FEATURE ARTICLE

Ten years of construction law in the Asia Pacific region

Professor Douglas Jones AO*

Sydney, London and Toronto

dougjones@dougjones.info

Introduction

It is with an extension of many congratulations and gratitude that I provide this regional update in celebration of the recent tenth anniversary of *Construction Law International*.

In reflecting on the decade that has been in the Asia Pacific region, one cannot help but marvel at the incredible economic, trade and infrastructure growth in the region. Despite the weathers of the global financial crisis, regional investment in infrastructure was so significant that it accounted for more than 50 per cent of the global increase in capital spending between 2009 and 2013.[1] This trend is projected to continue, with analysts predicting that the Asia Pacific infrastructure market will grow by seven to eight per cent each year over the next decade, representing nearly 60 per cent of the world's total in that time.[2] Indeed, with

Shanghai, China. Credit: ArtisticPhoto/Shutterstock.

such building blocks in place, the future of construction and infrastructure in the Asia Pacific region looks promising.

Legal developments, however, are more difficult to track. With no uniform system of law, it is often difficult to identify the key drivers of policy change. Some countries, such as Australia, Canada, New Zealand, Singapore and Hong Kong, for example, utilise a common law system in which developments are driven by judicial pronouncements and legislative direction. Others, such as China, Japan and South Korea, engage a combination of civil law and customary law. Others still, such as India, Indonesia and Malaysia, are driven by any combination of Islamic law, common law, civil law and customary law.

Much can therefore be said about the diversity of the legal systems present in the region. For one, there is an imperative for practitioners to not remain settled in the comfort of their own jurisdiction, but instead to gain an appreciation and understanding of other legal systems across the region. This will allow for an effective response to rising demand from clients for cross-border work.

Further, large-scale investment in infrastructure is indicative of a regional commitment to infrastructure, which many governments recognise as critical to the sustainable growth of their respective

economies. In some sense, it is this commitment to infrastructure (among other industries) that has driven the world into what is dubbed the 'Asian Century'.

In this short article, I will discuss developments across several areas that are relevant to construction law and practice, including in the areas of procurement, standard form contracts, substantive legal doctrines and alternative dispute resolution.

Procurement

Procurement methodologies are as diverse as they are complex. The greatest trend in procurement methodologies in the Pacific Rim is an increasing use of Public-Private Partnerships (PPPs). With the region estimated to require some US$15–20tn in infrastructure investment by 2030,[3] government funding alone is insufficient to meet this demand, and thus the private sector is being engaged on an increasing basis.

Through PPPs, governments can shift risks and obligations that they would ordinarily be responsible for to the private sector. The partnership is mutually beneficial; the public sector offers social responsibility, environmental awareness and local knowledge, while the private sector offers finance and expertise in commerce, innovation, efficiency, management and operations.[4]

Historically, Australia, China, Hong Kong, India, Japan, Singapore and South Korea have been the key uptakers in the Asia Pacific region of PPP procurement. In the decade between 2006–2016, China and India were the largest contributors, investing US$60bn and US$290bn respectively, across nearly 700 projects each.[5] However, the contributions of these economies are predicted to fall somewhat in the next decade, while other economies such as Indonesia, Malaysia, Myanmar, the Philippines, Thailand and Vietnam will substantially increase their PPP presence.[6] The energy and transport sectors have, to date, been the focus of private sector participants in the Asia-Pacific region, with a 50 per cent and 20 per cent share of the total number of projects respectively.[7] This is predicted to stay the same, though the Asian Development Bank has urged the telecommunications sector to also consider engaging PPP procurement methodologies.[8]

