GAR KNOW HOW CONSTRUCTION ARBITRATION

# Australia

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## Legal system

### 1 Is your jurisdiction primarily a common law, civil law, customary law or theocratic law jurisdiction? Are the laws substantially derived from the laws of another jurisdiction and, if so, which? What instruments have legal force and effect? Who are the lawmaking bodies? How and where are new laws published? Can laws be passed with retrospective effect?

Australia is a common law jurisdiction.

Australian law is based on the law of the United Kingdom, and until the passing of the Australia Act 1986 (Cth), the UK Parliament could legislate for Australia and the Privy Council was the ultimate court of appeal in the Australian hierarchy. In Australian courts, the judgments of other Commonwealth jurisdictions are regarded as persuasive, but not binding, precedent.

The instruments with legal force and effect are laws made by Parliament (Acts) and statutory rules, which operate as subordinate legislation.

The principal lawmaking body is the Parliament, which operates at both Commonwealth and state/territory levels. There is also a further level of local government, which is given its function and powers by the relevant state or territory parliament.

New laws enacted by Parliament are gazetted in an Australian Government Gazette in the relevant jurisdiction, and are then published in hard copy and online.

Although Parliament can pass laws with retrospective effect, there is a presumption against legislation having a retrospective effect on the basis that it is unjust.

## Contract formation

### 2 What are the requirements for a construction contract to be formed? When is a "letter of intent" from an employer to a contractor given contractual effect?

Broadly speaking, there are two types of construction contracts: commercial contracts and domestic building contracts. There are no formal requirements required to establish a commercial construction contract (beyond the requirements for contract formation – offer, acceptance, intention, certainty of terms and consideration). For domestic building contracts, there is a state-based legislative requirement that the contract be evidenced in writing (eg, Domestic Building Contracts Act 1995 (Vic)).

A "letter of intent" – which allows work to progress before a contract is in place on a project – will be enforceable in three circumstances. First, where the parties (objectively) intend to be bound by the terms of the bargain in the letter of intent. Second, where the parties have agreed all the terms of the bargain, but nonetheless have made performance conditional on the execution of a contract. Third, where work has been undertaken pursuant to a letter of intent, the cost of work performed may be recovered on a restitutionary quantum meruit basis.

## Choice of laws, seat, arbitrator and language

### 3 Are parties free to choose: (a) the governing law of their contract; (b) the law of the arbitration agreement; (c) the seat of the arbitration; (d) any arbitral rules; (e) anyone to act as arbitrator; and (f) the language of the contract and the arbitration? If not, what are the limitations on choice and what happens if the parties act contrary to them?

Parties to a contract are free to choose the:

- governing law of their contract;
- law of the arbitration agreement;
- seat of the arbitration;
- arbitral rules;
- arbitrators; and
- language of the contract and the arbitration.

In domestic building contracts in Victoria, New South Wales and the Northern Territory arbitration clauses are prohibited.

Similarly, section 43(1) of the Insurance Contracts Act 1984 (Cth) prohibits the use of arbitration clauses in contracts of insurance. This Act does not apply to reinsurance.

## Implied terms

### 4 How might terms be implied into construction contracts? What terms might be implied?

Terms can be implied into construction contracts by law, in fact (ie, by necessary implication) and by statute. Terms will not be implied to the extent they are inconsistent with the express terms of an agreement.

A term is implied by law when the courts decide that it should be implied into all contracts of a particular type, having regard to the nature of the legal relationship and reasons of policy. A term is implied in fact where this is necessary for the effective operation of that particular contract (in the relevant circumstances of the case).

Generally, for a term to be implied in fact, it must (i) be reasonable and equitable; (ii) be necessary to give business efficacy to the contract; (iii) be so obvious that "it goes without saying"; (iv) be capable of clear expression; and (v) not contradict any express term of the contract.

The courts have shown their readiness to imply terms regarding the work's fitness for purpose; a term that the contractor exercise reasonable care, skill and competence in the performance of the works (the competence and skill that is usual among professionals in that profession), and a term that the works be completed within a reasonable time. Terms are also commonly implied that oblige the employer not to hinder the contractor from performing the work; to pay a fair and reasonable price for the work (where the contract is otherwise silent); and not to take advantage of its own conduct to disentitle the contractor from a contractual right or benefit. A mutual obligation to cooperate – and do all that is necessary to enable the contract to be performed – will often be implied in construction contracts.

A number of terms can be implied by statute. The Australian Consumer Law implies terms concerning consumer guarantees for quality and fitness for purpose that may apply to certain construction contracts. Similarly, there is state-based legislation (eg, the Goods Act in Victoria) that implies terms concerning title, quality and fitness for goods sold. There is also state-based legislation that implies statutory warranties in the context of domestic building contracts.

## Certifiers

### 5 When must a certifier under a construction contract act impartially, fairly and honestly? To what extent are the parties bound by certificates (where the contract does not expressly empower a court or arbitral tribunal to open up, review and revise certificates)? Can the contractor bring proceedings directly against the certifier?

A certifier must act impartially, fairly and honestly when making determinations under a construction contract (eg, issuing certificates).

Subject to the proper interpretation of the contract, certificates will be binding on the parties if made in accordance with the terms of the contract (and if not attended by fraud, collusion or other misconduct). Some intermediate appellate courts draw a distinction between determinations that involve a mechanical application of fixed and objective criteria and those involving the exercise of a discretionary judgment – eg, ascertaining reasonable costs to complete. The latter type of determination will be binding even if it contains errors.

If, on a proper interpretation of the contract, a certificate is final and binding then it is likely that the contractor can only sue the certifier directly if the certificate was issued negligently.

## Competing causes of delay

### 6 If an employer would cause (eg, by variation) a two-week critical delay to the completion of the works (which by itself would justify an extension of time under the construction contract) but, independently, culpable delay by the contractor (eg, defective work) would cause the same delay, is the contractor entitled to an extension?

Some Australian standard form contracts attempt to deal with this issue by provisions relating to 'concurrent delay'. Those provisions are not particularly well drawn and are not the subject of any binding decisions. There is significant doubt as to whether they will regulate the situation. However, in most cases, such clauses appear to have been drafted with the intention that the contractor is not entitled to an extension of time.

Absent a clause to this effect, the usual common law rules relating to concurrent causes of loss would apply. Australian courts would first try to apply the 'but for' test. In circumstances where both causes are sufficient to cause the delay, the 'but for' test does not provide a sensible answer. According to High Court authority, a common sense approach must be adopted. That approach requires an enquiry into the purpose of (in this case) the extension of time clause. The purpose of that clause is to relieve the contractor from the obligation to pay liquidated (or general) damages during periods of delay for which the employer is responsible. Given that the employer is responsible for one of the two causes of delay, the likely outcome of such enquiry would be that the contractor is entitled to an extension of time.

