Index

```
Accounting for
  obligation to account for security, 133-144
Accrued entitlements
  loss of, 11-16
Accuracy of information see Buildability
Adjudication
  certification processes, 323
  claimed jurisdictional error in, 360-364
  in loss of productivity claims, 125-126
  judicial appeals against, 384-400
  opportunity to delay applications, 372-383
  risk of inability to pay, 334-336
Agreement to negotiate
  legal status of, 175-199
Alternative dispute resolution see Dispute resolution
Amiable compositeur
  clause removed from arbitration rules, 313
Anchor trenches
  construction defects vs design defects, 35-84
Appeals
  against liability for unpaid claim, 200-207
  against recovery of insurance payment by QBSA, 401-408
Apportionment of costs
  in arbitration, new rules regarding, 317-319
  in global claim for disruption, 124-125
Arbitration
  enforcement of international arbitral awards, 148-164
  expert determination as alternative to, 368-370
  loss of productivity claims, 126
  new IAMA Rules for, 307-322
  remuneration of arbitrators, 317
AS 2124-1992
  cl 12, on foreseeability, 240
  cl 16.3, on design defects, 247
  cls 33, 36, 40, 46 on loss of productivity, 112, 125
  cl 35, additional time claimed under, 91
  cl 35, 36 on disruption costs, 113
  cl 40.2, on additional costs, 10
  disruption costs and, 113
  on experienced contractors, 240
  proportion of projects using, 304
AS 4000-1997
  cl 14.3(f), on design defects, 247
  cl 25, on foreseeability, 240
  on contractor competence, 241
  proportion of projects using, 304
AS 4300-1995
  proportion of projects using, 304
```

AS 4902-2000

proportion of projects using, 304

Asia-Pacific region

enforcement of international arbitral awards in, 148-164

Assignment

of right of action, 35-84

Australian International Disputes Centre

foreign awards and, 152

Bank guarantees

conditions to be met before drawing on, 208-219

Best endeavours

reasonable endeavours vs, 4-6

Best engineering practice

design in accordance with, 35-84

Bias in arbitration

new IAMA Rules, 309

Breach of contract

damages claimed for, 334 express and implied obligations, 35-84 if contract not signed, 175-199

release for, 128-132

Buildability

fairness and, 238-253

Building and Construction Security of Payment legislation

loss of productivity claims under, 124-126

Building Appeals Board

breaches natural justice, 409-418

Business days

defining, 384-400

Canada

implied warranty of accuracy in, 251-252

Case law see Construction law

Causation

for loss of productivity, assigning, 113-119 particularisation of, 120-122

Certification processes

certificate of practical completion, 208-219 litigation concerning, 340-349 progress claims and payments, 384-400

Challenge in arbitration

new IAMA Rules, 309

Claims see Progress claims and payments

Codelfa true rule

contract interpretation and, 88-106

Collateral stipulation

extravagant and unconscionable, 19-21

Collins Report

on construction industry insolvency, 224-225, 234-237

Commercial approach

justification for time-bar clauses, 20-21

```
to contract administration notices, 88-106
Compensation
  for loss of productivity, 112
Compliance
  with time-bars, 10-16
Composite claims
  for loss of productivity, 109-110
Conditions precedent
  for non-compliance with time bars, 11-17
Conduct
  agreement not inferred from, 175-199
Confidentiality
  suppression orders for commercially sensitive information confidentiality, 258-262
Construction defects
  design defects vs, 35-84
Construction industry
  insolvency in, 234-237
Construction law
  on international arbitration, 154
  training in, 24-34
Contractors
  chain of, 226
  compliance with time bars, 88-106
  duty of good faith towards, 252
  loss of productivity claims, 107-127
  penalties for inexperience, 241
  proof of payment of required, 224-237
  reasonably prudent contractor test, 249-250
  risks to underwritten by owner and architect, 251
  teaching construction law to, 29-32
Contracts
  adjudication under Construction Contracts Act 2004 (WA), 360-364
  administration notices, 88-106
  assessing current market value for, 254-297
  breach of. see Breach of contract
  business days vs working days in, 384-400
  contradictory clauses in, 194-196
  design and construct contracts, 35-84
  funding agreements, 285-286
  guarantees for contractual performance, 133-144
  incidence of amendment, 305
  interpretation of, 340-349
  loss of productivity claims and, 112-113
  no reference dates after termination of, 419-423
  non-parties to not liable for payment, 200-207
  one-sided drafting, 241-242
```

