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To What Extent is there an International Construction Law?

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Hot Topics in Construction Law

ABSTRACT

This paper explores whether an international construction law truly exists. While global contracts and arbitration practices suggest convergence, national laws and public policy still dominate. The authors argue that rather than a unified legal system, international construction law functions as a comparative method—requiring practitioners to navigate diverse legal traditions and reconcile global standards with local constraints.

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INTRODUCTION

The question “is there an international construction law?” is a useful question to ask, given that many construction lawyers practise across different jurisdictions around the world. Further, the construction industry is of global significance economically, socially and in the reach of international contractors, project managers, and consultants.

The notion of an international legal framework is tempting to postulate but proves elusive to identify. While construction lawyers may be required to appreciate and recognise the international commercial realities of construction activities, such as issues of time, cost and quality of performance, how these play out in the construction law of different jurisdictions defies identification of common legal principles. These legal differences can be masked by the international use and prevalence of standard form contracts such as the Fédération Internationale des Ingénieurs-Conseils (“FIDIC”) suite of contracts and the development of options for an international legal system such as the International Institute for the Unification of Private Law Principles of International Commercial Contracts 2016 (“UNIDROIT Principles”). However, in practice, these developments do not amount to a coherent body of international construction law.

This paper suggests that despite the international character of the construction industry, it is important to keep in mind the nuances and subtleties that surface when applying these international commercial principles in a jurisdictional context, as informed by the governing law of particular construction contracts, and by mandatory laws of the place(s) of performance of construction activities involved in projects.

The adoption of FIDIC, and others international forms of contract, must be reconciled with local laws, and the application of international legal principles such as the UNIDROIT Principles remain substantially prospective.

Ultimately, this paper concludes that while international construction law is increasingly standardised, the law governing its practice remains fragmented. As a result, a comparative approach is essential for successfully navigating the legal landscape of global construction.

PART I: DRIVERS OF INTERNATIONAL PRACTICE

The rise of international construction law practice has been driven by the gradual convergence of multiple commercial pressures, legal frameworks and industry standards. This section discusses

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four primary drivers behind the development of an international construction law: (A) multinational business activity, (B) global procurement of construction services, (C) the diversity of contractor origins, and (D) the widespread use of international standard form contracts. Through these overlapping forces, there appears a steady emergence of legal concepts that potentially transcend national borders.

A. Multi-National Business Activities

The multinational business activities of contractors and industry consultants encourage the development of international practice. Contractors working across multiple jurisdictions are required to navigate a patchwork of local laws. When they can, contractors and consultants resort to “global template” contracts that combine different standard model clauses from international standard form contracts (such as FIDIC, NEC or ICC) with local laws and annotate them with jurisdiction-specific guidance.³ This patchwork of local laws and liability regimes also facilitates drafting by international project counsel of draft workable international contracts, in particular with regard to caps on liability and dispute board protocols.⁴

Thus, the multinational scope of contractor and consultant businesses drives the standardisation and globalisation of construction contract provisions. International project lawyers are compelled by the global nature of construction projects to master multiple “legal dialects” and deliver a coherent approach to managing the difficulties of both international and local law requirements. In doing so, these lawyers and their clients practice “international construction law”, in the context of local laws and legal dispute resolution regimes.

B. Purchase of Construction Services

It is very common in international construction projects for owners to procure construction services from a variety of different countries, especially in the petrochemical sector. To manage risk consistently, these companies adopt uniform contract strategies anchored in international standard form contracts and overlay them with many issues including trade sanction compliance and local

³ For example, the civil codes of countries such as Bahrain, Kuwait, Iraq, Jordan, Egypt and Lebanon contain articles extending the contractual liability of the Contractor, under FIDIC contract conditions, beyond the issue of the defect’s liability certificate – see Edward Sunna, Omar Al Saadoon (2007) "FIDIC in the Middle East".

⁴ See Walawender, R. (2024) ‘International contracts: Drafting considerations’ CISG Online.

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content thresholds.⁵ This approach also seeks to preserve consistent price adjustment formulas and delay-damage rates and ensures that local law does not significantly affect core risk-allocation.

The multinational nature of construction activity means that owners require dispute-resolution regimes they can enforce worldwide. Petrochemical companies in the Middle East, for example, often stipulate ICC arbitrations in “safe” seats such as London, Singapore, Dubai and Sydney.⁶ The freedom to choose the law and seat of arbitrations protects parties’ contractual expectations, upholding the commercial principle of international contracting, and facilitates the development of legal norms in construction arbitration.⁷

Thus, the global reach and procurement needs of petrochemical and other infrastructure owners underpin the maturation of an international construction law practice that offers contracting solutions, uniform dispute mechanisms and global compliance.

C. Contractors from a Variety of Different Countries

International construction activity is driven by the global nature of suppliers and service providers in “local” projects, resulting in a complex supply chain that demands uniformity in risk-allocation, and indemnity language that is effective internationally. In large scale projects, large portions of subcontractor work are performed by contractors based outside the project jurisdiction.⁸ The multitude of participants in these large-scale projects means dispute management protocols must be able to manage hundreds of small-value claims by local and international subcontractors, necessitating a consistent procedural roadmap for resolving disputes.

In essence, the diverse geographic origin of suppliers on local sites drives demand for a coherent, end-to-end contracting and dispute-resolution chain, which forms the basis of what can be identified as an international construction law practice.

⁵ See for example the CNOOC Huizhou Refinery, Huizhou City, Guangdong Province, P.R China, which used FIDIC concepts of contract management, risk management and sustainable development alongside Chinese laws and regulations.