## Disruption

### 7 How does the law view "disruption" to the contractor (as distinct from delay or prolongation to the completion of the works) caused by the employer's breaches of contract and acts of prevention? What must the contractor show for a disruption claim to succeed? If an entitlement in principle can be shown (eg, that a loss has been caused by a breach of contract) must the court or arbitral tribunal do its best to quantify that loss (even if proof of the quantum is lacking or uncertain)?

For the purposes of this question it is assumed that "disruption" means a loss of productivity caused by a breach of contract by the employer. In those circumstances, the contractor is entitled to damages. The damages are the sum of money that will put the contractor back into the position it would have been had there been no breach, therefore no disruption. Obviously, disruption is difficult to prove. Absent evidence of disruption, the contractor is likely to fail because it has not discharged the relevant onus of proof. However, mere difficulty in proving precisely the amount of disruption will not prevent recovery. In those circumstances, an Australian court will, following English authority (Chaplin v Hicks [1911] 2KB 786), do the best it can and make a determination of the amount payable.

## Acceleration

### 8 How does the law view "constructive acceleration" (where the contractor incurs costs accelerating its works because an extension of time has not been granted that should have been)? What must the contractor show for such a claim to succeed? Does your answer differ if the employer acted unreasonably or in bad faith?

A construction contract may entitle the contractor to costs arising from delay (eg, pursuant to a variations clause or a provision stipulating that the contractor is, in defined circumstances, entitled to 'delay costs'). The costs associated with an event of delay can be incurred either by way of prolongation (ie, costs incurred as a consequence of the extended duration of the project) or by acceleration. Viewed in this way, prolongation and acceleration costs are alternative ways in which the costs caused by the delay to progress are incurred. Provided the contractor has a right to delay costs, it should not matter whether the delay costs are incurred as a consequence of prolongation or acceleration (in the context of a breach of contract, subject to the duty to mitigate and, in other cases, reasonableness).

The Australian Standard forms of contract contain a warranty by the employer that the certifier (called the Superintendent) will certify proper adjustments in respect of time. Accordingly, if no such adjustment is made, then it is arguable that the failure to grant the extension of time is a breach of contract by the employer. The contractor may therefore be entitled to any extra over costs expended as a consequence of acceleration.

Where the contractor is entitled to an extension of time but nothing on account of delay costs and no extension of time is granted, the contractor may accelerate to overcome the delay. In that case, the contractor would not have been entitled to the prolongation costs that it would incur, notwithstanding its entitlement to an extension of time. Accordingly, where there has been a failure to grant an extension of time in breach of contract, the maximum amount recoverable would be the difference between the prolongation costs that it was obliged to incur, had an extension of time been granted, and the acceleration costs. Accordingly, if the costs of acceleration are less than the prolongation costs that would have been incurred absent acceleration, then nothing would be recoverable. Acceleration costs in any event will only be recoverable if the failure to grant an extension of time constituted a breach of contract by the employer and the costs incurred are in excess of that which would otherwise be incurred.

There is no concept of 'constructive acceleration' in Australian common law.

## Force majeure and hardship

### 9 What events of force majeure give rise to relief? Must they be unforeseeable and to whom? How far does the express or implied allocation of risk under the contract affect whether an event qualifies? Must the event have a permanent effect? Is impossibility in performing required or does a degree of difficulty suffice? Is relief available where only some obligations (eg, to make a single payment or carry out one aspect of the works) are affected or is a greater impact required? What relief is available and does it apply automatically? Can the rules be excluded by agreement?

Force majeure is a contractual term. What qualifies as a force majeure event depends on the contract. In the absence of such a contractual term, the doctrine of frustration applies.

A contract may be frustrated where there is a change in circumstances that results in the performance of work becoming something radically different from that which was contemplated by the contract. Impossibility of performance is not required. A contractual obligation must be 'incapable of being performed' such that its performance is radically different from that which, objectively assessed, was contracted for. The case of Codelfa Construction Pty Ltd v State Rail Authority of New South Wales (1982) 149 CLR 337 demonstrates that certain contractual obligations may be 'incapable of being performed' where work is not stopped or is not impossible to perform but merely proceeds much more slowly than was expected.

The change in circumstances must not have been caused by one or both of the parties and neither party must assume responsibility under the contract for the risk of the change in circumstances occurring. It is a matter of contractual construction to determine what was contracted for and therefore whether circumstances are radically different from that undertaken by the contract.

Where frustration occurs, it automatically discharges the parties from the obligation to continue to perform their contractual duties. Subject to very limited exceptions, frustration will not partially discharge a contract.

### 10 When is a contractor entitled to relief against a construction contract becoming unduly expensive or otherwise hard to perform and what relief is available? Can the rules be excluded by agreement?

As stated above, Codelfa Construction demonstrates that certain contractual obligations may be 'incapable of being performed' where work is not stopped or impossible to perform but proceeds a lot slower than expected. In that case, the High Court of Australia held that a construction contract can be frustrated where a supervening event merely disrupts performance of work, rather than bringing work to a halt.

## Impossibility

### 11 When is a contractor entitled to relief if after the contract is concluded it transpires (but not due to external events) that it is impossible for the contractor to achieve a particular aspect of the contractual specification? What relief is available?

The current position in Australia in respect of the default contractual risk allocation is the same as that in England and Wales. The contractor will assume the risk of completing the works in accordance with the requirements of the contract. However, in Australia, this risk may be limited by representations made by the owner prior to contract pursuant to section 18 of the Australian Consumer Law, to the extent the representations are misleading or deceptive (which can be established if the representations were negligently made).

Clauses that seek to pass risks to the contractor for matters it cannot foresee or control

### 12 How effective are contractual provisions that seek to pass risks to the contractor for matters it cannot foresee or control, for example, making the contractor liable for: (a) a specified event of force majeure; (b) ground conditions that no reasonably diligent contractor could have foreseen; or (c) errors in documents provided by the employer, such as employer's requirements in design and build forms?

Commercial parties are free to agree to whatever risk allocation they like. Such provisions will be enforceable to the extent they are clear and unequivocal.

## Duty to warn

### 13 When must the contractor warn the employer of an error in a design provided by the employer?

The duty to warn is a subset of the general law of negligence – that is, the duty to take reasonable care for foreseeable risks caused by ones acts or omissions. A duty to warn is more likely to arise when the defect poses a risk to the physical safety of occupants and the contractor has ownership over the design, and is less likely to arise (a) in respect of latent defects; (b) where the contractor has an obligation to construct only; and (c) where the risk in respect of which the duty is said to arise only becomes known after completion of construction.

A duty to warn can also arise in order to prevent liability for misleading or deceptive conduct under the Australian Consumer Law.

