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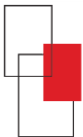
Key terms in consultancy agreements – impact of COVID-19 disruption

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Principal

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1

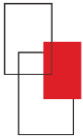


Agenda:

- Extensions of time
- Variations
- Force majeure
- Termination
- Frustration
- Limit of liability clauses



2



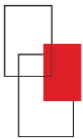
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Legal advice related to contracts



3



Limited number of “common law” default features apply automatically

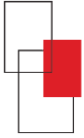
A large number of features are customisable



Some features are prohibited by law from being customised



4



Delays and Extensions of Time

Extensions of time (EOTs)

- No common law extension of time rights, so stipulate in Contract
- Does the contract require completion by a fixed date?
- What causes allow you to claim an EOT?
- What is the procedure?
- Do you get only time, or also a fee adjustment?

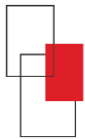


5

Institute CAA 2019 Clause A.5. Protracted Services



6



Variations

- Similar issues to EOTs
- No common law right to variations if the contract is silent
- Procedure to claim is often onerous so that rights are easily lost
- Look at the definition of what is a variation
- Stipulate clear procedure for valuing – e.g. by hourly rates or percentage

Institute CAA 2019 Clause D.8 Changes to the Services



9

AS 4122-2010 Clause 9.2

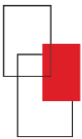


10



Force majeure

11



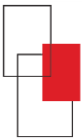
Force majeure

- There is no common law right to “force majeure” relief
- Clauses allowing relief from contract obligations
- Usually only for major disasters, e.g. war, earthquake, “acts of god”
- Each contract should provide:
 - What events trigger “force majeure” rights?
 - What rights follow from force majeure? Extensions of time? Right to terminate? Relief from all contract obligations?
 - What is the procedure to claim force majeure?

12

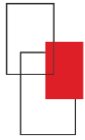


Termination



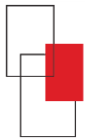
Termination – common law

- At common law, you can terminate a contract if the other party commits:
 - A breach of a material term (condition) of the contract;
 - A serious breach of an intermediate term of the contract;
 - Repudiates the contract (Conduct inconsistent with performance)
- But what is a “material” or “intermediate” term?
- Avoid arguments by specifying clearer grounds and procedure



Termination – Client's rights in contracts

- What allows the Client to terminate:
 - Breach and insolvency only?
 - Or also at will, without having to give any justification?
- Do you get a chance to defend yourself or rectify the breach?



Termination – Your rights in contracts

- Does the contract give you any termination rights?
- What allows you to terminate?
- You also want a right to suspend services

Institute CAA 2019

Clause K. Termination



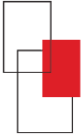
17

AS 4122-2010

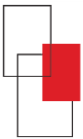
Clauses 26.1 -27



18



Limit of liability clauses



A question of scale



<http://www.aquasure.com.au/desalination-plant>

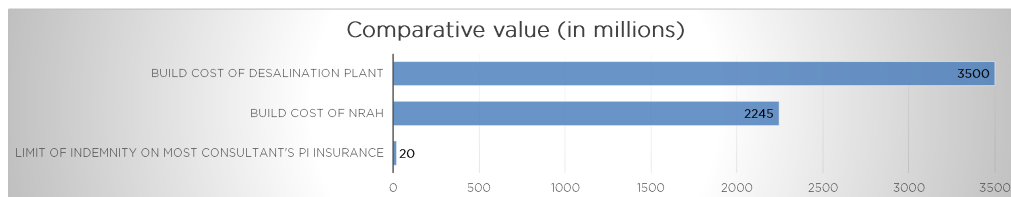
Victorian Desalination Plant
Completed: 2012
Build cost: \$3.5 bn



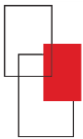
A question of scale

Limit of indemnity: the maximum amount your professional indemnity insurer will pay on any one claim

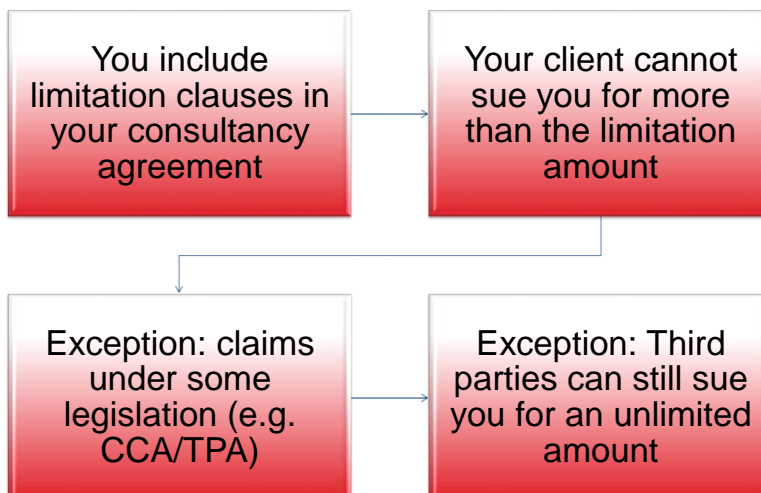
Limit of indemnity for a typical commercial/government consultant: **\$5 - \$20 million**



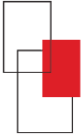
21



How do they work?

