



## → Business Recovery & Insolvency Newsletter

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### The Sky's The Limit. Why?

Having bungee jumped off Skippers Canyon in New Zealand, I don't think I suffer from vertigo, but there is something about being in a skyscraper that leaves me feeling distinctly uneasy. I have never really seen the appeal of a penthouse apartment, let alone one 828 meters high!

So, Burj Khalifa in Dubai, the world tallest building; I don't really get it! Announced during the building's opening celebration, the height of 828 meters was revealed. It still has to be ratified by the Council on Tall Buildings and Urban Habitat.

Dubai ate humble pie when it renamed the world's tallest building after the ruler of Abu Dhabi, the neighbouring emirate that saved the city-state from financial collapse. The announcement was made by Dubai's ruler at the opening.

The Skyscraper will now be known as Burj Khalifa, in honour of Sheikh Khalifa bin Zayed bin Sultan al-Nahyan, President of the United Arab Emirates. It was to be known as Burj Dubai.

So why the honour? The value of the real estate in Dubai has dropped by 50% over the last year. The property boom came to a crashing end. At the end of November, the state-owned Dubai World Group requested a six-month freeze on \$26 billion of debt repayments while it attempted to restructure.

Abu Dhabi intervened with a \$10 billion bailout in mid-December and further hand-outs followed. Meanwhile, ex-pats are reported to be fleeing and leaving cars at the airports to avoid criminal liability for unpaid debts.

But Dubai should have really seen it coming. Might they have exacerbated their recession as a result of actually building their most opulent skyscraper? Well perhaps there is a little more to it than that, but it does lend further credence to Andrew Lawrence's skyscraper index<sup>1</sup> which demonstrates an apparently remarkable correlation.





Andrew Lawrence's index demonstrates that business cycles and skyscraper construction are linked in such a way that investment in skyscrapers peaks when cyclical growth is exhausted and the economy is ready for recession.

Joe Cole, the Chelsea player may have been aware of Andrew Lawrence's article - he sold his villa last summer. However, it has been reported that Michael Owen, David James, Andy Cole and Kieron Dyer along with the Beckhams, Brad Pitt and Angelina Jolie all bought homes, apparently having overlooked Mr Lawrence's work!

So, predictions for places not to buy include:

- ➔ The Shanghai Centre. The tower (632m) is due for completion in 2014. Will it coincide with China's first recession?
- ➔ Indian's tallest building, the APIIC Tower in Hyderabad (450m) is due to be ready later this year.
- ➔ Moscow's 118-storey Russia Tower is due in 2012.

All of those places are too far for a holiday home anyway; five hours to Dubai is much more attractive. I quite fancy a bit of Dubai World, perhaps I could buy Wales! Also, I rather fancy being neighbours with Mr. Pitt now that real estate there is becoming more affordable!

In the meantime construction insolvency has been keeping us busy, although perhaps not as busy as one would have expected. It seems rather different from the last recession and the litigation is perhaps not so rife. Indeed having a quick look through the authorities nothing leaps out.

So attached is a reminder article on set-off and a reminder of the last largest Construction Insolvency

case, which went to the House of Lords - Smith (administrator of Cosslett (Contractors) Limited) v Bridgend County Borough Council [2001] UKHL 58 (8th November, 2001) in which our Cardiff office acted.

Our Cardiff colleagues have also been busy once again at the highest court in the land in a case that was the last civil appeal heard by the House of Lords and the resulting judgment was one of the first delivered by the Supreme Court.

**POST SCRIPT:** Burj Khalifa was in the news for the wrong reasons recently regarding one of its lifts: [www.timesonline.co.uk/tol/news/world/middle\\_east/article7021145.ece](http://www.timesonline.co.uk/tol/news/world/middle_east/article7021145.ece)

<sup>1</sup> Lawrence, Andrew (1999). *The Skyscraper Index: Faulty Towers. Property Report. Dresdner Kleinwort Wasserstein Research, January 15, 1999.*



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## → Have They Really Gone Bust?

Insolvency has significant consequences for any project, especially where there are numerous parties involved at various levels, as in construction. Nevertheless, it can be surprisingly difficult to find out if a contracting counterparty is insolvent.

Even with the procedures that involve courts (for example administration and compulsory liquidation), it can be difficult to know which court would be the right one to make enquiries of.

