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Construction Law 2022

New Zealand: Law & Practice

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NEW ZEALAND

Law and Practice

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1. GENERAL

1.1 Governing Law

Legal Framework

The principal laws governing New Zealand's construction industry are found in statutes and common law authorities. Common law authorities from similar overseas jurisdictions are not binding in New Zealand, but are often influential.

Key Statutes

Building Act 2004

This is the primary legislation governing the building industry. Its stated purpose is to provide that people can use buildings safely and without endangering their health. This act:

- provides the legal framework for the building code, which sets out the standard required for buildings in New Zealand, and guidance for how to meet those standards; and
- contains minimum mandatory warranties for building work in relation to household units.

Construction Contracts Act 2002

This act is predominantly concerned with regular and timely payments between the parties to a construction contract, given the importance of cash flow for contractors. This act:

- governs the requirements for parties holding retentions;
- provides for a fast-track dispute resolution mechanism (adjudication) for construction disputes and claims;
- prohibits "pay when paid" or "pay if paid" terms in construction contracts; and
- provides a default payment process of payment claims and payment schedules for construction contracts.

Health and Safety at Work Act 2015

This act outlines the standard needed at work sites to ensure personnel are safe. The act also

controls how this standard is measured and enforced.

Resource Management Act 1991

This act promotes the sustainable management of natural and physical resources. A construction project needs Resource Consent to demonstrate the work does not adversely impact the environment. The act regulates this process and requirement.

1.2 Standard Contracts

There are no mandatory contracts for construction projects in New Zealand. However, there are common and standard form New Zealand contracts for construction and for key construction consultants.

The New Zealand Standard (NZS) Series of Construction Contracts

The two most common standard form contracts for construction are provided by Standards New Zealand.

NZS 3910:2013 – Conditions of contract for building and civil engineering – Construction

This is a "construct only" contract where the employer provides the design and the contractor is responsible for the construction component of the project.

NZS 3915:2005, which is a similar "construct only" contract, is sometimes used instead of NZS 3910:2013 on projects where there is no "engineer" (see **2.1 The Employer**).

NZS 3916:2013 – Conditions of contract for building and civil engineering – Design and construct

This is a "design and build" contract where the employer provides its requirements and the contractor is responsible for both the design and the construction of the project.

Design, which is the key distinction between NZS 3910:2013 and NZS 3916:2013, is discussed further in **3.3 Design**.

Other Standard New Zealand Construction Contracts

Other standard form contracts that are found in New Zealand include the following.

The New Zealand Institute of Architects (NZIA) forms of contract

- Standard Construction Contract (for when the architect administers the construction contract).
- National Building Contract (for when the architect is not contractually involved in the administration of the construction contract).

The Registered Master Builders Association forms of contract

- Residential Building Contract (RBC1) (usually for use in smaller homeowner projects).
- Subcontract Agreement (for use between contractors and their subcontractors).

Overseas Forms of Construction Contracts That Are Commonly Used in New Zealand

Several overseas forms of contract are commonly used for construction projects in New Zealand including:

- the British New Engineering Contracts (commonly NEC3 and NEC4);
- the suite of contracts from the International Federation of Consulting Engineers (FIDIC), most commonly:
 - (a) The “Red Book” – Conditions of contracts for construction;
 - (b) The “Yellow Book” – Conditions of contracts for plant and design-build; and
 - (c) The “Silver Book” – Conditions of contracts for engineering, procurement and construction (EPC)/turnkey.

Standard New Zealand Construction Consultancy Contracts

The most common forms of consultancy contract for construction professional services are:

- the Conditions of Contract for Consultancy Services (CCCS), developed by Engineering New Zealand and Association of Consulting Engineers New Zealand (ACENZ), which is used for a wide range of construction consulting services;
- the Agreement for Architects Services (AAS) 2018, used for professional design services; and
- the Contract for Quantity Surveying Consultancy Services (CQSCS) used by members of the New Zealand Institute of Quantity Surveyors (NZIQS).

1.3 COVID-19

The Impact on Standard Form Contracts

Few standard form contracts in New Zealand anticipated an event as far-reaching as the pandemic, so parties now commonly add special conditions to standard form contracts to allocate associated risks and responsibilities.

The Impact on Procurement of Materials

Shortages of construction materials have been very common due to COVID-19 (particularly timber, steel and plasterboard) and supply chains for specialised materials and equipment (particularly from overseas) are a common cause of delay on projects.

