

# “A COMMON LAW OF CONSTRUCTION CONTRACTS”—OR VIVE LA DIFFÉRENCE?\*

DR DONALD CHARRETT

*BE, LLB, M Const Law, Ph D, FIE Aust, MIAMA  
Melbourne TEC Chambers, Victorian Bar*

“All the world’s legal systems focus on the sanctity of contracts, and damages as the remedy for breach of contract.”<sup>1</sup>

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## 1. Introduction

The title of this paper refers to the question of the extent to which construction law around the world is, or can be universal, and to what extent there are irreconcilable differences between legal systems and/or jurisdictions.

The world is a big place—as at 2011 there are 192 Member States in the United Nations, each of which presumably has the sovereignty to enact laws that could impact on the practice of construction law, at least (but not necessarily exclusively) within its borders. The legal systems of those Member States comprise a number of broadly defined “families” of law—common law, civil law, Shari’a law and socialist law, to name the most widely recognised. Each of these families has certain characteristics which distinguish it from the other members of the family. However, as suggested below, some of these differences may be more apparent than real.

Faced with this complex milieu, is it possible to identify any common threads in construction law as practised around the world? And to what extent can contracting parties create a “common construction law”?

This paper attempts, in a small way, to address these big questions. Given such a potentially limitless topic, the paper is confined to an overview of several relevant issues in the area of construction contracts in common law and civil law systems. By way of further confinement, the type of construction contracts considered in this paper is limited to those in which the object of the contract is construction of a structure fixed to the land.

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<sup>1</sup> Robert Knutson (Ed), *An Analysis of International Construction Contracts* (FIDIC, 2005), p. xiv.

<sup>2</sup> *Ibid.* p. xvi.

## 2. Contracts

Enforceable contracts are fundamentally important for commerce and international trade, as they provide the parties with the reassurance that they can plan their commercial affairs assuming that their agreement will be honoured. The modern globalised world could not function without contracts that are mutually recognised and enforceable across jurisdictions.

Construction is an important area of commerce that is based on the use of contracts. International construction is a significant element of world trade, and is often directly responsible for major improvements in infrastructure that improve the health and living standards of the people in lesser developed countries. The contractors and suppliers in large construction projects are frequently from another country to that of the site, particularly where international finance or aid is involved. It is vital in obtaining competitive prices for such projects that the contracting parties can have confidence that their contractual expectations will be fulfilled.

Contract law around the world is founded on two fundamental doctrines, operating within legal systems complying with the rule of law. The first of these, freedom of contract, sets the “ground rules” which govern the parties’ rights to enter into the contract of their choice. The second, the principle of *pacta sunt servanda*, governs the performance of a contract after it has been entered into.

## 3. Freedom of contract

The principle of freedom of contract has been entrenched in the common law for so long that it hardly needs restating. In 1875 freedom of contract was stated to be the paramount public policy in English common law: “. . . 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.”<sup>3</sup>

A more recent and succinct statement of the principle is: “Subject to public policy and statute law, parties to a contract can agree to do anything.”<sup>4</sup>

Freedom of contract is also a fundamental principle under civil law systems, e.g.: “In this jurisdiction [Philippines] 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,

<sup>3</sup> *Printing and Numeral Registering Co v. Sampson* (1875) LR 19 Eq 462, 465 (Sir George Jessel MR).

<sup>4</sup> *Abigroup Contractors Pty Ltd v. Transfield Pty Ltd & Obayashi Corporation* [1998] VSC 103 [86] (Gillard J).

and the courts will enforce them according to their terms.”<sup>5</sup> In this case the principle is enshrined in statute—Art 1306 of the Civil Code of the Philippines states: “The contracting parties may establish such stipulations, clauses, terms and conditions as they may deem convenient, provided they are not contrary to law, morals, good customs, public order or public policy.”

These statements identify two important constraints on the principle, which, it is submitted, are applicable universally: the freedom of parties to contract is subject to any constraints imposed by applicable statute law or public policy. Clearly both of these vary from jurisdiction to jurisdiction, with the result that both contract law and construction law inevitably are conditioned by the relevant jurisdiction. Whilst it may be possible for the parties to a contract to select the proper law of the contract, they have no choice over the jurisdiction of the site where the construction takes place, and any relevant statute law in that jurisdiction applicable to, e.g., property, the environment or employment will apply. Further, the heads of public policy will vary from jurisdiction to jurisdiction.