⁶ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958).

⁷ Ronald A Brand, ‘The Rome I Regulation Rules on Party Autonomy for Choice of Law: A US Perspective’ (Legal Studies Research Paper No 2011-29, University of Pittsburgh School of Law, December 2011) 5 citing Eugene F Scoles et al, Conflict of Laws (Thomson West, 4th ed, 2004) 947 [18.1].

⁸ See, for example Smits, Karen & Marrewijk, A.H. (2012). Chaperoning: Practices of collaboration in the Panama Canal Expansion Program. International Journal of Managing Projects in Business. 5.

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D. Standard Form Contracts Are Used Internationally

The adoption of FIDIC's "Rainbow Suite" (the Red, Yellow, Silver and Green Books) by over 150 countries has been a cornerstone in developing international construction law.⁹ Though the FIDIC contracts have a common-law heritage, coming from the United Kingdom's Institution of Civil Engineers' contracts, they have been refined by both civil and common law practitioners.¹⁰ The contracts attempt a balanced risk-allocation model, performance metrics, time bar procedures and standing DAB mechanisms, with a model ICC arbitration clause.¹¹

FIDIC contracts mitigate the constraints of local legal mandates by allowing contracting parties to insert unique conditions into the contract. For example, United Arab Emirates ("UAE") FIDIC users tailor hardship and force-majeure clauses to echo their *Civil Transaction Law* while still preserving the core FIDIC structure.¹² In doing so, the general provisions of FIDIC, including risk-allocation language, can remain harmonised even where local law differs sharply. This universality has also sparked demand for lawyers who can advise on adapting particular conditions from FIDIC contracts into national legal system compliant clauses.

Multilateral development banks (for example, the World Bank) and export credit agencies mandate either the FIDIC 1999 or 2017 forms for financing projects, actively driving the international acceptance of a uniform standard form contract.¹³ In addition, arbitral institutions (for example, the ICC, LCIA and SIAC) and national courts have in turn built a rich body of "soft precedent" on key FIDIC clauses, including force majeure, price adjustment, notice-bar, and variation provisions.¹⁴ This jurisprudence gives interpretive guidance to practitioners worldwide, creating a significant body of international construction law precedent.

⁹ Charret, D. (2021). 'Lex Constructionis – Or My Country's Rules?' *International Construction Law Review*, 38(1).

¹⁰ Phillip Greenham & the Society of Construction Law Australia (Eds.) (2021) *The International Compendium of Construction Contracts*. De Gruyter.

¹¹ Norris, T. (1990) 'FIDIC and the Engineers Role' *Arbitration International* 6(2), 158-172.

¹² Articles 249 and 287 UAE Civil Transactions Law, Federal Law No. 5 of 1985.

¹³ Seppälä, C. (2025) 'The UNIDROIT Principles and FIDIC Construction Contracts' *International Construction Law Review*, 42(3) 265-273.

¹⁴ See for example, *Cardno Me Limited v. Central Bank of Iraq*, ICC Case No. 26290/AYZ/ELU, where an ICC tribunal considered the application of Clauses 5, 8.1.1 and 8.2 of the FIDIC White Book 4th Edition 2006; see also *Obrascon Huarte Lain SA v. HM Attorney General for Gibraltar* [2015] EWCA Civ 712, the UK Technology and Construction Court examined the meaning of Clause 15 of the FIDIC Yellow Book 1999, see also the Switzerland Supreme Court Decision 4A_124/2014 dated 7 July 2014 held that according to Clause 20 of the FIDIC Yellow Book 1999 proceedings under a Dispute Adjudication Board was a mandatory pre-arbitral step.

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Given that construction legal practice enjoys such an international presence, do legal principles exist that transcend national legal systems? This question will be discussed in the following sections.

PART II: LIMITS OF LEGAL UNIFORMITY

A. Escaping the National Legal System

Regardless of any choice of law provision within a construction contract, construction projects unfold within a mandatory matrix imposed by local legal systems. Parties may agree that a contract is governed by a particular system of law (for example, England and Wales), yet the project host state statutes governing zoning, environmental protection, health and safety, and labour regulations remain binding. The mandatory state of local legal regulations is enforced by international instruments. Indeed, Article 11(1) of the *Hague Principles* makes it clear that mandatory laws can enable a court to apply the law of the forum rather than the chosen law when it is essential for “safeguarding public interests”.¹⁵ Thus, despite the alluring features of the choice of law provisions in international construction contracts, there is no true escape from the *lex loci solutionis*.¹⁶

Domestic courts may disregard a foreign law clause that conflicts with a mandatory statute or fundamental public policy of that state.¹⁷ There is much discourse in private international law as to what kinds of public policy will require intervention from local courts when faced with an

¹⁵Hague Conference on Private International Law, Principles on Choice of Law in International Commercial Contracts (adopted 19 March 2015) art 11 <https://www.hcch.net/en/instruments/conventions/full-text/?cid=135> (“*The Hague Principles*”). .

¹⁶ Translated to ‘Law of Place of Performance’; Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations [2008] OJ L 177/6, art 10(1); See also Art 9 Rome Regulation “Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation”.

¹⁷ The Hague Principles art 11; See also Andrew Dickinson, ‘Oiling the Machine: Overriding Mandatory Provisions and Public Policy in the Hague Principles on Choice of Law in International Commercial Contracts’ (2017) 22 *Uniform Law Review* 402, 420; Michael Douglas. & Nicholas Loadsman (2018) ‘The Impact of the Hague Principles on Choice of Law in International Commercial Contracts’ *Melbourne Journal of International Law* 19(1), 1-23 (“*Douglas & Loadsman*”).