As a case study, Australia leads the Asia Pacific region (and indeed the world) in developing and engaging robust PPP institutional and regulatory frameworks.[9] This is largely due to the fact that Australia's infrastructure landscape has a rich history of engaging in public-private relationships long before the PPP label was developed. However, there is no uniform legislative framework or code that regulates PPPs across Australia, with each state and the federal government implementing their own guidelines and legislation. This has led to a general criticism of the difficulty of navigating public procurement laws in Australia.[10] PPPs currently only make up about ten per cent of total government procurement in Australia, as traditional delivery models can generally deliver better value for money. The most successful use of the PPP model has been in road infrastructure projects, though this has been expanded with the New South Wales and Victorian governments extending the PPP reach to hospitals, schools and prisons. There are a variety of ways to improve the utility of PPPs in Australia, including better risk allocation transferrals, more robust financing structures, reducing transaction and bid costs, and the use of dispute resolution boards, among other reforms.[11]

Standard form contracts

The use of standard form contracts has become a systemic practice over the last two decades. This is unsurprising when considering the significant time and cost advantages associated with the use of standard form contract suites, and the ambitious level of infrastructure investment in the region.

The greatest trend in procurement methodologies in the Pacific Rim is an increasing use of Public-Private Partnerships.

There are two categories of standard suites available: (1) domestic suites, typically published by local government or expert agencies specialised for use in the country of origin; and (2) international suites, typically published by international organisations with a view towards international applicability and the streamlining of international construction transactions.

The Asia Pacific region has no shortage of domestic suites, with many economies in the

region having developed, updated and published their own contract suites. This development has progressed naturally in parallel with increased government investment in infrastructure. Examples of domestic suites can be seen in, among other countries, Australia,[12] Canada,[13] China,[14] Hong Kong,[15] Japan,[16] Malaysia,[17] New Zealand[18] and Sinagapore.[19] We should expect to see a growth of standard form contracts and updates over the decade, as these contracts will naturally refine with use and as industry-specific standard form suites will be developed on an increasing basis.

Given the significant international interest and investment in the Asia Pacific economy, the FIDIC contract suites have seen a steady growth in popularity, particularly across South East Asian countries such as Indonesia, the Philippines, Sri Lanka and Vietnam. The adoption of the terms in these contracts is not always a simple exercise. Aside from amendments that contracting parties may negotiate based on their commercial interests, there are situations in which certain FIDIC provisions may clash with domestic legal and cultural principles.[20] The FIDIC suites have enjoyed prevalence in the Asia-Pacific region, though there are other standard form suites that have also achieved a level of popularity internationally, including in the Asia-Pacific, such as the JCT and NEC forms born out of England.

The standard contractual forms have been updated based on criticisms and experience born out of years of construction practice. Moreover, the institutions responsible for their development have (and continue) to innovate in the production of their suite. In this regard, there are a number of developments that are being followed with great anticipation by the construction law community, including FIDIC Yellow 2017 (2nd edition), FIDIC White 2017 and FIDIC Joint Venture 2017.

Substantive legal doctrines

A number of legal developments in construction law have been made worldwide over the last decade. In a common law sense, many English courts have seen much case development, though not all common law courts follow the same developments. The introduction and amendment of statutes have also been influential. Three topical developments are discussed below.

Penalties and liquidated damages

The common law doctrine of penalties has received significant attention in recent years.[21] In the 2015 *Cavendish*[22] decision, the Supreme Court of England and Wales departed from the 'quasi-statutory status'[23] of the *Dunlop*[24] principles and reformulated the true test for penalties to be whether the detriment imposed on the contract breacher is 'out of all proportion' to any legitimate interest of the innocent party. The decision received widespread attention, however, neither the Australian courts nor Singaporean courts that have considered the case have altered their position in response.

FIDIC contract suites have seen a steady growth in popularity, particularly across South East Asian countries.