An example of the tension between the principle of freedom of contract and public policy is illustrated by the Canadian Supreme Court’s approach to the application of exclusion clauses. In the case of *Tercon Contractors Ltd v. British Columbia (Transportation and Highways)*<sup>6</sup> all of the judges agreed that, even if an exclusion clause is valid and applicable, the court may nevertheless decide to “refuse to enforce the valid exclusion clause because of the existence of an overriding public policy, proof of which lies on the party seeking to avoid enforcement of the clause, that outweighs the very strong public interest in the enforcement of contracts”.<sup>7</sup>

The somewhat nebulous concept of “public policy” has a very powerful reach in civil law systems also. In the European community, most of whose Member States have civil law legal systems, parties have a similar freedom of contract to that applying under common law systems, and are free to choose (within certain limits) the law that is to apply to their contract. Thus: “A contract shall be governed by the law chosen by the parties.”<sup>8</sup> However: “The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum.”<sup>9</sup>

#### 4. Pacta sunt servanda

The obverse of the principle of freedom of contract is articulated by the doctrine of *pacta sunt servanda*, which Latin phrase means that agreements

<sup>5</sup> *Lambert v. Fox*, 26 Phil 588 (Philippines), cited in Edgardo L Paras, *Civil Code of the Philippines Annotated*, Vol 4 (14th ed., 2000), p. 332.

<sup>6</sup> [2010] SCC 4.

<sup>7</sup> *Ibid.* [123].

<sup>8</sup> See EU Regulation 593/2008 (Rome I), Art 3.1.

<sup>9</sup> *Ibid.* Art 21.

are to be kept. It is a fundamental principle supported by the rule of both domestic and international law that the provisions of agreements properly concluded are to be observed. The principle means that once parties have exercised their freedom to enter into a contract, they have the legal rights and obligations they have agreed to, and a court or an arbitrator will enforce these. Thus, for instance, if the contracting parties have agreed that any disputes will be settled by arbitration, courts will generally stay any court proceedings commenced in breach of the agreement to arbitrate, on the principle that the parties should be kept to their agreement.

The universal nature of this principle has been stated as: “All the world’s legal systems focus on the sanctity of contracts, and damages as the remedy for breach of contract.”<sup>10</sup> The consequences are rather reassuring in the context of construction law: “. . . 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).”<sup>11</sup>

The universality of this principle across legal families is clear from its application in Shari’a law: “O you who believe! Fulfil your obligations.”<sup>12</sup>

## 5. Common law and civil law

By contrast to the common law, in a civil law system, detailed legislation endeavours to codify the law in a given area. Under civil law, there is a (more or less) comprehensive codified framework in which every construction contract is embedded, which will apply unless the parties make specific alternative provisions in their contract.

In practical terms, complete codification of a given area of the law into a contract code is not possible, as it can only take into account foreseeable situations. Furthermore, there may be gaps consciously left by the drafters, and these gaps leave scope for the application of judge-made law in the form of individual judgments.

The differences between the common law and civil law have become much less in recent years:

- The volume of legislation in common-law countries has increased substantially over recent decades. Increasingly, more of the law is explicitly stated in legislation, which either codifies or amends the previous common law, or forms new “social legislation” which achieves legislatively desirable social outcomes not addressed by the common law, e.g., the Human Rights Act 1998 (UK), which incorporates the rights and freedoms of the European Convention on

<sup>10</sup> Knutson (Ed), *op. cit.* n. 1, p. xiv.

<sup>11</sup> *Ibid.* p. xvi.

<sup>12</sup> Koran—Surah al Ma’idah (The dinner table) 1, <http://quod.lib.umich.edu/k/koran/browse.html> at 30 March 2011.

Human Rights into UK law, and the Housing Grants, Construction and Regeneration Act 1996 (UK), which introduced a statutory right to adjudication of certain construction disputes.

