



International construction law as a ‘Private Legal System’: emerging from the ‘primordial soup’ in the search for coherence

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1. What is ‘international construction law’?

This seems an odd question to ask.

To the observer, construction law appears to be a highly developed and active area of practice around the world. There are now Societies of Construction Law in more than a dozen regions, hundreds of texts and articles have been written on the subject¹, and many thousands of cases and statutes have emanated from courts and legislatures in relation to construction projects. Each year, millions of contracts – formal and informal – are entered into for construction work, and, as a global community, we collectively engage in billions of interactions with the built environment.

The prodigious activity of the industry and its lawyers is, therefore, undeniable. However, as is noted by Julian Bailey at the outset of his magisterial text on the subject, the ‘term „construction law” admits

¹ See, eg, the listings at http://unimelb.libguides.com/construction_law1.

of no easy definition'.² Whilst he goes on to offer that it 'is the law that applies to and in respect of the undertaking of construction and engineering projects', Bailey recognizes that this deceptively-simple conception covers a diverse and complicated legal matrix. It encompasses specialist court lists, legislation and legal practice and 'hegemonic' industry standard forms.³

To these key, documented manifestations of construction law may be added less visible, yet instrumental, factors such as the expectations of financiers, ratings agencies and insurers, and well-established (yet, often unstated or conflicting) understandings within the construction professions about how work is to be planned and executed.

As a result, the description of Professor Philip Bruner remains apt in 2015:

'Construction law today is a primordial soup in the „melting pot” of the law – a thick broth consisting of centuries-old legal theories fortified by statutory law and seasoned by contextual legal innovations reflecting the broad factual „realities” of the modern construction process⁴.

This paper peers into this broth, posing the dual-limbed question whether greater coherence in international construction law is desirable and possible. It answers 'yes' to both elements:

- *Section 2* argues that disparity in approaches to the legal regulation of construction (that is, differences between jurisdictions or disconnects between law and sound industry practice) tends inevitably towards inefficient allocation of resources, whether by legislators or construction organisations.
- *Section 3* explores the route to achieving greater consensus suggested by scholarship which has examined the way in which transnational commercial communities foster 'private legal systems' (PLSs). These promote opting out from generally-applicable regulatory frameworks in favour of enforcing rights and resolving disputes within that community. Ways in which international construction practice routinely exhibits PLS-type features are identified.

This leads to the paper's key proposal (*section 4*). It is that explicit recognition of an already-extant PLS in international construction may well assist in building a more coherent framework for international construction law. In turn, such a framework could allow a more principled delineation of the proper limits of state-based regulation (whether via legislation or public courts) upon this vital area of commercial endeavour.

2. Is greater coherence in international construction law desirable?

As a general principle, the virtue of coherence in the law – or, put another way, the reduction in disparity of approaches to like issues by different legal systems – seems self-evident. Indeed, appellate courts increasingly are recognising such desirability⁵, and organisations such as UNCITRAL hold 'harmonisation of applicable norms and standards [as their] very *raison d'être*, ... recogni[sing] the incentive to international participation where businesses know what to expect in overseas markets⁶.'

2 Julian Bailey, *Construction Law* (Informa Law, 2011), 1.

3 *Ibid.*, 3.

4 Philip L Bruner, „The Historical Emergence of Construction Law” (2007) 34 *William Mitchell Law Review* 1, 13-14. See, similarly, the 'morass' described by Lawrence C Mellon in „What We Teach When We Teach Construction Law” (2009) 29(3) *The Construction Lawyer* 8.

5 See, eg, Elise Bant, „Statute and Common Law: Interaction and Influence in Light of the Principle of Coherence” (2015) 38 *University of NSW Law Journal* 362.

6 Renaud Soriel, „Preface” in Roberto Hernández García (ed), *International Public Procurement: A Guide to Best Practice* (Globe Business Publishing Ltd, 2009) 5.

Construction law commentary is replete with criticisms of judicial rulings and (perhaps, more prevalent in recent years) legislation which display such disparity⁷. Australia has been particularly fertile ground for such criticism due to its federal constitutional arrangements, which mean that many core construction law issues fall within the legislative purview of the eight states and territories and therefore, naturally, are subject to parochial influences⁸. This has led, for example, to there being eight different legislative approaches to 'security of payment' in the industry.⁹

The tendency towards legislative parochialism seems inevitable in geographically-constrained democratic systems: after all, lawmakers' primary responsibility is to their constituents. However, from a cross-border commercial perspective, the resultant inconsistency of approach is anathema. For example, a 2014 research report by the Society of Construction Law Australia observed that there 'is more or less universal support... that there should be a single set of rules for adjudication in the construction industry'¹⁰. More forthrightly, Julian Bailey has termed the situation 'exasperating', leading him to query the continuing need for 'separate parliaments, courts and executive governments for each and every jurisdiction'¹¹.