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inconsistent foreign law. State practice and views vary considerably in this regard.¹⁸ In fact, some countries do not allow parties to choose a foreign law in certain categories of contracts.¹⁹

Even if parties choose a law independent of national laws, such as the UNIDROIT Principles of International Commercial Contracts (discussed in more detail in Part III), the model clauses set out by UNIDROIT expressly make reference to the overriding application of national law.²⁰ Similarly, where contracts nominate a foreign governing law, the law of the place of performance dictates essential performance obligations.²¹

Local mandates in construction law commonly relate to professional licensing regimes to ensure that foreign-registered engineers and buildings secure local accreditation to lawfully perform construction works. For example, in Australia, section 19(1) of the *Work Health and Safety Act 2011* (Cth) obliges every person conducting a business or undertaking to ensure, so far as is reasonably practicable, the health and safety of workers, binding all contractors on Australian soil regardless of their chosen governing law.²²

Standard form contracts such as FIDIC, NEC and AIA provide for the inclusion of localised adaptations to the contracts, emphasising the acceptance that there can be no escape from these local laws. NEC3 used in Hong Kong must be supplemented by the Building (Planning) Regulations Cap 123F, which mandate site-safety permits and crane certification.²³ Similarly in Canada, EJCDC C-700 general conditions are routinely modified to reflect provincial consumer-protection statutes and prompt-payment regimes.

¹⁸ For a general discussion see *Douglas & Loadsman*; see also Andrew Dickinson, ‘The Role of Public Policy and Mandatory Rules within the Proposed Hague Principles of the Law Applicable to International Commercial Contracts – Updating Note’ (Legal Studies Research Paper No 12/82, Sydney Law School, October 2012) 2.

¹⁹ Contracts involving Brazilian consumers or small enterprises require application of Brazilian law; see Brooke Marshall (2012) ‘Reconsidering the Proper Law of the Contract’ *Melbourne Journal of International Law* 13(1), 1-35; Dana Stringer(2006) ‘Choice of Law and Choice of Forum in Brazilian International Commercial Contracts’ *Columbia Journal of Transnational Law*, 44(3), 968–77.

²⁰ See Model Choice of law clause to utilise UNIDROIT principles in a commercial contract [4]: “.(***) Consequently, in arbitration, the UNIDROIT Principles apply within their scope to the exclusion of any particular national law, subject only to the application of those rules of domestic law which are mandatory irrespective of which law governs the contract; and since such “overriding” mandatory rules are for the most part of public law nature (e.g. prohibition of corruption; exchange control regulations; anti-trust rules; environmental protection rules; etc.), their application along with the UNIDROIT Principles normally will not give rise to any true conflict”.

²¹ For example, a FIDIC Red Book contract governed by English law but executed in Thailand still requires an Environmental Impact Assessment under the Thai Enhancement and Conservation of National Environmental Quality Act B.E. 2535 (1992).

²² *Work Health and Safety Act 2011* (Cth) s 19(1).

²³ *Building (Planning) Regulations* Cap 123F, section 38.

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Even international arbitration does not confer immunity from local legal imperatives. Under article V(2)(b) of the New York Convention, recognition or enforcement of an award “may be refused if ... contrary to the public policy of that country.”²⁴ An ICC award under Swiss law for a Cape Town development can thus be set aside if it violates South Africa’s non-arbitrable public procurement rules.²⁵ Therefore, in every phase, including drafting, performance, dispute resolution, enforcement, local legal regimes remain inescapable.

Australian Consumer Law (ACL)

In Australia, courts have consistently held that parties’ selection of a foreign governing law cannot displace mandatory domestic statutes or public-policy imperatives. The High Court’s decision in *Akai Pty Ltd v People’s Insurance Co* underscores that courts will enforce only those foreign-law clauses reflecting the parties’ genuine intentions and consistent with local mandatory rules.²⁶ Therefore, Australia gives full effect to its “overriding mandatory provisions,” noting that choice of law provisions must align with the Australian Constitution.²⁷

Notably, Australian Courts have taken a broad approach to the geographical scope of the *Australian Consumer Law* (“ACL”), citing the “policy” of the statute as a justification for extraterritorial application.²⁸ Section 18 prohibits “misleading or deceptive conduct” in trade or commerce, encompassing negotiations, tenders, warranties, and performance of construction services in Australia regardless of the chosen governing law.²⁹

²⁴ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958).

²⁵ See National Environmental Management Act 107 of 1998 (SA); see also the South African Supreme Court of Appeal decision in *Telkom SA Ltd v ZTE Mzansi (Pty) Ltd* 2013, ZASCA 14 where the court suggested that ADR will never be available to resolve disputes in the award phase of procurement since there is at that stage, in the court's view, no contractual relationship between the parties yet that can provide the basis for the ADR.

²⁶ *Akai Pty Ltd v People’s Insurance Co* (1996) 188 CLR 418, 433 (Toohey, Gaudron and Gummow JJ); where the policy of the Insurance Contracts Act 1984 (Cth) was part of the rationale for refusing to give effect to an exclusive choice of English courts and an express choice of English law.