The construction industry has adapted to the supply chain delays with a range of strategies, including:

- stockpiling key materials; and
- ordering materials significantly in advance of when they will be needed on site (often with advance payments made by employers) to

secure materials and to lock in the price of those materials.

On some projects, employers are procuring key materials early and then free-issuing them to contractors.

The Impact on Labour

Worker absences on site due to COVID-19 have had a notable impact on productivity, and the infectiousness of COVID-19 can take a high number of workers off the site at the same time. Further, the effect of COVID-19 on international travel has made it more challenging to secure specialist labour for more complex projects.

The construction industry in New Zealand generally attempts to manage this risk by sourcing labour locally where possible and having COVID-19-specific health and safety policies in place.

The Impact on Costs

The inflationary pressures linked to the pandemic have been acute in the New Zealand construction market. A range of measures are used in New Zealand for allocating and managing this risk, including indexation of costs and early procurement of materials.

2. PARTIES

2.1 The Employer

The Nature of Employers

The employer, also known as “the principal” in the NZS contracts, can be a wide range of persons including:

- a local council or central government body;
- an incorporated or unincorporated entity, eg, in industries such as manufacturing, residential and commercial real estate, or irrigation; or

- individual persons (eg, for home builds and renovations).

The Engineer as a Key Agent of Employers

The main NZS forms of contract includes the concept of “the engineer”, which is similar to the engineer in the FIDIC series of contracts.

Under the NZS 3910:2013 and NZS 3916:2013 contracts, the engineer administers the contract and has a dual role as an agent of the employer and a quasi-independent decision-maker. In the latter role, the engineer is expected to act fairly and impartially. Many of the roles of the employer referred to in this guide will actually be performed by the engineer (eg, issuing and assessing variations, confirming works are complete, etc).

General Rights and Responsibilities of Employers

Common rights

- To have the contractor perform the works so that they meet the requirements in the specifications and drawings.
- To vary the works (subject to awarding extensions of time and additional costs to the contractor where appropriate).
- To have the works performed within a specified timeframe (subject to extensions of time in particular circumstances).
- To have the works be free of defects, and to have the contractor remedy defects within a reasonable timeframe.

Common responsibilities

- To set out its requirements for the project (including providing the design and specifications, where applicable – see **3.3 Design**).
- To have/arrange funding for the project and pay the contractor within the agreed timeframes.
- To secure building consents and resource consents for the project.

- To provide access to the site and avoid interfering with the contractor's performance of the works.

The Relationship Between Employers and Contractors

The employer and contractor will be the parties to the construction contract. The contractor is obliged to carry out the works specified in that contract, and the employer is obliged to pay for those works in accordance with the contract.

It is also common for the employer to require security from the contractor to ensure the due, proper and punctual performance of the contractor's obligations under the contract. This is commonly achieved through a contractor's performance bond or retentions from payments due to the contractor.

Once the contract is under way, to facilitate communication, the employer and contractor usually each have a single nominated representative to enable clear communication. For the employer, this is usually the engineer (or the engineer's representative).

The Relationship Between Employers and Subcontractors

See **2.3 The Subcontractors**.

The Relationship Between Employers and Financiers

See **2.4 The Financiers**.

2.2 The Contractor

The Nature of Contractors

There is significant variability in the size and nature of contractors commonly operating in New Zealand. Contractors range from large listed corporations (both local and overseas) to much smaller private companies. It is not uncommon for larger projects in New Zealand

to involve overseas organisations (often in a joint venture with local entities).

Common Rights and Responsibilities of Contractors

Common rights

- To choose its preferred methodology for performing the works (albeit often within parameters).
- To receive payment from the employer within the agreed timeframes.
- To receive additional payments and extensions of time for a specified range of events/circumstances (commonly events and circumstances beyond the contractor's control).
- To perform the works without being prevented from doing so by the employer or third parties.

Common responsibilities

- To perform the works so that they meet the requirements in the contract (including requirements in the design and specifications, where applicable – see **3.3 Design**).
- To complete the works within a specified timeframe (subject to extensions of time in particular circumstances).
- To ensure that the works are free from defects, and to remedy such defects for a specified timeframe after the completion of the works.

Contractors are not relieved from their responsibilities to the employer if they subcontract works to third parties.

The Relationship Between Contractors and Employers

See **2.1 The Employer**.

The Relationship Between Contractors and Subcontractors

See **2.3 The Subcontractors**.

The Relationship Between Contractors and Financiers

See **2.4 The Financiers**.

2.3 The Subcontractors

The Nature of Subcontractors

Subcontractors can be a local, national or overseas entities. Subcontractors commonly specialise in specific trades.