In appropriate cases, a winding up petition can be presented in either the nearest court to the company's registered office having insolvency jurisdiction or in the High Court in London. That is assuming that the company's Centre of Main Interests under the EC Regulation on Insolvency Proceedings 2000 is not in a completely different EU Member State!

Voluntary procedures (such as CVAs or creditors' voluntary liquidations) need not involve a court at all so the answer is unlikely to be only a telephone call away. The same is true of receivership, although receiverships are comparatively rare following the Enterprise Act 2002 reforms.

Of course, receivership did not mean that the company was insolvent, but it did tend to mean that its fortunes were on the slide and that some form of insolvency was probably not far off once the receiver had done the bank's bidding.

So much for the regimes. It is usual for any one of them

to be provided for in a commercial contract, as the case of *William Hare Limited -v- Shepherd Construction Limited* (discussed elsewhere in this newsletter) shows. Usually, in the event of insolvency or a similar event implying financial impending financial problems (with all conceivable examples usually being listed at length) a party to a contract will have certain options. But those options only become available once the event has happened. So when has an insolvency event happened?

Strangely, even in 2010, this is sometimes a surprisingly difficult question to answer. Cash-flow insolvency and balance sheet insolvency will be known only to the company and its directors.

Accounts published at Companies House can be well over 12 months in arrears. Credit reference agency reports are also in arrears. Even insolvency filings at Companies House will take many days to become available. The London Gazette carries details of insolvency procedures but is also inevitably behind the times.

There is a telephone number at the High Court in London which is the Central Index of Petitions. Any winding up petition or application for administration filed in any court anywhere around the country should get recorded there. It is not clear how long it takes from a petition filed in the provincial courts to become listed.

The telephone number for the Central Index is a premium rate number which is frequently engaged. There is no facility to leave a message or to queue. If it is busy then you are invited to call back. Obviously the information there is potentially out of date as soon as it is given.

Unbelievably, the best way of identifying if a company is





subject to a formal insolvency regime is to either (a) word of mouth, (b) on-line newspapers and trade news sites, or (c) the company's website. The relevant trade or local press will usually run a story, providing that the company is of sufficient size to be newsworthy.

Alternatively, one of the first things that administrators will do following their appointment is to put a notice to that effect on the company's website.

Bearing in mind the sums that might be at stake, or indeed the whole viability of a multimillion pound project (in which numerous parties have a stake), the requirement to become an amateur detective, to ascertain something as fundamental as whether or not a company is actually the subject of a formal insolvency regime, is lamentable to say the least.

Furthermore, there can be contractual and other expensive consequences for getting this wrong. For instance, if a mistaken contractor publicises its incorrect belief that the contracting party is insolvent then that could be catastrophic.

In a worst case scenario, if the innocent company suffers losses as a result of word getting round that it has going bust when it has not, then any resulting losses could be laid at the mistaken contractor's door. While quite difficult to prove, those losses might include lost contracts, recall of loans, exercising of retention of title claims, different trade terms or ultimately actually going bust due to loss of reputation.

Unsurprisingly, terminating a party's employment under a contract based upon an incorrect belief that it is insolvent has consequences.

It may in fact enable the party on the receiving end with a right to terminate the contract for repudiatory breach. This would be on the basis that the party originally wishing to terminate was not entitled to and in so doing has actually placed themselves in a fundamental breach of contract. That could give rise to a claim for damages

(or other legal remedy) in favour of the other party who was believed, incorrectly, to be insolvent.

Given the potential consequences, the electronic technology available and the fact that it is 2010 after all, should there not be an easier and more definitive way of answering the question "have they really gone bust"? Until there is, our detective skills remain finely honed.



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## → A Matter Of Dirty Water

Geldards represented Dwr Cymru Cyfyngedig (“Welsh Water”) in an appeal from the Court of Appeal to the House of Lords.

The case was the last civil case heard by the House of Lords and the judgment was one of the first issued by the Supreme Court. It was effectively a test case on the proper interpretation of section 106 of the Water Industry Act 1991.

The Court held that a sewerage undertaker has no right to select the point of connection to the public sewer and no right to refuse a developer the right to connect with a public sewer because of dissatisfaction with the proposed point of connection.

This judgement is good news for developers as it provides justification for connecting to the public sewer at locations that are more convenient and economical to them, at the greater expense of sewerage undertakers.

Water companies, on the other hand, will now find it very difficult to stipulate points of connection to avoid capacity problems on their networks. This decision re-emphasises the point that the burden of dealing with such capacity issues, at potentially short notice, sits squarely with sewerage undertakers.

