



CONSTRUCTION ARBITRATION

Online Training Course



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THE SUBSTANTIVE LAW

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Introduction

An EPC Contract between a Spanish contractor and an Irish Client for a Solar Photovoltaic Power Plant located in Chile.

What does the substantive law cover?

The validity, formation, interpretation, performance of the contract, contractual breaches and the available remedies. The substance of the dispute: delays, damages, loss of profit, etc.

What does it NOT apply to?

The Project: permits, mandatory environmental provisions, labor and social security, taxes, mandatory industry standards, etc. (*lois de police* or rules of immediate application).

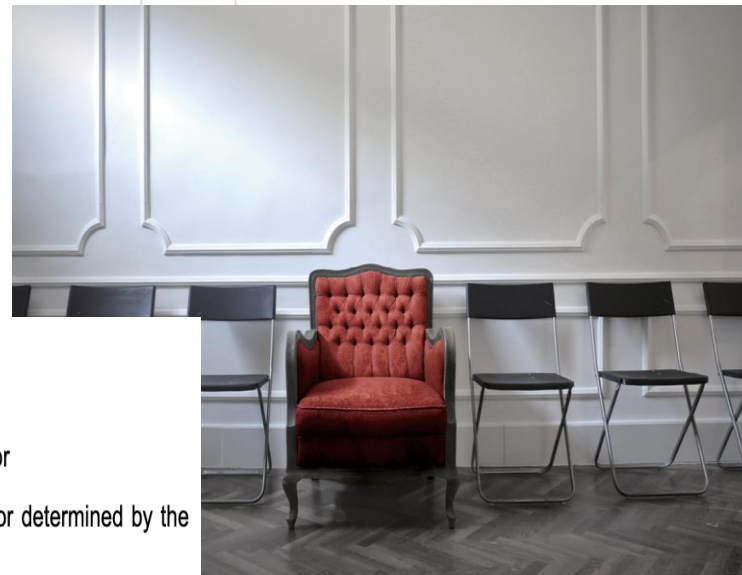
Why is it relevant?

COVID example: The unthinkable event: Force Majeure, frustration, hardship, etc.

I. Where to look for rules on the determination of the substantive law?

1. Lex arbitri (the law of the seat)

□ UK ARBITRATION ACT 1996



46 Rules applicable to substance of dispute.

- (1) The arbitral tribunal shall decide the dispute—
 - (a) in accordance with the law chosen by the parties as applicable to the substance of the dispute, or
 - (b) if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal.
- (2) For this purpose the choice of the laws of a country shall be understood to refer to the substantive laws of that country and not its conflict of laws rules.
- (3) If or to the extent that there is no such choice or agreement, the tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

I. Where to look for rules on the determination of the substantive law?

☐ Swiss Federal Statute on Private International Law



Article 187

VIII. Decision on the merits

1. Applicable law

¹ The arbitral tribunal shall decide the case according to the rules of law chosen by the parties or, in the absence thereof, according to the rules of law with which the case has the closest connection.

² The parties may authorize the arbitral tribunal to decide ex aequo et bono.

I. Where to look for rules on the determination of the substantive law?

□ UNCITRAL MODEL LAW

Article 28. Rules applicable to substance of dispute

- (1) The arbitral tribunal shall decide the dispute **in accordance with such rules of law as are chosen by the parties** as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.
- (2) Failing any designation by the parties, the arbitral tribunal shall apply the **law determined by the conflict of laws rules which it considers applicable.**
- (3) The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorized it to do so.
- (4) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.



I. Where to look for rules on the determination of the substantive law?

2. Institutional rules

☐ ICC Arbitration Rules

ARTICLE 21

Applicable Rules of Law

- 1 The parties shall be free to agree upon the **rules of law** to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the **rules of law which it determines to be appropriate.**
- 2 The arbitral tribunal shall take account of the provisions of the contract, if any, between the parties and of any relevant trade usages.
- 3 The arbitral tribunal shall assume the powers of an *amiabile compositeur* or decide *ex aequo et bono* only if the parties have agreed to give it such powers.



DIS

ICC INTERNATIONAL COURT OF ARBITRATION



KCAB INTERNATIONAL

LCIA Arbitration and ADR worldwide



SCC ARBITRATION INSTITUTE

SIAC

VIAC Vienna International Arbitral Centre

IFCAI International Federation of Commercial Arbitration Institutions

I. Where to look for rules on the determination of the substantive law?

2. Institutional rules



□ SIAC Rules

Rule 31: Applicable Law, *Amiable Compositeur* and *Ex Aequo et Bono*

- 31.1 The Tribunal shall apply the law or rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the Tribunal shall apply the law or rules of law which it determines to be appropriate.
- 31.2 The Tribunal shall decide as *amiable compositeur* or *ex aequo et bono* only if the parties have expressly authorised it to do so.
- 31.3 In all cases, the Tribunal shall decide in accordance with the terms of the contract, if any, and shall take into account any applicable usage of trade.

