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Sub-clause 20.6 [Arbitrage] in Romania

The majority of road infrastructure contracts, agreed during recent years, use sub-clause 20.6 [Arbitration] of the Special Conditions (imposed by legislation), without any changes to it, because of its balanced wording, tested in practice and because it should only be a description of the procedure followed to resolve a dispute by means of A.D.R. - alternative dispute resolution, which is arbitration.

However, in practice, we encounter cases where the mentioned sub-clause is changed, so that the number of judges (arbitrators) is reduced from three (3) to one (1). The modification of sub-clause 20.6 is done by the Appendix to Tender Documentation.

When additional costs – triggered by circumstances beyond anyone's control or due to the parties' action/inaction – are debated, the logical risks management would require awarding the case to a Board of Members. Thus, according to arbitration procedural rules, the committee would include: two arbitrators nominated by the parties, one for each, and an arbitrator appointed by those two.

The Committee shall ensure a decision as close to truth as possible, mutually satisfactory, the brain storming result of educated and experienced minds.

This change does not make sense, just as it makes no sense reducing the DAB members from three (3) to one (1), another common practice, frequently encountered.

It seems implausible the desire to give up the advantage of a dispute's data evaluation by three (3) experts in their field, thus ensuring the problem is assessed from three different angles, but with additional knowledge and experience, in a transparent, balanced, fair way, without other prevalence than finding the truth and further compensating those in loss, within the particular contract.

Most arbitration cases are conducted with the Contractor being the Applicant and the Beneficiary being the Defendant. By altering the Special Conditions, Sub-Clause 20.6 [Arbitration] and reducing the number of judges from three (3) to one (1), we face a situation in which both the Contractor and Beneficiary risk a lot, giving up the benefits of a process with three (3) arbitrators. The compensations pursued by the Contractors, due to the alleged projects' management mistakes by Beneficiaries, due to unforeseen circumstances etc., usually amount to millions of euros. It is surprising the acceptance of special conditions changed by the Employer, so that the Contractor would bear an increase in risks, otherwise inherent in any construction project.

From another perspective, but also in connection with an honest, unaltered, fair lawsuit, the arbitrators' incompatibility is also relevant. Article 20 of the Arbitration Rules [Arbitrators

Incompatibility] - International Commercial Arbitration Court, part of the Chamber of Commerce and Industry of Romania.

However, according to Art. 16 [Statement of Acceptance (Rules of Arbitrage Procedure)], these clauses referring to incompatibility lose their function, based on a simple declarations of the arbitrator.

This implies the absence of situations in which law firms, having as associate/partner a lawyer who is also arbitrator, could be able to provide consultancy, representation, legal assistance services or have direct commercial relations with one of the parties.

By changing sub-clause 20.6, namely the use of a single arbitrator, a situation may occur where, although one party knows incompatibility reasons, they shall not contest the arbitrator, thereby creating an advantage for themselves. Most times, the other party is unable to determine the incompatibility aspects, not having access to information on contracts between the arbitrator and the other party.

The state institutions, responsible for verifying the use of European and Public funds, consider necessary that the Authorising Officers, accessing these funds, use all legal appeals, before accepting additional costs to the prices contracted following a public procurement procedure.

Changing sub-clause 20.6, namely reducing the number of judges from three (3) to one (1), can be understood by the controlling authorities as Beneficiary's decreased interest in pursuing the process of winning a dispute.

If after arbitration, the Beneficiary is the one who will bear the additional costs, he will have to pursue all legal procedures, in order not to be accused by the control authorities that he had not exhausted all methods prescribed by law.

Considering:

- The importance of national infrastructure projects that generate causes of Arbitration
- The significant amount of additional value to the initial contract price
- The financing of such projects: European funds or State budget

it is necessary, on one hand, a more precise regulation of arbitration proceedings, and, on the other hand, raising the discussion on the ***suitability of using this alternative dispute resolution method for major infrastructure projects, as long as the decisions are pronounced under the arbitration agreement concluded under the law and not in the name of law[1] (***[1] Forms and Results of Arbitrage Decision – Phd. Cobuz Bagnaru Alina Mioara; Arbitrage Sentence 175/2007 file no. 305/2006)

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