Common Rights and Responsibilities of Subcontractors

The rights and responsibilities of subcontractors are typically akin to the rights and responsibilities between a contractor and the employer. See **2.2 The Contractor**.

The Relationship Between Subcontractors and Employers

By default, due to privity of contract, the employer does not form a relationship with the contractor's subcontractors. However, through its contract with the contractor, the employer typically places some controls on subcontracting such as:

- requiring consent to subcontract works over a specified value; and
- requiring particular sets of work to be performed by specified subcontractors.

Moreover, it is not uncommon for employers to have limited rights in respect of certain subcontract works by virtue of:

- direct warranties – whereby the subcontractor provides a warranty to the employer (usually by deed) in respect of specified works or materials;
- subcontractor continuity guarantees: whereby subcontractors agree to work directly for the employer in situations where the contract between the employer and the contractor

ceases to be viable (eg, due to termination or contractor insolvency).

The Relationship Between Subcontractors and Contractors

Subcontractors are engaged on a construction project through a subcontract with the contractor. It is common for a contractor to engage a variety of subcontractors, each with a specific trade, on a single project.

A subcontractor's scope of responsibility is generally limited to the work and risks outlined in its subcontract with the contractor. However, it is not uncommon for contractors to seek to pass risks in its contract with the employer down to the relevant subcontractor.

The Relationship Between Subcontractors and Financiers

See **2.4 The Financiers**.

2.4 The Financiers

The Nature of Financiers and the Financing of Projects in New Zealand

Financiers of construction projects in New Zealand are typically local and foreign commercial banks, investment banks and institutional investors (such as pension funds). Multi-financier syndicates are common on larger projects.

Rights and Obligations of Financiers

Financiers are obliged to provide financing to the employer, but will not be party to the construction contract itself or otherwise have any direct obligations to the contractor (although they receive the benefit of undertakings from the contractor under a direct deed – see the relationship between financiers and contractors below).

In traditional construction financings, financiers take security over physical assets such as land and buildings, as well as over construction contracts and other material contracts such as sale

agreements or leases. They may also receive the benefit of a guarantee from a parent company guaranteeing repayment of financing provided to its subsidiary, and/or take security over the shares in the employer held by its shareholder.

In limited recourse project financings, the security package may be similar; however, the financiers will have a significantly enhanced focus on the cash flows arising from the operation of the completed project. Accordingly, they will exercise a much higher degree of diligence in assessing and monitoring matters arising under the construction contract and related contracts (such as completion guarantees), given that the achievement of completion under the construction contract will unlock the cash flow.

The Relationship Between Financiers and Employers

The relationships between financiers and employers under construction projects are governed by the relevant finance and security documents. These will typically comprise a facility agreement, a general security agreement (providing for 'all assets' security over the employer), as well as one or more specific security agreements (for example, providing for an assignment by way of security of specific project contracts or for security over the shareholder's shares in the employer) and/or guarantees.

The Relationship Between Financiers and Contractors

On financed projects it is common for a direct deed to be agreed between the financier, the employer and the contractor.

A direct deed generally involves the contractor consenting to the security given to the financier over the construction contract, agreeing that certain insolvency action (such as appointing a receiver) will not of itself trigger a contractor's right to terminate the construction contract,

agreeing to give the financier additional cure periods to remedy a default of the employer under the construction contract that could otherwise lead to termination by the contractor, and pre-agreeing the basis on which the financier may sell the benefit of the construction contract and/or of the shares in the employer to a third party on enforcement of its security.

The Relationship Between Subcontractors and Financiers

It is uncommon for financiers and subcontractors to have a direct contractual relationship.

3. WORKS

3.1 Scope

Sources and Descriptions of the Scope

The scope typically takes the form of:

- "requirements" in a design-and-build contract: whereby the employer sets out the parameters and minimum obligations of the works to be performed by the contractor; or
- "specifications" in a construct-only contract: whereby the employer sets out in much more granular detail what the contractor must provide.

Both requirements and specifications can also contain drawings setting out the locations, dimensions, forms and finishes required. Drawings are typically much more detailed in a construct-only contract.

The Scope in Tenders

The employer will typically initially set out its requirement for the works (commonly called the scope or specifications) in a closed or open tender process. It is not uncommon for the contractor and employer to negotiate that scope (eg, to reduce the price) before the contract is finalised and executed.

The Scope in Contracts

Once the contract is executed, the scope is generally fixed and can only be modified thereafter if, and to the extent, permitted by the terms of the contract itself (see **3.2 Variations**).

