

## *Lex constructionis* – or My Country’s Rules?

**Zoom Maxwell Lecture  
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## Agenda

- Construction contracts
- International contract law 101
  - Statutory incursions into freedom of contract
  - Public policy constraints on freedom of contract
- *Lex constructionis*
  - What is it?
  - Why is it important?
  - Examples
- Aspects of *lex constructionis*
  - FIDIC contracts
  - International commercial arbitration
  - UNIDROIT Principles of International Commercial Contracts
- Government responses to the impact of COVID-19 on construction

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## Construction Contracts



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## Construction Contracts

- Construction law is the law relating to **construction projects**:
  - Design
  - Construction
  - Maintenance
  - Operation.
- The legal mechanism for delivery of a construction project is a **construction contract** between Employer and Contractor.
- Construction contracts have some features that make them *sui generis*.

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## Construction Contracts

### Features of construction contracts

- **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;
  - The constructed facility becomes 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;

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## Construction Contracts

### Features of construction contracts:

- **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. *Security of Payment* legislation that mandates payment obligations and makes some provisions illegal, e.g. pay when paid clauses;
  - Many aspects 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;

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### Construction Contracts

**Features of construction contracts:**

- **Risk:**
  - Construction involves significant environmental impacts – noise, dust, smells, vibration, nuisance, water run-off, sediment and erosion;
  - Construction may adversely impact adjacent property;
  - Construction activities are potentially dangerous: heavy machinery, working at heights, confined spaces;
  - Insurance of the works is usually mandatory and is a significant risk transfer mechanism;
  - Insolvency of parties to interrelated contracts.
- **Time:**
  - The time for contractual performance 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 for late contract completion.

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### Construction Contracts

**Features of construction contracts**

- **Cost:**
  - The contract sum and cashflow is typically substantial;
  - 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.

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### Construction Contracts

- A **construction contract** is the legal mechanism to deliver a **construction project**.
- A construction contract typically addresses issues of:
  - Scope of works
  - Risk allocation
  - Time for completion
  - Payment
  - Quality
  - Dispute resolution.

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### International Contract Law 101



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### International Contract Law 101

**Two universal principles of contract law:**

- Freedom of contract.
- *Pacta sunt servanda* (Latin: agreements are to be kept).

**Freedom of contract can only be exercised and *pacta sunt servanda* only has meaning in a jurisdiction subject to the rule of law.**

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### Freedom of contract

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 e.g. Malaysia).

- Freedom of contract is a long standing common law principle:
 

“... if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice.”

(Printing and Numerical Registering Co. v. Sampson (1875) L. R. 19 Eq. 462)
- Courts have a natural bias to uphold freedom of contract and to take a narrow view of any statutory constraint:
 

“Certainly, there are plenty of judicial dicta to suggest that courts will be slow to imply, where the applicable legislation is silent, a prohibition which interferes with the rights and remedies given to parties by the ordinary law of contract.”

(Colin John Fitzgerald v F J Leonhardt Pty Ltd (1997) 189 CLR 215 per Kirby J)

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### Freedom of contract

**French Civil Code Art 1102:**  
 Everyone is free to contract or not to contract, to choose the person with whom to contract, and to determine the content and form of the contract, within the limits imposed by legislation.  
 Contractual freedom does not allow derogation from rules which are an expression of public policy.

**Civil Code of the Philippines Art 1306:**  
 In this jurisdiction contracts are enforced as they are read, and parties who are competent to contract may make such agreements within the limitations of the law and public policy as they desire, and the courts will enforce them according to their terms.

**Russian Civil Code:**  
 421.1. Citizens and juridical persons shall be free in concluding a contract.  
 421.2. The parties may conclude a contract which is either provided for or is not provided for by a law or other legal acts.

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### Freedom of contract

**Lex mercatoria:**

**UNIDROIT Principles of International Commercial Contracts 2016 Art 1.1**  
 The parties are free to enter into a contract and to determine its content.

**Trans-Lex Principles No. IV.1.1 - Freedom of contract**  
 The parties are free to enter into contracts and to determine their contents (principle of party autonomy).

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### Freedom of contract

**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;
- to agree to resolve their disputes by private and confidential arbitration by an Arbitrator of their choice in accordance with procedures they have chosen.

