GAR KNOW HOW CONSTRUCTION ARBITRATION

United States

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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?

The United States and its constituent states are common law jurisdictions – broadly derived from English law. English law, however, retains limited influence in the US legal system.

The US legal system follows the concept of federalism, wherein lawmaking authority resides at two levels of government: the federal government and state governments. The federal government and each state government controls separate spheres of influence and retain their own legislatures and courts. Federal and state legislatures draft laws that are published and released as official code. In addition, federal and state courts establish case law, sometimes binding, by virtue of publicly available opinions. Although some states prohibit retrospective application of new laws, many states permit the practice, provided there is legislative intent to do so.

With the exception of federal and state government contracts, which are governed by specialised codes and regulations, questions involving private construction contracts are typically governed by state contract law. Therefore, construction contracts specify the laws of a particular state (as opposed to the laws of the United States) as the governing law. Although state contract law is broadly similar among the states, there is a wide variety of nuances that vary from state to state.

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?

As a general matter, contract formation requires (i) offer, (ii) acceptance, and (iii) consideration.

The question of whether a "letter of intent" is given contractual effect will depend on the facts and the governing state law; however, the general trend among state courts is to enforce "letters of intent" as they would any other contract.

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?

Although nuanced exceptions exist, parties are free to choose the governing law of their contract, the law of the arbitration agreement, the seat of the arbitration, the applicable arbitration rules, and the language of the arbitration.

Implied terms

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

It is possible for terms to be implied into construction contracts by virtue of the governing law of the agreement. For example, many states impose certain duties on the contracting parties, such as the duty of good faith and fair dealing. State statutes might also impose other requirements or rights for parties operating on projects located within the jurisdiction, such as state mechanics' lien statues.

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?

Generally, state laws require a certifier (architect or engineer) to execute its duties in good faith, and professional codes of ethics require certifiers to act impartially. Although some courts have upheld provisions that restrict the review of a certifier's decision by an appellate forum, the issue is an open question for many state laws. Broadly speaking, certifiers are generally immune from liability for their decisions, provided that the certifier did not act fraudulently or with wilful or malicious intent.

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?

Although state laws vary, courts typically hold that neither party is entitled to relief where both parties are responsible for a delay. However, a contractor may be entitled to an extension of time if it can apportion the employer-caused delay separately from those delays for which the contractor bears responsibility.

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)?

State laws generally treat disruption, or loss of productivity, as a breach of contract claim, distinct from claims associated with delays or extended durations of the contractor's work. To prevail, a contractor must typically show that the employer breached the contract and that the breach negatively impacted the contractor's performance. The contractor must also typically establish that the effects of the breach increased the costs of the work, to the exclusion of causes for which the contractor bears responsibility.

Although the specific standard differs between states, a contractor that demonstrates entitlement in principle will ordinarily only need to prove its loss to a reasonable degree of certainty, rather than with mathematical precision.

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?

The concept of constructive acceleration is broadly accepted under federal and state law. To prevail, a contractor must generally establish (i) that it suffered a delay for which the parties' contract allows it an extension of time; (ii) that the employer refused a timely and proper request for extension of time, requiring the contractor to complete its work by the originally specified date; and (iii) that the contractor incurred increased costs to accelerate the progress of its work to complete by the original deadline.

Although bad faith is not typically necessary to prove a constructive acceleration, the employer's bad faith conduct may separately support an independent claim for breach of contract based on a breach of the implied covenant of good faith and fair dealing.

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?

The identification of force majeure events, which will relieve performance, is typically left to the contracting parties. Thus, a tribunal may excuse performance if the construction contract's force majeure clause specifically mentions the category of events that prevented one party's performance. The degree to which a party's performance must be impacted and the types of relief available are generally left to the discretion of the contracting parties.

In the absence of an express contractual provision on these issues, state laws generally require a party to demonstrate that a force majeure event rendered some aspect of its performance impossible or practically impossible – not merely more difficult – and will then typically excuse the party from performing the impossible obligation.

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?

In exceptional circumstances, the common law doctrines of "impracticability" and "frustration of purpose" can afford a contractor relief in cases of unduly expensive or difficult projects. Under the doctrine of "impracticability", a contractor may be excused from performance where the cost of performance becomes excessive or unreasonable. The doctrine of "frustration of purpose" may also provide relief if the contractor can show that an exceptional and unforeseeable event transpired that so materially affects its performance that the contract is essentially valueless. Separately, the doctrine of "impossibility" – often considered alongside the doctrine of impracticability – may afford a contractor the ability to avoid performance when performance is rendered impossible by virtue of a superseding event for which neither party is responsible. In each case, courts often narrowly construe the application of these doctrines and parties can generally exclude their application by agreement.