3.2 Variations

Instructing Variations

The scope of an instructed variation is typically at the sole discretion of the employer, and in NZS contracts a variation is typically instructed via the engineer. In New Zealand, contracts typically permit the employer/engineer to:

- increase or decrease the quantity of work;
- omit any work (albeit major omissions may be deemed to be repudiation or termination);
- change the character or quality of any material or work; and
- change the level, position, dimensions, specifications, or any other part of the contract works.

Some events/circumstances are also commonly variations even though they do not arise from an instruction from the employer/engineer, eg, unforeseen ground conditions and archaeological discoveries.

Valuing Variations

The process for valuing variations differs across contracts. In New Zealand, particularly in NZS contracts, valuation is established by one of the following methods (in descending order of precedence):

- by agreement;
- by application of rates and prices in the contract;
- by application of rates and prices derived from similar rates in the contract; or
- by assessment of net cost.

Where rates do not include overheads and margins, or the variation is valued on a net cost basis, allowances for overheads and margins are usually added.

3.3 Design

In New Zealand, the two most common frameworks for allocating design responsibilities and risk are the following.

Construct Only

The contractor is responsible for its methodology of construction based on the design, but not for errors or omissions in the design itself.

- Between the contractor and the employer, the design risk sits with the employer except to the extent that such design relates to the contractor's methodology/temporary works.
- Typically, the employer separately allocates the design risk by contract to an architect and/or engineer. The designer's duty is only to the employer, and owes no responsibilities to the contractor.
- NZS 3910:2013 is commonly used for such contracts.

Design and Construct

The contractor is responsible for both the design and the construction of the works (if the owner has a pre-existing design, it may be novated to the contractor).

- Between the contractor and the employer, all design risk sits with the contractor.
- Contractors without in-house design resource typically subcontract the design aspects of such projects.
- NZS 3916:2013 is commonly used for such contracts.

3.4 Construction

The employer's role in the construction itself is generally limited to providing site access for the

contractor and its subcontractors. However, the employer may be obliged to provide supplementary information/design clarification when requested by the contractor.

The contractor generally has the autonomy and primary obligation to:

- select the appropriate construction methodology;
- source the necessary materials and resources; and
- manage and perform the construction works.

Subcontractors are managed by the contractor, and have a similar role to the contractor in respect of their subcontracted works.

3.5 Site Access

The employer is typically responsible for making the site available to the contractor by a particular date for the purposes of performing the works.

In respect of the geotechnical site conditions, responsibility and risk can vary significantly by contract. Commonly, the employer will bear the risks of adverse conditions unless:

- those conditions have been disclosed to the contractor;
- the contractor has had the opportunity to investigate those conditions before pricing;
- the conditions could have been foreseen by an experienced contractor; and/or
- the contractor accepts the risk.

Contamination

Pre-existing contamination is typically the employer's responsibility, whereas the contractor is typically responsible for ensuring that it does not contaminate or pollute the site in the course of construction.

Pollution and contamination is governed by the Resource Management Act and often local council guidelines.

Archaeological Finds

Archaeological discoveries, and any delays and additional costs caused by such discoveries, are usually the employer's responsibility.

Archaeological finds on a construction site are governed by the Heritage New Zealand Pouhere Taonga Act 2014, which requires that no person may modify or destroy a site if that person knows, or ought reasonably to have suspected, that the site is an archaeological site.

3.6 Permits

Common Permits

- Resource consent: authorisation for certain activities or uses of natural and physical resources.
- Building consent: authorisation to carry out building works in a specific way that complies with the building code.
- Code of compliance certificate: confirmation, once the work is completed, that the work performed complies with its building consent and the building code.
- Certificate of public use: an interim permit for members of the public to use a premises until the code compliance certificate is issued.
- Other: any other permits or licences required by regional regulations.

Responsibility for Permits

Arrangements for permits typically vary by contract. Generally:

- the employer obtains the resource consent;
- the party responsible for the design obtains the building consent and the code of compliance certificate; and

- the contractor obtains any permits/licences for its temporary works and services, and for the operation of its machinery.

3.7 Maintenance

Most construction contracts exclude general maintenance obligations after completion. These become the employer's responsibility.

Typically, the employer will enter either self-perform maintenance works or enter into separate maintenance service agreements with third parties for the proper operation and maintenance of the works. The NZS3917:2013 fixed-term contract is available for such maintenance services.

For defects in construction works arising after practical completion, see **3.11 Defects and Defects Liability Period**.