- Because the answer to a legal issue may not be found in the codes (which may not have been updated recently), 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, e.g., in a recent book on FIDIC contracts, the authors list a significant number of cases from the French and German civil law jurisdictions, as well as cases from various common law jurisdictions.<sup>13</sup>

Another “convergence” between the common law and civil law is that, despite the differences of form, procedure and terminology, in many factual situations, the two systems will arrive at essentially the same substantive result. For example:

- Under the common law, liquidated damages must be a genuine pre-estimation of the amount of damages that can reasonably be expected to result from the breach of contract. If a court considers that they are not a genuine pre-estimate, but are of such a magnitude as to constitute a penalty, they will be struck out and not enforced.
- Although penalties are generally acceptable under civil law (i.e., the pre-agreed amount of damages for breach of contract or non-performance can be higher than the actual damages that could reasonably be expected), section 343B of the German Civil Code authorises the courts to reduce an unreasonably high penalty amount. If penalty clauses for late performance exceed 0.2–0.3% of the contract price per day, or if there is no cap to the amount (5% is considered reasonable), the penalty clause will usually be declared void.<sup>14</sup>
- Further, the influence of international arbitration in bridging the systems of common law and civil law should not be underestimated. In an international arbitration, one of the parties may be from a common-law system whilst the other may be from a civil law jurisdiction. Different aspects of the contract and the project may be performed in a number of different jurisdictions. In a dispute determined by international arbitration, the arbitrators may not only be from different countries, but from different legal systems, and the arbitration may be held in a “neutral” country, whose laws will govern procedural aspects of the arbitration. Inevitably in such cases, common ground in relation to legal principles must be found between the potentially conflicting requirements.

<sup>13</sup> Axel-Volkmar Jaeger and Götz-Sebastian Hök, *FIDIC—A Guide for Practitioners* (2010), pp. xix–xxx.

<sup>14</sup> *Ibid.* 43.

## 6. Mandatory and non-mandatory laws

The term contract encompasses more obligations than those arising from mere agreement, summed up by the following definition: “Contract”, as distinguished from “agreement”, means the total legal obligation that results from the parties’ agreement as determined by [the Uniform Commercial Code] as supplemented by any other applicable laws.<sup>15</sup> In any jurisdiction, the total legal obligation includes not only the specific agreement made by the parties, but also the more complete set of rules comprised by the proper law of the contract. If the proper law is that of a common law jurisdiction, it will include both statute law as well as the relevant common law.

The various provisions of the relevant statutes of the proper law of the contract may be either mandatory law or alternatively may be non-mandatory law and only apply to the extent that the parties have not agreed otherwise. Mandatory law is based on public policy and as the parties cannot exclude it, it is a significant constraint on the principle of freedom of contract. This applies in both common law and civil law jurisdictions, however, the dividing line between mandatory and non-mandatory law varies from one legal jurisdiction to another. Determining whether a provision of a particular law is mandatory or non-mandatory can generally only be determined by the construction of the law itself, although some recent statutes in, e.g., France explicitly state when their rules are mandatory. Even the “rules” of construction of a document may depend on whether it is a civil law or common law jurisdiction, and specifically the particular jurisdiction. Thus, for example, the extent to which extraneous material can be taken into account in construction of a document is different in England than in France.<sup>16</sup>

Examples of mandatory laws relevant to construction law include:

- the Bribery Act 2010 (UK)<sup>17</sup>;
- liability for latent defects in many civil law countries—*garantie décennale* in France and many other countries<sup>18</sup>;
- the Australian Consumer Law, which provides remedies for loss “by” misleading or deceptive conduct, that can bypass the contractual agreement between the contracting parties.

Where a provision of a statute is non-mandatory, it may not be obvious that the agreement of the parties in a contract has replaced that particular provision. As an example, the provisions of the Civil Liability Act 2002 (Tas) which provide for proportionate liability of “concurrent wrongdoers” are

<sup>15</sup> Uniform Commercial Code (USA), §1.201 (b) (12).

<sup>16</sup> *Chartbrook Ltd v. Persimmon Homes Ltd* [2009] UKHL 38, [39] (Lord Hoffmann).