(2014) 30 BCL 443 445

project development agreement, 265-285

provision for recourse, 350-359 settlements deeds effect on, 340-349 standard forms used for, 302-306

```
superintendent's power to alter limited, 208-219
  unsigned, acceptance of inferred, 175-199
Contributory negligence see Negligence
Conversion
  characterisation of proceeds of, 139-142
Corporate overheads
  distinct from project-specific costs, 35-84
  calculating indirect costs, 83
  corporate overheads distinct from project-specific costs, 35-84
  in arbitration, new rules regarding, 311, 313-317
  modified total cost claims, 109-110
  special costs orders, 361-362
Counterclaims
   whether part of payment dispute, 360-364
Current market value
  determining, 254-297
Curriculum design
  for teaching construction law, 29-31
Damage insusceptible of evaluation
  penalty doctrine and, 17-19
Damages
  claimed for repudiation of contract, 193
  comments on, 82-84
  delay damages, 35-84
  for breach of contract, 334
  for disparagement, 128-132
Deceptive conduct see Misconduct
Declaratory relief
  application for determination, 254-257
Deed of release
  proceedings discontinued pursuant to, 128-132
Default
  in arbitration, new rules regarding, 312
Defective work and materials
  failure to account for, 384-400
Delay and disruption
  loss of productivity claims based on, 107-127
Delay damages
  corporate overhead claims, 35-84
Deposit of costs
  in arbitration, new rules regarding, 318-319
  best engineering practice and, 35-84
  bringing suit against designers, 244
```

design and construct contracts, 35-84

hybrid designs, 249

Spearin doctrine and, 250

Disclaimers

Discovery

in arbitration, new rules regarding, 311

Discretion, exercise of

grounds for, 336-338

Disparagement

declarations regarding, 128-132 in pleadings, 128-132

Dispute avoidance processes (DAPs)

teaching construction law and, 31

Dispute resolution see also Arbitration; Mediation

contractual provisions for, 254-297 effectiveness of mediation, 172-174 enforcement of outcomes, 171-172 mechanisms for construction disputes, 166-167 role of practitioners, 171, 173 settlement mediation, 165-174

teaching to contractors, 31

time delays in, 372-383

Dispute review boards (DRBs)

in construction industry, 165-174

Disruption

definition of, 107 liability for acts of, 111-113 proving causation, 114

Drainage

construction defects vs design defects, 35-84

Duty of good faith

in dealing with contractors, 243-245, 252

Endeavours

best vs reasonable, 4-6

Engineers

bringing suit against, 244

Entitlements, loss of

for non-compliance with time bars, 11-16

Evidence

expert evidence, 55, 116-117

in arbitration, new rules regarding, 312

Exocet Missile defence

loss of productivity claims, 122-123

Expert determinations

incorrect application of, 368-371

Expert evidence

objections to, 55

on loss of productivity, 116-117

Express and implied obligations

breach of, 35-84

buildability and, 240-242

Spearin doctrine and, 250-251

Extravagant and unconscionable collateral stipulation

in comparison with greatest loss, 19-21

Fairness buildability and, 238-253 denial of established, 409-418 FIDIC Red Book obligations under, 240-241 projects using, 304 50-year design life

sewerage treatment plant upgrade, 35-84 **Financial difficulties** *see* **Insolvency**

Fitness for purpose

warranty for design, 35-84

Foreign awards see International arbitral awards

Foreseeability

buildability and, 240

Forfeiture

for non-compliance with time bars, 11-12

Freight charges

litigation relating to, 359

Funding agreement

assessing current market value for, 285-286

Global claims

advantages of, 110 apportionment, 123-125 defending, 122-123 definition of, 108-110 essential elements, 110-111 for loss of productivity, 107-127 particularisation of causation, 120-122 prejudice caused by, 119-121

Good faith

in dealing with contractors, 243-245, 252

Guarantees for contractual performance

accounting for, 133-144

Hong Kong

international arbitration law, 151, 161

Hydrostatic testing

permissable leakage rate, 51-53

Implied warranty of accuracy of information

buildability and, 238-240

Indigenous employment policies

litigation relating to, 357-359

Injunction see **Interlocutory injunction**

Insolvency

security of payment and, 225-228

Institute of Arbitrators and Mediators Australia

new Arbitration Rules, 307-322

Insurance issues

challenge to recovery of payment, 401-408

Interim measures

in arbitration, new rules regarding, 311

Interlocutory injunction

power to grant, 323, 331-333

International arbitral awards

enforcement of, 148-164

Interrogatories

in arbitration, new rules regarding, 311-312

Judicial review

of adjudications, 381-382

Jurisdictional error

by adjudicator, 360-364

Justiciability

claim assessment issue, 406-408

Latent conditions

fairness and, 240-242, 247

Lawyers

hourly rates claimed by, 362-363 public opinion of, 24-26

Leave to amend pleading

to address proportionate liability, 45-47

Liability issues

amending pleading to address proportionate liability, 35-84 expert determinations, 371 in arbitration, new rules regarding, 319 progress payments, 200-207

Liquidated claims

performance security against, 350-359

Loss of entitlements see Entitlements, loss of

Loss of productivity claims

by contractors, 107-127 concurrent material causes of loss and apportionment, 123-125 contract bars or limits on, 112-113 defending global claims for, 122-123 definition of, 107 interim recovery, 125-126 proving and measuring, 115-119

