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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

PROGRESSIVE CODIFICATION OF INTERNATIONAL TRADE LAW

UNIFORM RULES ON INTERNATIONAL CONTRACTS IN GENERAL

Chapter 3 : THE SUBSTANTIVE VALIDITY OF INTERNATIONAL CONTRACTS

Section 2 : Public Policy Legislation

Chapter 4 : PUBLIC PERMISSION REQUIREMENTS

(Text prepared by the Informal Working Group on the Progressive Codification of International Trade Law; comments prepared by Professor Maskow of the Institut für ausländisches Recht und Rechtsvergleichung, Potsdam-Babelsberg and Professor Wade, T.M.C. Asser Institut voor Internationaal Recht, The Hague)

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Introduction

1. During its fourth session in Rome from 7 to 9 November 1983, the Informal Working Group on the progressive codification of international trade law reconsidered the work hitherto undertaken on the former Chapter 3, Section 2 (Public Prohibitions and Permission Requirements), paying due attention to the strong reservations expressed by some members of the Governing Council of UNIDROIT during its 62nd session and supported by the two new members of the Group. In the event, the approach formerly adopted has been significantly changed in the following two respects:

a) The more significant change has been to divide the former Section 2 of Chapter 3 in two. Both parts are consistent with each other, yet may be viewed independently with the result that should policy considerations lead to the deletion of the first part, (Article X), the second (Articles A-E) is capable of standing alone.

Briefly, the distinction which has been drawn is to specify in Article X those criteria to be fulfilled by legislation concerning public prohibitions and permission requirements to which effect shall be given. On the other hand, Articles A-E, being a new Chapter 4, are concerned with the rights and duties of the parties to the contract where its effectiveness or performance is subject to a permission requirement whose relevance has been established either in accordance with Article X or, in the alternative view, in accordance with applicable laws.

It is not the intention that Article X be a conflict of laws rule strictu sensu. It is a scope rule determining legislation relevant in assessing the effectiveness of the contract or its performance and does so by reference to national law. Similarly, Articles A-E are not concerned to establish conflict of laws rules.

b) The second significant change has been to delete the rule conferring a mandatory character on the provisions.

2. It should be noted that the text of the Articles here commented on have been elaborated by the Informal Working Group. The headings have been added by the commentators and have not been the subject of approval by the Working Group.

C H A P T E R 3

THE SUBSTANTIVE VALIDITY OF INTERNATIONAL CONTRACTS

Section 2: PUBLIC POLICY LEGISLATION

Article X: Legislation to be considered

(1) Effect shall be given to legislation directed mainly at ensuring the implementation of a general policy of the enacting State, in so far as it affects the validity of the contract, only if:

- a) it claims application whatever be the law otherwise governing the contract;
- b) there is a close and significant connection between the law of the enacting State and the contract;
- c) it is not contrary to the essential requirements of international trade or the legitimate interests of other States having a close and significant connection with the contract.

(2) Nothing in paragraph 1 shall limit the application of the legal rules of the forum which claim application to the contract.

(3) Where the legislation referred to in paragraph 1 only affects individual terms of the contract, Article 15 of Chapter 3 applies accordingly.

(4) Notwithstanding paragraph 1, a contract may nevertheless be regarded as valid where a party may reasonably be expected to fulfil the contractual obligation by performance not affected by legislation as referred to in paragraph 1.

Comment

This Article describes the type of legislation envisaged by the Working Group as falling within the notion of public prohibitions

and public permission requirements, which the commentators here term public policy legislation. The term "legislation" is used in the text of the Article, but it is not the intention that this should be interpreted narrowly to refer only to statutory provisions; rather, it should be seen as encompassing also rules of law developed by judicial decisions or established by means of governmental orders, provided they are generally accessible. The type of legislation aimed at is concerned to implement a general policy of the State establishing the law. This may be contrasted with provisions aimed mainly at ensuring justice between the parties and/or the application of which would lead to the substitution of the contractual term agreed by the parties by a term imposed by law: such provisions do not fall within the scope of Article X.

The intended consequence of the legislation with which Article X is concerned must be to affect the validity of a contract: it may prohibit it entirely or make it subject to a permission requirement. Both cases are covered but the opening words of paragraph 1 ("effect shall be given") make clear that the consequence of establishing the existence and applicability of such legislation is not necessarily its direct application, for the judge or arbitrator is at liberty to accord the effects that his own law (or an otherwise applicable law) would attach to similar provisions, or to determine the actual effect to be accorded in the given case. In practice the result might very well be the same but it could equally be that, whereas the directly applied legislation would have the effect of rendering the contract void, the result of giving effect to such legislation might be in terms of impossibility of performance, which might or might not lead to the granting of damages.

The subparagraph to paragraph 1 specifies three conditions that must be fulfilled if legislation is to fall within the scope of Article X. The conditions are cumulative and rank equally. If there is a distinction it lies with subparagraph a. Self-evidently, if legislation alleged to affect the validity of a contract does not claim to be applicable irrespective of whatever

law otherwise governs the contract, then Article X is not germane to the issue (although the validity of the contract may be affected by the legislation by virtue of another line of legal reasoning). Where such wide power is claimed, it is subject to the conditions specified in subparagraphs b and c. The notion of close and significant connection is a familiar one and may include the fact that the parties have their places of business in that State, that the goods are produced there, that payment is to be made there, etc. Subparagraph c reserves the discretion to decline to give effect to rules that are an expression of "obvious national egoism" of a State or conflict with public international law or otherwise cause or would cause recognisable harm to international trade.