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?

A contractor may be entitled to relief if the impossibility is a result of a defect in an employer-provided design specification. As a general matter, under the Spearin doctrine, recognised in nearly all US jurisdictions, an employer that issues design specifications that the contractor is bound to follow implicitly warrants the constructability of the design. Thus, to the extent a defect in the design renders an aspect of the specification impossible, the contractor may be able to avoid liability for failing to achieve the specification, and may be entitled to recover the increased costs it incurred while attempting to construct the specified design.

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?

Although state laws vary, contractual provisions that allocate risks to the contractor will generally be enforced as written; however, common law exceptions may apply to relieve a contractor in certain circumstances, even if the contract specifies otherwise. For example, in many states, a contractor will not be responsible for unanticipated ground conditions that no diligent contractor could have foreseen, even if the contract provides that the contractor has visited the site and had full opportunity to inspect its conditions. Similarly, as discussed above, the employer usually bears responsibility for errors in the design specifications it issues to the contractor under the Spearin doctrine.

Duty to warn

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

Typically, a contractor's duty to warn of a design error will be governed by the terms of the contract. However, some state laws impose requirements for contractors to warn employers of patently obvious errors.

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?

State laws generally impose a duty of good faith performance of contracts. Questions concerning (a) the level of intervention in the works that is allowed by an employer; (b) a party's discretion to terminate or suspend the contract; or (c) an employer's discretion to claim pre-agreed sums under the contract, such as liquidated damages for delay, will typically be governed by the concept that the parties cannot engage in opportunistic behaviour and must follow basic notions of fairness.

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?

Questions concerning the enforcement of notice provisions in construction contracts is a subject of great dispute in the US courts and will depend on the governing law of the contract and the facts. In many states, courts strictly apply the terms of notice provisions. In others, courts have applied more lenient standards that attempt to assess whether the employer was prejudiced by a lack of notice before enforcing a notice provision – though, even in these more lenient jurisdictions, a complete failure to supply notice can bar a claim.

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?

An employer's right to suspend payment or performance under a contract as a result of the contractor's non-performance or vice versa is usually governed by the provisions of the contract. However, where not defined by the contract, state laws typically allow parties to suspend performance only if the counte-party's breach is material. State laws do not typically permit parties to suspend performance in the event of minor or immaterial breaches. Although exceptions exist, in the event of a minor breach, the injured party normally retains the right to seek damages.

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?

As a general matter, if the employer's right to omit work or terminate for convenience is specified in the contract, those provisions are likely to be enforced. Except for exceptional cases, the motivations of the employer for exercising its right to omit work or terminate for convenience are not typically significant. However, contracts commonly specify that wrongful terminations may be treated as terminations for convenience and that the resulting damages are limited to the damages specified in the contract. In these cases, the motivation of the employer may be more relevant.

Termination

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

Frequently, construction contracts specify the parties' rights to terminate for convenience and to terminate for cause, including a list of acts of default that will justify a termination for cause. With enabling language in the parties' contract, a party generally may delete a portion of the project scope by way of a partial termination.

A practical consequence of a termination for convenience in many states is that an employer that does so typically waives its right to recover for alleged defaults in the contractor's work. Further, the construction agreement will usually provide the measure of compensation due upon termination for convenience – usually reimbursement for costs incurred up to the date of termination plus reasonable profit on the value of work performed.

Separately, while an employer that terminates for cause may generally recover actual damages caused by the contractor's default, a wrongful termination for cause may entitle the contractor to recover its anticipated profit on the project, as well as consequential damages.

Under either scenario, termination (whether partial or full, for-cause or convenience) is likely to give rise to a dispute regarding whether the termination was wrongful.

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?

Parties typically retain common law rights to terminate for material breaches of contract. Whether a breach is so substantial that it rises to the level of a material breach will depend on the facts and circumstances of a given case. The practical and financial consequences associated with termination are described in question 18.

20 What limits apply to exercising termination rights?

A party's right to termination, and limits thereof, are typically dictated by the terms of the contract. Apart from the requirement of a material breach, where a contract is silent on the question of termination, state laws commonly require the non-performing party be afforded notice and an opportunity to cure.