In Australia, the doctrine has instead been developed by two recent decisions: *Andrews*,[25] and its later continuation, *Paciocco*.[26] Prior to *Andrews*, a breach of contract was understood to be a pre-requisite for engaging the penalties rule.[27] However, in *Andrews,* it was affirmed that, though at common law the rule is only engaged upon a breach of contract, the rule in equity is flexible and allows for a collateral stipulation to be caught within the penalty doctrine if it is found to be in the nature of a security for, and *in terrorem* of, the satisfaction of the primary stipulation.[28] As a continuation of the same proceedings in *Andrews*, *Paciocco* added guidance by holding that a broad approach may be adopted when determining whether a fee is a penalty. Losses beyond those compensable at common law are validly within this approach,[29] and thus losses within the legitimate interest of the claiming party may be compensable despite an inability to prove actual loss. In *Paciocco*, the High Court reaffirmed *Andrews* and declined to follow *Cavendish.* The construction industry welcomed this decision, given the difficulty of proving losses in public infrastructure projects such as roads, bridges, power plants and the like.

The courts in both Singapore and Hong Kong, on the other hand, generally employ the traditional *Dunlop*[30] test, being a balancing act

Tengwang Pavilion, Nanchang, China. © Meiqianbao/Shutterstock.

between whether a clause that took effect on breach was a 'genuine pre-estimate of loss' (liquidated damages) or a deterrent for breach (penalty). It is yet to be seen what the Hong Kong courts make of *Cavendish*. They have, however, rejected the restrictive need to adduce evidence and calculate damages, holding that the purpose of liquidated damages was specifically to avoid this.[31] Singaporean courts, however, appear to be moving towards the *Cavendish* test, determining that secondary obligations will be struck down if they are extravagant or extraordinary.[32] They have not, however, made any reference to the *Cavendish* jurisprudence on legitimate interests.

Exclusion and limitation clauses

Being a common provision in many contracts, the jurisprudence around exclusion and limitation clauses has developed in a variety of contexts, both within and outside of construction disputes. Though it has been tried and tested a number of times in the last decade, courts have affirmed that the central rules remain the same – at least insofar as they have already been redeveloped from a traditionally strict rejection of such a clause, to upholding an agreement between parties in its entirety if the terms are unambiguous.[33] The clauses must also conform with the requirements laid out in relevant legislation, be it the various state legislations in Australia, the Unfair Contract Terms Act in Singapore, the Control of Exemption Clauses Ordinance in Hong Kong, or any other statutes that govern contract law in their respective Asia Pacific countries.

However, one area that has seen frequent challenge is when excluding or limiting indirect or consequential losses. The courts have upheld exclusions of this head of damage in the past, and some standard form contracts even include a provision to do so (clause 17.6 of the FIDIC Red Book, for example). The issue, however, lies in the definition of the heads of damage within the contract. In Australia, the jurisprudence of state level courts has developed to state that general provisions to exclude 'indirect' or 'consequential' losses will not always be sufficient to exclude all categories of losses when that loss is examined in the context of the agreement.[34] Thus, if parties wish to exclude specific types of loss, for example, lost profits or lost expenses, then they should endeavour to specify those in their agreement; a principle that rings true in most common law jurisdictions.

Security of interests

The Asia Pacific approach to security of interests is diverse. On one end of the spectrum, Canada, New Zealand and (as of 2012) Australia, have all developed their own versions of a Personal Property Securities Act (PPSA) which provide sophisticated governance on the registration of security interests in personal property. Such legislation is generally modelled on concepts of attachment and perfection in determining whether a security interest has been created, and where their interests lie in the hierarchy of parties that may have an interest in the project.

Security of interests regimes have a significant impact on structure, finance, investment and contractors in projects. Many ordinary contracts associated with construction projects – for example, supply contracts with retention of title clauses, deferred payment arrangements, subcontracts, contracts for equipment hire, joint ventures and even general provisions for rights to obtain property – may all be affected by a need to register those interests in order to enforce them over other third parties. For Australia, at least, this version of securities law is new and will require further exploration in the coming years to properly clarify.

Similar systems of security registration exist in the region, albeit under different names, as do a number of other methods of securing interests. India has a parallel system of registration for perfection under their Companies Act of India 1956, as do China, Hong Kong, Indonesia, Japan, Singapore and South Korea. 'Pledging' is a common terminology in the region, which generally describes the process of pledging ownership/security over a specific type of asset (most commonly 'moveable assets') by registering that pledge with a securities registration body. Other methods of securing interests involve guarantees or sureties, mortgages or hypothecs, liens and deposits, to name a few.