3.8 Other Functions

Finance and maintenance primarily sit outside the construction contract between the employer and the contractor. See **2.4 The Financiers** and **3.7 Maintenance**.

3.9 Tests

Some projects require key materials or equipment to be tested to ensure that they meet contractual or regulatory requirements.

The processes vary by contract. The contractor will typically give the employer notice of the date when it will be ready for such tests to be carried out. The contractor will commonly carry out the tests, or arrange for the tests to be performed by specialists, with the employer having the right to attend (or to have an agent attend) such tests.

There are numerous potential testing types and stages. Common tests include:

- factory acceptance tests – tests in the factory itself to ensure that equipment works as

expected, or that materials have the specified qualities;

- tests on completion – tests after the works have been installed and commissioned, before completion is certified, to ensure that works conform with the standards required by the contract;
- tests after completion – ensure the work continues to meet the standards required by the contract (eg, to ensure ongoing reliability) and to demonstrate that the performance guarantees specified in the contract have been attained;
- discretionary tests – Some contracts in New Zealand allow a representative of the employer to perform tests if they have concerns regarding an aspect of the works. Commonly, the costs/delays resulting from those tests are borne by the employer if the works meet contractual requirements, or by the contractor if the works are found not to meet contractual requirements.

3.10 Completion, Takeover, Delivery Completion/Taking Over

Most standard forms set out a process for verifying/delineating when works are completed/taken over. In some contracts this can be a multi-stage process, eg:

- practical completion – when works are largely complete but for minor defects/snags that do not prevent occupancy/use of the works;
- final completion – when works are complete and all defects have either been remedied or accepted.

For construction contracts, the employer (or, more commonly, its engineer) will typically inspect the works and issue a practical completion certificate, and later a final completion certificate, certifying the works meet the requirements of the contract.

However, there are also some actions (eg taking possession and using the works before practical completion) that can result in the employer being deemed to have taken over the works.

Delivery

The term delivery is typically used for materials or equipment, and is often linked to obligations to make payment and the transfer/allocation of risk or title.

In New Zealand, the point of delivery will usually be expressly stated in the contract. The International Chamber of Commerce's Incoterms rules are not mandatory, but are commonly referred to for international deliveries.

3.11 Defects and Defects Liability Period

Most construction contracts have a limited period after the works are completed (which can range from a few months to a couple of years) within which the contractor must remedy any snags/defects (commonly called a defects notification period, or DNP). In addition, the employer will often require various standalone warranties for defects arising after the DNP.

Common standalone warranties include key materials/equipment and weathertightness. The NZS forms of contract include standard form warranties as a schedule to the main terms.

Defect Notification Periods

Typically, if a defect or fault emerges during a defect notification period as a result of defective workmanship or materials, the contractor is obliged to remedy the defect or fault.

If the contractor does not remedy the works within a reasonable time, the employer can often engage third parties to remedy the works and then recover the cost of doing so from the contractor.

It is also common for employers to retain some of the contract price as a retention until the end of the defect notification period, to incentivise the contractor to return to fix such defects and thereby ensure the payment of the retentions.

Statutory Warranties

Under the Building Act 2004, residential building work is covered by a ten-year warranty. Parties may not contract out of this warranty.

4. PRICE

4.1 Contract Price

Cost Structures

The most common structures used to price construction projects are:

- Lump-sum contracts – a fixed price for a defined scope of work. However, the price can change if the owner alters the design/works, or if unexpected circumstances are encountered.
- Measure and value – a schedule of prices is usually agreed at the outset (eg, a rate per unit of work), and the quantity of work is then measured/assessed and paid accordingly.
- Cost-reimbursement – the employer pays the contractor the net costs plus a pre-agreed margin. This is less common than the above options, due to the lack of cost certainty and control.
- Target cost – prior to signing the contract, parties will outline the target cost of the project. It is normal for parties to agree to a structured formula to estimate the cost of the project. At practical completion if there are any savings or cost overruns the balance will be shared and paid between the employer and contractor.

Alliances and other forms of collaborative contracting are increasingly used on major projects.

Payment Structures

In New Zealand, it is common for project payments to be based on either:

- progress – payments are based on the percentage of the work that is complete; or
- milestones – payments are made when key stages of a project are achieved.

4.2 Payment

Advance Payments

Advance payments are common in New Zealand for long lead items, and have become more common recently as a means of locking in costs and reducing the risk of delays due to COVID-19.

If materials are to be paid for before they arrive on site, separate agreements for offsite materials are often entered into to allocate the relevant risks and obligations. The NZS forms of contract include standard form offsite material agreements as a schedule to the main terms.

