# *LEX CONSTRUCTIONIS* – OR MY COUNTRY'S RULES?

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## ABSTRACT

Each jurisdiction has laws that impact on contracts for construction work: for the governing law of the contract, for the site of the construction work, or for the seat of dispute resolution. This paper explores the question of whether there are universally accepted principles of construction law, a *lex constructionis*. Three issues are discussed that can promote greater uniformity in the international practice of construction law: the use of FIDIC contracts, international commercial arbitration and the modern statements of the *lex mercatoria*. A list of 20 principles of *lex constructionis* is proposed.

## INTRODUCTION

Contract law in all countries is based on the twin principles of freedom of contract, and *pacta sunt servanda*. However, each jurisdiction has laws that impact on contracts for construction work. Local laws apply if the governing law of the contract is in the jurisdiction, if the site of the construction work is in the jurisdiction, or if the seat of dispute resolution is in the jurisdiction. This paper explores the question of whether there are universally accepted principles of construction law, a *lex constructionis*, or whether it is trumped in every jurisdiction by local laws that differ from international norms. Three issues are discussed that support the concept of *lex constructionis* in the international practice of construction law: the use of FIDIC contracts, international commercial arbitration and the *lex mercatoria*.

The paper concludes with a proposed list of 20 principles of *lex constructionis* that take into account the unique features of construction projects and construction contracts.

## CONSTRUCTION CONTRACTS

Construction law is the law relating to construction projects: their design, construction, maintenance and operation. The legal mechanism for delivery of a construction project is a construction contract between employer and

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contractor. It defines their rights and obligations and allocates the risks between them. As a species of commercial contract that addresses the issues of construction projects enumerated below, international construction contracts have a number of features that make them *sui generis*. As discussed below, this author posits that, notwithstanding local laws, there are widely accepted principles of construction law that constitute a *lex constructionis*. That *lex* is a subset of *lex mercatoria* that takes account of the specific aspects of construction law that distinguishes it from commercial law in general.

There are a number of unique distinguishing features of construction law. These can be conveniently considered under a number of issues that are generally relevant to all construction projects. Under each of the following headings a number of distinguishing features are identified.

**Scope**

The subject matter of the contract relates to construction of a unique facility which will be affixed to the land at a specific location over a specific period of time. That fixing to the land results in the constructed facility becoming part of the real property of the landowner when attached.

The required design, scope, time, cost and quality requirements of the works and the finished project are defined by extensive and complex technical documentation. The employer (generally) has the right to increase or decrease the originally agreed scope of work by the issue of variations, and the contractor is obliged to carry out or omit the varied work. The execution of the construction work and/or the performance of the contract may be supervised by a person who is not a party to the contract.

**Risk**

There are many risks in a construction project – known knowns, known unknowns, and unknown unknowns. Ground conditions are never completely known, including geotechnical conditions, groundwater, contamination, or heritage items. Weather conditions can have significant impact on construction activities and delay completion.

Freedom of contract may be constrained, e.g. statutory adjudication legislation that mandates payment obligations and makes some provisions illegal, such as pay when paid clauses. In addition, many aspects of the execution of a construction project are subject to government laws and regulations.

There are usually a series of independent and interrelated contracts between a number of different parties: e.g. employer/consultant, employer/contractor, contractor/subcontractor, contractor/surety, contractor/insurer.

Construction activities are potentially dangerous to personnel and may involve heavy machinery, working at heights or in confined spaces. Construction involves significant environmental impacts: noise, dust, smells,

vibration, nuisance, water run-off, sediment and erosion. Other impacts on external stakeholders may include adverse impacts on adjacent property.

Insurance of the works is usually mandatory and is a significant risk transfer mechanism. Insolvency of parties to interrelated contracts may impact performance.

**Time**

The time for performance of a construction contract may extend over a number of years, including a period after completion of construction (and when the employer is in possession of the site) during which the contractor is liable to rectify defects.

There are usually significant financial consequences arising from late contract completion – the employer cannot generate revenue from the facility until it is operational, and the contractor is typically subject to liquidated damages for late completion.

**Cost**

The contract sum and cashflow is typically substantial – "cashflow is the very lifeblood of the enterprise".[1]

The contractor is usually required to provide security for its performance.

**Quality**

A construction contract may involve the assumption of obligations that are very long term, e.g. maintenance or liability for defects arising many years after construction was completed. Construction work apparently completed in accordance with contractual requirements may contain latent defects which only manifest themselves many years after construction was completed.

**Disputes**

Disputes are common and frequently involve complex technical issues and large volumes of documents.

A number of these features impact third parties and are subject to various laws, such as environmental impact or work, health and safety regulations. Other third-party impacts are subject to legal doctrines such as tort or the law of nuisance. However, the majority of the issues listed above are matters between the contracting parties and are therefore regulated by the terms of their contract.

[1] *Gilbert Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* (HL) [1974] AC 68; [1973] 3 All ER 195.

## INTERNATIONAL CONTRACT LAW

International contract law is based on the two fundamental principles of freedom of contract and *pacta sunt servanda*. These principles are universal in jurisdictions subject to the rule of law, the necessary precondition for the exercise of the parties' autonomy and the enforcement of their rights and obligations.

Freedom of contract is the ability of legal persons (e.g. natural persons over 18 years of age and properly constituted companies) to enter into a binding agreement to do anything, provided it is not contrary to the law or public policy (and in some jurisdictions, morals). Freedom of contract and *pacta sunt servanda* are long-standing principles enshrined in the common law,[2] and courts have a natural bias to uphold freedom of contract and to take a narrow view of any statutory constraint.[3]

Freedom of contract is enshrined in legislation in both common law and civil law jurisdictions, such as the Contracts Act 1950 (Malaysia) (sections 1, 10, 24), the Contracts Act 1872 (India) (section 10), the Civil Code (France) (section 1102), the Civil Code (Philippines) (section 1306) and the Civil Code (Russia) (section 421).

The universal application of freedom of contract is reinforced by its statement in principles that may be regarded as private codifications or restatements of international contract law (modern statements of the *lex mercatoria*): UNIDROIT Principles of International Commercial Contracts 2016 (Article 1.1)[4] and the Trans-Lex Principles (IV.1.1).[5]

Freedom of contract generally enables contracting parties to select the governing law of the contract, to agree on the scope of their rights and obligations, to agree on the allocation of risks between themselves and to agree to resolve their disputes by private and confidential arbitration by an arbitrator of their choice in accordance with procedures they have chosen.

As the common law and statutory definitions of the principle make clear, the parties' freedom of contract is not unlimited, as it is subject to any statutory constraints or prohibitions on conduct that is in conflict with public policy (or morals).

Once parties have exercised their freedom to enter into a contract, they have the legal rights and obligations they have agreed to. Those rights and obligations would be illusory if the parties did not fulfil their agreement. The principle of *pacta sunt servanda* is therefore the essential obverse of the principle of freedom of contract. The universality and importance of this principle for construction law has been aptly summed up as follows:

[2] *Printing and Numeral Registering Co v Sampson* (CA) (1875) LR 19 Eq 462.

