JUS 1230 Grading guidelines

The exam question asks students to write as if they had to solve the dispute as an arbitrator. In particular, they are asked to decide whether the Constructor is in breach of contract.

To answer this question, students are expected to come quickly to the analysis of the issue in dispute. A proper way to structure the paper would be to briefly describe the dispute, then to highlight which legal issues must be addressed to decide whether there has been breach of contract, then to analyse these issues.

The legal issues are: (i) the necessity to determine the governing law; (ii) how the governing law is determined in arbitral proceedings and (iii) how the issue of breach of contract would be decided under the governing law.

Other structures may also be possible, as long as they deal with relevant matters and the order is logical. General descriptions of arbitration, contract law, comparative law, etc., are not relevant but can be accepted if they are tailored in a way that is functional to the solution of the dispute.

The structure of the paper should count for about 20% of the final grade.
The analysis of each of the legal issues should count for about 27% of the final grade.

(i) The necessity to determine the governing law

Students should highlight that the issue cannot be solved simply on the basis of the contract, as there is a contradiction between the two contracts, due to the Entire Agreement clause. Hence, it is necessary to apply the governing law.
The contract did not choose the applicable law. Hence, it must be selected by the arbitral tribunal.

(ii) Selection of the governing law in arbitration

This is a crucial issue that needs a thorough analysis. The exam question informs that the arbitration clause refers to the UNCITRAL Arbitration Rules. Therefore, it is sufficient if students identify the article in the Arbitration Rules that regulates how the law is to be determined in case the parties have not made a choice. According to article 35 (1), the arbitral tribunal shall apply the law which it determines to be appropriate.

Students may discuss the difference between applying a “law” and applying “rules of law”. Students may also make some observations on the openness of the choice of law rule contained in article 35, and whether it is desirable. As long as these observations are written in a way that is relevant to the dispute at hand, it is a positive feature that students show such a broad understanding. However, if these observations are made in general terms and not applied to the dispute at hand (“copied” from the book, that is available to the students during the exam), they are not relevant and should give a negative contribution to the final grade.

The choice of law rule of article 35 is very open. Therefore, it is up to each student to decide which governing law he/she deems applicable, and to justify it in a convincing way. Basically, they should choose between the law of the Constructor and the law of the Owner. The place of arbitration should not be a relevant connecting factor, and if students give the place of arbitration significance in the selection of the law governing the merits, they show lack of understanding. However, the choice being discretionary, it would not be an error. It is an error to choose a source of transantional law such as the UNIDROIT Principles, because under the UNCITRAL Arbitration Rules the tribunal may not choose "rules of law".

Students may make reference to the conflict rules of private international law as a guideline to exercise the tribunal's discretion. They may, in this context, make reference to the Rome I Regulation, which applies in the EU.

To apply the relevant conflict rule, students should qualify the contract in dispute. Under Rome I, choice of law for contracts for the provision of services is regulated in article 1 (b). The connecting factor is the habitual residence of the service provider. Hence, the contract is governed by the law of the Constructor's country. Students who discuss the evolution of the connecting factor from "the closest connection" to "the habitual residence of the party performing the characteristic performance" should do so in a way that is functional to the solution of the dispute at hand.

Students may make some brief observations on the relationship between the arbitration rules and arbitration acts. They may highlight that, although the applicable arbitration act may have a different choice of law rule than the one contained in the applicable arbitration rules, choice of law rules in the arbitration acts generally are not mandatory and the ones contained in the arbitration rules will prevail.

It is not strictly necessary to discuss how the governing law is selected in arbitration in general, but it is reasonable to expect that students mention the matter, even if briefly. Students may spend some words on the different approaches in the various arbitration rules and arbitration acts.

The selection of the governing law in arbitration is specifically dealt with in section 5 of chapter 4 of the book International Commercial Contracts, that is mandatory reading for this topic and that the students were allowed to take with them at the exam. The difference between "law" and "rules of law" is discussed, among others, in section 3.5.1.1 of chapter 5. The question of selection of the governing law under Rome I is specifically dealt with in section 3.2 of chapter 4.

(iii) Breach of contract

The issue of whether there has been a breach of contract depends on which law each student determined to be the governing law. The Constructor's law belongs to the common law family, the Owner's law belongs to the civil law family. The exam question is not specific on which national system of law they belong to, because this is not a course on contract law.

However, students are expected to understand the main lines of the two main systems of common law and civil law.

The book and the lectures have focused on the different traditions according to which contracts are interpreted and applied (construed). If the governing law is common law, the Entire Agreement clause will be read literally, and there is no breach of contract. If the contract is subject to a civilian law, the Entire Agreement clause will be read purposely, and there is breach of contract.

The difference between common law and civil law is specifically dealt with in chapter 3. The Entire Agreement Clause is specifically dealt with in section 4.1.1 of chapter 1 and section 4.1.1 of chapter 3.