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?

Most construction contracts go to great lengths to disclaim implied acceptance of work. However, depending on the governing state law, parties may waive contractual disclaimers of acceptance by virtue of their conduct – including in the event an employer takes beneficial possession of the works.

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 approval or acceptance of work by or on behalf of an employer is typically determined by the contract and facts. Where the contract is silent, state laws vary on the precise requirements to establish acceptance; however, the courts will generally seek to ascertain the employer's intent to determine if acceptance occurred.

Depending on the governing state law and facts, an act of acceptance may waive an employer's right to recovery for any known or apparent defects or nonconformities. As a general rule, an employer cannot typically waive its rights to seek remedies for latent defects absent an express provision to the contrary.

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?

The extent to which liquidated damages are treated as an exhaustive remedy for an employer's losses stemming from delay will typically be governed by the terms of the construction contract. If the contract is silent, some state laws treat liquidated damages as the employer's exclusive remedy. However, there are exceptions to this general rule among the states.

Where a liquidated damages provision caps the amount of damages an employer may recover, the contractor's fraud, gross negligence, or wilful misconduct may serve as a ground to avoid a liquidated damages cap.

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?

It is an implied provision of virtually every contract that a party may not hinder or delay the performance of a counterparty. As a result, and although state laws may vary, if an employer causes critical delay, the contractor will typically be entitled to an extension of time, regardless of whether the contract establishes an explicit entitlement to relief.

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?

State laws generally require liquidated damages to reflect a reasonable estimate of the actual damages an employer will suffer as a result of inexcusable delay. Although often difficult to establish, if the stipulated damages bear no reasonable connection to an employer's actual damages, the liquidated damages may be deemed an unenforceable penalty. To assess the reasonableness of the liquidated damages, many courts look to the parties' understanding at the time of contracting; however, other courts will assess reasonableness with the benefit of hindsight.

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?

Liquidated damages generally represent the maximum amount of damages an employer can recover for time-related damages except in cases of fraud, gross negligence or wilful misconduct.

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?

The general rule among state laws is that monetary compensation for a breach of contract is assessed according to the doctrine of expectation damages, such that the breaching party is liable for the amount necessary to place the non-breaching party in the position it would have been in but for the breach. Although most construction contracts include terms that limit liability for consequential damages such as lost profits, if no such exculpatory clause exists, lost profits may generally be recoverable if (i) lost profits (or other consequential losses) were a foreseeable loss at the time the parties contracted and (ii) the lost profits at issue are not speculative.

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 is generally liable for the cost to repair or replace defective work so that the work complies with the requirements of the contract. However, if the cost to repair or replace is disproportionate to the value added by the corrective work, state laws may disallow the repairs as "economic waste". In such cases, the courts typically measure an employer's damages by the extent to which the non-compliant work diminishes the project's value. The parties generally are free to agree to a stricter arrangement, provided that no equitable or legal defences to enforcement are present under the applicable state law.

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?

Without a contractual requirement to the contrary, the employer's rights to recover for any defects discovered after the defects notification period will usually hinge on whether the employer intentionally or constructively waived such rights as a matter of state law. Typically, an employer's failure to notify the contractor of an obvious defect will waive the employer's right to recover compensation for the defect upon the expiration of the period. If the defect at issue is latent, and the contract does not call for the employer to waive its right to recover for latent defects, an employer will generally retain the right to recover for damages stemming from latent defects, subject to applicable state statutes of limitations and statutes of repose.

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

A contractual provision that excludes liability for indirect or consequential loss is generally enforceable, provided that the party seeking to enforce the provision has not engaged in acts of fraud, gross negligence or wilful misconduct.

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?

Generally, state laws disfavour exculpatory provisions and will strictly construe the terms of these provisions against the party seeking to enforce them. Furthermore, as mentioned above, state laws will not generally enforce exculpatory provisions that attempt to excuse a party for fraud, gross negligence or wilful misconduct. The ability of a party to pursue a claim in tort to avoid a contract's exculpatory provision is a complex inquiry that hinges on the applicable state law and facts of the dispute.

Lien

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?