[3] *Colin John Fitzgerald v F J Leonhardt Pty Ltd* (HCA) [1997] HCA 17; (1997) 189 CLR 215 per Kirby J.

[4] https://www.unidroit.org/english/principles/contracts/principles2016/principles2016-e.pdf (last accessed 30 November 2020).

[5] https://www.trans-lex.org/principles/of-transnational-law-(lex-mercatoria) (last accessed 30 November 2020).

> "… the principle of *pacta sunt servanda* … is universal to all legal systems. This means that the vast majority of construction disputes are fought and won or lost primarily over the wording of the contract (and alleged facts)".[6]

Of course, *pacta sunt servanda* would be illusory in the absence of a mechanism to enforce the rights and obligations the parties have agreed to. In a jurisdiction subject to the rule of law, the courts will give effect to *pacta sunt servanda* by holding the parties to their bargain. If necessary, the coercive powers of the state can be called in aid to enforce a court judgment. Thus, for example, if contracting parties have agreed that any disputes will be settled by arbitration, the courts will generally stay any court proceedings commenced in breach of their agreement to arbitrate.

### Statutory incursions into freedom of contract

Statutory incursions into freedom of contract are ubiquitous and increasing in both common law and civil law jurisdictions. Every statute whose subject matter is relevant to the content of a contract potentially impacts on freedom of contract by prescribing certain required conduct in particular circumstances or proscribing certain conduct in other circumstances.

The three categories of laws relevant to construction are:(1) project related laws – subject to the jurisdiction of the site where the works are carried out; (2) contract related laws – subject to the jurisdiction of the governing law of the contract; and (3) dispute resolution laws – subject to the law of the "seat" of the dispute resolution.

#### *Project related laws*

All applicable laws impacting on any aspect of a construction project explicitly constrain the parties' freedom of contract, particularly in how the work can be carried out and how it impacts on third parties, e.g. laws relating to labour, health and safety or the environment. Laws relating to activities, people and property at the site of a construction project will generally apply irrespective of the governing law of the contract.

The following are examples of project related laws that constrain the parties' freedom of contract:

- Protective measures in favour of sub-contractors, e.g. Law on Subcontracting 1975 (France);
- Liability generally for the partial or total collapse of structures, e.g. Civil Code (France) Articles 1792 – 1792-6; Civil Code (UAE) Article 880;
- Deemed acceptance of variations by the employer, e.g. Civil Code (Brazil) Article 619;

[6] Knutson, R (ed), *FIDIC An Analysis of International Construction Contracts* (2005).

- Interim payments, e.g. Construction Contracts Act 2013 (Ireland) section 3;
- Rules relating to property in goods, e.g. Property Law (China); Personal Property Securities Act 2017 (Fiji); Personal Property Security Act 2011 (Papua New Guinea).

Although much of the construction law in common law jurisdictions has traditionally been determined by the common law, there has been increasing statutory intervention to alleviate long standing challenges inherent in the application of classical contract theory to construction. Perhaps the greatest of these challenges has been to ensure the prompt and reliable flow of payments through the contractual chain. As far back as the 1880s, US States enacted mechanic's lien statutes to protect unpaid subcontractors, labourers and materialmen who had performed work on private property by granting them equitable interests in the improved real estate.[7] Following the Latham Report on procurement and contractual arrangements in the UK construction industry,[8] the UK enacted legislation that provided a statutory right to progress payments and for disputes to be determined provisionally by adjudication.[9] Similar legislation, restricted to adjudication of payment disputes has been implemented in all Australian States and Territories,[10] and a number of other jurisdictions.[11]

The constraints on freedom of contract from such statutory adjudication legislation is quite profound as, depending on the jurisdiction, it may provide statutory regulation of the following issues in legislation that cannot be contracted out of.

The contractor may have a statutory entitlement to progress payments, and an automatic entitlement to payment if the payer does not respond to a payment claim. There may be no contractual defences to court enforcement of an adjudicated amount as a judgment debt. "Pay when paid" and "pay if paid" clauses are void. A non-paid party may stop work irrespective of contractual terms.

Parties have the right to submit a defined type of dispute to adjudication, and the legislation defines formal adjudication procedures. There are strict

[7] Bruner, PL, "The Historical Emergence of Construction Law" (2007) 34.1 *William Mitchell Law Review* 1, 6.

[8] Sir Michael Latham, "Constructing the Team" (July 1994) Final Report.

[9] Housing Grants, Construction and Regeneration Act 1996 (UK).

[10] NSW: Building and Construction Industry Security of Payment Act 1999; Victoria: Building and Construction Industry Security of Payment Act 2002; Northern Territory: Construction Contracts (Security of Payments) Act 2004; West Australia: Construction Contracts Act 2004; Australian Capital Territory: Construction Industry (Security of Payment Act) 2009; South Australia: Building and Construction Industry Security of Payment Act 2009; Tasmania: Building and Construction Industry Security of Payment Act 2009; Queensland: Building Industry Fairness (Security of Payment) Act 2017.

[11] New Zealand: Construction Contracts Act 2002; Singapore: Building and Construction Industry Security of Payment Act 2004; Isle of Man: Construction Contracts Act 2004; Malaysia: Construction Industry Payment and Adjudication Act 2012; Ireland: Construction Contracts Act 2013; Ontario: Construction Act 1990.

time limits for adjudication, and parties may not be able to choose the adjudicator.

In some jurisdictions project bank accounts are required to provide a trust over monies payable to sub-contractors.

***Contract related laws***

Examples of contract related laws that constrain the parties' freedom of contract include the payment of penalties, e.g. Civil Code (Romania), Conventional Penalties Act 1962 (South Africa); unfair contract conditions, e.g. Standard Business Terms Act (Germany), Unfair Contract Terms Act 1977 (UK); and bribery and corruption, e.g. Bribery Act 2010 (UK).

Notwithstanding parties' agreement on the amount of liquidated damages payable in the event of specified breaches of contract, Civil Code provisions may allow subsequent adjustment, e.g. Civil Code (France) section 1152 and Civil Code BGB (Germany) section 343.

Many Civil Codes provide for relief from contractual stipulations if *force majeure* or hardship arising from a change in circumstances since the contract was executed prevent performance, such as the Civil Code (Philippines) section 1174, Civil Code (Indonesia) section 1245, Civil Code (Peru) sections 1315 and 1440 and Civil Code (France) section 1148.

***Dispute resolution laws***

The law applying to the conduct of dispute resolution will be that of the "seat" of the forum where the dispute resolution takes place. If the dispute is litigated in court, the law of the forum of the court will apply. If the parties have chosen arbitration, then the arbitration law at the "seat" of the arbitration will apply. In accordance with the principle of party autonomy, parties are free to choose an arbitral "seat" that is different to the jurisdiction of the governing law of the contract, or the jurisdiction of the site where the construction work is performed. In many cases that will be the case where the contracting parties choose a neutral forum for arbitration, so that neither party has any "home ground" advantage.