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### Pacta sunt servanda

- Once parties have exercised their freedom to enter into a contract, they have the legal rights and obligations they have agreed to, and these rights and obligations are enforceable by a court.
- 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.
- "... 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)."  
 (Robert Knutson (ed), *FIDIC An Analysis of International Construction Contracts* (2005))

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### International Contract Law 101

**Two universal principles of contract law:**

- Freedom of contract.
- *Pacta sunt servanda*

**Constraints on freedom of contract:**

- Statutes
- Public policy
- Morals (in some jurisdictions)

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### Statutory incursions into freedom of contract



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**Statutory incursions into freedom of contract**

- 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.
- Two categories of laws relevant to construction:
  - **Project related** – subject to the jurisdiction of the Site where the Works are carried out
  - **Contract related** – subject to the jurisdiction of the governing law of the contract

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**Statutory incursions into freedom of contract**

**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
  - the environment.
- Laws relating to activities, people and property at the Site will generally apply irrespective of the governing law of the contract.

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**Statutory incursions into freedom of contract**

**Examples of project related laws :**

- Protective measures in favour of subcontractors (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*)

**Examples of contract related laws :**

- Deemed acceptance of Variations by the Employer (e.g. *Civil Code (Brazil) Article 619*)
- 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 (UK)*)

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**Statutory incursions into freedom of contract**

**A number of countries have provided a statutory right for disputes to be determined provisionally by adjudication:**

- UK: *Housing Grants, Construction and Regeneration Act 1996*
- 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*
- Singapore: *Building and Construction Industry Security of Payment Act 2004*
- New Zealand: *Construction Contracts Act 2002*
- Malaysia: *Construction Industry Payment and Adjudication Act 2012*
- Ireland: *Construction Contracts Act 2013*
- Ontario: *Construction Act 1990*

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**Statutory incursions into freedom of contract**

**Statutory adjudication legislation may restrain freedom of contract in the following ways:**

- Statutory entitlement to progress payments.
- Automatic entitlement to payment if formalities are not observed.
- No contractual defences to court enforcement as a judgment debt.
- "Pay when paid" and "pay if paid" clauses are void.
- Non-paid party may stop work.
- Legislation can't be contracted out of.
- Parties have the right to submit a defined type of dispute to adjudication.
- Defined formal adjudication procedures.
- Strict time limits for adjudication.
- Parties may not be able to choose Adjudicator.

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**Statutory incursions into freedom of contract**

**Civil Code provisions departing from contract agreement on penalties:**

- **French Civil Code Art 1152:**  
Where an agreement provides that he who fails to perform it will pay a certain sum as damages, the other party may not be awarded a greater or lesser sum. Nevertheless, the judge may "even of his own motion" moderate or increase the agreed penalty, where it is obviously excessive or ridiculously low. Any stipulation to the contrary shall be deemed unwritten.
- **German Civil Code BGB s 343 Reduction of the penalty:**  
(1) If a payable penalty is disproportionately high, it may on the application of the obligor be reduced to a reasonable amount by judicial decision. In judging the appropriateness, every legitimate interest of the obligee, not merely his financial interest, must be taken into account. Once the penalty is paid, reduction is excluded.  
(2) The same also applies, except in the cases of sections 339 and 342, if someone promises a penalty in the event that he undertakes or omits an action.

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### Statutory incursions into freedom of contract

**Civil Code provisions providing relief from hardship:**

- French *Civil Code* Art 1148:  
There is no occasion for any damages where a debtor was prevented from transferring or from doing that to which he was bound, or did what was forbidden to him, by reason of *force majeure* or of a fortuitous event.
- Philippines *Civil Code* Art 1174:  
Except in cases expressly specified by the law, or when it is otherwise declared by stipulation, or when the nature of the obligation requires the assumption of risk, no person shall be responsible for those events which could not be foreseen or which, though foreseen, were inevitable.

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### Statutory incursions into freedom of contract

**Statutory incursions into freedom of contract may be:**

- **Project related** – subject to the jurisdiction of the Site where the Works are carried out.
- **Contract related** – subject to the jurisdiction of the governing law of the contract.

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### Public policy constraints on freedom of contract



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### 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 contravene "the policy of the law".