A contractor's right to claim a lien (known as "mechanics' liens") arises as a matter of state statute. All states have mechanics' lien laws, which vary widely in procedure and substance. Broadly speaking, a contractor will have the right to lien a property when the contractor, in good faith, furnished material or labour for the construction of buildings or other improvements on the property. Although states impose a number of different limitations on a contractor's right to lien a property, including limitations concerning an employer's interest in the property, the most significant and relevant are the strict procedural requirements some states impose to ensure a lien is effective. Given the diversity of approaches among the states, parties must carefully review the relevant state's mechanics' lien statute.

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)?

Conditional payment provisions (such as "pay-when-paid" or "pay-if-paid" clauses) are treated differently by the state courts, but are generally disfavoured. While some state laws strictly enforce these provisions – so that the general contractor is excused from performance to the extent of the employer's failure to pay – other states interpret these provisions as a timing mechanism to establish when a contractor must pay its subcontractor. Still other states have deemed conditional payment provisions unenforceable as a matter of state public policy.

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)?

Generally, although state-law exceptions exist, because subcontractors are not in direct privity with an employer, a subcontractor's right to assert a claim for performance on a project is typically restricted to the general contractor. Questions concerning the merits and proof of the subcontractor's claim will depend heavily on the circumstances of the case, contract, and governing law.

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?

The liability of a general contractor to the employer for the acts of a subcontractor is typically governed by the terms of the prime contract and any applicable arbitration agreements between the parties.

Whether a contractor can initiate litigation in the US courts between itself, the general contractor, and subcontractor will depend on the language of the relevant contracts, whether a party can successfully compel arbitration, and applicable law. The seat of the arbitration should not affect the analysis above.

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?

As a matter of most state laws, a third party does not typically retain rights under a contract to which it is not a party unless the third party is an intended beneficiary of the contract. A future owner's rights under a contract will typically arise by virtue of contract assignment. In that case, although contractual provisions and state laws may differ, the future, third-party owner's rights will generally be the same with respect to delays, defects, limitations of liability, etc, as its predecessor.

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?

The corporate law of the state in which the contractor is incorporated will generally govern questions concerning the liability of a contractor's affiliates, directors or employees. Limited liability corporate structures typically prevent related entities or persons from being liable for the debts of the contractor. Separately, contractual exculpatory provisions, if drafted to cover affiliates, directors or employees, may also limit those individuals' or entities' liability.

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?

Each state retains its own statute of limitations periods for breach of contract claims. Typically, the statute of limitations periods range from four to six years, but vary widely between states.

Most state statutory limitation schemes are predicated on the commencement of an "action" that would toll the statutory period. Typically, this would include the filing of a demand or request for arbitration; however, state laws concerning what constitutes an "action" vary.

In most states, statutes of limitations are considered a form of procedural law.

Parties are typically free to agree to different limitations periods within certain bounds (eg, some states permit parties to reduce the statute of limitations period to one year, but not less).

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?

State laws commonly impose mandatory rules that cannot be waived or modified by contract – typically grounded in public policy. These rights and requirements vary widely from state to state; however, among the most common mandatory rules are state mechanics' lien statutes, state prompt payment statutes, and state retainage laws.

FIDIC is not a commonly used form of construction contract in the United States and, therefore, has not been regularly interpreted by state or federal courts. However, none of the material provisions of the FIDIC Silver Book 1999 appear to run afoul of US laws.

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?

Complex state conflict of laws rules apply to determine the applicability of foreign laws on projects located in the United States. Commonly, state laws grounded in public policy considerations will trump foreign laws depending on where the project is located. A regular example of this type of law is a state mechanics' lien statute.

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?

Whether a contractor would be able to seek relief from an arbitral tribunal or court related to a DAB award will typically depend on the terms of the dispute resolution provision in the applicable contract. However, arbitral tribunals seated in the United States and courts generally have the authority to require parties to post security pending the resolution of a claim on the merits under certain circumstances.

Courts and arbitral tribunals

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

Certain federal and state courts (eg, the US Court of Federal Claims) specialise in construction disputes. Separately, other state courts designate judges or assign construction disputes to specific judges who do not sit on the general docket.

Although relatively rare, some jurisdictions have designated specific courts or judges to exclusively manage specialised arbitration disputes, including international arbitration disputes.

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

While the terminology will vary between state court systems and the federal court system, disputes concerning construction and arbitration matters are first referred to the district courts for determinations of disputed facts and law. Following a district court ruling, parties are free to challenge the district court's decision (subject to varying degrees of review) before the state or federal

appellate courts. Thereafter, appeals to the federal Supreme Court or state supreme courts are typically granted at the discretion of the supreme courts.