As noted above, statutory adjudication legislation may apply to the provisional resolution of disputes in the jurisdiction where the construction is carried out. However, this does not negate the parties' right to final resolution of a dispute by international arbitration in a neutral forum. Any party choice of an alternative method of dispute resolution is of course subject to any mandatory applicable law. For example, as noted below, a Dispute Board determination may not be final and binding in some jurisdictions, notwithstanding contractual agreement that it is. Some jurisdictions such as some Australian States prohibit pre-agreed arbitration of "consumer" disputes, such as those arising in domestic building contracts.

**Public policy constraints on freedom of contract**

Public policy is largely concerned with the potential for manifest unfairness or injustice in a given situation. Courts may disregard or refuse to give effect to contractual obligations which, whilst not directly contrary to any express or implied statutory prohibition, nevertheless contravenes "the policy of the law".

Examples of situations in which courts have refused to enforce a contractual agreement on the grounds that it is against public policy include:

- Imposing a penalty for breach of contract (*Andrews v Australia and New Zealand Banking Group Ltd* [2012] HCA 30);
- Unlawful conduct (*Gaffney v Ryan* [1995] 1 Qd R 19);
- Ousting the jurisdiction of the courts (*Brooks v Burns Philp Trustee Co Ltd* [1969] HCA 4);
- Economic duress – the application of illegitimate pressure to achieve an agreement (*DSND Subsea Ltd v Petroleum Geo Services ASA* (QBD (TCC) [2000] BLR 530);
- Exclusion clauses in conflict with public policy (*Tercon Contractors Ltd v British Columbia (Transportation and Highways* [2010] SCC 4);
- Conduct prejudicial to the administration of justice (*Trendtex Trading Corporation v Credit Suisse* (HL) [1982] AC 679; [1981] 3 WLR 766, [1981] 3 All ER 520);
- Conduct prejudicing the impartiality of public officials (*Wilkinson v Osborne* [1915] HCA 92);
- Conduct prejudicial to national or international security (*Foster v Driscoll* (KBD) [1929] 1 KB 470; [1928] All ER Rep 130);
- Unreasonable restraint of trade (*Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* (HL) [1967] UKHL 1).

## *LEX CONSTRUCTIONIS*

**What is it?**

For the purposes of this paper, *lex constructionis* is the international law of construction in jurisdictions subject to the rule of law and which recognise the parties' freedom of contract. It is a subset of *lex mercatoria* (the law merchant), a longstanding legal concept that has regained prominence and importance in the modern globalised world.

The "new" *lex mercatoria* dates from 1957.[12] Its significance is encapsulated in the introductory speech at the London colloquium on "The New Sources of the Law of International Trade with special reference to East-West Trade" in 1962:

[12] Berger, KP, *The Creeping Codification of the New Lex Mercatoria,* (Wolters Kluwer, The Netherlands, 2010) 1.

> "The evolution of an autonomous law of international trade, founded on universally accepted standards of business conduct, would be one of the most important developments of legal science in our time. It would constitute a common platform for commercial lawyers from all countries, those of planned and free-market economy, those from civil law and common law, and those of fully developed and developing economy, which would enable them to cooperate in the perfection of the legal mechanism of international trade."[13]

In this writer's view, by replacing "international trade" with "international construction" this statement is the lodestar for *lex constructionis*.

There are three theories of the meaning of *lex constructionis* that can be derived from the broader category of *lex mercatoria*:

1. A "mass" of rules and principles for the law of construction, devoid of any internal consistency or systematic quality.
2. The totality of usages that are refined according to the needs of construction.
3. An independent, supranational legal system.[14]

The first of these theories, based on the universally recognised principle of party autonomy in contract law, is that *lex constructionis* supplements the well-known categories of applicable domestic law. The second theory is based on statutory or judicial acceptance of trade usages as a factual supplement to the applicable domestic law. Both of these theories limit the ultimate development and application of *lex constructionis* by the constraints of domestic law.

In this writer's view, the third theory is supported by a conjunction of modern developments that make such a supranational system possible. As discussed below, these developments comprise widely used and accepted international construction contracts, the articulation of the new *lex mercatoria* and the application of international arbitration to finally resolve disputes.

Consistent with the above definition, *lex constructionis* is comprised of the following four elements: the governing law of the contract, the contract between the parties, the law applying to the project at the site, and the law applying to the final resolution of disputes.

**Why is it important?**

Construction is an important industry in every country of the world. It is important because it generally represents a significant component of gross

[13] Professor CM Schmitthoff, cited in Berger KP, *The Creeping Codification of the New Lex Mercatoria,* (Wolters Kluwer, The Netherlands, 2010) 4.

[14] Berger, KP, *The Creeping Codification of the New Lex Mercatoria,* (Wolters Kluwer, The Netherlands, 2010) 61–62.

national product;[15] it is important because it employs many people: in professional occupations, in skilled trades, and in less skilled jobs such as labouring.[16] But perhaps most important of all, it provides the infrastructure on which modern life depends: the facilities to mine and process natural resources; transport infrastructure; energy generation and distribution infrastructure; the provision of clean water and water treatment; and the built environment.

The construction industry is of particular importance in less developed countries. It is fundamental to the achievement of the United Nations' Millennium Development Goals,[17] to improving health and life expectancy, and advancing standards of living to reduce the gap between the living standards of the developed and less-developed countries.

Construction is a very international industry. The scale of large construction projects, and the time required to construct them, provide attractive opportunities for experienced contractors to operate internationally and transfer their skills and technology to other countries.

In this writer's view, *lex constructionis* is important in providing a legal framework within which the international construction industry can thrive and prosper by promoting best practice for successful projects in which the contracting parties' legitimate expectations can be realised. It can lead to better value for money by enabling less expensive projects with fewer disputes and fewer insolvencies, and it can promote international trade and greater comity between nations.

The following examples provide some historical and other evidence of *lex constructionis*.

## Examples of *lex constructionis*

### *Significant convergence between the common law and civil law*

Increasingly, more of the law in common law countries is explicitly stated in legislation. This can take the form of a statute that codifies the common law, or alternatively, a statute that modifies an aspect of the common law inconsistent with modern society's expectations (as perceived by legislators). Statutes may also form new "social legislation" that mandates desirable community outcomes not achieved by the common law. Examples of such

[15] For example, in Australia in 2016, revenue in the Construction industry division accounted for 13.5% of all industry revenue: https://www.bankwest.com.au/Blob/pdf/1292551628871/construction.pdf?pdf-link=docdetail (last accessed 30 November 2020).

[16] For example, in Australia in 2016, construction was the third biggest contributor to workforce numbers, employing 9.8% of the working population https://www.bankwest.com.au/Blob/pdf/1292551628871/construction.pdf?pdf-link=docdetail (last accessed 30 November 2020).