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### Public policy constraints on freedom of contract

**Examples**

- 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)
- Prejudicial to the administration of justice (*Trendtex Trading Corporation v Credit Suisse* [1982] AC 679)
- 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* [2000] BLR 530)
- Exclusion clauses in conflict with public policy (*Tercon Contractors Ltd v British Columbia* [Transportation and Highways] [2010] SCC 4)

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### Lex constructionis



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**Lex constructionis**

**What is it?**

- **Lex constructionis** – the law of international construction in jurisdictions subject to the rule of law and which recognize the parties’ freedom of contract.
- *Lex constructionis* is comprised of
  - 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.
- Provides a legal framework within which the parties’ legitimate expectations can be realised.
- Best practice for successful projects?

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**Lex constructionis**

**What is it?**

There are three theories 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. [Decided according to the well-known categories of applicable domestic law.]
2. The totality of usages that are refined according to the needs of construction. [Decided according to the statutory or judicial acceptance of trade usages as a factual supplement to the applicable domestic law.]
3. An independent, supranational legal system, e.g. UNIDROIT Principles, Trans-Lex Principles.

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**Lex constructionis**

**Why is it important?**

- Construction projects provide the infrastructure on which modern life depends.
- Construction projects are essential to improving the health, quality of life and living standards in less developed countries.
- The construction industry is a significant component of the world economy, and a significant employer.
- *Lex constructionis* can lead to better value for money – less expensive projects, fewer disputes and fewer insolvencies.
- *Lex constructionis* can promote international trade and greater comity between nations.

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**Lex constructionis**

**Example 1 Significant convergence between the common law and civil law:**

- More of the law in common law countries is explicitly stated in legislation:
  - codifies or amends the existing common law, or
  - forms new “social legislation” which mandates desirable community outcomes not achieved by the common law.
- 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.
- 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.

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**Lex constructionis**

**Example 2 Issues of a Contractor’s liability for defective work:**

**Code of Hammurabi (c 1750 BC) – oldest known written legal code**

229 If a builder build a house for some one, and does not construct it properly, and the house which he built fall in and kill its owner, then that builder shall be put to death.

230 If it kill the son of the owner the son of that builder shall be put to death.

231 If it kill a slave of the owner, then he shall pay slave for slave to the owner of the house.

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.

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**Lex constructionis**

**Example 2 Issues of a Contractor’s liability for defective work:**

**UK Supreme Court 2017**

- Contractor was liable for the structural failure of wind turbine towers that occurred within 2 years of installation.
- Failure occurred as a result of an unknown error in the specified design standard, in the absence of negligence.

*MT Højgaard a/s v E.ON Climate and Renewables UK Robin Rigg East Ltd [2017] UKSC 59*

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### Lex constructionis

**Example 3 Force majeure - Civil Law:**  
**Article 1174 Civil Code of the Philippines**  
 Except in cases expressly specified by the law, or when it is otherwise declared by stipulation, or when the nature of the obligation requires the assumption of risk, no person shall be responsible for those events which could not be foreseen or which, though foreseen, were inevitable.  
**Article 1245 Civil Code of Indonesia**  
 No compensation for costs, losses and interest shall be payable if Obligor, because of an act of God or an accident, was prevented from delivering or performing an obligation that Obligor was obliged to deliver or perform, or Obligor was compelled to do something that it was prohibited from doing.

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### Lex constructionis

**Example 3 Force majeure: - FIDIC Rainbow suite**  
**18.1 Exceptional Events**  
 "Exceptional Event" means an event or circumstance which:  
 (i) is beyond a Party's control;  
 (ii) the Party could not reasonably have provided against before entering into the Contract;  
 (iii) having arisen, such Party could not reasonably have avoided or overcome; and  
 (iv) is not substantially attributable to the other Party.  
**18.4 Consequences of Exceptional Event**  
 If the Contractor is the affected Party and suffers delay and/or incurs Cost by reason of the Exceptional Event of which he/she gave a Notice under Sub-Clause 18.2 [Notice of an Exceptional Event], the Contractor shall be entitled subject to Sub-Clause 20.2 [Claims For Payment and/or EOT] to:  
 (a) EOT; and/or  
 (b) if the Exceptional Event is of the kind described in sub-paragraphs (a) to (e) of Sub-Clause 18.1 [Exceptional Events] and, in the case of sub-paragraphs (b) to (e) of