A developer has an absolute right to connect to a sewerage undertaker’s system. If you are a water customer (or of course a water company) then it is bad news.

Customers charges will inevitably increase as water companies have to react to what might be unreasonable

or expensive requests to connect at potentially inconvenient points on the system, irrespective of capacity or flooding issues that may exist or arise in the future.

The decision leaves the planning process as the principal mechanism through which water companies can seek to exercise control over developments that intend to connect to an overloaded sewer network.

The key problem that now arises as a consequence of the Supreme Court’s judgment is that any individual or developer (whatever the size of the development) has an absolute right after 21 days to connect to a sewerage undertaker’s system.

This is regardless of (a) the size of that development; (b) any capacity issues to accommodate that connection; and (c) of any environmental incidents or problems that may flow from such a right to connect.

Their Lordships described this absolute right as “manifestly unsatisfactory”.

The way in which this right is supposed to be controlled is through the planning process, but that has many pitfalls not least because Welsh Water are not statutory consultees in the planning process, and also there are many sites where planning may not be required, but connections sought.

Geldards remains very much involved and is looking at a number of strategic options including European remedies and lobbying both domestic (i.e. Welsh Assembly) and national Government.

Given the increased focus on environmental concerns





it needs to be established if it was and/or remains Parliament's intention that connections can be made to sewerage systems irrespective of concerns as to capacity, overloading, financial impact or flooding (of land, watercourse or rivers).

There is scope to address the issue in the current Flood and Water Management Bill that is progressing through parliament.



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## → Contractor Insolvency And Drafting

In ***William Hare Limited -v- Shepherd Construction Limited [2009] EWHC 1603*** (TCC) “insolvency event” had been poorly defined in the contractual documentation.

The High Court therefore held that it would not rewrite a clause in a subcontract to take into account amendments to the Insolvency Act 1986 (“the 1986 Act”) which had been made long before the relevant subcontract was signed.

The dispute arose over the £210m Trinity Walk development in Wakefield. Trinity Walk (“T”) was funded by Anglo Irish. Shepherd Construction (“S”) had the main contract and William Hare (“WH”) had the steelwork subcontract.

The claimant sub-contractor (WH) sought declarations that withholding notices issued by the defendant main contractor (S) were invalid because the employer (T) was not “insolvent” within the definition in the relevant clause of the sub-contract.

Section 113(1) of the Housing Grants (Construction and Regeneration) Act 1996 (the 1996 Act) prohibits “pay when paid” clauses which provide that a main contractor need not pay a subcontractor until the main contractor has received payment itself, except in cases where the ultimate employer is insolvent. Clause 32 of the sub-contract was in similar terms.

The clause defined T’s insolvency as:

*“the making of an administration order by the court under the Insolvency Act 1986 Pt*

*II; the appointment of an administrative receiver; insolvent liquidation; and the making of a winding-up order.”*

WH had claims against S but S issued withholding notices relying on Clause 32 on the basis that T was insolvent.

Until 15 September 2003, under Part II of the 1986 Act, every administration was commenced by court order. On 15 September 2003, Part II of the 1986 Act was (for the most part) replaced by a new Schedule B1 which introduced alternative routes to administration (section 248 of the Enterprise Act 2002 – “the 2002 Act”).

T’s had filed the relevant papers to commence administration and an order of appointment had been made, but that was not the same as an administration order in the traditional sense under the pre-2003 legislation.

WH claimed that none of the four insolvency events identified in Clause 32 had occurred (in particular no administration order in the traditional sense had been made) and so T was not insolvent as defined within the wording of the clause. Therefore the withholding notices were invalid. Consequently, WH sought declarations to that effect.

S contended that it would be absurd for the sub-contract to be construed as ignoring the subsequent amendments to the legislation and that all routes to administration under the Insolvency Act 1986, as amended, were covered by the words of Clause 32.

The court’s declaration was in favour of WH. The court held that it would not rewrite Clause 32 to allow for the amendments to the 1986 Act for the following reasons:





The words of the clause as drafted, referring to an administration order by the court under the Insolvency Act 1986 Part II, did give rise to a coherent result.

Following amendment by the 2002 Act, Part II of the 1986 Act continued to exist and had two specific purposes: it was the place in the Act which provided for Schedule B1, which set out the three routes to administration in most ordinary cases.