As mentioned in in question 42, specialised courts or boards of claims in various jurisdictions also exist and oversee construction disputes in the first instance.

Decisions by all state and federal courts are publicly available and serve as precedent within their respective jurisdictions; however, commercial arbitration awards are rarely publicly available do not serve as precedent.

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 raise questions of interest in a case based on his or her personal understanding of the issues and can offer preliminary indications of his or her views on the merits of the dispute, provided that the judge or arbitrator permits the parties the opportunity to present their case. In practice, however, judges and arbitrators are reluctant to rely on personal opinions or offer preliminary views on the merits of the case for fear that doing so could place a subsequent decision or award at risk of being overruled or set aside.

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 a contractor initiates arbitration to which an employer opposes, the employer may seek relief in the courts to stay or enjoin the arbitration proceedings if the parties did not agree to arbitrate the dispute or if the preconditions for arbitration have not been satisfied. However, the US courts generally disfavour parallel proceedings and, therefore, will typically, on the motion of a party, attempt to consolidate the dispute into one forum.

If, in the circumstance above, the stay resulted from a failure to the satisfy the preconditions to arbitration, the stay would typically be effective until the preconditions were satisfied. Once satisfied, the contractor could compel arbitration in accordance with the arbitration agreement. Normally, a party cannot disregard preconditions to an arbitration agreement and immediately seek relief in arbitration; however, limited exceptions exist under differing state laws.

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?

While the case law involving a waiver of a right to arbitrate is varied, the basic inquiry is whether the contractor acted inconsistently with the right to arbitrate and whether the other party would be prejudiced by compelling arbitration. If the contractor applied to a foreign court for relief on the merits of the dispute, it seems plausible that US law could deem the contractor to have waived its right to arbitrate. However, in cases where an arbitrator applied for interim or provisional measures unrelated to the merits of the dispute, a court might reasonably conclude that waiver did not occur.

Expert witnesses

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

In the United States, party-appointed experts are most commonly used; however, tribunal appointed experts are not prohibited (albeit rare). Party-appointed experts generally owe a duty of candour to the tribunal and must follow other applicable professional or ethical standards relevant to their profession.

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).

Federal and state construction projects are governed by separate statutes and regulations and represent an entirely different area of the law. Laws involving public procurement, limits on the rights to suspend or terminate, etc, will vary between state and federal government projects. As a general matter, however, federal and state construction agreements typically favour the state and federal governments above what is normally seen in private construction projects.

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?

Although no law specifically regulates the practice of utilising settlement offers for the determination of costs in arbitration proceedings seated in the United States, US practice is heavily influenced by federal and state rules of evidence that, broadly speaking, prohibit the introduction of settlement offers to establish the value of a claim.

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?

Federal and state rules of evidence broadly recognise a "without prejudice" privilege that prohibits the use of settlement offers or communications made in furtherance of negotiating settlements to prove liability, validity of, or the amount of a claim in dispute. Although dependent on the applicable law, contractual fee-shifting provisions that take account of the value of an award, compared against the value of a final settlement offer, are generally permitted and, though not utilised heavily, have gained some acceptance among construction practitioners.

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?

As a general matter, the advice of in-house counsel is privileged from disclosure provided that the (i) advice is legal in nature; (ii) communicated to individuals who would naturally receive legal advice on behalf of the company; and (iii) the in-house counsel is a licensed to practice law in accordance with the requirements of the state in which he or she resides. The US courts generally treat questions of privilege as issues of substantive law.

Guarantees

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

To be valid, state laws generally require a guarantee to satisfy the same requirements as contract formation: (i) offer, (ii) acceptance, and (iii) consideration. Although state laws vary on the topic, oral guarantees are enforceable where the guarantor has no pecuniary interest in answering for the debt. If the guarantor has a pecuniary interest in the transaction, most state laws require the guarantee to be in writing, signed by the guarantor, and delivered to the creditor.

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?

Generally, the scope of the guarantor's liability will be determined by the terms of the agreement. Absent a specific term regarding the scope of the guarantor's liability, courts will normally look to the parties' intent.

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?

Typically, absent a waiver, if a creditor acts in a manner that increases the guarantor's risk of loss by increasing the potential costs of performance or decreasing the guarantor's potential ability to cause the principal obligor to bear the cost of performance, most state laws will discharge the guarantor's duties to the extent of the impairment.

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.