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### FIDIC Contracts



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### 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:
  - Conditions of Contract for Construction - First Edition 1999 and 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**);
  - The Short Form of Contract - First Edition, 1999 (**Green Book**)



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### FIDIC Contracts

**FIDIC Contracts:**

- Drafted by Contracts Committee and reviewed by friendly reviewers from many different countries and jurisdictions
- Common law heritage
- Used in many common law and civil law jurisdictions
- The most widely used for international construction contracts in the world
- General conditions are amended by Particular Conditions to comply with:
  - The governing law of the contract
  - The law of the Site where the Works are performed

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### FIDIC Contracts

Jurisdiction chapters on:

- Australia – Donald Charrett
- Brazil – Thiago Fernandes Moreira & Caio Gabra
- China – Sun Yiwen
- Czech Republic – Lukas Klee, Vojtech Hradecky & Anastazie Jegorova
- Fiji – Nicholas Barnes & Melvin Chand
- France – David Brown & Michael Conrad
- Germany – Götz-Sebastian Hök & Henry Stiegelmier
- Ghana – Kwame Amankwah-Twum & Priscilla Tara Buckman
- Hong Kong – Ben Bury & Julie-Ann Pemberton
- Italy – Nicola Davide Romano
- Malaysia – Ben Bury & Julie-Ann Pemberton
- Papua New Guinea – Joseph Barbaro, Andrew McCormack et al
- Peru – Jaime Gray & Jonnathan Bravo
- Romania – Cremona Cotovelea
- South Africa – Johan Beyers
- Sri Lanka – Harsha Cabral, Malith Mendis & Chamaka Ambagahawita
- Switzerland – Sam Moss, Tino Schneider & Jean-Rodolphe Fiechter
- UAE – Erjin Miller Rankin & Samantha Lord Hill



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### FIDIC Contracts

**Chapter template for each jurisdiction in *The International Application of Construction Contracts*:**

- Outline of the legal environment in the jurisdiction
- Constraints on the governing law of a construction contract
- Formal requirements for a construction contract
- What Special Provisions in the Particular Conditions are necessary for consistency with applicable laws?
  - FIDIC General Conditions are incompatible or inconsistent with the governing law of the Contract
  - FIDIC General Conditions are incompatible or inconsistent with the law of the Site / Country
  - FIDIC General Conditions are incompatible or inconsistent with the laws of the seat of the arbitration or relevant laws on dispute determination

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### FIDIC Contracts

**Chapter template for each jurisdiction in *The International Application of Construction Contracts*:**

- What Special Provisions in the Particular Conditions are desirable for consistency with applicable laws?
- Applicable legislation if the governing law is that of the jurisdiction
- Applicable legislation if the Site/Country is in the jurisdiction
- Applicable legislation if the “seat” of the dispute determination is the jurisdiction
- Issues that a Court or Arbitrator may construe differently to that expected from the words of the Contract, because of local law or custom
- References