## Good faith

### 14 Is there a general duty of good faith? If so, how does it impact upon the following (where they are otherwise permitted under the construction contract): (a) the level of intervention in the works that is allowed by the employer; (b) a party's discretion whether to terminate or suspend the contract; or (c) the employer's discretion to claim pre-agreed sums under the contract, such as liquidated damages for delay?

There is some uncertainty in Australia as to whether and in what circumstances a duty of good faith applies to commercial contracts. The question has not yet been resolved by the High Court of Australia. There are decisions (at first instance and the intermediate appellate level) where courts have recognised that an obligation of good faith may be implied as a matter of law. Equally, there are decisions where courts have approached the issue as one of implication in fact. It has also been suggested that the duty might come about by a proper construction of a contract.

The content of any duty is unclear, but has been recently said to encompass the "obligations (a) to act honestly and with fidelity to the bargain; (b) not to undermine the bargain or the substance of the contractual benefit bargained for; and (c) to act reasonably and with fair dealing having regard to the interests of the parties (which will, commonly, at times be in conflict), and to the provisions and objectives of the contract, objectively ascertained" (Masters Home Improvement Australia Pty Ltd v North East Solution Pty Ltd [2017] VSCA 88).

In respect of the contractual powers listed, whether a good faith obligation will be found will depend on the terms in which the power is expressed. If a contractual power confers an unqualified power on a party, a court may conclude that the power can be exercised in the interests of the party upon whom it is conferred for any reason it sees fit. If a contractual provision confers a power on a party where that party considers that a certain state of affairs exists, a court may hold that the power can only be exercised by an honest decision that the state of affairs does exist. If a provision confers a power that is concerned with cooperation between the parties to produce a result that benefits both parties, a court may imply an obligation to act in good faith such that the party upon whom the power is conferred must have regard to the interest of both parties.

## Time bars

### 15 How do contractual provisions that bar claims if they are not validly notified within a certain period operate (including limitation or prescription laws that cannot be contracted out of, interpretation rules, any good faith principles and laws on unfair contract terms)? What is the scope for bringing claims outside the written terms of the contract under provisions such as sub-clause 20.1 of the FIDIC Red Book 1999 ("otherwise in connection with the contract")? Is there any difference in approach to claims based on matters that the employer caused and matters it did not, such as weather or ground conditions? Is there any difference in approach to claims for (a) extensions of time and relief from liquidated damages for delay and (b) monetary sums?

Time-bar provisions that are expressed to be a condition precedent to a contractor's claim are generally effective (irrespective of whether the claim is for an extension of time or for payment of money). Such clauses are construed according to their natural

and ordinary meaning; read in the light of the contract as a whole, and construed contra proferentem (against the party relying on them) in the case of ambiguity (Darlington Futures Ltd v Delco Australia Pty Ltd (1986) 161 CLR 500).

There are several traditional means of circumventing time bars (including estoppel and waiver), and the recently expanded penalty doctrine (see question 25) has, arguably, created a further means of defeating time bars. This latter avenue is highly contentious and has not yet been tested.

Subject to the express terms of the contract, an employer-caused delay may – on the basis of the "prevention principle" – relieve a contractor from its failure to notify a claim within a prescribed time period (although this is not settled in Australia, with conflicting decisions at intermediate appellate level).

## Suspension

### 16 What rights does the employer have to suspend paying the contractor or performing other duties under the contract due to the contractor's (non-)performance, or the contractor have to suspend carrying out the works (or part of the works) due to the employer's (non-) performance?

Absent contractual provisions, there is no common law right to suspend performance of a contract – either payment by the employer, or completion of the works by the contractor – unless the other party's breach amounts to a repudiation of the contract and that repudiation is accepted, thereby rescinding the contract.

The state-based security of payment legislation has modified this position in respect of payment claims. Where the employer fails to pay in accordance with a payment schedule, the contractor may suspend the works (by first giving written notice).

## Omissions and termination for convenience

### 17 May the employer exercise an express power to omit work, or terminate the contract at will or for convenience, so as to give work to another contractor or to carry out the work itself?

A principal cannot omit or redirect work from a contractor so as to give work to another contractor unless the contractual terms expressly allow it, including pursuant to a variations power (Carr v JA Berriman Pty Ltd (1953) 89 CLR 327). It is an arguable extension of this principle that a principal cannot engage in similar conduct and use a termination for convenience clause in order to complete work itself or give work to another contractor unless the termination for convenience clause expressly states this right.

## Termination

### 18 What termination rights exist? Can a construction contract be terminated in part? What are the practical and financial consequences?

Termination rights exist pursuant to contract and at law. As to the former, a construction contract will usually set out the circumstances in which either party may terminate the contract and the process required for termination.

At common law, a party can terminate a contract where:

- there has been a breach of an essential term (ie, a term of such importance that the promisee would not have entered the contract unless he had been assured its strict performance);
- there has been a sufficiently serious breach of an intermediate term (ie, where the breach deprives the non-breaching party of substantially the whole benefit of the contract); or
- a counterparty has repudiated the contract (ie, an absence of readiness or willingness to perform).

There is no common law right to terminate part of a contract. A contract can be terminated in part only if the express terms of the contract provide that it can. Clause 44.4 of the Australian Standard 2124 form of contract provides that, in certain circumstances, the principal can 'take out of the hands of the Contractor the whole or part of the work remaining to be completed'.

Valid termination of contract will discharge the parties from further performance. The defaulting party will be required to pay compensation to the other party for the loss suffered as a result of the failure to perform. This may include the innocent party's loss of bargain (ie, profit).

Practical consequences of termination may include reputational damage, breakdown in relationship between contractor and employer, and delay to completion of the project.

There is recent authority from the highest court in Australia for the proposition that an innocent contractor can elect to recover either damages for breach or recover a quantum meruit for the work done (which is typically constrained by the original contract price) where the contractor does not have an accrued right to payment (Mann v Paterson Constructions Pty Ltd [2019] HCA 32).

### 19 If the construction contract provides for the circumstances in which each party may terminate the contract but does not expressly or impliedly state that those rights are exhaustive, are other rights to terminate available? If so, what are they and what are the practical and financial consequences?

A contractual right to terminate will only operate to the exclusion of common law termination rights if the contract provides, with clear, unequivocal words, that this is the intention of the parties.

### 20 What limits apply to exercising termination rights?

Termination is not automatic. Termination requires an election by the promisee. The promisee must make plain the election to terminate by unequivocal words or conduct. If the right to terminate is conferred by contract, the promisee must comply with the requirements in the contract.