²⁷ Rome I Framework; *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 521 [25]; see also *Lange v the commonwealth* (1997) 189 CLR 520, 566; See also *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 126 (Mason CJ, Toohey and Gaudron JJ); Douglas, M. & Loadsman, N. (2018) ‘The Impact of the Hague Principles on Choice of Law in International Commercial Contracts’ *Melbourne Journal of International Law* 19(1), 1-23.

²⁸ *Australian Consumer Commission v Valve* (2016) 337 ALR 647, 671 [116]; see also *Akai and Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498, 514 [25] (French CJ, Crennan and Kiefel JJ).

²⁹ *Australian Consumer Commission v Valve* (2016) 337 ALR 647, 671 [116]; Other ACL obligations include statutory guarantees of fitness for purpose and merchantable quality apply to imported materials and services, and the ACL’s unfair-contract-terms regime can void standard-form clauses that unfairly disadvantage small businesses or consumers, See, for example *Viterra Malt Pty Ltd v Cargill Australia* [2023] VSCA 157.

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For international contractors, the practical implications are clear. Legal advice familiar with local law is indispensable at the tender and drafting stages to incorporate compliance covenants and particular conditions addressing local laws. No foreign-law designation can absolve parties from the inescapable ambit of the statutory and policy regimes of the place of performance, or at the place of contract negotiation.

B. FIDIC and the Application of International Legal Principles

The widespread adoption of FIDIC standard form contracts suggests a growing international consensus in construction contracting. However, the structure of FIDIC reflects assumptions rooted in the common law, such as the enforceability of liquidated damages and the primacy of party autonomy. These assumptions, however, do not translate seamlessly into civil law or Islamic legal systems. Moreover, the proliferation of local standard forms further militates against the emergence of a unified international construction contracting approach. Thus, while FIDIC facilitates international contracting, it does not in itself create an international construction law regime.

Impact of Local Legal Systems on the use of FIDIC

The application of FIDIC contracts across jurisdictions reveals a fundamental tension between civil law and common law traditions. While FIDIC's structure is rooted in common law, which emphasizes detailed contractual terms, party autonomy, and limited judicial intervention, civil law systems often impose mandatory overlays that reshape or override these terms.³⁰

In common law jurisdictions such as the UK, Australia, and Canada, FIDIC contracts are generally enforceable as drafted.³¹ The principle of freedom of contract is paramount, and judicial discretion to modify agreed terms is limited.³² In contrast, civil law jurisdictions, such as Brazil, Italy and Germany, take a more interventionist approach.³³ FIDIC contracts used in Brazil, for

³⁰ Dr Donald Charrett 'Lex Constructionis – Or My Country's Rules?' *International Construction Law Review*, 38(1), 61-87.

³¹ Donald Charrett (ed.), *The International Application of FIDIC Contracts A Practical Guide* (Informa Law from Routledge, Abingdon England, 2020).

³² For example, in the UK, the *Cavendish v El Makdessi* [2015] UKSC 67 decision refined the test for enforceability of liquidated damages, focusing on whether the clause protects a legitimate commercial interest; The position is similar in Australia, see *Paccioco and Another v Australia and New Zealand Banking Group Ltd* [2016] HCA 28.

³³ Donald Charrett (ed.), *The International Application of FIDIC Contracts A Practical Guide* (Informa Law from Routledge, Abingdon England, 2020); see for example, the application of FIDIC in Brazil: Thiago Fernandes Moreira & Caio Gabra, Chapter 5, Italy: Nicola Davide Romano, Chapter 13 and Germany, Götz-Sebastian Hök & Henry Stiegelmier, Chapter 10.

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example, require Particular Conditions that exclude indirect damages and include time for notification of claims to be consistent with statutory limitations.³⁴

This divergence has significant implications for the effect of FIDIC contracts. For instance, while FIDIC allows for fixed delay damages, civil law courts have the power to adjust or proportion an amount stipulated as a penalty.³⁵ Moreover, civil law systems often impose non-waivable obligations, such as decennial liability for structural defects (e.g., Article 880 of the UAE Civil Code), which override FIDIC's shorter defects liability periods. This can lead to divergent outcomes even under identical FIDIC clauses.³⁶

To bridge these differences, FIDIC contracts often require "Particular Conditions" to ensure compliance with local law. These amendments might address issues such as governing law, dispute resolution, damages, and termination rights. Without such tailoring, parties risk unenforceable provisions or unexpected commercial outcomes.

Application of FIDIC in Islamic Jurisdictions

The Middle East presents a unique legal environment for the application of FIDIC contracts, shaped by a hybrid of civil law and Islamic law (*Shari'ah*). While FIDIC contracts are widely used across the region, their implementation is often subject to significant modification to align with local legal and religious norms. Countries such as Saudi Arabia, Kuwait, Oman, and the UAE have adopted FIDIC-based contracts in both public and private sectors. However, these contracts are frequently amended to comply with national procurement laws and civil codes, many of which are derived from the Egyptian Civil Code and influenced by *Shari'ah* principles.³⁷

Islamic law introduces additional considerations. Under *Shari'ah*, contracts must avoid elements of *riba* (illicit gain), *gharar* (risk and uncertainty), and *jahala* (lack of knowledge).³⁸

³⁴ Dr Donald Charrett 'Lex Constructionis – Or My Country's Rules?' *International Construction Law Review*, 38(1), 61-87.

³⁵ See for example, French Civil Code Article 1231-5.

³⁶ Gülöksüz, E. (2020) 'Regulation of International Construction Contracting Works: Contradictions Between Transnational and National Frameworks' *Megaron*, 15(3), 481-489.