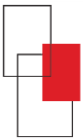


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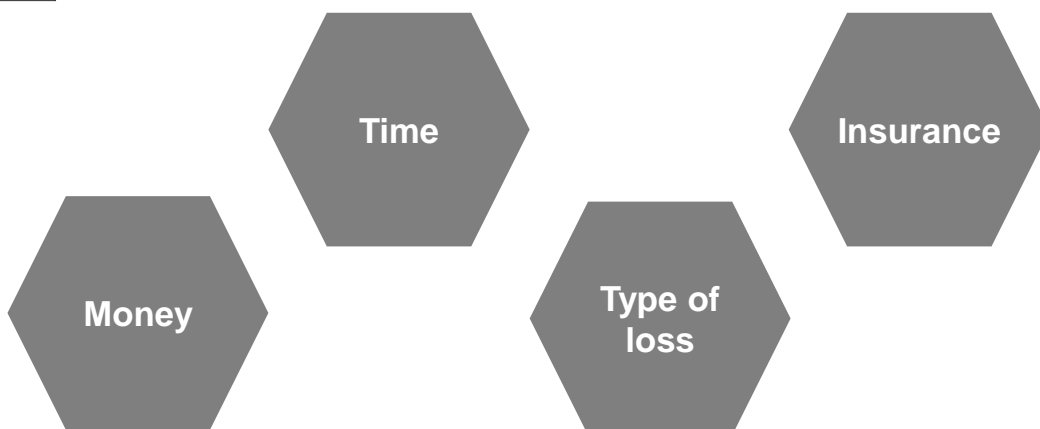


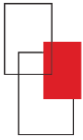
Limitation clauses in action

- Engineer used a 1-year contractual time limit to avoid liability for pavement that failed under heavy forklifts 4 years after completion
- Architect used a 1-year contractual time limit to avoid liability for serious corrosion in an aquatic centre, even though they were found to be negligent



Different types of limits



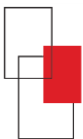


How do I decide what limit to have?

- No industry-agreed way to determine this
 - What can you negotiate?
 - What is the limit of indemnity on your PI insurance?
 - How much risk can your balance sheet bear?
- Some common amounts:
 - The amount of the consultant's Fee on this project
 - A multiple of the Fee (e.g. 3 times)
 - A fixed amount (e.g. \$300,000; \$500,000; \$2 million)
 - A time limit (often in addition to a money limit)
 - Tied to the consultant's PI insurance



25

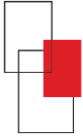


How do I decide what limit to have?

- Subject-specific disclaimers or limits, e.g. clauses requiring the Client to release you from any claims arising out of or in connection with:
 - Asbestos
 - ACP cladding
 - COVID-19



26

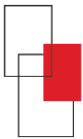


How do I decide what limit to have?

- Australian Institute of Architects' *Client and Architect Agreement 2019* (clause G.2)
- Limit is tied to insurance cover
- Simple: no need to write in a specific amount
- But still allows claims up to the limit of your insurance (\$1m or more)



27

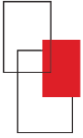


How do I decide what limit to have?

- Australian Institute of Architects' *Client and Architect Agreement 2009* (H.2)
- Time limit of 3 years (H.2.c)
- Money limit: whatever you write into Schedule H "Architect's liability to client"
 - (If blank, you have no limit)



28



Limits of liability – in conclusion

- Limits of liability have been upheld in court cases
- They can be a powerful protection against liability for large project losses
- Take care if you they are used by parties that you contract with (sub-consultants, clients)

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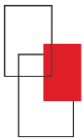


Checklist of a few key clauses

- Your fee clearly set out in the contract
- Clear procedure and time for paying your fee
- Your right to EOTs and variations and force majeure rights
- Copyright – make client rights contingent on paying your fee
- Moral rights – preserve right to withdraw attribution
- Your right to terminate *or suspend*
- Limit on your liability
- Client's obligation to give you instructions, information
- Scope of services



31



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32



Questions about consultancy agreements?

