INTRODUCTION

The strength of *The International Construction Law Review* is its focus on the international aspects of construction law and its unique challenges and opportunities. This issue of the ICLR discusses these questions of internationalisation and provides valuable comparative analyses which reveal how the law relating to construction continues to evolve over time and across jurisdictions. In the continued uncertainty of the Covid-19 era, the articles of Part 1 2021 bring to the forefront key, emerging issues in an increasingly relevant area.

We begin this Part with Jennifer Charlson and Rebecca Dickson's "Covid-19 and Construction Law: Comparing the UK and Australian Response". Charlson and Dickson embark on a timely, comparative analysis of the impact of the evolving Covid-19 pandemic on construction law and projects, following on from James Pickavance's discussion in Part 4 of the ICLR 2020. The authors' comparison of the UK and Australia leads to the conclusion that the impact of government responses to Covid-19 on the construction industry have been similarly profound across both jurisdictions albeit by way of different methods. In the UK, most restrictions have been delivered through health protection legislation, meaning impacts on the construction industry have been indirect and governed by separate guidelines. There is also a nascent body of case law in the UK Technology and Construction Court which reveals the desire of judges to expedite hearings despite difficulties with Covid-19. In Australia, each state and territory has responded to the pandemic with their own legislative powers creating a complex regulatory framework. There have also been several guidelines issued by key regulatory bodies, the uncertain binding nature of which is discussed by the authors. The article delves additionally into issues of contract and the likely difficulties with accessing *force majeure* or the doctrine of frustration, a topic also addressed by Christopher R Seppälä and Arthur Moreau in the French Correspondent's Report of this Part. Despite these challenges and future uncertainties, Charlson and Dickson argue that the construction industry in both countries has demonstrated that it is well placed to adapt to the ongoing changes in health and security requirements.

We continue with "Fitness for Purpose v Reasonable Skill and Care: How do English Principles Regarding Standards of Care Fit in Civil Law Jurisdictions?" by Ulrich Helm, George Fisher, Patricia Ugalde Revilla and Marcelo Richter. The authors examine the dichotomy between fitness for purpose and reasonable skill and care obligations in English law. They then assess the varying degrees to which this distinction is present, and how it is

applied in the civil law jurisdictions of France, Brazil, Germany and Spain. This is an important endeavour because defining the standard of care, and therefore the obligations with respect to performance, is a central concern for parties agreeing to a contract. Further, as civil and common law are both frequently chosen by the parties as the governing law in international construction contracts, it is interesting to compare the approach taken in civil and in common law jurisdictions to the interpretation of fitness for purpose requirements/obligations. The authors' analysis of the civil jurisdictions reveals the existence of a comparable distinction between the duty to achieve a specific result and the duty to make best efforts to perform one's obligation in each civil jurisdiction, with variations as to definitions and interpretations of standards such as "fit for purpose". The authors view the degree to which parties have the freedom to draw up their own contracts as the main difference between English law and the civil law Codes. Finally, the article references this distinction between obligations as existing, notably, within the UNIDROIT Principles, a nod to the growing internationalisation of construction law discussed in the next article by Donald Charrett.

In this article, entitled "*Lex Constructionis* – or My Country's Rules", Donald Charrett supports and further defines the scope of *lex constructionis* as a supranational, universally accepted set of principles which govern construction law internationally. The article situates this concept of an international law of construction within existing laws and mechanisms which already work to promote greater uniformity in construction contracts across jurisdictions. This degree of uniformity is a worthwhile pursuit, particularly considering the impact of Covid-19 on construction contracts, an issue discussed by Charlson and Dickson earlier in Part 1. Such mechanisms include the widely accepted standard form contracts from the Fédération Internationale des Ingénieurs-Conseils (FIDIC), the increasing use of arbitration to resolve international construction disputes, and modern expressions of the ancient body of *lex mercatoria* which can be applied to international construction contracts, namely the UNIDROIT Principles of International Commercial Contracts and the TransLex Principles. Charrett provides a valuable new contribution to the framing of *lex constructionis* by proposing 20 principles which cover scope, risk, time, cost, quality and resolving disputes. These principles touch upon key issues in modern construction law including the protection of workers' health and safety, the environment, and the rights of third parties.

Next, we have the second instalment of Tony Marshall's two-part article, "The Prevention Principle and Making the Contractor Pay for Employer Delay: Is English Law Departing from its Roots?". In Part 4 of the ICLR 2020 ([2020] ICLR 325), Marshall examined in depth the historical English and Australian approaches to the prevention principle in which an employer

cannot claim liquidated damages for a delay they themselves have caused. In this Part we pick up where we left off, with a critical discussion of the Australian *Gaymark* judgment which considered the extension mechanism to circumvent the prevention principle, and the notice-as-condition-precedent requirement. The article provides an interesting and thorough analysis of the cases since *Gaymark* and discusses the extent to which they signal a departure from the previous position held by English authorities. Like Helm, Fisher, Ugalde Revilla and Richter's article in this Part, this article also provides a comparative analysis of the position in the civil law jurisdictions of France, Germany and Switzerland. Marshall further engages with recent commentary on the prevention principle by Doug Jones AO, and Max Twivy's article following the English decision of *North Midland v Cyden Homes* in Part 3 of the ICLR 2019 ([2019] ICLR 375), creating a comprehensive overview and an assessment of the modern approach.

We are also delighted to have two reports prepared by our international correspondents. The first Correspondent's Report, from France, is authored by Christopher Seppälä and Arthur Moreau and examines the position of French courts on three issues relating to international arbitration and commercial contracts. The first is an important confirmation by the French courts, that where parties have not agreed on a national law to govern an international contract, the arbitral tribunal could apply the UNIDROIT Principles. Second, in the context of the Covid-19 pandemic, Seppälä and Moreau address the decision by the Paris Commercial Court to relieve buyers of their obligation by finding that Covid-19 satisfied *force majeure* clauses in the relevant contracts. They note that these are the first proceedings in France on this matter and are an interesting development in light of the uncertainty regarding *force majeure* and frustration discussed by Dickson and Charlson. Finally, the authors examine the ongoing question of which law governs an arbitration agreement, looking at the conflicting approaches taken by the French and English courts in the 2020 case of *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2020] EWCA Civ 6; [2020] 1 Lloyd's Rep 269.

Our final Correspondent's Report from Stéphanie van Gulijk arrives from the Netherlands and is entitled "The Circular Economy: Adaptive Law for Dutch Circular and Safe Building". A circular economy is centred around optimising the use of materials in the production process. Van Gulijk examines the increasing focus in Europe on recycling and waste management in construction, an important initiative not only for environmental protection but also the sustainability and efficiency of the construction industry as a growing, high-impact sector. In the context of these important discussions, the report recognises the challenges of design and ownership, and the demand for innovative business models facing the Dutch construction industry as it incorporates the values and practices of the circular economy. Stéphanie van Gulijk offers suggestions

to revitalise the existing legal framework and facilitate Dutch efforts to align with broader European goals for sustainable construction projects. Notably, she argues for a greater focus on digitalisation for the exchange of data, improved partnership in construction projects, and greater public sector intervention.

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