³⁷ For example, UAE Civil Transactions Code No. 5 of 1985 (the Civil Code) embodies both civil-law and *Shari'ah* principles. Article 31 of that Code explicitly elevates its mandatory provisions over any conflicting contractual clause, meaning that parties "ignorant of the law" cannot contract around them.

³⁸ Dr Abdulhafeez M Osman (2023) 'Fidic contracts in the light of islamic laws' *LexTalk World* (published on 12 May 2023) available at: <https://www.lextalk.world/post/fidic-contracts-in-the-light-of-islamic-laws> (Accessed 9 September 2025).

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FIDIC contracts, particularly the Red Book, are generally compatible with Islamic principles when appropriately modified.³⁹

Additionally, public sector contracts in the region often incorporate FIDIC terms but subject them to national laws. In Kuwait, for example, the Ministry of Public Works uses a modified FIDIC form that reflects fixed-price requirements and public procurement rules.⁴⁰ In Dubai, government departments may increase contract quantities by up to 30% without adjusting the contract price, an approach that supersedes FIDIC's variation provisions.⁴¹

Despite these challenges, FIDIC remains the preferred standard in the Middle East due to its international credibility, flexibility, and compatibility with project finance structures. Its widespread use is facilitated by the ability to customise terms through Particular Conditions, allowing parties to reconcile FIDIC's common law foundations with local legal and religious requirements.

Proliferation of 'Local' Standard Form Contracts

While FIDIC contracts offer a globally recognized framework grounded in international legal principles, their adoption is far from universal. Many jurisdictions continue to rely on locally developed standard forms that reflect national legal traditions, regulatory requirements, and cultural expectations. As such, even when considering the widespread use of standard form contracts within international construction, one does not see the universal proliferation of truly international legal principles.

NEC (New Engineering Contract)

The NEC suite of contracts represents a modern approach to construction contracting, emphasizing clear language, proactive management and fair risk allocation. The contract is widely used in the UK, Hong Kong and South Africa, especially for public infrastructure projects, and gained prominence through its use in the London 2012 Olympics.

³⁹ For instance, the concept of Muqawala (contract for work) aligns with FIDIC's structure, and the contract can be interpreted through the lens of Istisna' (manufacturing contract), which permits agreements for future delivery of non-existent goods under specific conditions.

⁴⁰ Edward Sunna and Omar Al Saadoon (2007) 'FIDIC in the Middle-East' available at: <https://www.fidic.org/sites/default/files/FIDIC%20in%20the%20Middle-East.pdf> (Accessed 10 September 2025).

⁴¹ Ibid.

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NEC4, the latest version, supports various delivery models, and includes features such as early warnings, shared risk registers and a strong focus on time and cost control.⁴² However, critics argue that its administrative burden and steep learning curve can hinder adoption, especially in jurisdictions accustomed to more adversarial models. Thus, whilst NEC's global presence is growing, it remains a regional standard rather than a pillar of international construction law.

AIA (American Institute of Architects) Contracts

AIA contracts are the dominant standard forms in the United States, particularly for commercial construction. The AIA A101 (owner-contractor agreement) and A201 (general conditions) form the backbone of the suite, offering detailed provisions on scope, payment, changes, and dispute resolution. These contracts are tailored to the US legal environment, emphasizing fixed-price arrangements, architect-led administration, and litigation-based dispute resolution.

AIA contracts are less flexible than FIDIC or NEC in international contexts, as they assume a US legal framework. Their limited adaptability to non-US jurisdictions and reliance on litigation-based dispute resolution restrict their international applicability. While they offer clarity and consistency within the American context, their role in shaping international legal principles is minimal. AIA's influence is geographically bounded, reinforcing the idea developed in this paper that standard forms are shaped by, and remain subject to, the legal systems from which they originate.

AS 4000

AS 4000–1997 is a widely used standard form contract in Australia for lump-sum construction projects across various sectors.⁴³ Known for its clarity and alignment with Australian common law, it offers practical risk allocation and clear processes for managing project changes.⁴⁴ A standout feature is its treatment of delays, including a deemed approval mechanism where extension of time (“EOT”) claims are automatically granted after 28 days. Dispute resolution

⁴² Evans, S. (2024) ‘NEC4 in Australia’ Concordia Resolution (Published 21 June 2024) Available at: <https://concordiaresolution.com/articles/nec4-in-australia> (Accessed 9 September 2025).

⁴³ Masst (20 May 2025) ‘AIA Contracts’ Available at: <https://www.masst.com/glossary/aia-contracts> (Accessed 11 September 2025).

⁴⁴ Sharkey AM, J., Bell, M., Jovic W. & Marginean, R (2014) ‘Standard Form Contracts in the Australian Construction Industry’ (Research Report, June 2014).

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defaults to arbitration, reinforcing legal certainty. While highly effective for domestic projects, its limited international use underscores the gap between local standardization and global harmonization in construction contracting.

Part III: COMPARATIVE LEGAL REALITIES

A. Commonality of Commercial Issues in Construction Projects

In a global construction industry, certain commercial imperatives are universally recognised: the need to complete work on time, within budget and to a specified standard of quality. These three pillars form the bedrock of the commercial reality in construction. Whilst they are not legal principles themselves, their ubiquity across jurisdictions can create an illusion of legal uniformity. However, while these commercial issues are globally relevant, their legal treatment is anything but, especially considering how local law influences contractual expression and enforcement.