As a general rule, issuers of on-demand instruments are required to perform the obligations set out in the instrument, irrespective of any allegations of non-performance in the underlying contract, provided that the perquisites for performance have been satisfied (eg, notice) and the call would not give rise to a fraud.

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?

Although state laws vary, issuers of on-demand instruments are obligated to honour a call irrespective of the merits of the underlying dispute, provided that the call would not give rise to a fraud. Relatedly, unless there is a finding of fraud, the general rule is that a draw may be in excess of the value of the entitlement. In such a case, the applicant will retain the right to recover the excess through common law claims such as unjust enrichment.

Further considerations

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

A critical inquiry in nearly all cases involving contract disputes is the question of the parties' intent. Thus, as a broad proposition, the courts in the United States will generally attempt to ascertain and give effect to how the parties intended a contract to be interpreted and applied.

Albert Bates

Troutman Pepper

Clients turn to Albert Bates, Jr to resolve US and international construction disputes. Albee is known for his ability to quickly identify and address complex legal and business issues for clients, including on multibillion-dollar mega projects.

Albee helps clients resolve US and international construction disputes, particularly in the areas of power generation, infrastructure, and heavy industrial process facilities. He also advises clients on project planning, project execution, and change management on large engineering, procurement, and construction projects. Albee has counselled clients on more than 15 mega-projects, including projects in the US and internationally, and including projects in excess of $10 billion. He has acted as counsel on coal, gas-fired, solar, nuclear, biomass and hydroelectric power generation projects; tunnelling projects; chemical plants; pharmaceutical plants; steel mills; coke and coal byproduct plants; mass transit, bridge and highway projects; airports; mixed-use facilities; and sports and entertainment venues.

In addition to serving as counsel in arbitration matters, Albee has served as an arbitrator or mediator on more than 150 US and international construction and commercial disputes, including multiple matters with amounts exceeding US$100 million. Albee is a Fellow of the Chartered Institute of Arbitrators, is a Fellow in the College of Commercial Arbitrators, and is a Certified Mediator by the International Mediation Institute. From 2008-2019, Albee served as a member of the board of directors of the American Arbitration Association/ International Centre for Dispute Resolution. In addition, Albee is honored to be an inaugural member of the AAA's Mega-Project Construction Panel of Arbitrators.

Chambers USA gave Albee a Band 1 rating in construction. He is also recognised as a Leading Lawyer in Construction by *The Legal 500* and is listed in *The Best Lawyers in America, Who's Who Legal,* and the *International Who's Who of Construction Lawyers*. Albee is a Fellow of the American College of Construction Lawyers.

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Zach concentrates his practice in construction-related disputes and specialises in complex domestic and international arbitration proceedings. He has advised clients on nearly every continent in connection with projects in the United States, Africa, the Middle East, and Latin America. Zach has represented owners, EPC contractors, and equipment manufacturers in disputes arising from a wide variety of construction projects including power plants, airports, commercial buildings, and other civil infrastructure works.

Zach also regularly advises clients in connection with contract drafting and negotiation, contract administration, and dispute avoidance. While many of these matters have involved bespoke EPC and other construction contracts, he has significant experience with a large number of industry-standard agreements, such as FIDIC.

Zach is a frequent contributor to the firm's construction blog, constructlaw.com, and has been published in multiple academic and professional journals on topics concerning international arbitration. His articles include: Abuse of Due Process in International Arbitration: Is Due Process Paranoia Irrational, *Am. J. Constr. Arb. & ADR* (2018); The Corruption Defense Asserted in International Arbitration Disputes: A Look at *BSG Resources v. Guinea, N.Y. Disp. Res. Lawyer* (2016); A Bribe is a Bribe: FCPA's Influence on International Arbitration, *N.Y.L.J.* (2015); Undermining ICSID: How the Global Anti-Bribery Regime Impairs Investor-State Dispute Resolution, 52 *Va. J. Int'l L.* 995 (2012).

Troutman Pepper is a national law firm known for its higher commitment to client care. With more than 1,100 attorneys in 23 US offices, the firm partners with clients across every industry sector to help them achieve their business goals. For decades, our multifaceted construction team has been quickly and effectively handling large, complex problems in a wide range of transactional, project management, and litigation matters. We counsel clients on some of the largest, most sophisticated construction projects in the world, and we are aware of no firm that tries (and wins) more complex disputes than we do, in federal and state courts nationwide and arbitration forums domestic and international.

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