Alternative dispute resolution

Alternative dispute resolution in the Asia Pacific region has seen substantial activity over the last decade. One could draw both correlation and causation with the general growth of infrastructure projects. In the below section, I will consider the development of statutory adjudication, dispute boards and arbitration in the region.

Statutory adjudication

A relatively new method of dispute resolution in construction law is statutory adjudication, usually utilised in security of payment legislation. In the late 1990s following the UK Housing Grants, Construction and Regeneration Act 1996, a select few common law countries developed the same. In the Asia Pacific region, these are Australia,[35] Maylasia,[36] New Zealand[37] and Singapore,[38] and indeed only Ireland[39] and the Isle of Man[40] elsewhere in the world have the same. The sparse list of countries utilising statutory adjudication is perhaps due to the establishment of a regime of rights and obligations that parties cannot contract away from, which interferes with their usual freedom of contract.

The aim of statutory adjudication is to provide parties with an efficient mechanism of securing interim progress payments in order to secure cash flow, and to accordingly prevent insolvency within projects and the wider industry. With this goal in mind, it is intended to be a fast-track method of dispute resolution that gives construction parties a quick and provisionally binding decision (in most cases there is a timetable of 28 days from start to finish). Despite an adjudicator hearing submissions from both parties, as an arbitrator would, it differs from arbitration in that only a performer of work for which payment is due can bring a claim. Ordinarily, parties contracting in jurisdictions without such legislation would be required to contractually agree to similar processes, otherwise known as contractual adjudication.

In terms of the future of statutory adjudication in the Asia Pacific region, it is speculative whether more countries in the region will adopt similar legislation. Hong Kong has recently demonstrated intentions of implementing security of payment legislation, with the Development Bureau of the Hong Kong government releasing an April 2016 report on the 'Proposed Security of Payment Legislation for the Construction Industry',[41] following a public consultation in June 2015. The Report concludes that, despite some divergence of views on some aspects of the proposed framework, there was overall positive support for the introduction of such legislation, and that the Hong Kong government intends to proceed with the legislation.

As far as development goes, we may expect to see some legislative reform in Australia over the next decade. There is currently a lack of national uniformity as state and territory governments have implemented security of payment legislation in piecemeal fashion over the last two decades. The division is separated into a 'West Coast'[42] model (based off the UK Act) and an 'East Coast'[43] model. Uniformity is, in general, preferred, however, it has been noted that the legislation is, across the board, 'more or less uniform… there are differences between the states, but core elements of the legislation are similar'.[44]

In terms of the future of statutory adjudication in the Asia Pacific region, it is speculative whether more countries in the region will adopt similar legislation.

Further, there has been some commentary that the legislation (with the exception of Tasmania's) should consider greater judicial review mechanisms, as the current 'one size fits all approach' of adjudication has no appreciation for the size of projects and documents that must be heard within the limited timeframe a decision must be made.[45] This has led to particular dissatisfaction in large projects in Australia.[46] In December 2016, John Murray AM was appointed to review the security of payment legislation across Australia, and provide a report by no later than December 2017.[47] Indeed, this will facilitate interesting discussion in the coming years.

Dispute boards

Dispute boards, and their several sub-species, have long been recognised as a uniquely efficient and effective method of reducing dispute time and costs in the construction industry. Their popularity, however, has historically been concentrated in Western markets, the United Kingdom and the United States as prime examples. The last decade has seen a steady rise in the practice of dispute boards in the Asia Pacific region for a variety of reasons, but notably due to the work of the Dispute Resolution Board Foundation and other organisations in the region.