Time of Performance

Time is a critical variable in construction contracts. Delays can have cascading effects on project financing, resource allocation, and stakeholder obligations. International standard forms like FIDIC, NEC, and AIA all include detailed provisions for time-related obligations, including commencement dates, completion milestones, extensions of time, and liquidated damages for delay.⁴⁵

In common law jurisdictions such as the UK and Australia, courts uphold the parties' freedom to allocate time-related risks contractually, subject largely to statutory overlays which can disrupt contractual time provisions.⁴⁶ In other jurisdictions, time of performance may be influenced by political goals. Contracts within the public sector in Egypt often have ambiguous timetables subject to political factors and are largely controlled by the military, resulting in projects having a firm expectation that the goal is achieved within time constraints.⁴⁷

⁴⁵ See for example – Clause 8.3 and 8.4 of the Fidic red book

⁴⁶ See, for example, the power of Australian courts to void clauses for unfairness and unconscionability under the ACL; see also Australian security of payment legislation imposes strict timelines for progress claims and adjudication, see Building and Construction Industry Security of Payment Act 1999 (NSW) and Building Industry Fairness (Security of Payment) Act 2017 (Qld).

⁴⁷ Kilian Bälz (2025) 'Contracting with the Egyptian Public Sector: The Legal Framework, Contract Drafting and Dispute Resolution' *International Construction Law Review* 42(3) 210-224.

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Thus, while the commercial imperative to complete projects on time is universal, the legal mechanisms for enforcing this imperative are local.

Cost of Performance

Cost is another fundamental concern in construction. Contracts typically define the basis of payment, whether lump sum, cost-plus, or bills of quantities, and include provisions for variations, provisional sums, and claims for additional costs. These mechanisms reflect the commercial need to manage financial risk in a volatile and complex industry.

However, the enforceability of cost-related provisions is again subject to local legal constraints. In the UAE, article 249 of the Civil Code allows courts to reduce oppressive obligations due to exceptional circumstances. Similarly, the Egyptian law principle of *imprévision* is only partially congruent with the concepts of force majeure and hardship, which are common in international contract models.⁴⁸

In common law jurisdictions, statutory regimes can still intervene. In Australia, the misleading or deceptive conduct provisions in the ACL can affect the enforceability of cost-related clauses.⁴⁹ Tendering practices also reflect legal influences on cost: bid cost reimbursement schemes are increasingly used to attract international contractors, and statutory requirements around local content, warranties, and security of payment laws further shape the financial structure of construction contracts. These statutory frameworks mean that even well-drafted cost clauses must be reconciled with public law obligations and consumer protections.

Quality of Performance

Quality of performance encompasses compliance with specifications, workmanship standards, and fitness for purpose. Contracts address quality through technical documentation, inspection regimes, and defects liability periods.

Internationally, legal enforcement of quality standards varies. In civil law jurisdictions, statutory warranties often supplement or override contractual provisions. The UAE imposes a mandatory 10-year decennial liability for structural defects, regardless of the contract's terms.⁵⁰ In

⁴⁸ Bälz, K. (2025) 'Contracting with the Egyptian Public Sector: the Legal Framework, Contract Drafting and Dispute Resolution' *International Construction Law Review* 42(3) 210-224, noting 'Imprévision is a well-established principle of French administrative law, initially developed by the French courts in order to deal with the economic turbulences after the First World War.'

⁴⁹ Competition and Consumer Act 2010 (Cth), sch 2, s 18.

⁵⁰ UAE Civil Code, Articles 880-883.

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France and Egypt, similar regimes exist, reflecting a civil law emphasis on protecting public interest in construction safety.⁵¹ These statutory warranties transform quality obligations from private contractual matters into public legal duties.

In common law jurisdictions, quality is primarily a matter of contract. However, implied terms may arise under statute or common law doctrines. In Australia, the ACL implies guarantees of acceptable quality and fitness for purpose into many commercial contracts.⁵² Courts may also imply terms of reasonable care and diligence or compliance with industry standards.⁵³

Relevance of the Commonalities

These frameworks operate within the constraints of local legal systems. Civil law jurisdictions impose mandatory rules that override contractual terms. Common law jurisdictions uphold party autonomy but are increasingly influenced by statutory regimes.

The result is a paradox: while the commercial issues in construction are globally consistent, their legal treatment is profoundly local. This can lull practitioners into a false sense of security, mistaking commercial norms for legal principles. In reality, the enforceability of time, cost, and quality provisions depends not on their commercial logic but on their compatibility with domestic law.

B. Application of the UNIDROIT Principles

The UNIDROIT Principles are a set of a-national rules developed by the International Institute for the Unification of Private Law (UNIDROIT), aimed at harmonising international commercial law. First published in 1994 and subsequently expanded, the UNIDROIT Principles cover key contract areas such as formation, performance, hardship and force majeure.⁵⁴

Designed to be neutral, flexible, and universally applicable, the UNIDROIT Principles are widely used in cross-border transactions, and are structured like the American Restatement, with rules, commentary and examples, but without ties to any national law. In the context of international construction law, they complement standard forms of contract, especially in

⁵¹ See Article 1792 et seq. civil code which mandates decennial warranty on all construction; see also the Egyptian Civil Code that was enacted in 1948, the decennial liability rules were retained and expanded in Articles 651-54

⁵² Competition and Consumer Act 2010 (Cth), sch 2.

⁵³ Implied term that a service provider is obligated to exercise proper or reasonable care or skill; *Rogers v Whitaker* (1992) 175 CLR 479.