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### FIDIC Contracts

FIDIC General Conditions are incompatible or inconsistent with governing law of the Contract		
Jurisdiction	Particular Conditions	Particular Conditions
Brazil	<ul style="list-style-type: none"> <li>• Exclude indirect damages.</li> <li>• Time for notification of claims to be consistent with statutory limitations.</li> </ul>	<ul style="list-style-type: none"> <li>• Implied terms</li> <li>• “Time-bar” clauses are illegal</li> <li>• Fitness for purpose – Yellow &amp; Silver Books</li> <li>• Allocation and scope of liability for fitness for purpose</li> <li>• Liquidated or only damages must be considered</li> <li>• Penalties</li> <li>• Limitation period of liability</li> <li>• Defects Notification period is a timeframe of responsibility</li> <li>• Contractual waiver of liability is illegal</li> <li>• Definition of parties’ specific liabilities and scope of work</li> </ul>
China	<ul style="list-style-type: none"> <li>• Subcontracting the main structure not permitted</li> </ul>	
Czech Republic	<ul style="list-style-type: none"> <li>• Replace liquidated damages with contractual penalty</li> <li>• Replace financing charges with contractual penalty or statutory interest</li> </ul>	<ul style="list-style-type: none"> <li>• Fit for purpose obligation</li> <li>• Limitation period for liability</li> <li>• Bankruptcy, insolvency, liquidation</li> <li>• “Unusual clauses”</li> <li>• Specific requirements for public procurement contracts</li> </ul>
France	<ul style="list-style-type: none"> <li>• Payment of subcontractors by the Employer</li> <li>• Termination of the construction contract by the Employer</li> </ul>	
Germany	<ul style="list-style-type: none"> <li>• Limitation of liability</li> <li>• Define “indirect loss”</li> <li>• Performance security</li> <li>• Cessation of Employer’s liability</li> </ul>	<ul style="list-style-type: none"> <li>• Unfair or unreasonable Particular Conditions unenforceable</li> <li>• Builder’s lien</li> <li>• Innocent or negligent representation</li> <li>• Election in case of breach of clauses 8.7 &amp; 8.8</li> <li>• Termination for Contractor’s default</li> </ul>
Italy	<ul style="list-style-type: none"> <li>• Acknowledgement that the contract has been completed by expert parties fully aware of the contract and the implications.</li> </ul>	
Malaysia	<ul style="list-style-type: none"> <li>• Copyright</li> </ul>	<ul style="list-style-type: none"> <li>• Defects Notification Period</li> <li>• No exclusion of gross negligence</li> <li>• No contracting out of statutory prescription periods for bringing a claim</li> <li>• Exceptional circumstances</li> <li>• Termination</li> </ul>

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### FIDIC Contracts

FIDIC General Conditions are incompatible or inconsistent with the laws of the Site / Country	
Jurisdiction	Particular Conditions
Brazil	<ul style="list-style-type: none"> <li>• Defect notice period</li> </ul>
China	<ul style="list-style-type: none"> <li>• Construction contract cannot materially change the bidding documents and proposals</li> <li>• Defects Notification period cannot be more than 2 years</li> <li>• Retention is limited to 5%</li> <li>• Commencement date of Defects Notification Period</li> </ul>
Italy	<ul style="list-style-type: none"> <li>• Provisions relating to bankruptcy, insolvency and liquidation.</li> </ul>
Romania	<ul style="list-style-type: none"> <li>• Design</li> <li>• Taking over the Works</li> </ul>

No Particular Conditions are necessary for consistency with the local laws of the Site/Country in the other 14 jurisdictions

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### FIDIC Contracts

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	<ul style="list-style-type: none"> <li>• Engineer’s decision not final and binding</li> <li>• DB decision not final and binding</li> </ul>
Czech Republic	<ul style="list-style-type: none"> <li>• DB decision not enforceable</li> </ul>

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### FIDIC Contracts

**Summary**

- FIDIC contracts are the most widely used international standard form contracts
- Drafting of FIDIC contracts has extensive international input
- They are suitable for common law and civil law jurisdictions
- Particular Conditions essential for conformity with local law are limited in number
- Implemented by the World Bank in its Standard Procurement Documents
- Perhaps the closest to an international norm construction contract

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### International commercial arbitration



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### International commercial arbitration

- International arbitration avoids any perceived home country bias in the courts.
- International arbitral tribunals typically comprise practitioners from different jurisdictions and legal systems.
- The widespread acceptance of the *New York Convention* ensures that:
  - court proceedings can be stayed to permit arbitration
  - arbitral awards can be enforced in many jurisdictions.
- International organisations promote principles, rules and procedures that are widely accepted as international norms, independent of legal systems.
- The arbitration law in 116 jurisdictions is based on the *UNCITRAL Model Law*

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### International commercial arbitration

**International Organisations**

- United Nations Commission on International Trade Law (UNCITRAL)
- IBA (80,000 members, 170 countries)
- Chartered Institute of Arbitrators – 16,000 members in 149 countries
- International Chamber of Commerce
- Singapore International Arbitration Centre
- Hong Kong International Arbitration Centre
- London Court of Arbitration
- etc

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### International commercial arbitration

**Summary**

- Freedom of contract means that parties can agree to resolve their disputes by arbitration instead of litigation.
- International arbitration is accepted in the majority of countries as a binding method of dispute resolution.
- The *New York Convention* enables enforcement of an arbitral award through the courts of any Convention country.
- There is consistency in much arbitration law because of adoption of the *UNCITRAL Model Law*
- There are widely accepted norms of international arbitration promoted by many international organisations.