<sup>17</sup> This Act applies not only to the UK and UK companies, but the UK courts have jurisdiction if an offence is committed by someone with a close connection with the UK, or by a corporation which does business in the UK, regardless of where the alleged offence was carried out.

<sup>18</sup> Jaeger and Hök, *op. cit.* n. 13, p. 314.

non-mandatory. In a case in which a contractor wished to take advantage of the provisions of the Act, the judge found that the provisions of the contract, taken as a whole, contracted out of the proportionate liability provisions, even though the contract did not explicitly refer to the issue of proportionate liability.<sup>19</sup>

Conversely, even though the parties may be unaware of the implications, or even existence of a relevant non-mandatory law, its provisions may apply unless the parties make different provisions in their contract. In civil law jurisdictions a statute is generally intended to be a complete codification of the law on a specific issue, and civil law statutes are therefore usually more comprehensive and detailed than in common law jurisdictions. Although many of the provisions of the relevant construction law statutes may be non-mandatory, they provide a default set of rules that will apply in the absence of agreement to alternative provisions by the parties. In France and Germany for instance, the statutes provide comprehensive sets of default rules for nominate contracts (“standard” type contracts governed by particular statutory rules) that typical parties to typical contracts would opt for. In accordance with the principle of freedom of contract, the parties can elect to derogate from those rules and provide for their own choice of rules in the contract. However, if they do not do so by way of an express or implied term in the contract, the default rules will still apply, whether or not the parties are aware of them: “Thus, for example, a German based FIDIC contract will include Section 631 *et seq.* German Civil Code, whereas a French construction contract will include art. 1792 *et seq.* French Civil Code.”<sup>20</sup>

If the parties wish to confine their agreement to the written contract, they can do so by an entire agreement clause which states that the express terms are exhaustive of the rights, obligations and liabilities of each of the parties to the other.<sup>21</sup> Such a clause is of course still subject to the applicable mandatory law.

## **7. Statutory constraints on freedom of contract**

In addition to the overarching duty of all persons within a particular legal jurisdiction to obey the laws of that jurisdiction, most construction contracts include a contractual obligation to comply with the law. Thus, in one sense, 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, etc. However, the

<sup>19</sup> *Aquagenics Pty Ltd v. Break O’Day Council* [2010] TASFC 3.

<sup>20</sup> Jaeger and Hök, *op. cit.* n. 13, p. 128.

<sup>21</sup> An example of such an entire agreement term is in the UK standard form contract MF/1 General Conditions of Contract published by the Association of Consulting Engineers.

narrower constraints considered here are those which explicitly circumscribe the terms regulating the parties’ own commercial agreement.

Notwithstanding the universal acceptance and powerful reach of the principle of freedom of contract, legislatures around the world have seen the need for statutory intervention to ameliorate the potentially draconian results which can arise from *laissez-faire*. Thus, particularly in cases where a large imbalance in bargaining power is perceived, laws have been enacted to provide statutory protection to “weaker” contracting parties, or to ensure that public policy principles are not subverted by private agreement.

The following are a few examples of the subjects of laws relevant to construction in different jurisdictions which constrain the parties’ freedom of contract:

- direct payment to subcontractors by the principal<sup>22</sup>;
- increase or decrease in agreed liquidated damages<sup>23</sup>;
- allocation of risk<sup>24</sup>;
- indemnification of the contractor when a major change in economic factors existing at the time of contracting destroys the contractual equilibrium (*imprévision*)<sup>25</sup>;
- the obligation to act in good faith<sup>26</sup>;
- legislation dealing with unfair contract conditions<sup>27</sup>;
- rules relating to when property in goods passes.

In addition to these types of legislative constraints on the parties’ freedom of contract, there are usually statutes that impact on the extent and manner in which courts or an arbitrator will provide a remedy for breach of contract. This “law of the forum” in which a dispute is litigated or arbitrated may well be different to the proper law of the contract, and this could result in potential conflicts of laws issues in a construction contract.

## 8. Proper law of the contract

The principle of freedom of contract generally means that the contracting parties have the freedom to determine the proper law of the contract, subject to any applicable mandatory law. The parties can make an explicit

<sup>22</sup> E.g., Building and Construction Industry Security of Payment Act 2002 (Vic), s. 31.