Employers also commonly protect their interests in high-value advance payments by way of advance payment bonds.

Progress Payments

Typically, at regular intervals, the contractor submits a payment claim. The employer will then assess the claim and issue a payment schedule of amounts that it considers to be due.

Late Payments

Construction contracts in New Zealand typically include interest on late payments.

The Construction Contracts Act 2002 has default payment structures intended to ensure regular cash flow throughout the industry. If a qualifying payment claim/invoice (see **4.3 Invoicing**) is not appropriately disputed in a payment schedule and is then late/unpaid, the act enables a contractor to:

- suspend work after giving notice; and/or
- issue a statutory demand for payment.

4.3 Invoicing

Requirements for Tax Invoices

In New Zealand, an invoice will typically include:

- the words 'tax invoice';
- the name and GST number of the provider;
- the date of issue; and
- a description of the goods or services.

Recommended Requirements for Construction Invoices

To benefit from the Construction Contracts Act (see **4.3 Payment**), a payment claim/invoice should:

- be in writing;
- identify the construction contract to which the payment relates;
- identify the construction work and the relevant period to which the payment relates;
- state the amount to be paid and the due date for payment;
- indicate the manner in which the payee calculated the claimed amount; and
- state that it is made under the Construction Contracts Act.

Invoices issued after payment claims are typically a formality to reflect the outcome of the payment claim and payment schedule process.

5. TIME

5.1 Planning, Programme

The Role of, and Responsibility for, Construction Programmes

In New Zealand, a programme is usually prepared by the contractor at the outset of a project and it is often integral to setting up a project for success. The programme is often reviewed

by the employer, who may provide comments/input, but good programming is ultimately the contractor's responsibility.

Contracts commonly require the contractor to report against, and update, the programme regularly over the course of a project.

Common Programme Requirements

Standard contractual requirements for a programme are that it should set out:

- the proposed sequence of works and start/end dates of the component activities, demonstrating how the contractor proposes to meet the due dates for completion;
- the critical path and dependencies between activities; and
- the dates by which the contractor requires access to specific areas of the site and any materials, services, or work to be provided by the employer.

5.2 Delays

If a delay occurs, most contracts in New Zealand include a process along the following lines:

- the contractor must notify the employer/engineer, often within a specified timeframe, and provide details of the cause and effect of the delay;
- the employer will assess the extent of the delay and determine the extension of time that it considers appropriate (the employer/engineer is commonly required to act reasonably when making this assessment); and
- the dispute resolution procedure will apply if the parties disagree on the appropriate extent of the extension of time.

There is an expectation in New Zealand that contractors will take reasonable measures to avoid potential delay events, and to mitigate delays if such events occur. In standard form contracts,

failure to give notice can affect the contractor's eligibility for extensions of time and variations if it deprives the employer of the opportunity to avoid or mitigate the delay.

5.3 Remedies in the Event of Delays

Contractor Delays

If the contractor is responsible for the delay, then contracts will commonly provide that the contractor:

- will be liable for damages for the period between the due date for completion and actual completion. It is not uncommon for contracts in New Zealand to specify a sum of liquidated damages per day/week; and/or
- must expedite the works at its cost to make up the lost time.

Employer Delays

If the employer is responsible for the delay, then contracts will commonly provide that the employer will:

- allow more time for the contractor to complete the work; and
- pay the additional costs arising from the prolongation of the work.

5.4 Extension of Time

Contractors usually issue notices for extensions of time to the employer/engineer in writing.

Contractors are typically required to set out the basis for an extension of time claim under the contract. Common grounds for an extension of time claim include:

- the effects of variations;
- weather;
- events that an experienced contractor could not foresee at the time of its tender;
- defaults by the employer under the contract; and

- some force majeure events, such as flood, volcanic, or seismic events.

5.5 Force Majeure

In New Zealand, force majeure only applies if it is expressly included in the contract.

Force majeure clauses are not included in most New Zealand construction contracts as standard. However:

- most standard form contracts include some degree of relief for events that would usually be considered force majeure events; and
- it is not uncommon for force majeure clauses to be added to standard form contracts as special conditions.

5.6 Unforeseen Circumstances

Relief for unforeseen circumstances is generally only available if it is included in the contract (albeit New Zealand recognises the common law concept of frustration, which can apply in some instances of unforeseen circumstances). Frustration is grounds for termination under the NZS 3910:2013 and NZS 3916:2013 contracts.

