

Newsletter

May 2017

UNIDROIT: ADOPTION OF THE 2016 PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS

On May 9th, the International Institute for the Unification of Private Law (UNIDROIT) published¹ the fourth (2016) edition of the UNIDROIT Principles of International Commercial Contracts, which includes the amendments and additions to the 2010 edition of the Principles, elaborated by the Working Group of the UNIDROIT Secretariat and adopted by the Governing Council at its 95th session (Rome, 18-20 May, 2016).

Scope of the amendments

Upon request of the Governing Council, which emphasized the need to monitor the use of the Principles in their actual market practice and to inquire with the international legal and business communities whether new topics should be considered for inclusion in future editions of the Principles, the Secretariat identified the long-term contracts as a possible area of review of the Principles. In particular, as the Principles were originally conceived mainly for ordinary exchange contracts such as sales contracts to be performed at one time, in view of the increasing importance of more complex transactions – namely long-term contracts – the 2016 edition of the Principles now takes into account also the characteristics and needs of such transactions.

The newly introduced definition of long-term contract refers to a contract which “*is to be performed over a period of time and which normally involves, to a varying degree, complexity of the transaction and an ongoing relationship between the parties*”. Examples of long-term contracts are also provided and include contracts involving commercial agency, distributorship, out-sourcing, franchising, leases, framework agreements, investment or concession agreements, contracts for professional services, operation and maintenance agreements, supply agreements, construction/civil works contracts, industrial cooperation and contractual joint-ventures.

Summary of the main amendments²

Article 1.11 (Definitions): new definition of “long-term contract”. The essential term of the definition is the duration, while the ongoing relationship between the parties and the complexity of the transaction are mentioned for descriptive purposes and are not essential.

Article 2.1.14 (Contract with terms deliberately left open): introduction of the possibility that missing terms might be determined unilaterally by one of the parties. New Comment 4 emphasizes the particular relevance of such provisions in the context of long-term contracts: in particular, it is stated that the parties may leave a term to

¹ See <http://www.unidroit.org/unidroit-principles-2016/official-languages/english-integral>.

² For further information, please see the Memorandum of the Secretariat to the Governing Council on the Working Group’s recommended amendments and additions to the provisions of the 2010 Principles (<http://www.unidroit.org/english/governments/councildocuments/2016session/cd-95-03-e.pdf>).

Newsletter

be agreed when that term applies only to obligations at a later stage of the contract. For example, the parties may agree a price which is only to apply during the first year of the contract, leaving open the price to apply for the second or subsequent years. Equally, the parties may leave open the date for delivery because, for instance, the delivery of a piece of machinery may depend on the completion of a building before it is delivered. In such circumstances the term as to price may not be appropriately supplied by reference to Article 5.1.7³ nor may time of performance be appropriately supplied by reference to Article 6.1.1⁴. The appropriate term would then be supplied by Article 4.8⁵ or Article 5.1.2⁶.

Article 5.1.7 (Price determination): new Comment 3 refers to the possibility for the parties to fix a standard with which a third party would have to comply, and that determination could be challenged if that standard was not met.

Article 2.1.15 (negotiations in bad faith): new Comment 3 on “Agreement to negotiate in good faith”, provides that the duty to negotiate in good faith means a duty to negotiate seriously with an intent to conclude an agreement, but not that an agreement must be reached. In the case of a complex long-term contract (i) parties might wish to further define such duties themselves and (ii) a duty to use best efforts may amount, for all practical purposes, to a duty to negotiate in good faith.

Article 4.3 (Relevant Circumstances) in contracts with evolving terms: new Comment 3 emphasizes that practices established between the parties and conduct subsequent to the conclusion of contract are particularly relevant in the interpretation of long-term contracts but cannot contradict the original terms of the contract. In such respect, parties might wish to adopt a particular mechanism for possible variations and adjustments of the contract during performance to avoid any uncertainty as to the effects of subsequent conduct on the content of the contract.

Article 7.1.7 (Force majeure): new Comment 5 indicates that force majeure, like hardship, is typically relevant in long-term contracts: In such respect, due to the extensive amount of time and resources associated with long-term contracts, parties might wish to add provisions in their contracts allowing for the continuation of the relationship when hardship or a force majeure situation arose, thereby reserving termination of the contract as a last resort. New illustration is introduced as a practical example. In particular, it is made reference to a binding provision contained in a long-term contract pursuant to which “*except where it is clear from the outset that an impediment to a party’s performance is of a permanent nature, the obligations of the party affected by the impediment are temporarily suspended for the length of the impediment, but for no more than 30 days, and any right of either party to terminate the contract is similarly suspended*”. The provision also states that, “*at the end of that time period, if the impediment continues the parties will negotiate with a view to agreeing to prolong the suspension on terms that are mutually agreed*”. Finally, “*if such agreement cannot be reached, disputed matters will be referred to a dispute board pursuant to the ICC Dispute Board Rules*”.