An election to continue performance (ie, affirmation), which is inconsistent with the right to terminate, will result in a loss of the right to terminate, however, the promisee retains the right to recover damages flowing from the breach. An election to continue performance may be express or inferred from unequivocal conduct of the promisee. The promisee must also, at the time of the alleged election not to terminate, have sufficient knowledge of the breach or the circumstances giving rise to the right to terminate. An election to continue performance does not prevent reliance on a subsequent or continuing repudiation by the promisor or on a breach that was not within the promisee's knowledge at the time.

Where, prior to the time of performance by the promisee, the promisee is not ready and willing to perform, the absence of readiness or willingness does not restrict termination in respect of a breach or repudiation by the promisor unless the promisor was entitled to terminate the performance of the contract.

A right to terminate must be exercised within a reasonable time. This is a question of fact that is determined by the circumstances of the case (see recently, Donau Pty Ltd v ASC AWD Shipbuilder Pty Ltd [2019] NSWCA 185).

There is authority in Australia to the effect that a contractual power to terminate must be exercised in good faith and reasonably. However, the question has not been determined by the High Court of Australia.

## Completion

### 21 Does the law of your jurisdiction deem the works to be completed (irrespective of what the contract says) if, say, the employer takes beneficial possession of the works and starts using them?

No. Completion of works is determined by contract in Australia. Whether the work has been brought to 'practical completion' is a question of fact, having regard to the relevant contractual provisions. Of course, a contract may provide, expressly, that the works are deemed to be complete if the employer takes possession.

### 22 Does approval or acceptance of work by or on behalf of the employer bar a subsequent complaint? What constitutes acceptance? Does taking over the work by the employer constitute acceptance? Does this bar subsequent complaint?

The effect of acceptance of work by or on behalf of the employer – manifested in a final certificate – depends upon the terms of the contract. However, absent an express term to the contrary, the contractual rights of the parties to claim damages for breaches remain, subject to contractual and statutory time limitations.

## Liquidated damages and similar pre-agreed sums ('liquidated damages')

### 23 To what extent are liquidated damages for delay to the completion of the works treated as an exhaustive remedy for all of the employer's losses due to (a) delay to the completion of the works by the contractual completion date; and (b) delays prior to the contractual completion date (in the absence of, say, interim milestone dates with liquidated damages for delay attaching to them)? What difference does it make if any critical delay is caused by the contractor's fraud, wilful misconduct, recklessness or gross negligence? If so, what constitutes such behaviour and can it be excluded by agreement?

Whether a liquidated damages regime is to be treated as an exhaustive remedy is determined by reference to the terms of the contract by applying the usual rules of contractual interpretation. There is authority to the effect that such clauses not only liquidate the damages payable but also limit or cap the amount to be paid.

If this is so, then insofar as the clause is a clause of limitation, it should be construed having regard to the usual rules. Courts have stated that limitation of liability clauses should not be construed as limiting liability for negligence, unless the clause expressly so provides. This is justified by the contention that it is unlikely to have been the intention of the parties that the exclusion clause was intended to exclude liability for negligence, unless it says so expressly. While such reasoning, insofar as it relates to negligence, may not be applicable in all contracts, the logic is applicable, perhaps more so, in the case of fraud, wilful misconduct, recklessness or gross negligence. Therefore, absent an express exclusion in respect of such matters, it is unlikely that a clause will be construed to exclude or limit liability for fraud, wilful misconduct, recklessness or gross negligence.

### 24 If the employer causes critical delay to the completion of the works and the construction contract does not provide for an extension of time to the contractual completion date (there being no "sweep up" provision such as that in sub-clause 8.4(c) of the FIDIC Silver Book 1999) is the employer still entitled to liquidated damages due to the late completion of works provided for under the contract?

No. The prevention principle applies if the employer causes or contributes to delay to completion and the contract does not contain an appropriate extension of time clause, meaning the employer will not be able to recover liquidated damages. Unless the contract provides otherwise, the prevention principle applies even when the principal's conduct was expressly permitted under the contract (eg, ordering variations), or when the contractor may have disabled itself from completing by the due date by its own delays (SMK Cabinets v Hili Modern Electrics Pty Ltd [1984] VR 391).

However, where the employer has lost its ability to recover liquidated damages due to the prevention principle, the employer may be able to recover general damages if the contractor fails to complete within a reasonable time. This is because when the employer's actions prevent on time completion, the contractor's obligation to complete by the date stipulated in the contract is replaced by an obligation to complete within a reasonable time (CMA Assets Pty Ltd v John Holland Pty Ltd (No 6) [2015] WASC 217).

### 25 When might a court or arbitral tribunal award less than the liquidated damages specified in the contract for delay or other matters (eg, substandard work)? What factors are taken into account?

Where a court or tribunal finds that a liquidated damages provision, judged at the time of entering into the contract (not the time of breach), is not a genuine pre-estimate of the damage likely to occur, the provision will be a penalty. In this circumstance, the contractor will not be required to pay the liquidated damages. However, the contractor will be liable to pay as general damages any sum that the employer can prove.

In Australia, a clause may be penal even if it is not triggered by a breach of contract (Andrews v Australia and New Zealand Banking Group Ltd (2012) 247 CLR 205 and, more recently, Paciocco v Australia and New Zealand Banking Group Ltd (2016) 258 CLR 525). To this extent, the doctrine of penalties in Australia differs from the position in the remainder of the common law world (eg, Cavendish Square Holding BV v Talal El Makdessi [2015] UKSC 67).

### 26 When might a court or arbitral tribunal award more than the liquidated damages specified in the contract for delay or other matters (eg, work that does not achieve a specified standard)? What factors are taken into account?

A court or tribunal may award more than the liquidated damages specified in a contract if on a proper construction of the contract the liquidated damages provision is not an exhaustive remedy for delay (ie, a code). In this circumstance, the principal

may be able to recover general damages in addition to or instead of liquidated damages. As discussed above, as a matter of construction, a liquidated damages clause may not act as a cap if the limitation does not apply to deliberate delay or gross negligence.

## Assessing damages and limitations and exclusions of liability

### 27 How is monetary compensation for breach of contract assessed? For instance, if the contractor is liable for a defect in its works is the employer entitled to its lost profits? What if the lost profits are exceptionally high?

In Australia (as in England and Wales), monetary compensation (ie, damages) for breach of contract is assessed as the sum of money that will put the claimant in the position it would have been in had there been no breach (ie, had the contract been performed).

Recovery is subject to rules of remoteness – that is, limited to losses that (i) arise in the ordinary course of things; and (ii) were reasonably contemplated by the parties at the time of contract – and mitigation (ie, preventing a claimant from recovering losses that could have been reasonably avoided).

Subject to these rules (and any applicable exclusion or limitation of liability clause – refer question 30), an employer can recover lost profits, even if exceptionally high.

### 28 If the contractor's work is technically non-compliant, is the contractor liable for remedying it if the rectification cost is disproportionate to the benefit of the remedy? Can the parties agree on a regime that is stricter for the contractor than under the law of your jurisdiction?