1. Where to look for rules on the determination of the substantive law?

2. Institutional rules

□ The Rules of the European Court of Arbitration

11.4. If the parties have not agreed on the substantive law applicable to their dispute, the Arbitral Tribunal shall apply the substantive law **determined by applying the law of the State with which the contract is most closely connected**; in the absence of that, it shall apply another criterion which be not in conflict with the legitimate expectations of the parties. If any provisions of the substantive law chosen by the parties or by the arbitrators are in conflict with mandatory provisions or the public policy of the lex fori, such mandatory provisions take precedence over the relevant substantive law chosen by the parties or by the arbitrator.



II. Parties' freedom of choice

1. The relevance of the contractual terms

“... in accordance with the contract...”

2. Are there any limits to the freedom of choice?

- No ex ante limitation but an ex post review (PUBLIC POLICY)

ECA, art. 11.4: “If any provisions of the substantive law chosen by the parties or by the arbitrators are in conflict with mandatory provisions or the public policy of the lex fori, such mandatory provisions take precedence over the relevant substantive law chosen by the parties or by the arbitrator.”

3. What about non-national law?

General principles of law, lex mercatoria, UNIDROIT Principles on International Commercial Contracts, etc.



II. Parties' freedom of choice

Pathological choice of law

A purchase contract under the “substantive law which is valid in the territory of the European Union”?

A loan agreement: “[t]he arbitrator will apply the laws of the Cheyenne River Sioux Tribal Nation and the terms of this Agreement.”

“All disputes arising from the execution of or in connection with the present contract shall be settled through friendly consultation between both parties. In case no agreement can be reached, the dispute shall be submitted to **Singapore International Economic and Trade Arbitration Commission in USA law apply**. The disagreement should be settled on the basis of the underlying contract and applied law. The decision of arbitration court will be binding and final for both parties.”

“Arbitration: Court of Arbitration of Paris”

II. Parties' freedom of choice

4. What is the better option for your contract:

- National law of one of the parties
- Law of the place where the project is located
- Law of the arbitration seat
- Law of a third jurisdiction, etc.?



5. Choice of law as a leap of faith

“Faith is taking the first step even when you don't see the whole staircase.”

Martin Luther King, Jr.

III. Determination of the substantive law by the arbitral tribunal

1. Conflict of Law's traditional approach

The law determined by the conflict of laws rules: UK, Switzerland, UNCITRAL laws, the ECA, etc.

“The realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon. The ordinary court, or lawyer is quite lost when engulfed and entangled in it.”

William L. Prosser

III. Determination of the substantive law by the arbitral tribunal

2. Direct application of the substantive law

- The law or rules of law determined to be appropriate by the tribunal: ICC, SIAC, etc. May include or not non-national law.
- What is the so-called “negative choice of law”?



Summary: Relevant Terms

- Freedom of Choice
- Law = National Law
- Rules of Law = Law + Non-national Law
- Decide in accordance / Take account of the contract vs. Apply the Law or Rules of Law
- Conflict of Laws Approach vs. Direct application of the Substantive Law

Bonus: Does the substantive law apply to the validity of the arbitration agreement?

The traditional Civil Law vs. Common Law divide

Art. 34 UNCITRAL MODEL LAW:

- (2) An arbitral award may be set aside by the court specified in article 6 only if:
 - (a) the party making the application furnishes proof that:
 - (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid **under the law to which the parties have subjected it** or, failing any indication thereon, **under the law of this State**; or

The change: Sulamérica CIA Nacional de Seguros S.A. and others v Enesa Engenharia S.A. and others [2012] EWCA Civ 368:

A two-steps approach:

1. First, one cannot assume that the proper law of the arbitration agreement will follow the law of the contract;
2. Rather, there should be a “three-stage enquiry” into (i) express choice; (ii) implied choice and (iii) closest and most real connection.

IV. Legal transplants through contractual terms

FIDIC contracts within the Civil Law jurisdictions

- ❑ Legal obligation to perform the contract in good faith
- ❑ Damages for delay / Liquidated damages
- ❑ Time bar clauses

The new models include :

1. FIDIC Conditions of Contract for Construction, the (New Red Book)
2. FIDIC Conditions of Contract for Plant and Design/Build, the (New Yellow Book)
3. FIDIC Conditions of Contract for EPC Turnkey Projects, the (Silver Book)
4. FIDIC Short Form of Contract, the (Green Book)





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THANK YOU!

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