Secondly, the old Part II regime continued to have effect for certain special companies. Consequently it was incorrect to say that there was no longer such a thing as an administration order under Pt II of the Act.

As reference to an administration order made by the court was making a difference to the creditors, the situation was not commercially implausible.

WH's construction based on the plain meaning of the words used was to be preferred. That conclusion was consistent with the nature of a pay when paid provision which was a form of exclusion clause and should be narrowly construed against those seeking to rely on it.

The amendments to the 1986 Act were made five years before the subcontract was made and yet the parties did not amend Clause 32 to reflect those changes. As the parties agreed that they must be deemed to have known about the amendments, the failure to include the amendments could be viewed as deliberate.

## Summary

Commercial contracts frequently define key concepts by reference to terms defined in legislation, particularly company legislation and insolvency legislation. This case demonstrates that the consequences of not keeping up with the legislation and using old precedents slavishly can be disastrous.



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## → Re-Capping Cosslett

It was a standard term in a building contract that allowed the employer to use the contractor's plant, machinery and materials to complete the works and then realise the assets against any indebtedness, in the event that the contractor became insolvent.

The sensible theory behind it was that it allowed the employer to complete the job if its contractor went bust, without having to incur time and money in re-procurement and then settle any indebtedness.

That was the contractual position. But why should the creditors of the insolvent contractor wait until the works are completed before any remaining plant, machinery and equipment was realised?

Section 234 of the Insolvency Act 1986 gives an insolvency practitioner the right to go to court to require the employer to deliver up any of the insolvent company's property so the assets can be realised as soon as possible.

In *Smith (administrator of Cosslett (Contractors) Limited) -v- Bridgend County Borough Council [2001] UKHL 58* the House of Lords held that the contractual right of the employer to sell the insolvent contractor's assets and apply the proceeds towards settling the employer's claims against the contractor, amounted to a floating charge over the assets of the contractor, which was void as against the administrator (in that case) because it had not been registered.

The House of Lords also held that the administrator had the power under section 234 to recover assets belonging to the contractor and a claim for conversion against the employer for selling the contractor's assets.

The House of Lords judgment in Cosslett did not consider how section 234 operated where the employer had a contractual right to use (but not sell or dispose of) the contractor's plant once the insolvency had occurred. Many building contracts have been re-drafted that way.

There is however the risk that the courts would uphold the insolvency practitioner's powers to recover the assets under the Insolvency Act in these circumstances and in a timely fashion, even if they are at odds with the terms of the contract.

An obvious commercial solution would be to ensure that the insolvent company did receive some benefit from the arrangement as consideration for the IP not insisting upon delivery up.

In any event, do the contractual terms potentially create significant potential problems? There are a raft of issues to consider before an employer should take such a step, not least health and safety issues as well as commercial and relationship issues.



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## → Construction Insolvency - You Can Run, But You Can't Hide

It has been reported that the number of construction firms facing financial concerns in 2008 was 547 per cent higher than in 2007. It is likely that such figure will be maintained, if not increased, during 2009/2010.

If parties were able to foresee with certainty the insolvency of the organisation with whom they intend to contract, then they would undoubtedly not enter into contract with such organisation.

Hindsight is also a wonderful thing, but it offers no form of comfort to a party who is looking at large losses due to the insolvency of the organisation they appointed or the organisation who appointed them.

Whilst a party may not be able to avoid the effect of the insolvency of the organisation with whom they have contracted, the carrying out of the requisite level of financial due diligence, incorporation of anticipatory measures into contract conditions and the use of other collateral contracts assist with minimising their exposure to any future insolvency.

### Financial Due Diligence

Whilst most prudent contracting parties will carry out an element of financial due diligence as part of pre-qualification questionnaires or invitations to tender, responding organisations who are experiencing financial difficulties can often become adept at hiding (or only partially disclosing) the true extent of their near insolvency (done in the interests of prolonging the life of

their organisation, with the genuine belief that this next job may just help them turn a corner, back onto the path of solvency).

Caution should be exercised when interpreting published company accounts. These are often historical and do not offer a true reflection of the current financial status of the organisation. An often valuable but unused source of information is the construction trade press, which should be regularly reviewed to establish whether the subject company is receiving an amount of prejudicial coverage.

If one party is a subsidiary, the other party should research the subsidiary's group structure and obtain, if possible, a Parent Company Guarantee (PCG) from the subsidiary's parent company, although this will only be of use if the parent company is in good shape. Therefore the party requesting the PCG may also choose to request a Performance Bond (discussed below).