Looking to dispute adjudication boards

(DABs) first, the growth in the of use of DABs in the Asia Pacific region is somewhat connected to the increasing use of FIDIC contracts in Asia Pacific infrastructure projects, given that DABs are often a precondition to arbitration under the contract suites.[48] DABs are also readily accepted in many jurisdictions that have established specific statutory adjudication regimes, such as Australia, Malaysia, New Zealand and Singapore and, indeed, DABs have become mandated in projects financed by the Asian Development Bank and the World Bank in their Standing Bidding Documents. Furthermore, the work of multilateral development banks and international financial institutions, in particular, the Japan International Cooperation Agency, in financing the cost of DABs (and other dispute boards) and in providing education and training services for the effective administration of DABs has been significant in promoting DAB use in the region. Even in terms of enforceability, the Singaporean Courts have contributed substantially to the global construction community's understanding of DAB decisions through the *Persero* decisions.[49]

In looking to dispute resolution boards (DRBs), no discussion of their employment in the Asia Pacific region can begin without recognition of their success in the mega-projects of China. The Ertan Hydropower Project, the Xiaolangdi Multipurpose Dam, the Shanxi Wanjiazhai Water Control Project, and the Kunming Zhangjiuhe River Water Diversion and Water Supply projects were all enormous in their own rights, but also all saw massive success of DRBs with all claims and counterclaims resolved outside of arbitration. These projects demonstrated the great dispute avoidance capabilities of DRBs to the region, however, there exists still a lack of DRB use in projects in China that do not involve foreign corporations. This may change in the coming decade, however, as the Chinese government has begun promoting the practice substantively through, for example, the Standard Documents for Construction Project Bid Innovations,[50] the Project Constructions Contract (Model),[51] the Rules for Construction Disputes Adjudication[52] and the Rules for Construction Disputes Adjudication (Trial Version).[53] Outside of China, there are many accounts of the use of DRBs in Australia,[54] Hong Kong, Indonesia, Malaysia, the Philippines, Singapore and Vietnam.

Quite clearly, the use of dispute boards is spreading across the Asia Pacific. There are still, however, some significant hurdles to overcome. For one, there is a strong resistance to the philosophy of DABs as immediately binding on contract parties, even if a Notice of Dissatisfaction has been given alongside a clear intention to refer the dispute to arbitration. For another, it is often lamented by commentators who look to Australian examples that the costs associated with DABs make the process unappealing except in the largest of construction projects. Moreover, local standard form contract suites do not commonly employ dispute boards as a dispute resolution mechanism, more commonly opting for arbitration, mediation or conciliation. Perhaps the most complicated barrier is a cultural difference in dispute resolution between Asian and Western countries, which involves a preference for consensual, non-confrontational, courteous and amicable negotiations.[55] At this level, some have commented that dispute boards would in fact align with these values, provided the cost disadvantages can be overcome.[56] Much work will need to be done over the decade to resolve such barriers and, in my view, that work should be concentrated at highlighting the dispute avoidance benefits that DRBs have.

Arbitration

Arbitration has seen major growth in use over the past decade and now enjoys primacy as the preferred method of alternative dispute resolution for international construction disputes. The Asia Pacific Rim has seen steady growth of arbitration centres to mirror this growing popularity of arbitration, and an equally steady growth in the popularity of the centres. The most successful are arguably concentrated in common law based arbitration centres, such as the Singapore International Arbitration Centre (SIAC), the Hong Kong International Arbitration Centre (HKIAC), Malaysia's Kuala Lumpur Regional Centre for Arbitration (KLRCA), both the British Columbia International Commercial Arbitration Centre (BCICAC) and the Canadian Commercial Arbitration Centre (CCAC) in Canada, and the Australian Centre for International Commercial Arbitration (ACICA). Of particular note, the SIAC has been tremendously competitive, handling 343 new arbitrations in 2016 (almost quadruple its 90 new cases in 2006).[57]

The success of the common law arbitration

centres, however, is not to negative the success of non-common law arbitration centres in the region. China's International Economic and Trade Arbitration Commission (CIETAC), the Korean Commercial Arbitration Board (KCAB), the Japan Commercial Arbitration Association (JCAA), the Vietnam International Arbitration Centre (VIAC) and the BANI Arbitration Centre of Indonesia, to name a few, have all seen widespread success.