A contractor will be liable for rectification costs (or the costs of completion) where the work is reasonable and necessary. The employer will be entitled to such costs even if the rectification works are directed at, for example, aesthetic concerns rather than structural integrity. If the work and associated costs are unreasonable (eg, disproportionate to the benefit), the employer will be entitled to damages reflecting the diminution in value in the works.

### 29 If there is a defects notification period (DNP) during which the contractor must or may remedy any defect in its works that appears during a certain period after their completion, if the construction contract is otherwise silent, does it affect the employer's rights to claim for any defects appearing after the DNP expires?

A DNP is a creature of contract. If the contract is otherwise silent, following the expiration of the DNP the employer does not have a right to require a contractor to return to site and repair defects. However, the employer will still, unless expressly excluded, have the right to claim common law damages from the contractor in respect of any defects in the work that are caused by a breach of contract (including defects that only manifested themselves after expiration of the DNP).

### 30 What is the effect of a construction contract excluding liability for "indirect or consequential loss"?

The usual practice in Australia is to define concepts of 'indirect or consequential loss'. Where defined, the courts will give the expression the defined meaning.

However, in several recent Australian cases the expression 'consequential loss' has not been defined and various state courts have chosen different meanings for the expression. Accordingly, the proper meaning of these words will remain unsettled until the High Court of Australia makes a determination in respect of the issue. The current position can be summarised as follows:

- In Victoria and New South Wales, the Courts of Appeal have determined that consequential loss means everything beyond 'the normal measure of damage', such as profit or expense incurred through breach. In so doing they have adopted the view advanced in McGregor on Damages (a leading authority on damages). Those courts have concluded that the English approach is not to be followed; that is, consequential loss is not limited to loss falling within the second limb of Hadley v Baxendale.
- In South Australia, the relevant case is Alstom Ltd v Yokogawa Australia Pty Ltd (No. 7) (2012) SASC 49. There the court held that unless the term was qualified by its context, it would normally extend, subject to the rules relating to remoteness, to

all damages suffered as a consequence of a breach of contract. According to that case unless the contract prescribed a remedy (such as in respect of liquidated damages), common law damages are not available.

- The relevant Western Australian case is Regional Power Corporation v Pacific Hydro Group Two Pty Ltd [2013] WASC 356 (followed by Patersons Securities Ltd v Financial Ombudsman Service Ltd (2015) 108 ACSR 483). There Justice Kenneth Martin was critical of the English, Victorian and New South Wales approaches to the question. Rather, similar to the view expressed in South Australia, he preferred that the expression be given its normal (wide) meaning, having regard to the context of the particular contract. Similar comments were made by Justice Allanson in the recent decision of AGC Industries Pty Ltd v Karara Mining Ltd [2019] WASC 140.

### 31 Are contractually agreed limits on – or exclusions of – liability effective and how readily do claims in tort or delict avoid them? Do they not apply if there is fraud, wilful misconduct, recklessness or gross negligence: (a) if the contract is silent as to such behaviour; or (b) if the contract states that they apply notwithstanding such behaviour? If so, what causation is required between the behaviour and the loss?

Exclusions and limitations of liability are effective and are not, except in rare circumstances, avoided by tortious claims.

If the contract is silent, it is likely that the term will be construed in a manner so that fraud, wilful misconduct, recklessness or gross negligence will not be covered by a limit or exclusion of liability. If the contract states that exclusions and limitations of liability apply notwithstanding the occurrence of fraud, wilful misconduct, recklessness or gross negligence, then they will be enforceable.

The contravening conduct must have been a material cause of the loss. A 'common sense' test for causation has been approved by the highest court in Australia (while nonetheless recognising the utility of a 'but for' enquiry).

## Liens

### 32 What right does a contractor have to claim a lien (or similar) in the works it has carried out? If so, what are the limits of the right if, for example, the employer has no interest in the site for the permanent works? How is the right recognised and enforced?

Only one Australian jurisdiction, South Australia, has legislation in place that enables a contractor to claim a lien on the works it has carried out. This is the Worker's Liens Act 1893 (SA). The contractor must have a present entitlement to payment for works conducted with the consent of the owner or occupier of the land and the lien must be registered within 28 days of the contract price becoming due. The right is enforced by bringing an action in a court where the contract price (or wages) can be recovered. The court is empowered to order the sale of the relevant estate or interest to satisfy the lien.

The Northern Territory used to have similar provisions in the Workmen's Liens Act 2002 (NT). It was repealed by section 66 of the Construction Contracts (Security of Payments) Act 2004 (NT). However, the Workmen's Liens Act will still apply to contracts entered before 1 August 2005.

## Subcontractors

### 33 How do conditional payment (such as pay-when-paid) provisions operate under the law of your jurisdiction (including interpretation rules, any good faith principles and laws on unfair contract terms)?

Pay when paid provisions have been prohibited by statute in all Australian states and territories.

### 34 May a subcontractor claim against the employer for sums due to the subcontractor from the contractor? How are difficulties with the merits and proof of the subcontractor's claim addressed, including any rights the contractor has to withhold payment? What if aspects of the project suggest that the law of your jurisdiction should not apply (eg, the parties to both the main contract and the subcontract have chosen a foreign law as the governing law)?

The Security of Payment legislation across Australia provides that, in certain circumstances, a subcontractor may obtain a statutory right to be paid by the employer amounts owed by a head contractor. The procedure only applies where the

subcontractor has obtained an adjudication in its favour on a claim lodged pursuant to the Security of Payment (SOP) legislation (and in respect of a project within an Australian state or territory).

### 35 May an employer hold its contractor to their arbitration agreement if their dispute concerns a subcontractor (there being no arbitration agreement between the contractor and the subcontractor or no scope for joining two sets of arbitral proceedings) or can the contractor, for example, require litigation between itself, the employer and the subcontractor? Does it matter if the arbitration agreement does not have its seat in your jurisdiction?

Yes the employer may hold the contractor to the arbitration agreement. As between the employer and contractor, the dispute between them is governed by their arbitration agreement. There may be rights and liabilities between each or both of the employer and contractor and other parties or strangers to the action (such as the subcontractor). But this has no bearing on whether the dispute between the employer and contractor is susceptible to their arbitration agreement. If the contractor seeks to litigate the dispute, the court must refer the employer and contractor to arbitration (section 8(1) of the uniform commercial arbitration legislation or, if applicable, the equivalent provision in the International Arbitration Act), unless the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed. Note that a dispute under security of payment legislation is not capable of settlement by arbitration and is therefore "inoperative or incapable of being performed" (Siemens Ltd v Origin Energy Uranquinty Power Pty Ltd (2011) 80 NSWLR 398).