In standard form contracts in New Zealand, a contractor is commonly entitled to additional time for unforeseen circumstances but not necessarily additional costs.

6. LIABILITY

6.1 Exclusion of Liability

Warranties under the Building Act 2004 cannot be contracted out of for residential properties.

On policy grounds, a person cannot exclude liability for their own fraud.

6.2 Wilful Misconduct and Gross Negligence

The concepts of wilful misconduct and gross negligence are not well-established in the New Zealand courts. However, where contracts include limitations on liability (see **6.3 Limitation of Liability**), such clauses often seek to ensure that any limitation of liability does not apply if the contractor engages in wilful misconduct or gross negligence.

6.3 Limitation of Liability Consumer Contracts

In consumer contracts in New Zealand, limitations of liability are restricted by the Consumer Guarantees Act 1993. For example, a contractor cannot limit its liability for completing construction with reasonable skill and care, so that it is fit for purpose, and on time or within a reasonable timeframe.

Commercial Contracts

In *CBL Insurance Ltd (Liq) v Harris* [2021] NZHC 1393, the High Court confirmed that clear limits of liability are enforceable in commercial contracts in New Zealand.

Limitations of liability are not included in New Zealand's most common standard form contracts, but it is not uncommon for parties to add such clauses.

7. RISK, INSURANCE AND SECURITIES

7.1 Indemnities

Parties are generally free to negotiate indemnities subject to policy restrictions – eg, not indemnifying certain court issued fines and penalties. Standard form contracts in New Zealand typically include indemnities:

- from the contractor to the employer for losses:
 - (a) arising out of the construction;
 - (b) for remedying defects in the construction; and
 - (c) injuries to persons or damage to property;
- from the employer to the contractor for losses:
 - (a) arising from the employer's lack of rights to carry out construction on the site;
 - (b) arising from acts or omissions of the employer; and
 - (c) injuries to persons or damage to property.

It is not uncommon for parties to agree further indemnities (to the extent permitted by law) for:

- infringement of third-party intellectual property rights; and
- infringement of the Building Act or Resource Management Act.

7.2 Guarantees

There are no mandatory guarantees in New Zealand. However, there are several forms of performance guarantee that are common in the New Zealand market.

Bonds

Standard form contracts in New Zealand anticipate performance bonds. These may be provided by the principal to the contractor, or by the contractor to the principal.

Parent Company Guarantees

If the contractor is a subsidiary and/or has limited assets, the employer may require (and financiers may expect) performance to be assured by way of a guarantee from a parent company.

7.3 Insurance

In the NZS standard forms of contract, there are four types of insurances that are commonly taken out by the parties:

- Construction insurance – for loss and damage to the works.
- Plant insurance – for loss of equipment on site that is critical to the performance of the contract.
- Public liability insurance – for legal liability to third parties.
- Professional indemnity insurance – for the design of the construction work.

However, it is not uncommon for other insurances, such as marine cargo insurance, to be taken out where the specific project involves relevant risks.

7.4 Insolvency

Under most contracts in New Zealand, the insolvency of a party typically permits the other party to terminate the contract. The insolvency of the contractor commonly also permits the employer to resume possession of the site.

7.5 Risk Sharing

Risk-sharing arrangements are not particularly common in New Zealand, and are most often found in alliance agreements or target cost arrangements (see **4.1 Contract Price**).

The orthodox approach regarding risk in New Zealand is to allocate the risk to the party who is best placed to control that risk, or for a party to accept additional risk in return for a price premium (if accepted by the contractor) or reduction (if accepted by the employer).

8. CONTRACT ADMINISTRATION AND CLAIMS

8.1 Personnel

It is not uncommon for employers to require the contractor to:

- retain key personnel – often any changes to the key personnel will require the employer's approval;
- remove unsuitable personnel – in standard form contracts, the employer may require that contractors remove personnel for serious misconduct, incompetence, negligence, or for causing danger to safety or welfare.

8.2 Subcontracting

The standard NZS construction contract prohibits a contractor from subcontracting the whole or substantially the whole of the works. Subcontracting generally requires the employer's consent.

Subcontracting does not relieve the contractor from any liability or contractual obligations owed to the employer under the contract.

8.3 Intellectual Property

Typically the employer and the contractor will each retain their intellectual property rights, but grant licences to the other to the extent necessary for the project. Rights over new intellectual property that may result from a project are typically negotiated and vary significantly – a common approach is shared ownership with cross-licences.

It is not uncommon for parties to agree indemnities for infringement of third-party intellectual property rights.