Some countries traditionally closed to arbitration have undergone major reforms to promote arbitration. India is a significant example, having made substantial amendments to their Arbitration & Conciliation Act 1996 in 2015. These opened access to interim relief and restricted the 'public policy' barrier of enforcing arbitral awards, among other amendments. Coupled with the establishment of the Mumbai Centre for International Arbitration (MCIA) in 2016, we should reasonably expect to see a rising popularity of arbitration in India as a massively developing economy in the region. Indeed, in the coming decade, we may see even further amendments to encourage arbitration in India, for example, by recognising the need for emergency arbitration.

The great success of arbitration in the region is a reflection of a number of factors, foremost an increasingly pro-arbitration attitude of legislators, and a compounding non-interventionist attitude of judiciaries. With these two cornerstones in the construction market in place, commercial parties have developed a strong confidence in the region that their disputes will be resolved independently, efficiently and commercially, and are readily enforceable in the region. One must also have regard for the increase of investor-state arbitration in the region, facilitated by a growing number of bilateral and multilateral trade agreements.[58] Indeed, the work of the UNCITRAL, in generating widely accessible uniform principles and rules, cannot be ignored, as the rules of most local arbitral institutions are heavily influenced by UNCITRAL and global best practice. The differences in rules between institutions, however, are naturally designed to ensure competitiveness, and are tailored to distinct markets.

In recent years, the purported time and cost efficiencies of arbitration have been challenged. By way of example, the 2015 White & Case International Arbitration Survey rated these the worst features of arbitration. There is much in the way of thought leadership in the international arbitration community for innovative practices for overcoming these issues. Case management conferences, the first procedural order, and robust guidelines on evidence, disclosure and submissions have all received much attention. The utility of cost awards is a subject of considerable importance.[59]

We should reasonably expect to see a rising popularity of arbitration in India as a massively developing economy in the region.

The onus rests on parties, counsel and arbitrators alike, to capitalise on the procedural flexibility that arbitration offers, and thereby recover the efficiencies that arbitration has to offer.

Conclusion

The Asia Pacific region is undoubtedly headed for continual legal and industry development, driven by major private and public capital investment. Significant new growth lies in a number of 'emerging economies', in addition to that fuelled traditionally by the power-house economies in the region. Investment in essential infrastructure is critical for ensuring the sustainable development of economies and societies, particularly infrastructure in the industries of transport, energy, utilities and telecommunications. The South East Asian emerging economies, such as India, Indonesia, Malaysia, the Philippines, Thailand and Vietnam will, on many predictions, be areas of enormous growth to follow. Corresponding with this growth will be new and exciting developments in construction law. From this diversity of experience, the international construction community stands only to benefit.

Professor Doug Jones AO is a leading international commercial and investor/state arbitrator, with an office in Sydney and chambers in London and Toronto. He may be contacted through **www.dougjones.info**.

Notes

* International Arbitrator, CArb (www.dougjones.info). The author gratefully acknowledges the assistance provided in the preparation of this paper by his Legal Assistant, Jason Corbett.