Australian courts also retain inherent power to stay properly commenced litigation – for example, between a contractor and subcontractor – pending resolution of the arbitration between the employer and contractor. Particularly where there are overlapping issues in the arbitration and litigation; or where the result of the arbitration would have a material effect on the conduct/result of the litigation (see, for example, UDP Holdings Pty Ltd v Ironshore Corporate Capital Ltd (2016) 51 VR 60).

## Third parties

### 36 May third parties obtain rights under construction contracts? How readily can those connected with the employer (such as future or ultimate owners) bring claims against the contractor in respect of (a) delays and (b) defects? To what extent are exclusions and limitations of liability in the construction contract relevant?

In Australian contract law, the doctrines of privity and standing exclude third parties from suing on a contract to which they are not a party (subject to limited exceptions). This position has been modified by statute in some states and territories to allow, in limited circumstances, for a third-party beneficiary to enforce a promise made in its favour. There is also recent authority from Australia's highest court to the effect that a third party may sue or be sued under an arbitration agreement if it claims 'through or under' a party to the arbitration agreement (Rinehart v Hancock Prospecting [2019] HCA 13).

In addition, third parties – in particular subsequent purchasers – are not entitled to sue contractors for delays or defects pursuant to the contract unless the relevant contract has been novated or a cause of action assigned.

In Australian law, defective building work is characterised as pure economic loss. In a decision of the High Court it was determined that third parties, such as a subsequent purchaser, will rarely (if ever) be able to sue in tort, particularly if they could have protected their interests by contract.

### 37 How readily (absent fraud, wilful misconduct, recklessness or gross negligence) can those connected with the contractor (such as affiliates, directors or employees) face claims in respect of (a) delays (b) defects and (c) payment? To what extent are exclusions and limitations of liability in the construction contract relevant?

Generally, affiliates, directors or employees of a contractor (ie, persons not party to the construction contract) will not be liable for delays, defects or payments.

In certain circumstances – eg, where there has been conduct in contravention of statutorily imposed norms such as breaches of directors' duties under the Corporations Act 2001 or misleading or deceptive conduct in contravention of the Australian Consumer Law – Australian courts will 'pierce the corporate veil' and attribute liability to affiliates, directors or employees. Such instances are rare and, where established, are, in accordance with current authority, generally not affected by exclusions and limitations of liability in the construction contract.

## Limitation and prescription periods

### 38 What are the key limitation or prescription rules for claims for money and defects (and insofar as you have a mandatory decennial liability (or similar) regime, what is its scope)? What stops time running for the purposes of these rules (assuming the arbitral rules are silent)? Are the rules substantive or procedural law? May parties agree different limitation or prescription rules?

The limitation period for actions in respect of defective building work varies from jurisdiction to jurisdiction. Victoria, New South Wales, Tasmania, South Australia, the Northern Territory and the Australian Capital Territory have a 10-year limitation period. In Victoria, this period starts to accrue from the date of issue of the occupancy permit or the date of issue of the certificate of final inspection. Other states have similar provisions designed to provide certainty as to the date upon which the period commences.

Queensland and Western Australia have a six-year limitation for actions founded on simple contracts (and 12 years for deeds) (see, for example, Limitations of Actions Act 1974 (Qld), sections 10(1), (3)).

Parties may agree to extend or shorten a limitation period. Although note that there is recent first instance authority suggesting that it is not possible for the limitation period in respect of certain statutory causes of action – eg, misleading or deceptive conduct under the Australian Consumer Law – to be shortened by agreement (Brighton Australia Pty Ltd v Multiplex Constructions Pty Ltd [2018] VSC 246).

Following the High Court of Australia's decision in John Pfeiffer Pty Ltd v Rogerson (2000) 203 CLR 503, all statutes of limitation are classified as substantive. This position is also reflected in legislation (to the extent that the law of the cause of action is that of another state, territory or New Zealand); see, eg, Choice of Law (Limitation Periods) Act 1993 (Vic).

## Other key laws

### 39 What laws apply that cannot be excluded or modified by agreement where the law of your jurisdiction is the governing law of a construction contract? What are the key aspects of, say, the FIDIC Silver Book 1999 that would not operate as its plain words suggest?

Where the law of an Australian state is the governing law of a construction contract, a number of laws cannot be excluded or modified by agreement between the contracting parties.

Proportionate liability legislation has been enacted in each Australian state and territory as a means of apportioning loss between concurrent wrongdoers. It replaces the common law principle of joint and several liability. The legislation expressly allows parties to contract out of the proportionate liability regime in New South Wales, Tasmania and Western Australia (see, for example, Civil Liability Act 2002 (NSW), Part 4). Other states, such as Queensland, expressly prohibit contracting out. In Victoria, the statute is silent and arguments are available either way.

Security of Payment (SOP) legislation has been enacted in each Australian state and territory. It aims to ensure that cash flow is maintained for all parties in the contractual chain. It provides contractors and subcontractors with a statutory right to recover monthly progress payments and to have payment disputes determined quickly via adjudication. Although some inconsistencies exist between the jurisdictions, parties cannot contract out of SOP legislation in Australia. Section 7(1) of the Building and Construction Industry Security of Payment Act 2002 (Vic) provides that the Act applies to any construction contract, written or oral, where the work site is located in Victoria, even if the construction contract is expressed to be governed by non-Victorian law. Certain classes of construction projects such as residential building work are exempt (though this is expected to soon change in NSW following the enactment of the Building and Construction Industry Amendment Act 2018 (NSW)).

The Australian Consumer Law regulates consumer protection and fair trading. Parties cannot contract out of the ACL, and any term purporting to exclude statutory warranties and consumer guarantees provided under the statute will be void (section 64(1)). Moreover, a contract term alone cannot exclude liability for misleading or deceptive conduct under section 18 of the ACL. It may, however, be possible to limit the ACL's application in certain instances (noting that this has not yet been considered by the High Court of Australia or any intermediate appellate court).

Residential building contracts are heavily regulated by the state governments, although these regulations have little impact on commercial construction activities. Section 132 of the Domestic Building Contracts Act 1995 (Vic) renders a domestic building contract term void if it is contrary to the Act or purports to annul, vary or exclude its provisions.

### 40 What laws of your jurisdiction apply anyway where a foreign law governs a construction contract? What are the key aspects of, say, the FIDIC Silver Book 1999 that would not operate as its plain words suggest?

All construction projects that take place in Australia, even those governed by foreign law, are subject to a number of statutes and regulations that cannot be excluded or modified by agreement. See question 39. Some of those same statutes also have extra-territorial application, for example the ACL (Valve Corporation v ACCC [2017] FCAFC 224) and, in some circumstances, the SOP legislation (Wiggins Island Coal Export Terminal Pty Ltd v Monadelphous Engineering Pty Ltd [2015] QSC 307).

