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UNIFORM RULES ON INTERNATIONAL CONTRACTS IN GENERAL

Chapter 3 : THE SUBSTANTIVE VALIDITY OF INTERNATIONAL CONTRACTS

(Section 2 : Public Prohibitions and Permission Requirements)

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C H A P T E R 3

THE SUBSTANTIVE VALIDITY OF INTERNATIONAL CONTRACTS

Section 2 : PUBLIC PROHIBITIONS AND PERMISSION REQUIREMENTS

Article 1: Definitions

1. A "public prohibition" means a prohibition mainly directed at the implementation of the general policy of the State, and not mainly directed at the prevention of gross disparities between the obligations of the parties to the contract.
2. A "public permission requirement" means a permission requirement serving the same purposes as a public prohibition as defined in paragraph 1 whereby the right to permit is exercised by an organ of the State or an organ acting on behalf of the State.
3. An "ineffective contract" in the sense of this section means a contract which is concluded according to the provisions of chapter 1, but has not yet become valid since a public permission requirement has not yet been fulfilled.
4. Public prohibitions and permission requirements in accordance with this section are only those which result from generally accessible provisions of law, and which shall be applied in accordance with the law of the State that issued them, whatever the law applicable to the contract.
5. Public prohibitions in accordance with this section are those in respect of which, according to the law of the State establishing such prohibition, nullity of the contract or of the corresponding term of the contract, is provided as the legal consequence of non-observance.
6. Public permission requirements in accordance with this section are those in respect of which, according to the law of the State establishing such permission requirement, ineffectiveness

of the contract or of the corresponding term of the contract, is provided as the legal consequence of the absence of this permission.

Article 2: Public prohibitions and permission requirements to be considered

1. A contract is null where it is prohibited in accordance with the law in force in any State the law of which has a close and significant connection with the contract, except where this public prohibition does not correspond to the requirements of international trade and/or the legitimate interests of other States the law of which has also a close and significant connection with the contract.
2. A contract is ineffective where it requires public permission in accordance with the law in force in any State the law of which has a close and significant connection with the contract and where the permission has not yet been granted, except where this permission requirement in itself or the refusal of permission based thereon does not correspond to the requirements of international trade and/or the legitimate interests of other states the law of which has also a close and significant connection with the contract.
3. The recognition of the nullity of the contract under paragraph 1. or of the ineffectiveness of the contract under paragraph 2. may be refused where it is incompatible with the public policy ("ordre public") of the forum, provided the law of the forum has a close and significant connection with the contract.
4. Nothing in these rules shall limit the application of the public prohibitions and permission requirements of the State of the forum, provided the law of the forum has a close and significant connection with the contract.

Article 3: Obligation to obtain public permission and consequences of failure to do so

1. Unless otherwise provided, the party whose place of business is situated in the State that requires the public permission shall take such measures as are necessary to obtain such permission. If public permission is required by the law of a State in which none of the parties has his place of business, the party who has to perform the act for which public permission is required must take such measures as are necessary to obtain permission.
2. The party required to take such measures as are necessary to obtain public permission shall do so without undue delay and with the diligence due in trade, he shall bear any expenses entailed and inform the other party of receipt or final refusal of such permission without undue delay.
3. If the party required to take such measures as are necessary to obtain the public permission does not do so within an agreed period or within an extended period fixed by the other party or, where no period had been agreed within / 6 / months from the formation of the contract, the former party is entitled to withdraw from the contract. The same applies if the latter party has not been informed by the other party of the receipt of the public permission within such period. The party required to take such measures as are necessary to obtain the public permission may likewise withdraw from the contract if notwithstanding the fact that he took all measures without undue delay and with the diligence due in trade to obtain the public permission he failed to do so within the agreed period, or the extended period or, where no period has been agreed, within / 6 / months from the formation of the contract.
4. Where a party fails to fulfil his obligations according to paragraphs 1 and 2. with the effect that one party withdraws from the contract, the other party is entitled to claim for damages arising out of the making of the contract and of the

fact that he did not make other contracts in relying on the former contract becoming effective.

5. Where a party fails to fulfil his obligations according to paragraphs 1 and 2 with the effect that the granting of the permission is delayed or the information of the other party on the granting or the refusal is delayed the other party is entitled to claim for damages arising therefrom.

Article 4: Effectiveness of a contract depending on public permission

1. A contract which according to article 2 paragraph 2 is ineffective becomes effective after the last public permission, the absence of which gave rise to its ineffectiveness, has been granted, unless the parties have otherwise agreed or another date is indicated in the permission.

2. If the other party has not been informed of the receipt of a public permission by the party who had to take such measures as are necessary to obtain such permission, the latter cannot rely on the effectiveness of the contract in relation to the former party.

Article 5: Party with more than one place of business

A party may not rely on any public prohibition or permission requirement applicable according to these rules, where he can reasonably be expected to perform the contract by a branch / or subsidiary / operating in a State where no such prohibition or permission requirement exists.

Article 6: Public prohibitions and public permission requirements concerning individual terms of contract

Where public prohibitions or public permission requirements under Article 2 paragraphs 1 and 2 refer only to individual terms of the contract, then in cases of such prohibition, or of failure to obtain such permission within the period fixed by

Article 3 paragraph 3, or of refusal of permission, the contract shall be considered to be concluded without the corresponding term, unless it becomes apparent that the parties would not have concluded it without that term.

Article 7: Mandatory character of the rules

The rules contained in Articles 1 and 2 are mandatory.

Remarks:

1. It might be discussed whether the definition of an ineffective contract would not be more properly placed in chapter 1 though in a more general wording including other preconditions as prescribed by these rules or as agreed upon by the parties.
2. The new version does not only combine the former articles 2 and 3 para 1. as already discussed but also the former article 5, since the latter deals with a similiar problem. This operation incites the indea for futher simplification. Para 3. of the new art. 2 could be integrated in paras 1. and 2. by replacing the word "legitimate interests" in these latter paras by the words "public policy ("ordre public")".
3. It should be kept in mind whether it would not be advisable to cover the ideas expressed in paras 4 and 5 of art. 3 in a more general manner in chapter 1.