1 PricewaterhouseCoopers, *Developing Infrastructure in Asia Pacific; Outlook, Challenges and Solutions* (2014) 5.
2 PricewaterhouseCoopers, *Capital Project and Infrastructure Spending: Outlook to 2025* (2014) 2.
3 BCG report – The Global Infrastructure Challenge (2010).
4 Wolfgang Schiefer, 'Public-Private Partnerships in the Asia Pacific – the best of two systems' (26 August 2011) International Labour Organisation News Feature: www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/genericdocument/wcms_189167.pdf.
5 See: http://ppi.worldbank.org/snapshots/country/china; and http://ppi.worldbank.org/snapshots/country/india.
6 Robert Tiong, 'The impact of political risks on public-private partnership (PPP) opportunities in Asia': http://research.ntu.edu.sg/News/Documents/2007/HRT_Impact%20of%20political%20risks%20on%20PPPs%20-%20CEE.pdf.
7 See: http://ppi.worldbank.org; and EY, 'PPP trends and initiatives in the Asia Pacific region' presented at the PPP National Workshop in Bhutan 19–20 August 2014 organised by UN ESCAP: www.unescap.org/sites/default/files/3.%20PPP%20Trends%20in%20Asia-Pacific.pdf.
8 Asian Development Bank and Asian Development Bank Institute, *Infrastructure for a Seamless Asia* (2009) 195.
9 The Economist Intelligence Unit, *Evaluating the Environment for public-private partnerships in Asia-Pacific: the 2014 Infrascope*: www.adb.org/sites/default/files/publication/158409/2014-infrascope.pdf.
10 Julian Bailey, *Construction Law* (2nd edn, Informa 2016), Vol 1, 291.
11 Doug Jones, 'Evolutionary stages of PPPs in Australia', presented at the Canadian College of Construction Lawyers, Washington DC, 29 May 2015.
12 Standards Australia (AS) suite, the Australian Building Industry Contract (ABIC) suite, National Public Works Council Ed 3 General Conditions of Contract, among others.
13 Those published by the Canadian Construction Documents Committee.
14 Chinese Energy Performance Contract suite developed by the Standardisation Administration of the People's Republic of China in 2010.
15 Joint Contracts Working Committee's (JCWC) Standard Form of Building Contract 2006, Hong Kong Construction Association's Standard Form of Domestic Subcontract, among others.
16 Those published by the Engineering Advancement Association of Japan (ENAA); Japanese Energy Service Agreement (JEPA) developed by the Japan Association of Energy Service Companies (JAESCO) in 2007.
17 The Malaysian Institute of Architects (PAM) suites.
18 The New Zealand Institute of Architects suites.
19 Singapore Institute of Architects (SIA) Lump Sum Contract suite, SIA Conditions of Appointment & Architects' Services & Mode of Payment, Public Sector Standard Conditions of Contract, among others.
20 See, for example, Kongkoon Tochaiwat and Visuth Chovichien, *Acceptance of FIDIC Standard Contracts in an Asian Country: A Survey in Thailand* (2010).
21 See my 2016 NZ Society of Construction Law lecture on the development of penalties and liquidated damages over the last century: www.dougjones.info/wp-content/uploads/2006/10/Penalties-Lecture-New-Zealand-SCL-Final-Website-Version.pdf.
22 *Cavendish Square Holding BV v Talal El Makdessi; ParkingEye Limited v Beavis* [2015] UKSC 67 ('*Cavendish*').
23 *Ibid*, 10–1 [22] (Lords Neuberger and Sumption).
24 *Dunlop Pneumatic Tyre Co Ltd v New Garage Motor Co Ltd* [1915] AC 79.
25 *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205.
26 *Paciocco & Anor v Australia and New Zealand Banking Group Limited* [2016] HCA 28.
27 *Interstar Wholesale Finance Pty Ltd v Integral Home Loans Pty Ltd* (2008) 257 ALR 292.
28 See n 25 above, 216 [10] (French CJ, Gummow, Crennan, Kiefel and Bell JJ).
29 See n 26 above, HCA 28, [65] (Kiefel J; French CJ agreeing), [170]-[171] (Gageler J), [283] (Keane J).
30 See n 24 above.
31 *Brio Electronic Commerce Limited v Tradelink Electronic Commerce Limited* CACV 271/2013 citing *Ip Ming Kin v Wong Siu Lan* (unreported, 28 May 2013, CA, CACV 201/2012).
32 *iTronic Holdings Pte Ltd v Tan Swee Leon* [2016] SGHC 77; *Allplus Holdings Pte Ltd v Phoon Wui Nyen (Pan Weiyuan)* [2016] SGHC 144.
33 See, generally, *Owners SP 62930 v Kell & Rigby Pty Ltd* [2009] NSWSC 1342; *MWH Australia Pty Ltd v Wynton Stone Australia Pty Ltd (in liq)* [2010] VSCA 245; *Carewins Development (China) Ltd v Bright Fortune Shipping Ltd* (2009) 12 HKCFAR 185.
34 *Environmental Systems Pty Ltd v Peerless Holdings Pty Ltd* [2008] VSCA 26; *Regional Power Corporation v Pacific Hydro Group Two Pty Ltd (No 2)* [2013] WASC 356; *MacMahon Mining Services v Cobar Management (No 1)* [2014] NSWSC 502; *MacMahon Mining Services v Cobar Management (No 2)* [2014] NSWSC 731.
35 Building and Construction Industry Security of Payment Act 1999 (NSW); Building and Construction Industry Security of Payment Act 2002 (Vic); Building and Construction Industry Payments Act 2004 (Qld); Construction Contracts Act 2004 (WA); Building and Construction Industry Security of Payment Act 2009 (SA); Building and Construction Industry Security of Payment Act 2009 (Tas); Building and Construction Industry (Security of Payment) Act 2009 (ACT); Construction Contracts (Security of Payment) Act 2004 (NT).
36 Construction Industry Payment & Adjudication Act 2012 (Act 746).
37 Construction Contracts Act 2002.
38 Building and Construction Industry Security of Payment Act 2006.
39 Construction Contracts Act 2013.
40 Construction Contracts Act 2004.
41 See: www.devb.gov.hk/filemanager/en/content_880/SOPL_consultation_report.pdf.
42 Covering the Northern Territory and Western Australia.
43 Covering the Australian Capital Territory, New South Wales, Queensland, South Australia, Tasmania and Victoria.
44 *Georgiou Building Pty Ltd v Perrinepod Pty Ltd* [2012] WASC 72 at [31], per Adamson J.
45 Samer Skaik, 'Taking Statutory Adjudication to the Next Level: A Proposal for Review Mechanism of