## Enforcement of binding (but not finally binding) dispute adjudication board (DAB) decisions

### 41 For a DAB decision awarding a sum to a contractor under, say, sub-clause 20.4 of the FIDIC Red Book 1999 for which the employer has given a timely notice of dissatisfaction, in an arbitration with its seat in your jurisdiction, might the contractor obtain: a partial or interim award requiring payment of the sum awarded by the DAB pending any final award that would be enforceable in your jurisdiction (assuming the arbitral rules are silent); or interim relief from a court in your jurisdiction requiring payment of the sum awarded by the DAB pending any award?

There are no cases directly on point. However, pursuant to Australian law, an engineer's payment certificate under a construction contract usually gives rise to an immediate right to payment, even if the employer disputes the value of the certificate. The employer must pay the amount certified and refer the dispute to arbitration, which may result in an award requiring some or all of the money to be repaid. This position is analogous to the situation where a DAB has made a binding, but not final, determination. The amount determined by the DAB must be paid and an arbitrator has jurisdiction to make an award on this basis. The determination of the DAB can be challenged by arbitration; however, such a challenge is likely to require more evidence and take longer than the first. An Australian court would likely follow the recent Singapore Court of Appeal decision in PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation (2015) SGCA 30, which corrects the earlier decision in CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK (2011) SGCA 33.

## Courts and arbitral tribunals

### 42 Does your jurisdiction have courts or judges specialising in construction and arbitration?

Yes. Some courts in Australia, at a State level, have specialist lists managed by judges with expertise in the relevant areas. For example, the Supreme Court of Victoria contains an Arbitration List and a Technology, Engineering and Construction List in its Commercial Division. Likewise, a Commercial Arbitration List and a Technology and Construction List form part of the Equity Division of the Supreme Court of New South Wales. Each registry of the Federal Court of Australia has an arbitration coordinating judge, and a proceeding under the International Arbitration Act 1974 (Cth) will be listed before an arbitration coordinating judge.

### 43 What are the relevant levels of court for construction and arbitration matters? Are their decisions published? Is there a doctrine of binding precedent?

The Australian court system consists of federal courts and state and territory courts. All states and territories have a Supreme Court, with both trial and appeal divisions. The majority of construction matters are heard, in the first instance, in the Supreme Court of the relevant state or territory. Most states and territories also have two further levels of courts: a district (or county) court and a magistrate's court. The financial jurisdiction of these courts is limited so they rarely hear construction matters. Each Supreme Court has jurisdiction under its respective uniform commercial arbitration legislation.

The Federal Court of Australia is a superior court of limited jurisdiction. It has extensive jurisdiction under the International Arbitration Act 1974 (Cth) (along with the state and territory Supreme Courts), including the enforcement of a foreign award and applications for an order to stay a proceeding. The Federal Court will also hear construction matters where there is a parallel claim made pursuant to Commonwealth legislation (eg, under the Australian Consumer Law).

The High Court of Australia is Australia's highest court with appellate jurisdiction over all other courts, as well as power of constitutional review.

In most instances, court proceedings are conducted in public and court decisions are published. A doctrine of binding precedent applies to the Australian court system.

### 44 In your jurisdiction, if a judge or arbitrator (specialist or otherwise) has views on the issues as they see them that are not put to them by the parties, can they raise them with the parties? Is the court or arbitral tribunal permitted or expected to give preliminary indications as to how it views the merits of the dispute?

A judge or arbitrator may not decide a case on a point not raised by one of the parties or by the court or tribunal for the consideration of the parties. If a judge or arbitrator has a view on an issue that is not put to him or her by the parties, he or she must raise the issue with the parties and seek submissions.

To avoid any perception of bias, it is unwise (and unusual) for a judge or arbitrator to give a preliminary indication as to how he or she views the merits of the dispute.

### 45 If a contractor, say, wishes to arbitrate pursuant to an arbitration agreement, what parallel proceedings might the employer bring in your jurisdiction? Does it make any difference if the dispute has yet to pass through preconditions to arbitration (such as those in clause 20 of the FIDIC Red Book 1999) or if one of the parties shows no regard for the preconditions (such as a DAB or amicable settlement process)?

If an action brought by a party is a matter that is the subject of a domestic arbitration agreement, unless the court finds that it is null and void, inoperative or incapable of being performed, section 8(1) of the Commercial Arbitration Act 2011 (Vic) (uniform in each state and territory except the ACT) requires the court to refer the parties to arbitration. There is no room for the exercise by the court of any discretion to do otherwise. This issue arose in John Holland Pty Ltd v Kellogg Brown & Root Pty Ltd [2015] NSWSC 451, where KBR succeeded in its application for an order under section 8(1) referring John Holland and it to arbitration. If an action is brought pursuant to an international arbitration clause, the result will be the same.

Where, however, there are contractual preconditions to a party being entitled to refer a dispute to arbitration, which are not fulfilled, a court will not refer a dispute to arbitration because to do so would conflict with the contractual provisions that the parties agreed. This was the second issue that arose in John Holland v KBR. The court held that the arbitration agreement between John Holland and Atlantis, the second respondent, was inoperative because the relevant conditions precedent to arbitration had not been fulfilled. It followed that Atlantis had no right under section 8(1) to request the court to refer the matter to arbitration. However, Atlantis was entitled to an order staying the action in court. Therefore, the claimant's only option was to follow the procedure required by the arbitration clause and refer the dispute to arbitration.

### 46 If the seat of the arbitration is in your jurisdiction, might a contractor lose its right to arbitrate if it applied to a foreign court for interim or provisional relief?

No. Both the Commercial Arbitration Act and the International Arbitration Act 1974 (Cth) give the UNCITRAL Model Law the force of law in Australia. Therefore, irrespective of whether the arbitration is international or domestic, it is not incompatible with an arbitration agreement for a party to request interim relief from a court.

Further, like most of the major international arbitration rules, article 33(8) of the Arbitration Rules of the Australian Centre for International Commercial Arbitration recognises a party's right to apply to a competent court for interim measures.

## Expert witnesses

### 47 In your jurisdiction, are tribunal- or party-appointed experts used? To whom do party-appointed experts owe their duties?

Both tribunal- and party-appointed experts are used in Australia (although tribunal-appointed experts are rare). The expert's paramount duty is owed to the court (or tribunal) to assist in the resolution of the dispute.

## State entities

### 48 Summarise any specific limitations or requirements that apply when the employer is a state entity or public authority (including, for example, public procurement rules, limits on rights to suspend or terminate, excluded lien rights and arbitrating – as well as enforcing an award – against such an employer).

The ordinary principles of contract law apply to government agencies when entering into contracts.