<sup>23</sup> E.g., under Swedish law a liquidated damages clause may be modified to increase or decrease the amount payable: *per* Samuelson & Lennart Iwar, “Sweden” in Knutson (Ed), *op. cit.* n. 1, pp. 277, 308.

<sup>24</sup> E.g., Wolfgang Rosener and Gerhard Dorner, “The Shifting of Risk concerning Errors etc. in Site Data Delivered by the Employer as Intended under Sub-Clauses 4.10 with 5.1 EPCT [FIDIC Contract for EPC/Turnkey Projects 1999] would as such be Null and Void under §9 AGBG [General Terms and Conditions Act (Germany)]”, “Germany” in Knutson (Ed), *op. cit.* n. 1, pp. 87, 110.

<sup>25</sup> Marc Frilet, “France” in Knutson (Ed), *op. cit.* n. 1, pp. 79, 83.

<sup>26</sup> E.g., French Civil Code, Art 1134.3.

<sup>27</sup> E.g., Unfair Contract Terms Act 1977 (UK); Contracts Review Act 1980 (NSW).

choice of the proper law of the contract by means of a choice of law clause in their contract. Where they do so, this is generally unproblematic, providing it is not in conflict with the mandatory law of the forum. A court will usually apply the parties' explicit choice of law in the event that a dispute is referred to it.

The principle of party autonomy to determine the law applicable to a contract is widely upheld, and many international agreements on choice of law do not constrain the choice of a legal system to one that has a link to the contract. For example, neither Rome I<sup>28</sup> nor the Inter-American Convention on the Law Applicable to International Contracts<sup>29</sup> requires such a link.

However, where the parties have made no explicit choice (perhaps because they cannot agree on the appropriate law as each prefers the laws of its own legal jurisdiction), and there is more than one legal jurisdiction whose laws may govern the contract, there is a conflict of laws. In such a case the judge or arbitrator adjudicating a dispute must determine the proper law of the contract by the appropriate conflict of laws rules. The application of such conflict of laws rules in any dispute situation may involve a complicated interaction between the facts of the case, and the procedural law and substantive law of different legal jurisdictions, where there is no unanimity of conflict of laws rules. This complexity highlights that a carefully thought out and appropriate choice of law clause should be essential in any international construction contract.

In some cases where the parties have not included a choice of law clause in the contract, the arbitrator has determined that, as the subject-matter of the contract does not have sufficiently close connections with any particular legal jurisdiction, the proper law of the contract is the international *lex mercatoria*.<sup>30</sup> It is worth noting that the use of such a transnational or non-state body of law is specifically provided for in Rome I, which provides in the Preamble: "This Regulation does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention."

## 9. *Lex mercatoria*

By its nature the *lex mercatoria* is not well defined, and there is no universally agreed definition as to what its content is. One contemporary statement of the modern content of the *lex mercatoria* is in the Unidroit Principles of International Commercial Contracts (UP) promulgated by the International Institute for the Unification of Private Law (Unidroit).

<sup>28</sup> Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law applicable to Contractual Obligations.

<sup>29</sup> <http://www.jurisint.org/doc/html/ins/en/2000/2000jiinsen122.html> at 24 September 2010.

<sup>30</sup> E.g., Arbitral Award 9875 ICC (1999): <http://www.unilex.info/case.cfm?pid=2&do=case&id=675&step=Abstract> at 31 March 2011.

The UP are a set of principles which apply to the entry into, execution and termination of commercial contracts. They have evolved from considerable work by lawyers from many countries and from all the major legal systems. The UP are intended to be a modern comprehensive statement of the law applicable to international contracts in which the rules are not derived from any particular national law, but nevertheless embody contractual principles which are or can be recognised by the laws of any country, whether those laws are based on the common law or the civil law.<sup>31</sup> The 2004 edition contains 10 clauses with 184 sub-clauses.

The possible application of the UP is stated in the Preamble:

“These Principles set forth general rules for international commercial contracts.

They shall be applied when the parties have agreed that their contract be governed by them.

They may be applied when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like.