In another area of legislative intervention in Australia, 'proportionate liability', there is disparity not only as between jurisdictions but also because its underlying intent is to overturn a key tenet of contract law: joint and several liability. As noted by international construction lawyer Andrew Stephenson, the ability to assume the prevalence of joint and several liability 'allows debt, equity and government to be satisfied that the joint promisors... have the capacity to deliver on the promises they made or to pay damages in the event that they fail to so deliver'¹². When the reforms were first brought in on a widespread basis, Stephenson predicted that, given the regimes' 'uncertainty and the futility of bargaining for contractual allocation of risk, it is likely that well informed parties will seek to avoid the operation of apportionment legislation'¹³.

The proposition that parties might go out of their way not to comply with a legal requirement may seem radical or revolutionary in some quarters. Yet, according to a scholar of the 'contract minimalist' school, Dr Jonathan Morgan, this behaviour is *de rigueur* within the commercial community. His thesis includes that, where contract law seeks to pursue goals outside of 'provid[ing] workable rules for business-to-business transactions[,]... [s]ophisticated commercial parties will contract out of undesirable rules or exit the legal system altogether.'¹⁴

The past decade has borne out these predictions in respect of proportionate liability. It has seen many attempts made – including at the highest level of Australia-wide reform, the Standing Council

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- 7 By way of representative sample only, see Christopher Seppälä, „How Not to Interpret the FIDIC Disputes Clause: The Singapore Court of Appeal Judgment in Persero” (2012) *International Construction Law Review* 4; Jonathan Kay Hoyle, „Enforcing a Foreign Arbitral Award: Not as Straightforward as it Seems?” *Bar News (New South Wales)*, Summer 2011-12, 38 (on *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 282 ALR 717); Ian Duncan Wallace, „Prevention and Liquidated Damages: A Theory Too Far?” (2002) 18 *Building and Construction Law* 82 (on *Gaymark Investments Pty Ltd v Walter Construction Group Ltd* [1999] NTSC 143).
- 8 Donald Charrett and Matthew Bell, „Statutory Intervention into the Common Construction Law of Australia – Progress or Regress?” (2011) 137 *Australian Construction Law Newsletter* 6, 7.
- 9 See, eg. Jeremy Coggins and Steve Donohoe, „A Comparative Overview of International Construction Industry Payment Legislation, and Observations from the Australian Experience” [2012] *International Construction Law Review* 195.
- 10 Society of Construction Law Australia, „Report on Security of Payment and Adjudication in the Australian Construction Industry” (2014) 21. See, similarly, Bailey, above n 2, 9.
- 11 Bailey, above n 2, 9.
- 12 Andrew Stephenson, „Proportional Liability in Australia – the Death of Certainty in Risk Allocation in Contract” [2005] *International Construction Law Review* 64, 64-5.
- 13 *Ibid*, 90.
- 14 Jonathan Morgan, *Contract Law Minimalism: A Formalist Restatement of Commercial Contract Law* (Cambridge University Press, 2013) 89.

of Law and Justice (SCLJ) – to enact harmonized legislation. These have, to date, borne little fruit. It seems clear that disagreement over the ability to contract out of the legislation remains a significant stumbling block, and that the views of construction lawyers on this point are at odds with the broader commercial law community. Indeed, in its submission to the SCLJ, the Law Council of Australia (representing 56,000 lawyers) noted that its Infrastructure and Construction Law Committee was one of two constituent bodies which did not endorse the prohibition upon contracting out¹⁵.

The Australian experience with security of payment and proportionate liability is, it is submitted, emblematic of the reaction of the international construction law community to lack of coherence. As has been noted above, not only is it criticized as leading to inefficiency, it prompts reactions ranging from seeking to contract out of the generally-applicable legal regime (Stephenson) through to challenging the very existence of parochial institutions (Bailey). This willingness to set aside localized norms has resonance with PLS-based structures which have been found to exist in other transnational commercial communities.