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### UNIDROIT Principles of International Commercial Contracts



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### UNIDROIT Principles of International Commercial Contracts

**What is UNIDROIT?**

- UNIDROIT - the International Institute for the Unification of Private Law
- Independent intergovernmental Organisation with its seat in Rome
- 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

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**UNIDROIT Principles of International Commercial Contracts**

**What are the UNIDROIT Principles?**

- UNIDROIT Principles of International Commercial Contracts (UP) are a set of a-national principles that apply to the:
  - formation,
  - validity,
  - interpretation,
  - performance and
  - termination of commercial contracts.
- A modern statement of a *lex mercatoria* for international contracts:
  - drafted by legal experts from many countries, common law and civil law,
  - the rules are not derived from any particular national law,
  - embody contractual principles which are or can be recognized by the

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**UNIDROIT Principles of International Commercial Contracts**

**What is the purpose of the UNIDROIT Principles?**

- 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.

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**UNIDROIT Principles of International Commercial Contracts**

1994 Edition 120 Articles	2004 Edition 185 Articles	2010 Edition 211 Articles	2016 Edition 211 Articles
Chapter 1 General Provisions			
[No 2.2 Authority of Agents]	Chapter 2 Formation and Authority of Agents		
Chapter 3 Validity			
Chapter 4 Interpretation			
[No 5.2 Third-party rights, 5.3 Conditions]	[No 5.3 Conditions]	Chapter 5 Content, Third Party Rights and Conditions	
Chapter 6 Performance			
Chapter 7 Non-performance			
-	Chapter 8 Set-off		
-	Chapter 9 Assignment of Rights, Transfer of Obligations, Assignment of Contracts		
-	Chapter 10 Limitation Periods		
-	-	Chapter 11 Plurality of Obligors and Obligees	

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**UNIDROIT Principles of International Commercial Contracts**

**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.
- *"The Unidroit Principles of International Commercial Contracts are a reliable source 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."*
- The UP comprise rules *"broadly recognised throughout the world and the practice of international contracts"*.

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**UNIDROIT Principles of International Commercial Contracts**

**International application of UNIDROIT Principles on hardship and *force majeure***

The following relevant 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
- Brazil

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**UNIDROIT Principles of International Commercial Contracts**

**Examples of the UNIDROIT Principles**

**ARTICLE 6.2.1 (Contract to be observed)**  
Where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions on hardship.

**ARTICLE 6.2.2 (Definition of hardship)**  
There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and

- the events occur or become known to the disadvantaged party after the conclusion of the contract;
- the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;
- the events are beyond the control of the disadvantaged party; and
- the risk of the events was not assumed by the disadvantaged party.

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**UNIDROIT Principles of International Commercial Contracts**

**Examples of the UNIDROIT Principles**  
**ARTICLE 6.2.3 (Effects of hardship)**

- (1) In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based.
- (2) The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance.
- (3) Upon failure to reach agreement within a reasonable time either party may resort to the court.
- (4) If the court finds hardship it may, if reasonable,
  - (a) terminate the contract at a date and on terms to be fixed, or
  - (b) adapt the contract with a view to restoring its equilibrium.

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**UNIDROIT Principles of International Commercial Contracts**

**Examples of the UNIDROIT Principles**  
**ARTICLE 7.1.7 (Force majeure)**

- (1) Non-performance by a party is excused if that party proves that 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.
- (2) When the impediment is only temporary, the excuse shall have effect for such period as is reasonable having regard to the effect of the impediment on the performance of the contract.
- (3) The party who fails to perform must give notice to the other party of the impediment and its effect on its ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, it is liable for damages resulting from such non-receipt.
- (4) Nothing in this Article prevents a party from exercising a right to terminate the contract or to withhold performance or request interest on money due.