[17] The MDGs are the world's time-bound and quantified targets for addressing extreme poverty in is many dimensions – poverty, hunger, disease, lack of adequate shelter, and exclusion – while promoting gender equality, education, and environmental sustainability. (United Nations Development Program, UN Millennium Project 2005: Investing in Development – A Practical Guide to Achieve the Millennium Development Goals, United Nations, New York, 2005).

laws that impact construction projects include legislation for health and safety and environmental protection. Statutory adjudication laws (discussed above) are a recent example of "social legislation" aimed at promoting prompt payment and redressing contractual imbalances of power.

The courts in civil law countries are relying to a much greater extent than previously on the precedential value of court judgments on a similar issue, because the answer to a legal issue may not be found in the codes. Whilst previous civil law court judgments may not have the authority that *stare decisis* has in the common law, well-reasoned judgments of other courts can be persuasive in cases where the legal issues are the same and the facts similar. For example, in the Swiss First Civil Law Court case *A._____ SA v B._____ SA, 4A_124/2014*[18] the court referred to previous decisions in support of its findings on the jurisdiction of an arbitral tribunal and its ability to review the factual findings of an arbitral tribunal.

Further, despite the differences between legal theories, form, procedure and terminology, in many factual situations, the two systems will arrive at essentially the same substantive result. There is frequently broad agreement on what constitutes a just and equitable outcome in a given situation, despite the different potential routes to achieve it. The ability of international arbitral tribunals comprised of members from different countries and legal systems to agree on an award is testament to widely held concepts of justice.

### *Liability for incorrect cost estimates*

In 15BC Vitruvius noted in his seminal architectural books that in Ephesus an architect was liable for construction cost overruns in excess of 25% above his estimate.[19]

Two thousand years later, an architect in Australia could similarly be legally liable for cost overruns in excess of his/her estimate. An architect who was retained to plan a residence to a price specified by the client, and represented that the house could be built for that price in accordance with the plans he drew up, was found to have engaged in misleading or deceptive conduct in contravention of the Trade Practices Act 1974 (Cth) (now Australian Consumer Law).[20]

### *Contractor's liability for defective work*

The oldest known written legal code, the Code of Hammurabi (c 1750 BC), prescribed the financial consequences if a builder built a house that was defective:

[18] A case in which the court considered whether a DAB decision was a precondition to referring a dispute to arbitration under the 1999 FIDIC Red Book.

[19] *Vitruvius: the 10 books on architecture* translated by Morris Hicky Morgan (1960) 281.

[20] *Coleman v Gordon M Jenkins & Associates Pty Ltd* (1993) 9 BCL 292.

> "232. If it ruin goods, he shall make compensation for all that has been ruined, and inasmuch as he did not construct properly this house which he built and it fell, he shall re-erect the house from his own means.
>
> 233. If a builder build a house for some one, even though he has not yet completed it; if then the walls seem toppling, the builder must make the walls solid from his own means".

Thus, in the event that the consequences of the defective work were confined to property damage, the builder was liable for reinstatement costs. That is still the situation today. For example, in the UK recently, the contractor was liable for rectification costs arising from the structural failure of wind turbine towers that occurred within two years of installation. The failure occurred as a result of an unknown error in the specified design standard, in the absence of negligence.[21]

It should be noted that the penalties for industrial manslaughter have changed since the time of Hammurabi, when the builder could be put to death for a collapse that killed someone!

## FIDIC CONTRACTS

Fédération Internationale des Ingénieurs-Conseils (FIDIC) (International Federation of Consulting Engineers) publishes standard form Conditions of Contract that are used in many countries and are the most widely used international construction contracts in the world. The following contracts are commonly referred to as the "Rainbow Suite":

- Conditions of Contract for Construction – First Edition 1999, Second Edition 2017 (Red Book);
- Conditions of Contract for Plant and Design-Build – First Edition 1999, Second Edition 2017 (Yellow Book);
- Conditions of Contract for EPC/Turnkey Projects – First Edition 1999, Second Edition 2017 (Silver Book).

FIDIC contracts are drafted by a Contracts Committee with international representation and are reviewed by friendly reviewers from many different countries and jurisdictions. They are based on a fair allocation of risks and rewards. Although they have a common law heritage, they are used in many countries, both civil law and common law jurisdictions. Because of their genesis from the common law Institution of Civil Engineers' contract, they are more detailed than typical construction contracts in civil law jurisdictions which rely on Civil Codes for many legal rights and obligations.

[21] *MT Højgaard A/S v E.ON Climate and Renewables UK Robin Rigg East Ltd* (SC) [2017] UKSC 59; [2017] BLR 477.

It is submitted that the detailed articulation of the contracting parties' rights and obligations in FIDIC contracts as the outcome of the drafting process is a significant contribution to *lex constructionis*. The Contracts Committee has distilled common practices in international construction contracting into a form that is broadly consistent with domestic law in many countries and is therefore widely accepted.

The extensive international input into the drafting of FIDIC General Conditions and its acceptance as an appropriate contract for international contracts is evidenced by the World Bank's implementation of the 2017 Red Book in its 2019 Standard Procurement Document.[22] The Particular Conditions of Contract in the World Bank Standard Procurement Document does not change the balanced risk/reward allocation in the General Conditions, and mainly comprises "social provisions" to provide protections for labour, local communities and the environment that may not be adequately covered by legislation in less developed countries.

Each of the printed FIDIC Rainbow Suite standard forms comprise General Conditions, Guidance for the Preparation of Particular Conditions, and Forms. A FIDIC contract comprises the General Conditions as published by FIDIC, as amended by Particular Conditions to comply with the governing law of the contract, and the law of the site where the works are performed.

The extent to which the FIDIC contracts contribute to *lex constructionis* may be gauged from the extent to which Particular Conditions essential for conformity with local law are required. A recently published book on the application of FIDIC contracts contains chapters on 18 jurisdictions from around the world, each written by a locally experienced construction law practitioner.[23] The brief for these chapter authors included a requirement to identify what Special Provisions in the Particular Conditions were necessary for consistency with local laws in circumstances where FIDIC General Conditions are incompatible or inconsistent with the governing law of the contract, the law of the site/country or the laws of the seat of the dispute determination.

The following tables identify the issues in each of the above categories that the chapter authors identified as requiring Special Provisions in the Particular Conditions for conformity with local law. It should be noted that as a consequence of freedom of contract, the jurisdictions for the governing law of the contract and the law of the seat of arbitration could be different from the law of the site for a specific construction project. The parties will of course have no choice as to the law of the site, as this is automatically the law of the country where construction occurs.

[22] http://pubdocs.worldbank.org/en/865231562944956956/SPD-Request-for-Bids-WORKS-after-prequalification.docx (last accessed 30 November 2020).

[23] Charrett, D (ed), *The International Application of FIDIC Contracts A Practical Guide* (Informa Law from Routledge, Abingdon England, 2020).