Dependant on the size of the project, an employer may want to research the financial status of the contractor's supply chain so as to ensure that any key material suppliers or specialist sub-contractors are also in good shape (the obligation to provide such information may be passed down to the contractor by way of a requirement in the invitation to tender).

The gap in timing between expressions of interests being submitted and actual tender award can be, in some cases, significant. It is therefore essential that the parties (both contractor and employer) ensure that any financial due diligence is kept updated – an organisation that looked reasonably healthy in the first quarter of the year may well be struggling in the final quarter.





## Retention, Retention Bonds And Performance Bonds

Retention is a longstanding method of employer security used in construction contracts, whereby a set percentage of money is deducted from monies due to the contractor by way of interim payment. It has long had its place in all standard form contracts (JCT, ICE, NEC etc) and operates (amongst other matters) as security that the contractor will:

- (i) complete the works properly and on time (50% of the retention being paid to the contractor on achieving completion); and
- (ii) remedy any defects identified during the defects liability period (the remaining 50% being paid to the contractor on completion of the remedying of all defects within the defects liability period).

Popular forms of construction contract (such as the JCT form) will contain terms such that the employer will hold the retention as trustee for the contractor and will open a separate designated trust bank account for the deposit of the retention.

This obviously offers protection for the contractor in the event of the employer's insolvency, however, such terms are often amended or deleted by the employer as part of contract negotiations such that the retention is in effect used as the employer's working capital until due for release.

There is a seldom run argument that retention need not actually be deducted from interim payments as the contract (and statute, in the form of the Construction Act 1996) provides a mechanism to enable an employer to deduct or withhold monies due to a contractor owing to defective work.

The solution may be to agree that in place of deductions from interim payments, a single sum will be deducted from the final payment and held until such time as all

defects are remedied, thereby assisting the contractor's cash flow during construction.

Dependant on the sum actually deducted, such an approach should still operate as an incentive for the contractor to carry out the works properly and remedy any defects.

Owing to the low profit margin of main contracting, the retention on a project could well represent the majority (if not all) of the contractor's profit, especially so given that retention percentages have generally risen over recent years (anything from 3% to 10% has been reported).

As if this didn't present a big enough problem to a contractor operating near to their financial limit, the exercise of recovering the retention (which, remember, is a sum of money deducted from monies which have been certified as properly due) is often a long and arduous task, especially in the case of sub-contractors where the release of their retention may be linked to the timing of the release of the retention under the main contract, which could be some considerable time after the sub-contractor has finished their sub-contract works (a key provision for any sub-contractor to negotiate in their sub-contract).

Given the longevity of retention in the industry, it is very doubtful that as a principle it will be disappearing any time soon. Therefore, the parties should review (and negotiate where possible):

- (i) the rate at which retention is to be deducted;
- (ii) the time at which it is to be released; and
- (iii) the basis upon which it is to be held by the employer.

An alternative to retention may be for the parties to agree a Retention Bond (the cost of which is typically between 0.4% and 0.9% of the total contract value), whereby the sum which would otherwise be deducted by way of retention is covered by the Retention Bond





(reducing by 50% at practical completion), which can be called upon in the event that defective works aren't dealt with by the contractor.

A Retention Bond obviously would come at a cost but such cost could be built into the contractor's tender which in turn could be recovered in interim payments.

One distinct advantage of using a Retention Bond would mean that a contractor would not have to chase the release of the retention at completion, making their financial position more certain.

In turn, the Retention Bond would also provide protection for the employer in the event of the contractor's insolvency (provided that the terms of the same enabled the Retention Bond to be called upon insolvency).

Performance Bonds enable the beneficiary (i.e. the employer) to call upon the bond in the event of a specified default, such as the contractor's insolvency.

They usually allow the surety (i.e. the person named in the Performance Bond who agrees to be responsible for the debt and/or obligations of the contractor) to raise the same contractual defences as the contractor would have under the original construction contract, therefore employers should not consider the use of a Performance Bond as an absolute guarantee of receiving a set amount of money at a set time.

Performance Bonds may also provide that the amount the employer can claim cannot be quantified (and consequently cannot be paid) until the works are completed (such claims are often limited to around 10% of the total contract value in any event).

This of course can cause significant cash flow problems for an employer if an employer cannot secure interim/ additional funding to complete the project.

It is doubtful whether an employer would accept a Performance Bond in place of a traditional retention or a Retention Bond.

