Arbitration clauses in EPC contracts

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Introduction

Arbitration is becoming an increasingly popular choice for engineering, procurement and construction (EPC) contracts, particularly when international entities are involved or parties are engaging in cross-border transactions.

EPC contracts often involve significant amounts of money and large complicated projects that are undertaken by international entities – for example, a French contractor may subcontract some of its work to an Italian subcontractor for a project located in Russia. In the case of a dispute, the project may be compromised if the disputing parties stop work until it is settled. Questions can also arise regarding what jurisdiction will settle the dispute – hence the importance of the choice of arbitration.

Drafting of arbitration clause

The principal advantages of arbitration include:

- the parties' autonomy in choosing their arbitrators and the applicable law;
- the speed and flexibility that arbitration offers; and
- the confidentiality of the proceedings.

However, when drafting an arbitration clause, choosing the arbitration venue that will settle a dispute between the parties is of critical importance.

International arbitration is designed to create a neutral forum so that neither party has to litigate in the courts of the other party's home country or expose itself to an unfamiliar legal system.

The applicable procedural law – sometimes referred to as *lex arbitri* (ie, the law of the place in which the arbitration is to take place) or curial law – will depend on the seat of arbitration.

Seat of arbitration

The seat of arbitration is significant, as it will normally determine the procedural law which the arbitration will adopt, as well as the level of involvement or intervention, as appropriate, of the courts exercising jurisdiction over the seat.

In other words, procedural law determines to what extent the local courts will be involved in the process, for example:

- any formalities to be complied with;
- the extent to which the arbitration agreement excludes court jurisdiction;
- how much autonomy and discretion the parties will have in choosing the arbitral procedure;

- what support the court will give to the arbitration;
- whether the decision of the arbitral tribunal can be appealed and what timescales will apply; and
- the award's enforceability.

The value of the local court's involvement in the arbitration will depend on the speed and quality of the courts in that particular jurisdiction.

Governing law

The substantive law – sometimes described as the applicable or governing law or the law of the contract – is the law governing the subject and merits of the dispute. In most jurisdictions, parties to an agreement are free to choose the law that will apply. An arbitration agreement will generally set out its governing law at the outset, and the parties' right to do so is enshrined in various international conventions and institutional rules.

An agreement's governing law defines and regulates the rights, duties and powers of parties and determines how the agreement's dispositions will be interpreted.

Comment

The form and forum of dispute resolution are of great importance and must be considered carefully at the outset of any transnational deal and in the course of drafting contracts. As the place of arbitration has far-reaching implications at every stage of the process, when arbitration is the preferred method, the arbitration clause must stipulate a well-considered arbitration-friendly venue.

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