**FIDIC General Conditions are incompatible or inconsistent with governing law of the contract**

| Jurisdiction | Particular Conditions |
|---|---|
| Brazil[24] | • Exclude indirect damages<br>• Time for notification of claims to be consistent with statutory limitations |
| China[25] | • Subcontracting the main structure not permitted |
| Czech Republic[26] | • Replace liquidated damages with contractual penalty<br>• Replace financing charges with contractual penalty or statutory interest |
| France[27] | • Payment of subcontractors by the employer<br>• Termination of the construction contract by the employer |
| Germany[28] | • Limitation of liability<br>• Define "indirect loss"<br>• Performance security<br>• Cessation of employer's liability |
| Italy[29] | • Acknowledgement that the contract has been completed by expert parties fully aware of the content and the implications |
| Malaysia[30] | • Copyright |
| Peru[31] | • Implied terms<br>• Time-bar clauses are illegal<br>• Fitness for purpose – Yellow & Silver Books<br>• Meaning and scope of liability for fitness for purpose<br>• Liquidated or delay damages must be considered *penalidades*<br>• Limitation period of liability<br>• Defects Notification Period is a timeframe of responsibility<br>• Contractual waiver of liability is illegal<br>• Definition of parties' specific liabilities and scope of work |

[24] Moreira, TF and Gabra, C, chapter 5.
[25] Yiwen, S, chapter 6.
[26] Klee, L, Hradecny, V and Jegorova, A, chapter 7.
[27] Brown, D and Conrad, M, chapter 9.
[28] Götz-Sebastian Hök and Stiegelmier, H, chapter 10.
[29] Davide Romano, N, chapter13.
[30] Bury, B and Pemberton, JA, chapter14.
[31] Gray, J and Bravo, J, chapter 16.

| | |
|---|---|
| Romania[32] | • Fit for purpose obligation<br>• Limitation period for liability<br>• Bankruptcy, insolvency, liquidation<br>• "Unusual clauses"<br>• Specific requirements for public procurement contracts |
| South Africa[33] | • Unfair or unreasonable Particular Conditions unenforceable<br>• Builder's lien<br>• Innocent or negligent representation<br>• Election in case of breach of clauses 8.7 & 8.8<br>• Termination for contractor's default |
| United Arab Emirates[34] | • Defects Notification Period<br>• No exclusion of gross negligence<br>• No contracting out of statutory prescription periods for bringing a claim<br>• Exceptional circumstances<br>• Termination |

No Particular Conditions are necessary for the use of FIDIC contracts subject to the governing law of the common law jurisdictions of Australia,[35] Fiji,[36] Ghana,[37] Hong Kong,[38] Papua New Guinea,[39] Sri Lanka,[40] or the civil law jurisdiction of Switzerland.[41]

**FIDIC General Conditions are incompatible or inconsistent with the laws of the site/country**

| Jurisdiction | Particular Conditions |
|---|---|
| Brazil | • Defect notice period |
| China | • Construction contract cannot materially change the bidding documents and proposals<br>• Defects Notification period cannot be more than two years<br>• Retention is limited to 5%<br>• Commencement date of Defects Notification Period |

[32] Cotovelea, C, chapter 17.
[33] Beyers, J, chapter18.
[34] Miller Rankin, E and Lord Hill, S, chapter 21.
[35] Charrett, D, chapter 4.
[36] Barnes, N and Chand, M, chapter 8.
[37] Amankwah-Twum, K and Buckman, PT, chapter 11.
[38] Bury, B and Pemberton, JA, chapter 12.
[39] Barbaro, J, McCormack, A, Thorne, N, Warokra, R and Imako, K, chapter 15.
[40] Cabral, H, Mendis, M and Ambagahawita, C, chapter 19.
[41] Moss, S, Schneider, T and Fiechter, JR, chapter 20.

| | |
|---|---|
| Italy | • Provisions relating to bankruptcy, insolvency and liquidation |
| Romania | • Design<br>• Taking over the Works |

No Particular Conditions are necessary for the use of FIDIC contracts where the site is in Australia, Czech Republic, Fiji, France, Germany, Ghana, Hong Kong, Malaysia, Papua New Guinea, Peru, South Africa, Sri Lanka, Switzerland or United Arab Emirates.

**FIDIC General Conditions are incompatible or inconsistent with the laws of the seat of the arbitration or relevant laws on dispute determination**

| Jurisdiction | Particular Conditions |
|---|---|
| Brazil | • Engineer's decision not final and binding<br>• Dispute Board decision not final and binding |
| Czech Republic | • Dispute Board decision not enforceable |

No Particular Conditions are necessary for the use of FIDIC contracts where the site of the construction project is in Australia, China, Fiji, France, Germany, Ghana, Hong Kong, Italy, Malaysia, Papua New Guinea, Peru, Romania, South Africa, Sri Lanka, Switzerland or United Arab Emirates.

Considering the range of jurisdictions covered, there are a relatively small number of changes that need to be made to FIDIC General Conditions for their international use. In this writer's view, the tables above highlight the extent to which FIDIC contracts approach an international norm, and support for *lex constructionis*.

## INTERNATIONAL COMMERCIAL ARBITRATION

Freedom of contract allows parties to select arbitration to finally resolve disputes, rather than the courts. Arbitration is frequently preferred over litigation in court for construction disputes because of features such as confidentiality, and the exercise of party autonomy to tailor a suitable process and select a tribunal with appropriate legal and technical skills. For international disputes, international arbitration is also preferred as it avoids any perceived home country bias in domestic courts.

The importance for *lex constructionis* of the adoption of the 1958 New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) by over 160 countries cannot be overstated. The New York Convention ensures that international arbitration is accepted in the majority of countries as a binding method of dispute

resolution, so that court proceedings can be stayed to permit arbitration, and arbitral awards can be enforced in most jurisdictions.

International arbitration is well suited to the resolution of international construction disputes. International arbitral tribunals typically comprise practitioners from different jurisdictions and legal systems, and there are many international arbitrators with expertise in handling complex construction disputes and their extensive technical documentation.

International arbitration is well supported by a number of international organisations. These organisations promote principles, rules and procedures that are widely accepted as international norms, independent of legal systems. The following are a few examples of such organisations, and their publications that support international arbitration practice: the United Nations Commission on International Trade Law (UNCITRAL);[42] the International Bar Association (80,000 members in 170 countries);[43] the Chartered Institute of Arbitrators (16,000 members in 149 countries);[44] and the International Chamber of Commerce.[45]

There are also many institutions that publish arbitration rules and administer international arbitrations, such as the ICC Court of Arbitration, the London Court of International Arbitration,[46] the Singapore International Arbitration Centre,[47] and the Hong Kong International Arbitration Centre.[48] Notwithstanding the inevitable differences in rules and procedures, it is submitted that there is broad consensus on the principles of international arbitration that promote consistency of approach and just and equitable outcomes.

A considerable degree of international comity in arbitration law is evidenced by the 116 jurisdictions that have based their arbitration law on the UNCITRAL Model Law. This uniformity of arbitral law coupled with respected international organisations that administer international arbitrations is a significant contributor to *lex constructionis*.