9. REMEDIES AND DAMAGES

9.1 Remedies

Contract law in New Zealand recognises general damages for breach of contract. Sufficiently serious breaches of contract may also entitle a party to terminate the contract.

Common Employer Remedies

- Liquidated damages for delay (see **5.3 Remedies in the Event of Delays**).
- Rectification of defects, or the right to recover the cost of rectifying defects by third parties (see **3.11 Defects and Defects Liability Period**).
- Damages for non-performance (see **7.2 Guarantees**).
- The right to draw upon bonds, parent company guarantees, or retentions (see **7.2 Guarantees** and **3.11 Defects and Defect Liability Period**).
- Suspension or termination of the contract.

Common Contractor Remedies

- Payment, including interest when payment is late (see **4.2 Payment**).
- Variations (see **3.2 Variations**).
- Extensions of time (see **5.4 Extension of Time**).
- Suspension or termination of the contract.

9.2 Restricting Remedies

See **6.1 Exclusion of Liability**, **6.3 Limitation of Liability**, **9.3 Sole Remedy Clauses** and **9.4 Excluded Damages**.

It is common for parties to limit the duration of some liabilities, for example liability under consultancy contracts is typically limited to six years.

9.3 Sole Remedy Clauses

Sole remedy clauses, also referred as exclusive remedy clauses, are not included in the standard NZS construction contracts but are enforceable in commercial contracts. However, these are not widely used in New Zealand.

Where a contract provides for delay liquidated damages, that will typically be considered the sole remedy for delay.

9.4 Excluded Damages

It is not uncommon for commercial parties in New Zealand to exclude liability for:

- indirect, consequential, special, incidental, exemplary or punitive loss or damage; and
- loss of profit, revenue, goodwill, or loss of production.

9.5 Retention and Suspension Rights Retentions

Retentions are permitted and common in New Zealand construction contracts. Employers are required to hold retention monies on trust for the contractor under the Construction Contracts Act. Further requirements, such as holding retentions in a separate account, are anticipated in the near future.

Suspension Rights

Contractors have statutory suspension rights for non-payment but, under the NZS forms of contract, are typically not permitted to suspend works due to a dispute.

Adjudication is a relatively swift but interim dispute resolution process that takes place entirely by way of written submissions (there are no hearings). Adjudication decisions are binding and any awards must be paid within two working days of award. Notwithstanding the obligation to pay, parties may then proceed to litigation or arbitration for final determination of the dispute.

Adjudications are determined by a single adjudicator from a recognised institution.

Recognised Institutions

In New Zealand, there are several institutions recognised as competent to appoint persons to hear construction disputes as adjudicators or arbitrators. These include:

- the Building Disputes Tribunal;
- the New Zealand Dispute Resolution Centre; and
- the Arbitrators & Mediators Institute of New Zealand.

10. DISPUTE RESOLUTION

10.1 Regular Dispute Resolution Courts

In New Zealand there are four tiers of court that may hear construction disputes (in descending order):

- the Supreme Court;
- the Court of Appeal;
- the High Court; and
- the District Court.

Adjudication

In New Zealand, parties may not contract out of the adjudication process, which is set out in the Construction Contracts Act.

10.2 Alternative Dispute Resolution

Private and alternative dispute resolution options recognised in New Zealand include:

- Arbitration – this binding form of dispute resolution is common in New Zealand contracts and is included in the NZS forms of contract. This form of dispute resolution has its statutory basis in the Arbitration Act 1996.
- Mediation – this non-binding form of dispute resolution is common in New Zealand contracts and is included in the NZS forms of contract.
- Expert recommendation/determination – referrals to experts for either binding decisions or non-binding recommendations are relatively common in New Zealand.
- Dispute review boards – these tend to be limited to major projects due to the cost. The

extent of their authority varies from contract
to contract.

Anderson Lloyd is one of New Zealand's oldest and most respected law firms. It is a unique national firm with four integrated offices (Auckland, Christchurch, Dunedin and Queenstown) across New Zealand. Project development, energy, construction and infrastructure have become core strengths and Anderson Lloyd is widely recognised for its expertise in these areas. The projects team at Anderson Lloyd is

based in Auckland and is made up of a combination of its construction, property, banking & finance and litigation departments. Recent major projects in New Zealand have included the Waimea Dam, ACC and CORT's joint venture social housing project, Christchurch City Council's Ngā Puna Wai sports hub development, Tilt Renewables' Waipipi wind farm and Mercury's Kaiwaikawe and Kaiwera Downs wind farms.

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