usually charged with investigating the underlying transaction although it always has the right to do so. Promissory notes are highly formal instruments, so if you obtain one ensure that it contains all of the essential elements. Any provision for the payment of interest will be null and void. It is therefore best to have the Saudi debtor sign two different promissory notes, one for the

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<sup>2</sup> Note that, depending on the nature of the underlying transaction and the constitutional documents, you may need a power of attorney from the shareholders.

total amount of the facilities made available to the Saudi debtor at any given time, the other for the total amount of interest (or ‘commission’).

### **Are you ready to start enforcement proceedings tomorrow?**

When things go wrong it may be important to act quickly. If you contemplate suing in Saudi Arabia, ensure that you have originals of the executed documentation (or at least the original promissory note if you have one) in Saudi Arabia, so that actions can be brought before the relevant adjudicatory bodies without delay. In particular, note that when planning an action against a debtor in Saudi Arabia, the creditor must pursue the action in the adjudicatory body in the location where the debtor is registered. It may therefore be advisable to keep originals with your local Saudi legal counsel.

Although the contracting parties may choose to have documents solely in a language other than Arabic under Saudi law, documents will need to be translated by a certified translator to be acceptable in court. To avoid delay and uncertainty a promissory note should be drafted in both languages (as your counterparty might otherwise challenge the translation). If you have to rely on foreign language documents in a Saudi court, start getting them translated at the first signs of crisis.

For further information please contact

Tobias Müller-Deku  
T +966 1 479 2200  
M+966 53 542 4202  
E tobias.muellerdeku@  
freshfields.com

Fares Al-Hejailan  
T +966 1 479 2200  
M+966 50 442 4280  
E fares.al-hejailan@  
freshfields.com

Hussam Al-Hejailan  
T +966 1 479 2200  
M+966 50 545 2106  
E lfhshriyadh@  
hejailanlaw.com

Gavin Batcheler  
T +966 1 479 2200  
M+966 56 418 8725  
E lfhshriyadh@  
hejailanlaw.com

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