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**UNIDROIT Principles of International Commercial Contracts**

**Examples of the UNIDROIT Principles**  
**ARTICLE 7.2.2 (Performance of non-monetary obligation)**

Where a party who owes an obligation other than one to pay money does not perform, the other party may require performance, unless

- (a) performance is impossible in law or in fact;
- (b) performance or, where relevant, enforcement is unreasonably burdensome or expensive;
- (c) the party entitled to performance may reasonably obtain performance from another source;
- (d) performance is of an exclusively personal character; or
- (e) the party entitled to performance does not require performance within a reasonable time after it has, or ought to have, become aware of the non-performance.

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**UNIDROIT Principles of International Commercial Contracts**

**Summary**

- The UP represent a set of overarching principles that are appropriate to regulate an international contract.
- They can be used as the governing law of the contract where the contract has an arbitration clause
- A modern statement of the *lex mercatoria*

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**Government responses to the impact of COVID-19 on construction**



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**Government responses to the impact of COVID-19 on construction**

**Execution of construction projects:**

- Prohibition on construction, e.g. lockdown of construction sites
- Constraints on working on construction sites, e.g. limiting working hours; increasing working hours
- Health & safety constraints on employees, e.g. face masks; temperature checks
- Health & safety constraints on the normal operation of a construction site, e.g. physical distancing; cleaning and disinfection; record keeping; preparation for a COVID-19 infection
- Health & safety requirements after a confirmed COVID-19 infection, e.g. shutdown of construction site; deep cleaning
- Constraints on travel, e.g. border closures; prohibitions on travelling to or from certain countries or regions; compulsory quarantine on arrival
- Changes to normal employment law, e.g. standing down workers; direction to perform other duties; direction to work at a different place; direction to work on different days or times
- Financial support, e.g. grants or loans to businesses; payment of employee wages

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### Government responses to the impact of COVID-19 on construction

Operation of construction contracts							
	Australia	Singapore	Malaysia	Hong Kong	Indonesia	Philippines	Peru
"Force majeure" provisions		X			Civil Code 1244, 1245	X Civil Code 1174	X Civil Code 1315
Defence to breach of contract		X					Civil Code Art 1480
Commencement or continuation of court or arbitration proceedings		X					
Extension or enforcement of security		X				X	
Constraints on calling on performance bonds		X					
Moratorium on calculating liquidated damages		X				X	X
New dispute resolution provisions		X		X			
Insolvency and bankruptcy	X	X					

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### Government responses to the impact of COVID-19 on construction

**Summary**

- In respect of the operation of **construction projects**, Governments have responded in similar ways to stop the spread of COVID-19 by (almost) universal agreement on appropriate health measures
- In respect of the operation of **construction contracts**, Governments have taken different approaches:
  - benign neglect – leaving the parties to their existing legal and contractual remedies
  - specific legislation such as the *COVID-19 (Temporary Measures) Act 2020 (Sin)*
  - existing *Civil Codes* may provide relief for a *force majeure* event in the absence of a contractual provision
- In respect of **disputes** some Governments have implemented new dispute resolution procedures such as the Online Dispute Resolution Scheme in Hong Kong or an assessor's determination in Singapore

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### Proposed principles of *lex constructionis*



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### Proposed principles of *lex constructionis*

**Overarching principles**

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

**Scope**

- The contract defines, in writing, the original scope of work and the known conditions at the site.
- 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.
- Construction works must be carried out so as to protect the health and safety of workers.
- Construction works must not adversely affect the environment or the interests of third parties.
- Subject to any contractual requirements, the Contractor selects the methods and timing of the works.

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### Proposed principles of *lex constructionis*

**Risk**

- 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.
- A party is not allocated risks that it cannot insure for or has insufficient financial resources to bear.
- The Contractor is responsible for the works whilst it is in possession of the site.

**Time**

- The parties have a reasonable time to perform their obligations and exercise their rights.
- 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.
- 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.
- The Contractor is liable to pay damages if it does not complete the works by the

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### Proposed principles of *lex constructionis*

**Cost**

- The Employer has adequate financial resources to complete the contract.
- The Contractor provides security for its performance.
- The Employer pays the Contractor its contractual entitlements promptly.

**Quality**

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

**Disputes**

- Unresolved disputes are finally determined by arbitration.

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**Final Comments**



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**Final Comments**

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.

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**Thank you for your attention**

**Questions?**

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