Generally, the government can be sued for damages for breach of contract in the same way as a natural person (section 64 of the Judiciary Act 1903 (Cth) and State and Territory Crown Proceedings legislation). The doctrine of 'executive necessity' may enable the government to break an otherwise binding contract if enforcement would fetter the Crown's ability to govern, however, in practice this doctrine is seldom employed.

The Crown is immune from estoppel claims where the alleged representation purports to limit a statutory discretion, duty or policy; or where an agent of the Crown makes an ultra vires representation.

To establish claims against public authorities under the Australian Consumer Law, it must be established that the body was "carrying on a business" and the impugned conduct was "in trade or commerce".

Crown Proceedings legislation provides for the appropriation of moneys from the consolidated revenue to satisfy a judgment against the Crown. Commonwealth property cannot be seized and sold to satisfy judgment debts. Coercive orders are available in very limited circumstances.

## Settlement offers

### 49 If the seat of the arbitration is in your jurisdiction, on what basis can a party make a settlement offer that may not be put before the arbitral tribunal until costs fall to be decided?

In Australia, a party can make a Calderbank offer (ie, an offer made 'without prejudice save as to costs'), which cannot be put before the arbitral tribunal until the question of costs arises. In court proceedings, parties may either make a Calderbank offer or may elect to make an offer of compromise pursuant to the applicable court rules.

## Privilege

### 50 Does the law of your jurisdiction recognise "without prejudice" privilege (such that "without privilege" communications are privileged from disclosure)? If not, may it be agreed that a sum is payable if communications to try to achieve a settlement are disclosed to a court or arbitral tribunal?

Yes, 'without prejudice' privilege is recognised in Australia.

### 51 Is the advice of in-house counsel privileged from disclosure under the law of your jurisdiction? Is the relevant law characterised as substantive or procedural law?

Yes. Communications to or from in-house counsel will be privileged from disclosure if the communication is confidential and made for the dominant purpose of providing legal advice or for use in existing or anticipated legal proceedings. In-house counsel often have legal and non-legal responsibilities. If an in-house counsel was not acting in his or her legal capacity (eg, because he or she was giving commercial or administrative advice), privilege would not arise due to a failure of the dominant purpose test.

Although the issue has not been explored extensively in the authorities, we consider that privilege would be treated as substantive for choice of law purposes in Australia. This is because Australia takes a narrow approach to the concept of "procedure". In Australia, rules regulating the mode or conduct of court proceedings are considered procedural whereas rules affecting the existence, extent or enforceability of parties' rights or duties are substantive (John Pfeiffer Pty Ltd v Rogerson (2000) 203 CLR 503). Privilege has a significant impact on the rights and duties of the parties.

## Guarantees

### 52 What are the requirements for a guarantee under the law of your jurisdiction? Are oral guarantees effective?

In all Australian states and territories, guarantees must be in writing – oral guarantees are not effective. Further, guarantees must refer to an existing (underlying) contractual liability; and be supported by consideration or be given under seal.

### 53 Under the law of your jurisdiction, will the guarantor's liability be limited to that of the party to the underlying construction contract, if the guarantee is silent? Can the guarantee's wording affect the position?

If the guarantee is silent, the guarantor's liability will be limited to that of the party to the underlying contract. The wording of the guarantee can affect the position and result in the guarantor assuming more responsibility.

### 54 Under the law of your jurisdiction, in what circumstances will a guarantor be released from liability under a guarantee, if the guarantee is silent? Can the guarantee's wording affect the position?

A guarantor will be released from liability under a guarantee where the primary obligation (in the context of a construction project, usually the underlying construction contract) has been varied (including where the debtor is given additional time to meet its obligations); and at the expiration of the guarantee period (if one exists).

The guarantee may provide, by express terms, that the guarantor remains liable notwithstanding the occurrence of the events described above.

## On-demand bonds

### 55 If an on-demand bond is governed by the law of your jurisdiction on what basis might a call be challenged in your courts as a matter of jurisdiction as well as substantive law? Assume the underlying contract is silent on when calls may be made.

Generally it is not possible to challenge a call made upon an on-demand bond unless there is some fraud that affects the call.

### 56 If an on-demand bond is governed by the law of your jurisdiction and the underlying contract restrains calls except for amounts that the employer is entitled to (such as sub-clause 4.2 of the FIDIC Red Book 1999), when would a court or arbitral tribunal applying your jurisdiction's law restrain a call if the contractor contended that: (i) the employer does not have an entitlement in principle; or (ii) the employer has an entitlement in principle but not for the amount of the call?

The courts may enjoin the employer from making a call on the bond, where such call is contrary to a negative covenant (which may be expressed in positive terms). A provision that stipulates that an employer may call in defined circumstances will be construed as pregnant with the negative; unless those circumstances exist, there is no right to call and the employer thereby promises not to call. An interim injunction, pending final resolution of the issue, will be granted where the contractor can establish:

- there is a negative covenant regulating the right of the employer to make the call;
- there is a serious question to be tried as to whether the employer is entitled to make the call; and
- damages are not an adequate remedy or the balance of convenience otherwise favours the granting of an injunction.

## Further considerations

57 Are there any other material aspects of the law of your jurisdiction concerning construction projects not covered above?

No.


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Andrew Stephenson is a partner in the projects and international arbitration group of Corrs Chambers Westgarth Melbourne. Andrew has over 30 years' experience in contentious and non-contentious matters relating to all types of energy and resources projects. Andrew's practice relates to both national and international projects. He has given advice or otherwise acted in respect of projects situated in all Australian states and territories, Bangladesh, the Central African Republic, the People's Republic of China, Dubai, India, Iran, Ireland, Kuwait, Malaysia, New Zealand, Papua New Guinea, Singapore, Thailand and the United Kingdom.

Andrew is a senior fellow of Melbourne Law School, University of Melbourne, lecturing in project risk and dispute resolution. He has also lectured at Monash University, Queensland University of Technology and Queensland University, and regularly presents at industry conferences. He is a past co-chair of the Project Execution subcommittee of the International Construction Projects Committee of the International Bar Association. Andrew is the Australian correspondent for the *International Construction Law Review*, published in London. He is the Projects' group practice leader at Corrs Chambers Westgarth and board member of ACICA (Australian Centre for International Commercial Arbitration), and a Foundation Fellow of the International Academy of Construction Lawyers.


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She holds a bachelor's of civil laws from Oxford University, a bachelor of laws (first-class honours) and arts from the University of Western Australia, and has a diploma in international commercial arbitration from the Chartered Institute of Arbitrators. From 2005 to 2006, Lee clerked for The Honourable Justice Kenneth Hayne AC of the High Court of Australia. She has practised at leading international law firms in London and Paris. She is a fellow at Melbourne University Law School and a sessional lecturer in the JD programme.


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