

## The Secret Weapon to Contract Success – the Governing Law!!!

### Introduction

Turner & Townsend's (TT) recently published *International Construction Market Survey 2023 (ICMS/23)* sets out the Construction Market's key challenges in 2023 compared against the same challenges in 2022, adopting a metric of 1 – 5 where 1 indicates “no difficulty” and 5 indicates “significant difficulty”, to highlight any increase/decrease in the same.

Specifically, TT highlights in its ICMS/23 that “*Difficult Contractual and Legal Conditions*” is a key challenge in both years and that in 2023 it increased in “difficulty” across the globe.

In other words, the Parties to a C&E Contract fail to understand their Contract's meaning under the law that governs its terms (**Governing Law**). Generally, the Parties' failure causes a myriad of issues which inevitably causes the supply chain to incur additional time and costs.

Despite the above, many are not aware that understanding and applying the Contract's Governing Law is the “**Secret Weapon to Contract Success**” because it dictates their C&E Contract's meaning and how they should perform their rights and obligations under the Contract.

In our experience, if you fail to understand your C&E Contract's meaning under its Governing Law, from the outset, you will not understand the legal risk you have assumed and how the Contract operates and will find yourself in a costly Claims and formal C&E Dispute, which you will likely lose.

To assist, we provide the **3 Key Legal Strategies** to identify and apply your Contract's Governing Law to your benefit below.

We refer to FIDIC's Design & Build Contract 1999 (**FIDIC**), JCT's Design & Build Contract 2016 (**JCT**) and NEC/3's Engineering & Construction Contract 2005 (**NEC**), used on the High Speed 2 C&E Project in England, together with the law of England & Wales (**E&W Law**) and the law of several countries within the Middle East (**ME Laws**).

### Key Strategy 1: Identify the Governing Law

Generally, each C&E Contract sets out its Governing Law which may, for a variety of reasons, be the law of a country which is different to the country in which the Project is located (**Foreign Law**). For example, your Project may be located in the Middle East e.g., State of Qatar, however, its Governing Law may be the Law of England & Wales and *vice versa*.<sup>1</sup>

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<sup>1</sup> Generally, if the C&E Contract is silent regarding its Governing Law then the law of the country in which the Project is located will apply.

In this context, adding to the international nature of C&E Projects across the globe, the Employer may engage international companies as Contractors, Subcontractors, Engineers etc to design and construct the Project, which did not originate from the country in which the Project is located.

In addition to the above, your C&E Contract will define its Governing Law, which includes a unique structure i.e., “*hierarchy of laws*”. For instance, FIDIC defines the Governing Law as all “...*legislation, statutes, ordinances and other Laws, and regulations and by-laws or any legal constituted public authority...*” (FIDIC: 1.1.6.5 / JCT: 1.11 / NEC: See Contract Data & 12.2) and the Parties set out the same in the Appendix to Tender (FIDIC: 1.4) and a Governing Law’s “*hierarchy of laws*”, will include laws such as those set out in FIDIC’s definition above.

### **Key Strategy 2 : Understand your Governing Law’s Mandatory Rules of Law**

Each Governing Law, whether E&W Law or ME Laws, includes its own specific “*Mandatory Rules of Law*”. These are laws that a C&E Contract may not exclude, and a Court/Arbitral Tribunal must apply regardless of the C&E Contract’s terms.

The “*Mandatory Rules of Law*” are different under E&W Law and ME Laws and include the following:

**E&W Law:** The Construction Act 1996 (Statute) includes “*Part II Construction Contracts*” which defines a “*Construction Contract*” and provides:

*“This Part applies whether or not the law of England and Wales...is otherwise the applicable law [Governing Law] in relation to the contract...” (emphasis added)*

In other words, the above is a Mandatory Law and applies to all C&E Contracts for Projects located in England & Wales, even in circumstances when its Governing Law is a Foreign Law e.g., Qatar Law.

**ME Laws:** Qatar’s Civil Code 2004 (Written Code) includes Art: 711 under which a Contractor and Engineer guarantee the structural integrity of a Project (building/installation etc) for a period of 10 years and is commonly known as Decennial Liability (Bahrain: Art. 615 - 5 years only, Kuwait: Art. 692, Oman: Art. 634, UAE: Art. 880). In addition, Art: 715 of Qatar’s Civil Code provides:

*“Any condition [in the C&E Contract] that seeks to exclude an architect or contractor from liability [under Art: 711] or restrict it will be void”*

Art. 715, therefore, renders Art. 711 a Mandatory Law and it applies to a C&E Contract for a Project located in Qatar even in circumstances when its Governing Law is a Foreign Law e.g., E&W Law.

**Key Strategy 3: Identify and Apply the Unique Laws/Rules of Interpretation of Contracts**

Once you have identified and understand your C&E Contract’s Governing Law and its “Mandatory Rules of Law” you should identify and apply its unique “Laws/Rules of Interpretation of Contracts” to the C&E Contract.

Please note that each Governing Law, whether E&W Law or ME Laws, includes its own specific “Rules of Interpretation of Contracts”, which must be applied to a C&E Contract to determine its meaning, as a whole, under its Governing Law.

In this context, please note that the “Rules of Interpretation of Contracts” are different under E&W Law and ME Laws.

**Conclusion & Best Strategy**

Given the above, it is vitally important that you understand that your C&E Contract’s “meaning” is determined by applying its Governing Law, including its “Mandatory Rules of Law” and its bespoke “Rules of Interpretation of Contract” and do not rely on your C&E Contract’s language only, which is a matter of grammar.

In our experience, interpreting a C&E Contract under its Governing Law is not straightforward and requires a detailed legal analysis. For example, if a ME Law governs your Contract this means that the mandatory principle of Decennial Liability, mentioned above, applies regardless of its terms and you should construe your C&E Contract accordingly and identify the legal risk. Similarly, if E&W Law governs your C&E Contract then, in certain circumstance, the mandatory principles in the Construction Act, mentioned above, apply as does the case law emanating from the relevant Courts, regardless of where your Project is located in the world.

If you fail to complete a legal analysis to identify and apply the appropriate Governing Law i.e., “*Contract Interpretation*”, to your C&E Contract you will not understand its meaning and you will find yourself in a costly formal C&E Dispute, which you will likely lose.

If you have any doubt regarding your C&E Contract’s meaning as a matter of its Governing Law, in relation of your rights & obligations, you should obtain detailed legal advice from an experienced C&E Solicitor/Lawyer as soon as possible.

I hope the above enhances your knowledge and assists in managing the above legal risks. Specifically, I am providing Clients with the optimal strategic legal advice in relation to the importance of the Governing Law and “*Contract Interpretation*” on Projects across the globe, in both Common Law and Civil Law jurisdictions, and are happy to provide you with the benefit of that experience in a Complimentary Strategic Legal Consultation (30 minutes), which will:

- Enhance your understanding your C&E Contracts Governing Law;
- Improve your knowledge of “*Mandatory Rules of Law*”;
- Highlight the importance of understanding and applying the “*Rules of Contract Interpretation*”; and
- Significantly increase your prospects of a successful Contractor’s Claim & Avoiding Formal Disputes.

Please email us directly on [info@cels.global](mailto:info@cels.global) using ***Contract Interpretation*** in the subject heading to book your ***Complimentary Strategic Legal Consultation***.

We look forward to hearing from you.

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