3. Does international construction operate as a Private Legal System?

3.1 What are PLSs?

Over the past quarter-century¹⁶, a number of scholars, including Professor Lisa Bernstein, have identified and analysed the manner in which certain industries have ‘systematically rejected state-created law. In its place, the sophisticated traders who dominate the industry have developed an elaborate, internal set of rules, complete with distinctive institutions and sanctions, to handle disputes among industry members’¹⁷.

These PLSs are based upon the relevant commercial community favouring relationship-based, internalised modes of commercial interaction (including contracting and dispute resolution) which are based on a shared cultural understanding. The manifestations of these preferences are as varied as the commercial endeavours they reflect, but a sample from the literature includes:

- *Widespread (if not, close to universal) use of standard forms of contract which are bespoke to the industry*: these privilege clarity over complexity so as to avoid misunderstanding and promote certainty of outcomes¹⁸, and tend towards under-compensation (as compared to general law entitlements) for default¹⁹.
- *Fostering of a ‘club’ mentality amongst members of the community*: information is shared for mutual benefit and ‘non-legal sanctions’ are deployed to dissuade – and internally deal with – aberrant behaviours such as revelation of commercially-sensitive information²⁰.

15 Law Council of Australia, „Uniform Proportionate Liability Provisions” (2012) 4.

16 See, eg, Lisa Bernstein, „Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry” (1992) 21 *Journal of Legal Studies* 115; Lisa Bernstein, „Private Commercial Law in the Cotton Industry: Creating Cooperation through Rules, Norms and Institutions” (2001) 99(7) *Michigan Law Review* 1724; R Ellickson, *Order without Law: How Neighbours Settle Disputes* (Harvard University Press, 1991); Barak D Richman, „Community Enforcement of Informal Contracts: Jewish Diamond Merchants in New York” (2002); Barak D Richman, „Firms, Courts and Reputational Mechanisms: Towards a Positive Theory of Private Ordering” (2004) 104 *Columbia Law Review* 2328; R E Speidel, „Court-Imposed Price Adjustments under Long-Term Supply Contracts” (1981) 76 *Northwestern University Law Review* 369; B Uzzi, „Social Structure and Competition in Interfirm Networks” (1997) 42 *Administrative Science Quarterly* 42. and, generally, Morgan, above n 14, ch 5.

17 Bernstein, above n 16 (“Opting out...”), 115.

18 Bernstein, above n 16 (“Private Commercial Law...”), 1742; Bernstein, above n 16 (“Opting out...”), 121-124.

19 For example, enforcing liquidated damages which are substantially lower than the anticipated loss, and excluding rights to ‘consequential loss’. Bernstein, above n 16 (“Private Commercial Law...”), 1733.

20 For example, Bernstein has traced the way in which, as the forum for cotton trading has moved from a single street in Memphis to the global village, the community has actively fostered information sharing through the trade press, functions and so forth, and favoured contractual mechanisms that promote performance rather than compensation: *ibid*, 1750 ff. See, similarly, Bernstein, above n 16 (“Opting out...”), 119-121 and 138-145 (on the use of reputational bonds).

- *Keeping dispute resolution within the 'club'*: this is primarily by way of expedited arbitration according to bespoke rules, with an emphasis on secrecy and there being no right of appeal to external courts on substantive grounds²¹.

Bernstein has proposed a number of ways in which the use of PLSs offers benefits to the commercial communities which promulgate them. These involve the promotion of transactional efficiency, cooperation and performance, resulting in reductions in both the avoidable costs arising from disputes and the disparities in bargaining position which tend towards one-sided and therefore fraught commercial relationships²². She has also proposed that an understanding of how PLSs 'create value for transactors may help identify other industries and other contexts in which private institutions can play a positive role in supporting trade'²³.

3.2 A PLS in international construction?

Taking up Bernstein's invitation, this paper proposes that the law pertaining to international construction procurement represents a field which is ripe for analysis through a PLS lens. This is because experienced participants – whether lawyers, developers, contractors, consultants, financiers or otherwise – appear routinely to demonstrate preferences akin to those of recognized PLSs.

Broadly speaking, members of the international construction community tend to be heavy users of industry-tailored standard forms of contract,²⁴ and strong advocates for their norm-setting influence²⁵. They also favour private dispute resolution through mediation, dispute boards and arbitration²⁶, and, conversely, are wary of local courts (other than specialist, expert lists such as the English Technology and Construction Court)²⁷. Moreover, as was described above, the community is critical of parochial legislation which is seen unjustifiably to intervene into parties' freedom of contract.