As with retention and Retention Bonds, the terms of a Performance Bond need to be negotiated carefully

between the parties.

## Parent Company Guarantees (PCG's)

It is common that the parent company of an organisation is in a stronger financial position (or is able to provide a stronger financial covenant) than that of its subsidiary. Therefore, a party contracting with a subsidiary may request a PCG.

In essence, a PCG obliges the parent company to assume all obligations of the subsidiary in the event of the subsidiary's inability to perform the contract (insolvency can be one reason for such non-performance).

Unlike Performance Bonds, the amount which the employer could recover against the parent company is usually unlimited, although the parent company will usually be able to rely on the terms of the underlying contract to bring a defence against any claims made by the employer which the parent does not consider legitimate.

In addition, PCG's do not usually attract a cost to the person providing one, although there is a clear risk to the parent company in entering into one. This obviously eases a contractor's cash flow, and helps to reduce tender costs, which ultimately assists in avoiding insolvency.

## Project Bank Accounts (PBA's)

PBA's provide a protected payment mechanism for all those participating in the project. The PBA is set up as a trust for the benefit of all its members (i.e. contractors, consultants, sub-contractors etc) to ensure that each of them is paid on time, and in the amounts certified. Their use is suited to large multi-million pound projects, owing to their administration and set up costs.

Essentially, instead of the money being paid from the employer to the contractor who then pays his sub-contractors, consultants, suppliers etc, the money goes into the PBA and is paid out to all members. This therefore avoids a situation where the employer pays the





contractor but then the contractor does not pay his sub-contractors, consultants, suppliers etc.

The benefit in terms of minimising the effect of a main contractor's insolvency is that in the event of such insolvency, payments will continue to be made to the main contractor's consultants, sub-contractors and suppliers (who are members of the PBA), rather than being held by an Administrator. This obviously helps the employer in continuing with the project.

Whilst PBA's have received government backing (specific reference being made to their potential use in large public sector schemes, largely due to the significant costs of setting up a PBA, which in part can be offset by the interest gained on the monies deposited), their regular use has mainly been seen outside of the UK.

That said, the UK has reacted to the concept and both Barclay's and Bank of Scotland are offering PBA's, together with the NEC and PPC forms of contract including specific PBA provisions.

Whilst a PBA may be seen to assist cash flow, which in turn reduces the risk of insolvency of any of the PBA's members, it does not ensure that payments which have been certified are actually correct, therefore payment disputes will still occur.

Obviously it is essential that the terms on which the PBA is to be governed are negotiated by the parties carefully.

### Step-in Rights in Collateral Warranties

Collateral warranties are provided to third parties who have an interest in the project but who are not already in direct contract with the person providing the collateral warranty.

For example, an employer of a main contractor may receive a collateral warranty from a sub-contractor who has been employed by the main contractor.

Certain terms of the collateral warranty provided by the sub-contractor, in essence, allow the employer (in the

event of a specified default e.g. the main contractor's insolvency) to rely on and enforce the terms of the sub-contract as if the employer had originally appointed the sub-contractor from the out-set.

Such terms are referred to as "step-in rights" or "substitution provisions" and enable the beneficiary of the collateral warranty (i.e. the employer of the main contractor in this example) to "step-in" and assume the role of employer of the sub-contractor (on the same sub-contract terms), thereby enabling the employer to instruct the sub-contractor to continue with the carrying out of the sub-contract works.

When assuming the role of the main contractor, the employer will consequently be responsible for all payments due to the sub-contractor and any claims which the sub-contractor may wish to bring under the sub-contract.

The decision to step-in should therefore not be taken lightly, and should be based on an assessment of all the key commercial and legal considerations affecting the project.

Care should therefore be taken when drafting step-in provisions so as to address:

- (i) the events which should give rise to step-in;
- (ii) the period within which the beneficiary of the collateral warranty must state that he wishes to step-in; and
- (iii) what liabilities the parties will assume post step-in; and
- (iv) the priority of step should similar rights be given to other beneficiaries.

### Summary

Insolvency may not be avoidable, but its effects can be minimised. There are a number of options open to both employers and contractors which help to create an





element of certainty and provide mechanisms to deal with events of insolvency throughout the supply chain.

However, such options need to be considered at project inception and provided for accordingly when drafting the relevant contract documentation, as there is little, if any, incentive for an organisation facing insolvency to co-operate subsequently.



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