[42] UNCITRAL publishes: Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 – New York Convention (165 parties); UNCITRAL Model Law on International Commercial Arbitration 2006 (83 countries, 116 jurisdictions); UNCITRAL Arbitration Rules. https://uncitral.un.org/en/texts/arbitration (last accessed 30 November 2020).

[43] IBA publishes: Rules on Taking of Evidence in International Arbitration; Guidelines on Party Representation in International Arbitration; Guidelines on Conflicts of Interest in International Arbitration; Guidelines for Drafting International Arbitration Clauses. https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx (last accessed 30 November 2020).

[44] Chartered Institute of Arbitrators publishes: International Arbitration Practice Guidelines; ADR Procedures in Arbitration; Consumers and Parties with Significant Differences of Resources; Multi-Party Arbitrations; CIArb Code of Professional and Ethical Conduct. https://www.ciarb.org (last accessed 30 November 2020).

[45] ICC publishes: ICC Rules of Arbitration; Procedure; Practice Notes; Checklists; ICC Terms of Reference; ICC procedural timetable. https://iccwbo.org/dispute-resolution-services/ (last accessed 30 November 2020).

[46] https://www.lcia.org (last accessed 30 November 2020).

[47] https://www.siac.org.sg (last accessed 30 November 2020).

[48] https://www.hkiac.org (last accessed 30 November 2020).

## *LEX MERCATORIA*

As noted above, *lex constructionis* is a subset of *lex mercatoria* which applies to the broad class of international commercial contracts. However, the concept of *lex mercatoria* is of limited practical value unless its content can be determined. Fortunately, there are at least two modern expressions of *lex mercatoria* that can be applied to international construction contracts: the UNIDROIT Principles of Commercial Contracts,[49] and the TransLex Principles.[50]

There are many references discussing *lex mercatoria*, but few discussing *lex constructionis*.[51]

### UNIDROIT Principles of Commercial Contracts[52]

#### *What is UNIDROIT?*

UNIDROIT is the International Institute for the Unification of Private Law, an independent intergovernmental organisation with its seat in Rome. It studies needs and methods for modernising, harmonising and co-ordinating private, and in particular commercial law as between states and groups of states. UNIDROIT's 63 member states are drawn from the five continents and represent a variety of different legal, economic and political systems as well as different cultural backgrounds.[53]

#### *What are the UNIDROIT Principles?*

The UNIDROIT Principles of International Commercial Contracts (UP) are a set of anational principles that apply to the formation, validity, interpretation, performance and termination of commercial contracts.

They are considered to be a modern statement of a *lex mercatoria* for international contracts which are drafted by legal experts from many

[49] https://www.unidroit.org/contracts#UPICC (last accessed 30 November 2020).

[50] https://www.trans-lex.org/principles/of-transnational-law-(lex-mercatoria) (last accessed 30 November 2020).

[51] A Google search on 30 November 2020 yielded the following in English: Charles Molineaux, "Moving Towards a Constrcution Lex Mercatoria – A Lex Constructionis" https://www.trans-lex.org/126700/_/a-lex-constructionis-14-j-int-l-arb-1997-no-1-at-55-et-seq/; Yuliya Pshenichnaya, "Lex constructionis as the legal source of the international construction contract" https://www.hse.ru/en/edu/vkr/206782720; CEC Jansen, "The Case for the European Lex Constructionis" https://research.vu.nl/en/publications/the-case-for-the-european-lex-constructionis; Novoselov Mikhail Alexandrovich, "Application Lex Constructionis for the Regulation of International Construction Contracts in Russia" http://urvak.org/articles/bizne-vypusk-4-primenenie-lex-constructionis-v-ros/; Klee, L, *International Construction Law* (Wiley Blackwell, Hoboken NJ, 2nd Edition, 2018) chapter 5.

[52] A more detailed discussion of the use of the UNIDROIT Principles in international construction contracts is in Charrett, D, *The Application of Contracts in Engineering and Construction Projects* (Informa Law from Routledge, Abingdon England, 2018), chapter 31 and Charrett, D, "The Use of the UNIDROIT Principles in International Construction Contracts" [2013] ICLR 507.

[53] https://www.unidroit.org (last accessed 30 November 2020).

countries, common law and civil law in which the rules are not derived from any particular national law. Accordingly, the UP embody contractual principles which are, or can be, recognised by the laws of any country, whether common law or civil law.

There have been four editions of the UP: 1994 – 120 articles, 2004 – 185 articles, 2010 – 211 articles and 2016 – 211 articles. The dynamic nature of the UP in responding to contemporary developments is evident in the addition of new chapters on set-off, assignment of rights and limitation periods in the 2004 Edition, and the new chapter on plurality of obligors and obligees in the 2010 Edition. The 2016 Edition is not intended as a revision of the previous edition but was altered marginally to take better into account the special needs of long-term contracts.[54]

The UP and explanatory notes on each clause are available on the UNIDROIT website.[55]

### *How are the UNIDROIT Principles applied?*

The possible applications of the UP are aptly summed up in the Preamble:

> "These Principles set forth general rules for international commercial contracts.
>
> They shall be applied when the parties have agreed that their contract be governed by them.
>
> They may be applied when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like.
>
> They may be applied when the parties have not chosen any law to govern their contract.
>
> They may be used to interpret or supplement international uniform law instruments.
>
> They may be used to interpret or supplement domestic law.
>
> They may serve as a model for national and international legislators."

The UP have been applied in these various ways by many hundreds of arbitral tribunals and courts around the world.[56]

### *What are the benefits of using the UNIDROIT Principles?*

The UP are a private codification of civil law, approved by an intergovernmental institution. Although neither treaty, nor compilation of usages, nor standard terms of contract, they are in fact a manifestation of transnational law:

[54] UNIDROIT, UNIDROIT Principles of International Commercial Contracts (UNIDROIT, Rome, 2016) vii.

[55] https://www.unidroit.org/contracts#UPICC (last accessed 30 November 2020).

[56] http://www.unilex.info/instrument/principles (last accessed 8 September 2020); IBA, *Perspectives in Practice of UNIDROIT Principles 2016* (IBA, 2019) https://www.ibanet.org/Publications/Perspectives-in-Practice-of-the-UNIDROIT-Principles-2016.aspx (last accessed 30 November 2020).

> "The UNIDROIT Principles of International Commercial Contracts are a reliable Fonti [sic] of international commercial law in international arbitration for they 'contain in essence a restatement of those "principes directeurs" that have enjoyed universal acceptance and, moreover, are at the heart of those most fundamental notions which have consistently been applied in arbitral practice'."[57]

The UP comprise rules "broadly recognised throughout the world and the practice of international contracts".[58]

### *UNIDROIT Principles on hardship and force majeure*

The UP include provisions that provide principles applicable to situations where contractual performance as originally anticipated is adversely affected by unforeseen circumstances. These provisions are particularly relevant to the contractual issues in construction projects arising from the Covid-19 pandemic in 2020.[59]

Whilst these provisions provide adjustment mechanisms to relieve a party from the consequences of events that impose excessively onerous financial burdens, they do so within the principles of freedom of contract and *pacta sunt servanda*. In circumstances where the performance of a contract becomes more onerous for a party because of hardship,[60] it is still required to perform its obligations.[61] However, it is entitled to request renegotiation of the contract; in the event that the parties fail to reach agreement within a reasonable time, either party may resort to the court.[62] The court has the power to terminate the contract or adapt the contract with a view to restoring its equilibrium.[63]

The *force majeure* provisions excuse performance in circumstances where "the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences".[64] Non-performance is only excused for the reasonable period in which the impediment operated, and is subject to notice within a reasonable time.[65]

[57] ICC Award No 9797 http://www.unilex.info/principles/case/668 (last accessed 30 November 2020).