They may be applied when the parties have not chosen any law to govern their contract.

They may be used to interpret or supplement international uniform law instruments.

They may be used to interpret or supplement domestic law. They may serve as a model for national and international legislators.”<sup>32</sup>

As a set of principles, the UP are complementary to and supportive of the specific contract which applies to a given situation, in a similar way that the common law, civil law or statute law applies to regulate the entry into, performance and termination of the contract in the given legal system. In addition, the UP incorporate the rules to be followed in construing the contract, as well as the UP themselves. However, because the UP are transnational, they do not and cannot have the legal force of a national legal system which is based on government power. Any force that the UP have can only be derived from the parties themselves in their contract, relying on the principle of freedom of contract.

It is suggested that, to the extent reasonably possible, the UP represent a set of overarching principles which are appropriate to regulate an international construction contract in a manner which is:

- fair to all parties;
- straightforward to apply;
- predictable in outcome;
- independent of a particular national legal system;
- generally consistent with the contract law and principles in any country (but with some notable exceptions).

The advantages of these features are self-evident as conducive to the promotion of international trade and the avoidance or efficient resolution

<sup>31</sup> <http://www.unidroit.org> accessed 30 March 2011.

<sup>32</sup> <http://www.unidroit.org/english/principles/contracts/main.htm> at 2 September 2010.

of contractual disputes. In connection with drafting international construction contracts, it has been suggested that: “It is helpful to use international soft law, such as the Unidroit Principles of International Commercial Contracts.”<sup>33</sup>

There is considerable international jurisprudence on the UP: as at 1 September 2010, there were 84 court citations (27 from common law countries, including 12 from Australia), and 156 international arbitration awards in English which referred to the UP, listed on the Unilex website.<sup>34</sup> It is worth noting that of these 240 reported decisions, in only 11 cases the parties had expressly or impliedly chosen the UP or international law as the law of the contract, whereas in 29 cases the judge or arbitrator found that the UP was the applicable law to be applied. In a further 14 cases, the UP was referred to as supplementary to national law.

However, it is clear from the cases that the UP are not totally consistent with the law in all jurisdictions. They incorporate some civil law concepts that are inconsistent with English common law, particularly in relation to the admissibility of evidence of pre-contract negotiations in determining the intentions of the parties.

It is suggested that significant progress could be made towards a common law of construction contracts if parties chose the UP as the law of the contract, instead of the law of a specific country. Such a choice would mesh well with an international construction contract such as FIDIC, in which any disputes were to be resolved by international arbitration.

The UP are directly applicable to an international contract where, exercising their freedom of contract, the parties have expressly referred to the UP. In this situation, they will apply generally to the extent and in the manner that the parties have provided for in their contract. This statement is subject to the two exceptions to freedom of contract discussed above. Thus, for example, the parties could explicitly nominate the UP as the system of law to govern the contract, to the exclusion of any national law that would otherwise apply based on the application of the well-established principles of conflict of laws. Any dispute arising under such a contract could, in principle, be resolved by the award of an arbitral tribunal sitting anywhere in the world. If, as Unidroit suggests, the UP are sufficiently developed as a *lex mercatoria*, an arbitral tribunal would not need to refer to any national law to determine the meaning of the contract, and the law of the contract would be the UP. In such a situation, inconsistencies with national law may well be moot.

## 10. FIDIC contracts—an application of international construction law

Fédération Internationale des Ingénieurs-Conseils (FIDIC) produces a suite of construction contracts that are probably the most widely used around the

<sup>33</sup> Jaeger and Hök, *op. cit.* n. 13, p. 132.

