ESG in Cross-Border Contracts: Jurisdiction and Applicable Law

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COP30, hosted in Brazil in November of this year, brought with it a renewed focus on environmental issues, placing sustainability at the center of the global agenda.

As governments around the world incorporate social and environmental requirements into their legislation, ESG considerations are no longer viewed as secondary: they have become central to risk allocation, especially in cross-border contracts.[1] In these situations, the level of regulatory rigor can vary significantly between sovereign nations.

Global market participants increasingly work with partners subject to different regulatory standards, and ESG clauses have become essential for defining expectations and allocating risk. In highly regulated sectors – such as energy, infrastructure, agribusiness, and technology[2] – failure to comply with ESG obligations can result in fines, contract suspension, and other legal consequences.

The impact of ESG clauses goes beyond their substantive content, introducing an additional strategic layer: the choice of dispute resolution mechanism and applicable law. These choices, often considered primarily for procedural reasons, can significantly expand or limit the parties' liability, influencing where and how contractual provisions will be interpreted and enforced in the event of a breach.

The technical nature of ESG-related disputes makes the choice between the ordinary courts and arbitration especially important.[3] Arbitration offers various advantages, including a neutral forum, arbitrators with expertise in social and environmental matters, and the possibility of confidential proceedings. Confidentiality can help mitigate external pressures and reduce reputational risks for the parties involved.

However, arbitration also presents challenges. ESG disputes often involve complex contractual chains, which can lead to fragmented dispute resolution, inconsistencies between arbitration clauses, and conflicting decisions in different proceedings. The participation of third parties – such as affected communities – is typically limited in arbitration, and urgent measures may require mobilizing the ordinary courts, which can be time consuming.

Another important issue to consider when choosing arbitration is the widespread adoption of the New York Convention, which facilitates the recognition and enforcement of arbitral awards across jurisdictions. Still, the public policy exception remains a significant factor, since awards that conflict with environmental or human rights standards may be unenforceable in certain countries.

Selecting the applicable law is another important consideration. Different jurisdictions impose varying levels of social and environmental liability, so the choice of law can directly affect how key legal concepts, such as the duty of care, the scope of liability, and the standard of reparation are interpreted and enforced.

Ultimately, the challenge is not just to incorporate ESG obligations into cross-border contracts, but to take an integrated approach to managing the risks associated with the choice of applicable law, dispute resolution mechanisms, and enforcement strategies.

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NOTES

[1.] Nikolaus Pitkowitz and Johanna Kathan-Spath, “The Arbitrator and the Arbitration Procedure, The Vienna Propositions: Setting a New Beat in Resolving ESG Disputes, Embracing Innovation, and Tackling Legal Challenges in a Changing World. In: Christian Klausegger et al. (Orgs.), Austrian Yearbook on International Arbitration, 2025, pp. 95-178.

[2.] Natalie Sheehan and Anna Brennan, “The New Frontier: Arbitration of Climate Change Disputes”. In: Gregory Roy Fullelove et al. (Orgs.), International Arbitration in England: Perspectives in Times of Change, pp. 345-360.

[3.] Matteo Zambelli, “ESG Arbitration and Arbitral Procedure”. In: Benson Lim and Mary Mitsi, Environmental, Social and Governance (ESG) Disputes: Litigation and Arbitration, pp. 1-32.

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