⁵⁴ Berger, K. (ND) 'History & Modern Evolution of Transnational Commercial Law' Trans-Lex, Available at: https://www.trans-lex.org/the-lex-mercatoria-and-the-translex-principles_ID8 (Accessed 11 September 2025).

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jurisdictions where domestic law is underdeveloped or unpredictable, emphasising freedom of contract, good faith and preserving contract validity.

Application of the UNIDROIT Principles to construction contracts

The UNIDROIT Principles are not construction-specific, but they have been applied in construction disputes, particularly in international arbitration. Their utility arises in several scenarios:

- As the governing law: Parties may expressly choose the UNIDROIT Principles to govern their contract, especially when they wish to avoid the complexities of national contract laws.
- As interpretive tools: Arbitral tribunals and courts may use them to interpret or supplement national law or international instruments (e.g., the CISG).
- In the absence of choice of law: Where parties have not selected a governing law, tribunals may apply them as a neutral default.
- To fill gaps in standard forms: FIDIC and other contracts may leave certain issues unresolved; they can provide guidance on matters like hardship, renegotiation, and performance standards.

Notably, the FIDIC Red Book (2017) incorporates concepts from the UNIDROIT Principles, such as the definition of interest rates for delayed payments (Sub-Clause 14.8), which draws from article 7.4.9(2) of the UNIDROIT Principles.⁵⁵ This reflects a growing convergence between international contract norms and construction-specific practices.

Part IV: GOVERNING LAW AND CONFLICT RULES

Given the amalgamation of laws potentially applicable to international construction contracts, parties often specify in their contract what substantive law will govern if they have a dispute. But even with the growing number of contracts that provide for dispute resolution through international arbitration rather than litigation in a specified national court, and with the increasing number of practitioners who are skilled in international arbitration, some cross-border agreements

⁵⁵ C. Seppälä (2025) 'The UNIDROIT Principles and FIDIC Construction Contracts' *International Construction Law Review*, 42(3), 265-273.

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that provide for arbitration do not specify a governing law.⁵⁶ In these cases, the arbitral tribunal must determine which law applies to the substance of the dispute.

Just as there is no uniform international law governing international construction contracts, there is no uniform approach to how arbitrators decide which substantive law to apply when the parties have not agreed upon the governing law.

As a general matter, there are two broad approaches arbitrators may take in the absence of agreement among the parties, and each of those two approaches can lead in several different directions. These two broad approaches are “*voie directe*” and “*voie indirecte*” – the direct way and the indirect way. The governing arbitral rules or applicable arbitration statutes usually govern which of those approaches the arbitrators will apply.

A. *Voie Directe and Voie Indirecte*

Where the applicable arbitration law or institutional rules provide for a *voie directe* approach, the tribunal applies its own reasoning directly to select the appropriate law or rules of law applicable to the merits of the dispute. Under this method, the tribunal may consider elements such as the contract, the circumstances of the case, and the submissions of the parties. When using this approach, the arbitral tribunal should determine the law most relevant to the commercial circumstances of the case. Additionally, several leading arbitration institutions adopt the *voie directe* approach, including notably the ICC Arbitration Rules 2021 and the United Nations Commission of International Trade Law (“UNCITRAL”) Arbitration Rules 2021, which provide for the use of the *voie directe*. This is contrasted against the 1976 UNCITRAL Arbitration Rules, which adopted the *voie indirecte* approach.⁵⁷

Under the *voie indirecte* approach, the tribunal does not weigh the commercial circumstances directly. Rather, it looks to a set of conflicts of law rules to decide how to make the determination as to what substantive law to apply. How the tribunal determines which conflicts rule applies varies. The terms of the contract or rules from which the tribunal’s power is derived

⁵⁶ Irina Durnova (26 September 2024) ‘ICC and LCIA Arbitration Statistics 2023: In-Depth Analysis and Insights’ Enyo Law, Available at: <https://enyolaw.com/news/icc-and-lcia-arbitration-statistics-2023-in-depth-analysis-and-insights/> (Accessed 11 September 2025).

⁵⁷ Article 33(1) of the UNCITRAL Arbitration Rules (1976) provided: “[f]ailing such designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of law rules which it considers applicable.” Art 35(1) of the UNCITRAL Arbitration Rules (2010) provides: “[f]ailing such designation by the parties, the arbitral tribunal shall apply the law which it determines to be appropriate.”

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may give the tribunal discretion to apply the conflicts rule it considers “applicable” or “appropriate”, or the contract may prescribe how the conflicts rule is to be selected. For example, the contract may require the tribunal to determine the substantive law by application of a particular jurisdiction’s choice of law rules, or by application of the widely used “closest connection” test.⁵⁸ Notably, the 2006 UNCITRAL Model Law on International Commercial Arbitration (“Model Law”) adopted the *voie indirecte* approach.⁵⁹ Following the Model Law, a number of national arbitration statutes also adopted the *voie indirecte*, although, more recently, there has been a movement toward national legislation that adopts the *voie directe* that many institutional arbitration rules follow.⁶⁰

B. Application of the Two Approaches

In many cases, application of either the *voie directe* or *voie indirecte* method will lead to the same result. Institutional rules and statutes that provide for the *voie directe* often do not specify the factors relevant to the tribunal’s exercise of discretion in determining the most appropriate law to apply, and thus the factors considered may be similar. For example, a tribunal following the *voie directe* approach may look for a significant connecting factor between the contract and the law the arbitrator decides to apply, which, in practice, may be similar to applying the “closest connection” test applicable in many conflicts of law regimes.