<sup>34</sup> <http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=14311> at 31 March 2011.

world for international construction. The current FIDIC suite contains four major construction contracts,<sup>35</sup> as well as a short form contract for smaller works,<sup>36</sup> a specialised contract for dredging works<sup>37</sup> and a “back-to-back” subcontract.<sup>38</sup>

The FIDIC contracts clearly have a common law “pedigree”,<sup>39</sup> but are intended to be (and are) used where the law of the contract is a civil law jurisdiction. The use of FIDIC contracts across jurisdictions is of particular interest in the context of this paper, as it presents a well documented “case study” of “*vive la différence*”. The book by Jaeger & Hök<sup>40</sup> is especially valuable for its commentary on different philosophical approaches to drafting international contracts, and how the FIDIC contracts are applied in civil law jurisdictions. The book edited by Knutson<sup>41</sup> contains chapters on the use of FIDIC contracts in 13 different countries—four common law,<sup>42</sup> eight civil law<sup>43</sup> and one Shari’a.<sup>44</sup> The commentaries in this book clearly underscore the differences between legal jurisdictions in the use of FIDIC contracts, leading one to question whether there could be any such concept as a “a common law of construction contracts”.

However, notwithstanding the common law genesis of FIDIC contracts, and the significant differences in a number of legal theories, the following observation from the perspective of German law suggests there may be substantive common ground:

“The legal background of the “*Werkvertrag*” as contained in the German Civil Code does not lead to a completely different structure of a construction contract compared to the FIDIC-new series model forms, however, some features of the FIDIC-new series, which stem from English construction law, are either unknown (e.g., the Engineer) or differently regulated (e.g., provisional and final acceptance of the works) in German construction law. Apart from these two major differences both the structure and the system of a construction contract of CONS [Red Book] and P & DB [Yellow Book] seem to lead to both in similar legal principles and sometimes even the same results (e.g., *force majeure*, risk and responsibility, damages and compensation.”<sup>45</sup>

<sup>35</sup> Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer (“Red Book”); Conditions of Contract for Plant and Design-Build (“Yellow Book”); Conditions of Contract for EPC/Turnkey Projects (“Silver Book”); Conditions of Contract for Design, Build and Operate Projects (2007) (“Gold Book”).

<sup>36</sup> Short Form of Contract (1999) (“Green Book”).

<sup>37</sup> Form of Contract for Dredging and Reclamation Works (2006).

<sup>38</sup> Conditions of Subcontract for Construction for Building and Engineering Works Designed by the Employer (Test Edition 2009).

<sup>39</sup> Ellis Baker and others, *FIDIC Contracts: Law and Practice* (2009), p. 4.

<sup>40</sup> Jaeger & Hök, *op. cit.* n. 13.

<sup>41</sup> Knutson (Ed), *op. cit.* n. 1.

<sup>42</sup> England, India, Malaysia and USA.

<sup>43</sup> Brazil, Egypt, France, Germany, Japan, Netherlands, Sweden and Switzerland.

<sup>44</sup> Saudi Arabia.

<sup>45</sup> Wolfgang Rosener and Gerhard Dorner, “Germany” in Knutson (Ed), *op. cit.* n. 1, pp. 87, 125.

## 11. Conclusions

In all jurisdictions, statute law related to construction contracts provides significant constraint on the parties' freedom of contract (as does common law in the relevant jurisdictions). That statute law varies from jurisdiction to jurisdiction in many and various ways. Not surprisingly, there are differences in terminology and in legal principle that make it difficult to discern even broad principles of a common construction law. Nevertheless, the principles of freedom of contract and *pacta sunt servanda* form the basis of construction law around the world, and ensure that there is a thriving international construction industry. Construction contracts can be executed in the knowledge that, notwithstanding local law differences, there are appropriate methods of dispute resolution, broad agreement on what constitutes a just outcome in most situations and international norms that ensure remedies can be realised. Knowledge and analysis of the differences may well stimulate desirable improvements in local law and further convergence in approaches between jurisdictions.

Contracting parties can use the principle of freedom of contract to move closer to a common construction law, particularly by the use of the Unidroit Principles as the governing law of the contract, in conjunction with construction contracts written for international use such as FIDIC. There is ample precedent for such an approach to be supported by international arbitration tribunals.

Perhaps the clearest pointer to what there is of a common construction law is the following statement on the fundamental importance of the words of the contract itself, vindicating the twin principles of freedom of contract and *pacta sunt servanda*: "Finally, deep in the night, with no one else around, most lawyers in their heart of hearts will admit—the contract usually decides the issues, despite what the law is."<sup>46</sup>

<sup>46</sup> Knutson (Ed), *op. cit.* n. 1, p. xix.