In addition, the community actively supports institutions which foster the growth and increased coherence of construction law across borders – operating, arguably, as a transnational 'club' of the type Bernstein has identified. Manifestations of this include:

- inter-linked Societies of Construction Law, along with kindred organisations such as the International Construction Projects Committee of the International Bar Association (which has more than 1000 members) and the American and Canadian Colleges of Construction Law;
- Masters-level programmes in construction law, at King's College London, Melbourne Law School, The University of Stuttgart and elsewhere²⁸, the mainstay of which is practitioner-led (and -focused)

21 Bernstein, above n 16 ("Opting out..."), 124-130; ("Private Commercial Law..."), 1728-1739.

22 Bernstein, above n 16 ("Opting out..."), 132 ff; ("Private Commercial Law..."), 1788-1790.

23 Bernstein, above n 16 ("Private Commercial Law..."), 1725.

24 See, eg, John Sharkey et al, „Standard Forms of Contract in the Australian Construction Industry: Research Report” (2014) and Surajeet Chakravarty and W Bentley MacLeod, „On the Efficiency of Standard Form Contracts: The Case of Construction” (August 2004): USC CLEO Research Paper No. C04-17.

25 Indeed, in the view of Professor John Uff QC (aligning closely with the minimalist school of contract – see Morgan, above n 14, 207-8), courts ought to have no role in interpreting these forms, as 'the dispute is private between the parties involved': „Origin and Development of Construction Contracts” in John Uff and Phillip Capper (eds), *Construction Contract Policy: Improved Procedures and Practice* (Centre of Construction Law and Management, King's College London, 1989), 9.

26 See, eg, Sundaresh Menon, „Origins and Aspirations: Developing an International Construction Court” [2014] *International Construction Law Review* 341, 343-4.

27 See, eg, Peter Wood and Owen Cooper, „Involvement of National Courts – Anaconda v Fluor, a Cautionary Tale” (2006) 2 *Asian International Arbitration Journal* 163.

28 Matthew Bell and Paula Gerber, „Passing on the Torch of Learning in the 'Primordial Soup' of Construction Law: Reflections from the Construction Law Academic Forum, 2012” (2012) 7(3) *Construction Law International* 26.

curriculum development and teaching;²⁹ and

- academically-rigorous, practitioner-focused journals dealing with trans-border contracting, such as the *International Construction Law Review*, *Construction Law Journal*, *International Journal of Law in the Built Environment* and *Construction Law International*.

Thus, a strong case can be made that, at least, a ‘virtual PLS’ exists within the international construction law community. That said, these tendencies are by no means universally displayed. Indeed, it is likely the case that many construction lawyers are content to deal with their clients’ concerns on their face in accordance with the local laws, without giving a second thought to their being participants in a transnational community. Therefore, detailed empirical research is warranted to confirm whether an international construction law community can in fact be said to exist³⁰, and – presuming, as is proposed above, that it does – the extent to which its members subscribe to PLS-type preferences³¹.

4. Is the quest for a construction law PLS worthwhile?

Morgan has noted that, for those schooled in the Birksian view that categorization and compartmentalization of legal norms is not only possible but essential³², it is ‘a serious embarrassment’ that many highly-developed aspects of commercial law sit ‘beyond the pale of proper legal understanding’³³. A more coherent understanding of what construction law is – and is not – would therefore assist in its recognition within traditional academic and legal practice structures.

That said, and as was foreshadowed above, the real benefit of greater coherence lies in its reduction of needless inefficiency. Every day, around the world, construction lawyers and their clients (and, indeed, those who are affected by construction but unable to engage a lawyer) make choices about where to allocate scarce legal resources. These decisions are, like their underlying construction activities, infinitely varied. They include whether to review and negotiate a subcontract put forward by a main contractor, pursue a claim rejected by a superintendent, or commence proceedings alleging breach of a legal right. Similarly, legislators ponder which policy goals to pursue within a busy political cycle, and court administrators determine how judges manage case lists (an especially fraught issue in construction trials given their notorious factual complexity)³⁴.