[58] ICC Award No 8264 http://www.unilex.info/principles/case/658 (last accessed 30 November 2020).

[59] For a discussion of the application of the UNIDROIT Principles on hardship and *force majeure* to address the contractual impacts of non-performance arising from the Covid-19 pandemic, see: UNIDROIT Secretariat, "The UNIDROIT Principles of International Commercial Contracts and the Covid-19 Health Crisis" https://www.unidroit.org/english/news/2020/200721-principles-covid19-note/note-e.pdf (last accessed 30 November 2020).

[60] Hardship is defined in Article 6.2.2 Definition of hardship.

[61] Article 6.2.1 Contract to be observed.

[62] Article 6.2.3 Effects of hardship.

[63] *Ibid.*

[64] Article 7.1.7 *Force majeure.*

[65] *Ibid.*

A party that owes an obligation other than one to pay money is required to perform unless, *inter alia*, performance is impossible in law or fact, or performance or enforcement is unreasonably burdensome or expensive.[66]

These articles have been introduced, either literally or with only few modifications, in a number of national codifications, including: People's Republic of China (only *force majeure*), Russian Federation, France, Argentina, Estonia, Lithuania and Brazil.[67]

***Summary***

The UP represent a set of overarching principles that are appropriate to regulate an international construction contract in a manner that is fair to all parties, straightforward to apply, predictable in outcome, independent of a particular national legal system and generally consistent with the contract law and principles in any country (with some exceptions).

**TransLex Principles**

***Content***

The TransLex Principles are a recent manifestation of what Klaus Berger refers to as the "creeping codification of the *lex mercatoria*". These principles are based on compilation of a list that:

> "reproduces all those rules and principles of the new *lex mercatoria* as black-letter law which have been accepted in international arbitral and contract practice together with comprehensive comparative references. The list unifies the various sources that have fostered the evolution of a transnational commercial legal system into one single, open-ended set of rules and principles: reception of general principles of law, codification of international trade law by 'formulating agencies', case law of international arbitral tribunals, the law-making forces of international model contract forms and general conditions of trade, and the analysis of comparative legal science". [68]

The recognition that the "new" *lex mercatoria* is constantly evolving and needs to draw on all relevant sources for its legitimacy has resulted in a different approach to UNIDROIT. The TransLex Principles take into account comparative research and the comprehensive case law of international arbitral tribunals. "[T]he most significant contribution is not the list per se, but the technique that gave rise to and is meant to ensure its open-endedness and continuing evolution: the technique of creeping codification."[69]

[66] Article 7.2.2 Performance of non-monetary obligation.

[67] UNIDROIT Secretariat, "The UNIDROIT Principles of International Commercial Contracts and the Covid-19 Health Crisis" 4 https://www.unidroit.org/english/news/2020/200721-principles-covid19-note/note-e.pdf (last accessed 30 November 2020).

[68] Berger, KP, *The Creeping Codification of the New Lex Mercatoria,* (Wolters Kluwer, The Netherlands, 2010) 256.

[69] L Yves Fortier, "The New, New *Lex Mercatoria,* or Back to the Future" (2001) 17.2 *Arbitration International* 121, 127.

A basic difference between the UNIDROIT Principles and the TransLex Principles is that the latter is not limited to the field of international commercial contract law. The TransLex "list follows the decision-making practice of international arbitration and therefore contains legal principles that are related to those fields of law which play a predominant role in international arbitral case law, such as international company law, conflict of laws, rules of evidence, the international law of expropriation and general arbitration law."[70]

The TransLex Principles are maintained in an online database, easily accessible to practitioners in any jurisdiction. The website has four sections as follows (as at 11 September 2020):

- *Principles*, comprising 143 TransLex Principles in 14 chapters, 1408 full text comparative references and 2,193 contract clauses;
- *Bibliography*, containing 1,025 entries on transnational law;
- *Materials*, comprising a collection of contemporary materials on transnational and arbitration law (86 documents); and
- *Archive*, comprising 62 rare historical documents on arbitration and ADR (including England's oldest surviving arbitral award from AD118).

### *TransLex Principles on hardship and force majeure*

The TransLex Principles contain provisions on hardship[71] and *force majeure*[72] applicable to situations where contractual performance as originally anticipated is adversely affected by unforeseen circumstances. These provisions are similar to the corresponding UNIDROIT Principles. In respect of hardship[73] there is a good faith obligation to renegotiate the contract if there is a need to adapt it to changed circumstances;[74] failing party agreement a court can adapt the contract to the changed circumstances or terminate the contract.[75] Non-performance as a consequence of *force majeure* is excused for the period of the impediment, subject to reasonable notice. Any limitation period is suspended so as not to expire before one year after the relevant impediment has ceased to exist.[76]

As with the corresponding UP discussed above, these provisions are particularly relevant to the contractual issues in construction projects arising from the Covid-19 pandemic in 2020 by providing a mechanism for

[70] Berger, KP, *The Creeping Codification of the New Lex Mercatoria,* (Wolters Kluwer, The Netherlands, 2010) 258.

[71] No. IV.6.7 – Duty to renegotiate; No. IV.6.8 – (Re-) Negotiation agreement/clause (pactum de negotiando); No. VIII.1 – Definition [hardship]; No. VIII.2 - Legal consequences [of hardship].

[72] No. VI.3 – *Force majeure.*

[73] No. VIII.1 – Definition [hardship].

[74] No. IV.6.7 – Duty to renegotiate.

[75] No. VIII.2 – Legal consequences [of hardship].

[76] No. VI.3 – *Force majeure.*

equitable changes to contractual obligations arising from circumstances outside the control of either party.

## PROPOSED PRINCIPLES OF *LEX CONSTRUCTIONIS*

It is suggested above that *lex constructionis* can promote best practice for successful projects in which the contracting parties' legitimate expectations can be realised. In this writer's view, those legitimate expectations are typically along the following lines.

The employer expects completion of the project on time, for the contract price and to the agreed standard of quality, and timely and adequate communication from the contractor of any departures from the original scope of works, the materialisation of risks and any claims.

The contractor expects prompt payment of all amounts due under the contract, and the freedom to carry out the construction in accordance with the contract without hindrance by the employer.

The contractor can also expect timely and adequate communication from the employer of the materialisation of any risks, communication of instructions and assessment of claims.