Measured mile methodology

for determining productivity, 117

Mediation

assessment of suitability, 172-174 in construction disputes, 172-174 settlement mediation, 168-169

Misconduct

liability for loss resulting from, 243

Natural justice

Building Appeals Board in violation of, 409-418

Negligence

liability for loss resulting from, 242, 245, 251-252 statutory apportionment for, 124

New South Wales

insolvency in, 224-237

security of payments legislation, 372 supporting statement requirement, 224-237

```
New York Convention
  obligations under, 149-150
Notices
  of arbitration, new procedure for, 308-309
  of variation to works, 208-219
  time-bar obligations in, 7-23
Offer and acceptance
   battle of the forms, 175-199
Old rule see Codelfa true rule
Overheads see Corporate overheads
Payment claims see Progress claims and payments
Pedagogy
  of teaching law, 29-32
Peer review
  in arbitration, new rules regarding, 312-313
Penalties
  for non-compliance with time bars, 11-17
  time of ascertaining penal clauses, 17-19
Performance security
  against liquidated claim, 350-359
Pleadings
  absolute privilege attached to, 128-132
  disparagement in, 128-132
  in arbitration, new rules regarding, 310
  leave to amend, 45-47
Prejudice
  caused by global claims, 119-121
  proposed amendments and, 35, 46-47
Principal contractors
  as superintendents, 208-219
Procedural fairness
  denial of established, 409-418
Productivity see Loss of productivity claims
Progress claims and payments
  counterclaims, 360-364
  entitlement to, 337-338
  liability for, 200-207
  liquidated claims, 350-359
  making, assessment and certification of, 388-389
  prompt payment provisions, 231-236
  superintendent's power to issue, 384-400
Project development agreement
  assessing current market value for, 265-285
Promissory estoppel
  unsigned contract and, 192-193
Prompt payment provisions see also Security of payments legislation
  supporting statements and, 231-236
```

Proof of payment requirements

contractors, 228-229

Proportionate liability

leave to amend pleading to address, 35-84

Public policy grounds

enforcement of international arbitral awards, 148-164

Oueensland

building services legislation, 350-359 security of payments legislation, 419-423

Queensland Building Services Authority

challenge to recovery of payment by, 401-408

Reasonableness

reasonable endeavours, 4-5 reasonably prudent contractor test, 249-250

Recovery proceedings

insurance issues, 401-408

Reference dates

first payment for is only valid one, 419-423

Residential building work

challenge to recovery of payment, 401-408

Right of action

assignment of, 36, 82

Rolled up claims see Modified total cost claims

Scope for Improvement report, 26

Security

guarantees for contractual performance, 133-144 obligation to account for, 142-144 performance security against liquidated claim, 350-359

Security of payments legislation

East Coast Model of adjudication, 372-383

insolvency and, 224-231

litigation under, 323-339

Queensland, 419-423

time delays in, 372-383

West Coast Model of adjudication, 373, 383

Western Australia, 360-364

Set off amounts

in arbitration, new rules regarding, 316

Settlement mediation see **Mediation**

Settlements deeds

effect on construction contract, 340-349

Side Deeds

investor's use of, 286-287

Singapore

international arbitration law, 151, 158-161

South Australia

progress payments legislation, 326-327

Spearin doctrine (US)

liability for providing inaccurate information, 245-249

Standard forms of contract see Contracts

Statements

in arbitration, new rules regarding, 310 supporting statement requirement, 224-237

Stay of execution of judgment

grounds for granting, 333-334

Superintendents

as principals, obligation to act fairly, 208-219 certification processes, 384-400 duties and obligations of, 340-349

Supporting statement requirement

in New South Wales, 224-237

Suppression orders

to preserve commercially sensitive information, 258-262

Surrounding circumstances

contract administration notices, 88-106

Surveys

into use of standard contracts, 303-304

Time limits

evading, in adjudication, 372-383 for arbitration, 309-310

Time-bars

after Andrews v ANZ, 7-23 obligations in notices, 88-106

Total cost claims

definition of, 109

Training in construction law

for professionals, 24-34

True rule see Codelfa true rule

UNCITRAL Model Law

new IAMA Rules based on, 307-322

Unconscionable burdens

relationship between the parties and, 21-22

Unconscionable conduct

time-bars and, 19-21

United Kingdom

best vs reasonable endeavours in, 6 global claims for loss of productivity in, 122-123 implied warranty of accuracy in, 238-240, 244-245

United States

implied warranty of accuracy in, 245-251

University-level courses

in construction law, 28-29

Valuation

determining current market value, 254-297

Victoria

Building Appeals Board challenged, 409-418 security of payments legislation, 372-375

Western Australia

security of payments legislation, 360-364

With drawals

of applications for adjudication, 378-379

Working days
defining, 384-400