3 In particular, with reference to a price “at the time of the conclusion of the contract”. Paragraph (1) of Article 5.1.7 provides that “*Where a contract does not fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have made reference to the price generally charged at the time of the conclusion of the contract for such performance in comparable circumstances in the trade concerned or, if no such price is available, to a reasonable price*”.

4 Article 6.1.1 (Time of performance) provides that: “*A party must perform its obligations: (a) if a time is fixed by or determinable from the contract, at that time; (b) if a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the other party is to choose a time; (c) in any other case, within a reasonable time after the conclusion of the contract*”.

5 Article 4.8 (Supplying an omitted term) provides that: “*(1) Where the parties to a contract have not agreed with respect to a term which is important for a determination of their rights and duties, a term which is appropriate in the circumstances shall be supplied. (2) In determining what is an appropriate term regard shall be had, among other factors, to (a) the intention of the parties; (b) the nature and purpose of the contract; (c) good faith and fair dealing; (d) reasonableness*”.

6 Article 5.1.2. (Implied obligations) provides that: “*Implied obligations stem from (a) the nature and purpose of the contract; (b) practices established between the parties and usages; (c) good faith and fair dealing; (d) reasonableness*”.

Newsletter

Article 5.1.3 (Co-operation between the parties): the Comment contained in the 2010 edition is now divided into two separate Comments. Comment 1 covers the duty of co-operation for all kinds of contracts whereas Comment 2 emphasizes the particular importance of such duty in the context of long-term contracts. New illustrations are introduced as practical examples of the duty of co-operation: in a contract for the construction of industrial works the employer may be required to prevent interferences in the contractor's work by other contractors it employs to carry out other works at the site. Likewise, in a distributorship agreement the supplier is under a duty to abstain from any conduct that might hinder the distributor from achieving the contractually-agreed minimum of orders, or in a franchising agreement the franchisor may be prevented from setting up a competing business in the immediate neighbourhood of the franchisee's business even if the franchise is not exclusive.

Article 5.1.8 (Termination of a contract for an indefinite period): it now explicitly provides that once a contract for an indefinite period is terminated, the provisions of Articles 7.3.5 (Effects of termination)⁷ and 7.3.7 (Restitution with respect to long-term contracts)⁸ would apply and new Comment 2 is added accordingly. The fact that, by virtue of termination, the contract is brought to an end does not deprive a party to the contract of its right to claim damages for any non-performance. As an illustration, reference is made to a distribution agreement entered into for an indefinite period, which may be terminated by giving notice to the other party a reasonable time in advance. Notwithstanding the termination, a party may claim damages under the rules set out in Article 7.4.1⁹.

Article 7.3.5 (Effects of termination in general): Comment 3 is supplemented with further examples of provisions or obligations which survive. In particular, in the context of a termination of an equipment leasing contract, the duty of the lessee to cooperate with the lessor concerning the relocation of the equipment to another country is provided. Furthermore, new Comment 4 has been added, emphasizing the particular relevance of post-termination obligations in long-term contracts and suggesting that, to avoid any misunderstanding, parties might wish to indicate specifically which obligations, if any, would survive after termination. By way of example, the indemnification clause for losses attributable to the delay in carrying out the administrative formalities by the lessee is expressed to survive contractual termination and operates and is enforceable independent of any damage claim under the terminated contract, though the payment thereof would impact the calculation of damages under such contract.

The Corporate department of Legance is available to provide any clarifications, also in respect of any specific situation which may be of interest for you.

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⁷ Article 7.3.5 provides that "(1) Termination of the contract releases both parties from their obligation to effect and to receive future performance. (2) Termination does not preclude a claim for damages for non-performance. (3) Termination does not affect any provision in the contract for the settlement of disputes or any other term of the contract which is to operate even after termination".

⁸ Article 7.3.7 provides that "(1) On termination of a long-term contract restitution can only be claimed for the period after termination has taken effect, provided the contract is divisible. (2) As far as restitution has to be made, the provisions of Article 7.3.6 apply."

⁹ Article 7.4.1 (Right to damages) provides that "Any non-performance gives the aggrieved party a right to damages either exclusively or in conjunction with any other remedies except where the non-performance is excused under these Principles".

Newsletter

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