It is submitted that the principles proposed below, if followed, would fulfill those expectations. The proposed principles have been formulated taking into account the unique features of construction projects and construction contracts discussed above, the Abrahamson principles of balanced risk allocation,[77] the FIDIC General Conditions in the Rainbow Suite, the FIDIC Golden Principles[78] and "social obligations" owed to third parties. They are also influenced by Charles Molyneaux's paper on this topic in which he formulated a "modest Mosaic 10" principles.[79]

One of the criticisms that could be directed to the proposed (or any) principles of *lex constructionis* is that they cannot cover all situations, nor can they necessarily be applied in their entirety in many situations. The following discussion of principles in the context of *lex mercatoria* is equally applicable to the proposed principles of *lex constructionis*:

> "General principles do not necessarily have pre-set conditions for application. Instead they merely constitute "rules of optimal application" which means that they may be complied with in varying degrees. The required degree of compliance depends not only on the actual but also on the legal options open to the target group. Application of general principles therefore requires a substantial process of weighing up contradictory principles and rules. General principles are therefore always subject to a continual discussion about the effectiveness and scope."[80] (citations omitted)

[77] Abrahamson, MW, "Risk Management" [1983] ICLR 241, 244.

[78] Charrett, D (ed), *The International Application of FIDIC Contracts A Practical Guide* (Informa Law from Routledge, Abingdon England, 2020) chapter 2.

[79] (1997) 1 JIntArb 55.

[80] Berger, KP, *The Creeping Codification of the New Lex Mercatoria,* (Wolters Kluwer, The Netherlands, 2010) 201.

**Proposed principles**

***Overarching principles***

1. *Pacta sunt servanda.*
2. *Rebus sic stantibus* – doctrines or rules relating to changed conditions.
3. The parties must act in accordance with good faith and fair dealing in construction contracts.

***Scope***

4. The contract defines, in writing, the original scope of work and the known conditions at the site.
5. The employer has the right to instruct variations consistent with the original scope of the contract, and the contractor has the obligation to carry out all such variations.
6. Construction works must be carried out so as to protect the health and safety of workers.
7. Construction works must not adversely affect the environment or the interests of third parties.
8. Subject to any contractual requirements, the contractor selects the methods and timing of the works.

***Risk***

9. Each risk is allocated to the party best able to manage and control it and the consequences if it eventuates, or to the party who will derive any benefit or suffer the least consequences if the risk eventuates.
10. A party is not allocated risks that it cannot insure for or has insufficient financial resources to bear.
11. The contractor is responsible for the works whilst it is in possession of the site.

***Time***

12. The parties have a reasonable time to perform their obligations and exercise their rights.
13. The contractor provides the employer with prompt and adequate notice of any unexpected conditions that affect its performance, the occurrence of any risk events and any claims.
14. The employer provides the contractor with prompt and adequate notice of the occurrence of any risk events that affect the contractor, instructions and responses to claims.

15. The contractor is liable to pay damages if it does not complete the works by the contractually agreed date.

***Cost***

16. The employer has adequate financial resources to complete the contract.
17. The contractor provides security for its performance.
18. The employer pays the contractor its contractual entitlements promptly.

***Quality***

19. The contractor either rectifies defects in its works or pays damages to reinstate the works to the contractually specified quality.

***Disputes***

20. Unresolved disputes are finally determined by arbitration.

**Discussion**

Space does not permit a detailed exposition of each of the above principles. Some would probably be accepted as with implied terms that go without saying. Others may be more controversial.

The overarching principles are contained in statements of the *lex mercatoria*, such as the UNIDROIT Principles. In this writer's view they are important for successful execution of construction projects that frequently take place over a long time and involve changed circumstances. In particular, the requirements of honesty, fairness and reasonableness inherent in the good faith principle will necessarily be relied upon to resolve amicably (where possible) many of the expected and unexpected issues that can arise during the execution of a construction contract.

The principles on scope acknowledge the complexity of construction projects, the possibility that the scope may need to change, and that the works impact on third parties and the environment. Risks are inherent in any construction project, and their appropriate allocation is often critical to achieving a successful project.[81]

[81] For a discussion of the consequences of inappropriately allocating risk, *see* Japan International Cooperation Agency, "Check List for One Sided Contracts" (2011), 1. https://www.jica.go.jp/english/our_work/types_of_assistance/oda_loans/oda_op_info/guide/c8h0vm0000aoeprl-att/guide02.pdf (last accessed 9 September 2020).

The principles on time reiterate the requirement of reasonableness, and emphasise the importance of adequate and timely communication from contractor to employer and vice versa. Damages for late completion are appropriate to compensate the employer for its inability to make commercial use of the constructed facility from the agreed date.

Certainty and promptness of payment are usually of great importance to the contractor and may be critical to its solvency. The requirement for a contractor to rectify or pay for defect rectification is merely a construction specific implementation of *pacta sunt servanda*.

The near universal implementation of the New York Convention, the norms of international arbitration and the finality and enforcement of awards are the basis for arbitration to be the most appropriate method for resolving international construction disputes.

## CONCLUSION

The impact of Covid-19 on construction projects reinforced some aspects of *lex constructionis*, specifically the legislated adjustments to working methods on construction sites to ensure worker safety. Conversely, the frequent lack of legal or contractual provisions suitable to make appropriate adjustments for unforeseen circumstances in situations such as Covid-19 indicates the need for wider application of the principles of *lex constructionis*.

The foundations of *lex constructionis* already exist: a *lex mercatoria,* international contracts that can be implemented in any jurisdiction and international arbitration of disputes in accordance with widely accepted laws and rules that results in final awards that can be enforced in most jurisdictions.

It is submitted that the 20 principles of *lex constructionis* proposed can encourage projects that provide better value for money, promote international trade and greater comity between nations whilst fulfilling the parties' legitimate expectations. As with the *lex mercatoria* the *lex constructionis* is "not carved in stone but has always been, still is, and will always be subject to constant review, textual refinement and adaptation to new developments in international business practice."[82]

The closest approach to a *lex constructionis*, that is as an independent, supranational legal system not subject to the vagaries of a particular jurisdiction may be achieved by:

- Use of an internationally accepted standard form of contract such as FIDIC,
- UNIDROIT Principles (or TransLex Principles) as the governing law of the contract, and
- International arbitration as the final method of dispute resolution.

[82] Berger, KP, *The Creeping Codification of the New Lex Mercatoria,* (Wolters Kluwer, The Netherlands, 2010) 277.

Such a contract exercises the parties' freedom of contract and is de-localised to the maximum extent achievable for a construction contract. It must always be accepted that the construction of a facility at a particular location in a specific jurisdiction will be subject to laws applicable to construction projects in that jurisdiction. However, it is submitted that there is considerable international agreement on many of the overarching principles underlying laws to protect the health and safety of workers, protection of the environment and the rights of third parties impacted by construction, and these are probably the least controversial of the proposed principles of *lex constructionis*.