However, in a significant number of cases, the *voie directe* and *voie indirecte* will lead to the application of different laws, particularly where the tribunal is directed to apply a specific conflicts rule in a *voie indirecte* model.

One such difference is that, in some instances, under the *voie directe* method, the applicable law chosen may not be an exclusively national law, but may instead consist of a set of rules, such as the general principles of private international law, the *lex mercatoria*, trade usages or particular principles, or international regulations regarding a specific subject such as intellectual property in copyright or patents-related disputes. Although there is nothing to exclude the application of these principles under a *voie indirecte* method, in practice they are more likely to be applied where the

⁵⁸ For construction contracts, the “closest connection test” will usually result in the application of the law of the location of the property.

⁵⁹ Art 28(2).

⁶⁰ See for example, Singapore International Arbitration Act, which adopted the Model Law in its revised 2020 / 2002 edition; see also English Arbitration Act 1996 s46(3).

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tribunal has discretion to determine the applicable law directly than when the tribunal's discretion is to determine the choice of laws rule, the application of which is more likely to point to a particular national law.

A common approach of many conflicts of law regimes that tribunals may look to under the *voie indirecte* approach involves application of the “closest connection” test or something similar to it.

In South Korea, for example, under article 46 of the Act of Private International Law (“APIL”), “[w]here the parties to a contract do not choose the applicable law, the contract shall be governed by the law of the country most closely related to the contract.” The statute then specifies rules for making this “most closely related” determination.⁶¹

In the European Union, the Rome I Regulation sets forth conflicts of law principles to apply absent agreement by the parties. As in South Korea, these principles vary depending upon the type of contract at issue. Where the contract is not covered by any of the specified contract types, or where the elements of the contract would be covered by more than one type, it is generally governed by the law of the country where the party performing the obligation has their habitual residence. However, if the contract is clearly more closely connected to another country, that country's law will apply instead. If no applicable law can be determined by these rules, the contract is governed by the law of the country most closely connected to it.

If a tribunal taking the *voie indirecte* approach applies New York conflict of law principles, the applicable principles are known as the “center of gravity” or “grouping of contracts” approach to identify the jurisdiction with the most significant relationship to the contract and the parties. This involves weighing a variety of factors. For international construction contracts, the following factors are often found to be particularly relevant:⁶²

- **Place of Contracting and Negotiation:** Where the contract was negotiated and executed may be relevant but is generally less significant than the place of performance for construction contracts.⁶³

⁶¹ See APIL Article 46.

⁶² *Santos v. Medina*, 417 F. Supp. 280 (S.D. 2019), *Federal Ins. Co. v. SafeNet, Inc.* 817 F. Supp.2d 290 (2011).

⁶³ *TCA Television Corp. v. Askins et al.*, 839 F.3d 168, 188 (2nd Cir. 2016) citing *Lazard Freres & Co. v. Protective Life Ins. Co.*, 108 F.3d 1531, 1533 (2nd Cir. 1997), *AEI Life, LLC v. Lincoln Benefit Life Co.*, 225 F. Supp.3d 136 (2016).

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- **Place of Performance:** Construction contracts are typically performed at a specific site. The law of the country where the construction takes place is often given substantial weight, as the project is physically located there and subject to local regulations.⁶⁴
- **Location of the Subject Matter:** The immovable nature of construction projects (such as buildings or infrastructure) means the location of the project is a critical factor.⁶⁵
- **Parties' Domicile, Place of Business, or Incorporation:** The home countries or principal places of business of the contracting parties are also considered, especially if they are located in different jurisdictions.

In construction contracts, New York courts typically apply the law of the place where the construction occurs, since local laws often govern key aspects like building codes and permits. Unless there is a strong reason to apply another jurisdiction's law, the project location's law usually prevails. While New York may refuse to apply foreign law that violates its fundamental public policy, this is rare. Courts also consider international principles, such as those in the Restatement (Second) of Conflict of Laws, aiming to honor the parties' intentions and the practical context of the deal.⁶⁶

CONCLUSION

Some have proposed the idea of an international *lex constructionis* akin to the law merchant. However, while the international construction industry is increasingly shaped by globalized practices, standard form contracts, and transnational dispute resolution, this paper demonstrates that there is no unified body of international construction law. Instead, legal obligations remain firmly rooted in national systems, shaped by mandatory local statutes, public policy, and jurisdiction-specific doctrines. Yet, the commercial realities of construction are universally recognized, and their consistent presence across jurisdictions has fostered a comparative legal consciousness among practitioners. It is this shared commercial foundation, rather than any formal legal harmonization, that gives rise to a functional internationalism in construction law.

⁶⁴ *TCA Television Corp. v. Askins et al.*, 839 F.3d 168, 188 (2nd Cir. 2016) citing *Lazard Freres & Co. v. Protective Life Ins. Co.*, 108 F.3d 1531, 1533 (2nd Cir. 1997), *AEI Life, LLC v. Lincoln Benefit Life Co.*, 225 F. Supp.3d 136 (2016).

⁶⁵ Restatement (Second) of Conflict of Laws § 188 (1971), October 2024 Update.

⁶⁶ *Lazard Freres & Co. v. Protective Life Ins. Co.*, 108 F.3d 1531, 1539 (2nd Cir. 1997), citing *In re Allstate Ins. Co.*, 81 N.Y.2d 219, 227 (1993).

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Accordingly, the practice of international construction law is best understood not as a distinct legal system, but as a method: one that demands fluency in multiple legal traditions, sensitivity to local constraints, and a comparative approach to risk allocation and dispute resolution.

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