None of these decisions is without cost. Parties – whether individuals or companies – can be bankrupted by the costs of litigating even where they have a good case, or suffer financial ruin by not pursuing their legal rights. They might spend substantial amounts on contract reviews even though, in most business dealings, the ‘significance accorded to contract drafting is typically small [and the] effect of

29 Indeed, the King’s College programme was established on the basis that it was ‘entirely self-financing through generous donations from business and the professions and through fees charged for courses’: Sir Nicholas Lyell, „Construction Contract Policy: Keynote Address” in Uff and Capper, above n 25, 4. See, generally, Matthew Bell, Paula Gerber and Phil Evans, „Building Bridges in the Classroom: A View from the Academy” (2014) 30 *Building and Construction Law Journal* 24.

30 Few detailed studies have previously been undertaken exploring specifically the extent to which construction law practice reflects the broader interface between commerce and private law. Notable first steps towards such scholarship include Richard Lewis, „Contracts between Businessmen: Reform of the Law of Firm Offers and an Empirical Study of Tendering Practices in the Building Industry” (1982) 9 *Journal of Law and Society* 153.

31 This suggestion is made with the exhortation of Professor Justin Sweet to undertake such research in construction law very much in mind, along with the challenges he identified: „Construction Law: The Need for Empirical Research” *Construction Litigation Reporter*, January 2002, 2.

32 See, especially, P B H Birks (ed), *English Private Law* (Oxford University Press, 2000); P B H Birks (ed), *The Classification of Obligations* (Clarendon Press, 1997).

33 Morgan, above n 14, 35.

34 See, eg, Hon David Byrne, „The Future of Litigation of Construction Disputes” (2007) 23 *Building and Construction Law* 398, 399; Bruner, above n 4, 17.

any „written deal” on the actual performance of an agreement may be smaller still³⁵. Likewise, well-intentioned policy-makers can expend significant time and political capital enacting laws (such as the security of payment and proportionate liability reforms discussed above) which seek to ameliorate the negative effects of the unrestrained market on certain participants yet risk imposing significant burdens on the industry as a whole.

In turn, as was illustrated above, where regulation sits in conflict with the construction industry’s preferred modes of contracting, construction lawyers tend to seek to avoid that regulation via contract. Drafting and negotiating amendments to navigate around such legislation requires careful and detailed – and, therefore, expensive – legal consideration, consuming resources that otherwise could be directed towards areas where there is a real need for legal protection and advice.

Where, though, does that ‘real need’ properly exist? This is one of the key questions which a PLS-based analysis could assist in answering. Such an analysis must commence by recognizing that international construction is distinct from other commercial pursuits where PLSs have been identified, largely because of the deep and abiding public interest which it embodies. This recognition rests upon the inherent responsibility of local, democratically-accountable legislatures (albeit, preferably, on a harmonized basis to the extent possible) to fill the gaps which market-based solutions tend inadequately to address, including in respect of safety of workers and building users and substantial disparity of bargaining positions³⁶.

Thus, it is by no means inevitably the case that recognition of a PLS would result in a vacation of the field of regulation by local legislatures. Rather, it could allow a renewed focus on the need for, and proper boundaries of, statutory intervention³⁷.

5. Conclusion

As a first step towards greater coherence, this paper encourages a recognition that the lack of a clear sense of the proper limits and interaction of the various elements of construction law – judge-made, legislative, standard forms and otherwise – makes Bruner’s ‘primordial soup’ inevitable. Therefore, by examining the extent to which a PLS exists – and, more importantly, *should* exist – within construction law practice, a more explicit and reasoned engagement with the broader law may be facilitated.

To stretch Bruner’s analogy further, therefore, by offering a PLS as a separate dish, the ‘thick broth’ of construction law may be rendered more transparent. In turn, it may be made more palatable to the millions of people around the world who taste it each year, and the thousands of lawyers, construction professionals, financiers and other contracting parties who are immersed in it on a daily basis.

³⁵ Morgan, above n 14, 85.

³⁶ See, eg, Matthew Bell and Ravindu Goonawardene, „Monetary Value: The ‘Least Worst’ Proxy for Vulnerability in Regulation of Construction Contracting?” (2013) 29 *Building and Construction Law* 465.

³⁷ A prominent area of construction contracting where such intervention does seem appropriate is in the types of residential construction statutes which are described in, eg, Philip Britton and Julian Bailey, „New Homes and Consumer Rights: England and Australia Compared” (2011) 3(3) *International Journal of Law in the Built Environment* 269, 277-287. That said, the proper limits of this legislation remains contestable: for example, the warranty rights available under the New South Wales *Home Building Act 1989* have recently been watered down, to the likely detriment of consumers in that state.

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