Erroneous Determinations' [2016] ICLR 287.

46 Society of Construction Law Australia, Australian Legislative Reform Subcommittee, 'Report on Security of Payment and Adjudication in the Australian Construction Industry', February 2014.

47 See: https://ministers.employment.gov.au/cash/john-murray-am-appointed-review-security-payments-laws.

48 In the Red, Yellow, and Silver Books.

49 *CRW Joint Operation (Indonesia) v PT Perusahaam Gas Negara (Persero) TBK* [2011] SGCA 33; *PT Perusahaam Gas Negara (Persero) TBK v CRW Joint Operation (Indonesia)* [2014] SGHC 146.

50 Issued by nine Ministries and Commissions under the State Council in 2007.

51 Issued by the Ministry of Construction in 2010.

52 Issued by the Beijing Arbitration Commission in 2009.

53 Issued by the China International Economic and Trade Arbitration Commission in 2010.

54 For a good discussion on DRBs in Australia, see Claire Newhouse, 'DRBs have finally cemented their place in the Australian construction industry' (2016) 11(3) *Construction Law International* p 9.

55 Gordon Jaynes 2012, 'In the Asia/Pacific Region, 'Quo vadis' Dispute Boards?', presented at the DRBF International Conference 2012 in session 8, 'Future of Dispute Boards in the Asia/Pacific Region'.

56 Asanga Gunawansa, 'The Scope for the Use of Dispute Review Boards for Resolving Construction Disputes in ASEAN Countries': www.irbnet.de/daten/iconda/CIB14506.pdf.

57 See: www.siac.org.sg/2014-11-03-13-33-43/facts-figures/statistics.

58 See Jawad Ahmad, Kelvin Poon and Andre Yeap, 'Investment Arbitration in Asia', *The Asia-Pacific Arbitration Review 2016*.

59 See my 2016 CIArb Roebuck Lecture on the topic of cost orders: www.dougjones.info/wp-content/uploads/2006/10/Roebuck-Published.pdf.

Credit: Vadim Nefedoff/Shutterstock.