2. The reservation of the applicability of the law of the forum in paragraph 2 is in keeping with this more or less generally accepted principle. It can also be derived from paragraph 1 but has been included in express terms for the sake of clarity. It covers also the public policy provisions of the forum State but does not come into play unless the law of the forum also claims application, a situation that occurs rather frequently in international trade, e.g., where arbitration is conducted in a third State having no connection with the contract.

3. If giving effect to legislation directed at specific terms of contracts would result in individual terms of a contract being held to be void, the remainder of the contract may be saved by virtue of Article 15 of Chapter 3, Section 1. If the result of giving effect is that a permission requirement must be fulfilled, the provisions of Chapter 4 first apply and Article 15 of Chapter 3 only comes into play if the permission is refused.

4. The final paragraph of Article X covers those cases where a party has a branch outside the State whose legislation is in issue and is able to perform at that branch. It also covers those cases where for other reasons he can reasonably be expected to perform the contract, e.g., because he disposes of funds or other necessary means of performance in another country. However,

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the purpose of this paragraph should not be misunderstood. It is not intended to be an invitation to act whenever possible in violation of legislation properly falling under paragraph 1. It is intended that it should apply only where the party may reasonably be expected to perform: the provision is intended to prevent abuse of the rules proposed by the Working Group.

C H A P T E R 4

PUBLIC PERMISSION REQUIREMENTS

Article A: Public permission requirements to be considered

1. The provisions of the following articles apply where at the time of the conclusion of the contract the permission of an institution exercising public authority is required and its absence would wholly or in part affect the validity of the contract or render its performance impossible.

2. A party shall not be entitled to rely on a permission requirement where he could reasonably be expected to perform the contract by means of performance not subject to such a permission requirement.

Comment

Chapter 4 specifies the mutual rights and obligations of the parties in those cases where public permission requirements exist; it relates to the obtainment of such permissions and to the legal consequences in case of non-obtainment.

The Chapter contains unified substantive rules. It adopts the position that where there is a contractual agreement between the parties that is subject to permission requirements, certain rights and duties of the parties in regard to the obtaining of such permission are created. This is witnessed by the widely accepted practice in international trade.

Article A states the initial premise, i.e., that permission requirements affecting the validity or performance of the contract exist, but leaves open whether effect is to be given thereto or not. This is a matter to be resolved by the court or arbitration on the basis of Article X of Chapter 3, Section 2 or, in its absence, by reference to the law deemed applicable,

including rules of private international law where relevant.

Article A does not deal with public prohibitions, which are covered by Article X or, in its absence, by the law the court or arbitration deems applicable. Since a public prohibition is not subject to a subsequent permission, the matters dealt with in Articles A-E cannot arise in that connection.

1. The expression "institution exercising public authority" will normally refer to an organ of State, but also includes other bodies on whom the particular function has been conferred, e.g., banks. A permission constitutes an individual act relating to a single act or group of acts required for the preparation or performance of a contract of a type or for a purpose that is generally forbidden but which may be allowed upon permission being granted.

This provision covers not only permission requirements to which the competent court or arbitration would probably give effect but also those requirements that would probably be disregarded, but which cannot but be taken into consideration since without such permission the performance of the contract would be physically impossible, e.g., a foreign embargo regulation where the goods to be delivered are located in the enacting State. In both these cases the provisions of Articles A-E have to be complied with. In the event of litigation, however, where the permission has not been granted the legal consequences will differ according to whether the legislation is given effect to or not.

An express reference to the time of conclusion of the contract as the relevant time has been placed within parentheses, since it might be advisable to cover also cases of supervening permission requirements. If this should be so it might entail further and special rules concerning, e.g., information as to such additional requirements, termination (or possibly even adaptation) of the contract, matters that have not yet been discussed.

2. Paragraph 2 has been placed between parentheses. A decision on

retention or deletion was deferred. If Article X is retained this paragraph would be otiose; if it is not retained, the inclusion of this provision would, in the opinion of the majority of the Working Group be, superfluous. Even though an alternative means to perform the contract exists, the obliged party as a rule must first apply for permission: the issue of alternative means arises only upon failure to obtain permission. The inclusion of this provision might become important where, in its absence, the court or arbitration would be likely to give effect to the legislation and, e.g., allow the contract to be terminated under Article D. If this is not the case, only impossibility of permission arises, which is not relevant where the party concerned can reasonably be expected to fulfil the contractual obligations by other means.

Article B: Obligation to apply for permission

1. The party who has a place of business in a State the law of which requires such permission shall take the measures necessary to obtain the permission.
2. Where none of the parties has a place of business in such State, the party whose performance requires permission shall take the necessary measures.

Comment

This Article determines which party is under the obligation to apply for permission.

1. Parties frequently insert specific provisions into the contract concerning the question of application, e.g., by reference to INCOTERMS. In the absence of any contractual regulation, the obligation to apply for permission lies on the party having a place of business in the State whose permission is required, on the reasoning that this party is in the better position to obtain the permission with the least delay. For parties not having a place of business, see Article E.

2. The second paragraph applies also in the absence of contractual regulation. Where paragraph 1 does not apply, recourse is had to the notion that obtainment of the permission is part of the obligation to perform, which contains a reference to the place of performance, since each party must obtain all permissions necessary to effect performance at the place of performance.

Other criteria had been discussed by the Working Group. They included reference to the party in the better position to apply for permission and to the party required to perform the obligation characteristic of the particular contract. Other criteria were not adopted mainly on grounds of vagueness and difficulty of formulation.

Article C: Procedure in applying for permission

1. The party required to take the measures necessary to obtain the permission (the applicant party) shall do so without undue delay and with due diligence. He shall bear any expenses so entailed.
2. The applicant party shall inform the other party of the grant or refusal of such permission without undue delay. He shall not be entitled to rely in relation to the other party on the full effectiveness of the contract, if he has not informed the other party of the grant of permission.

Comment

This Article deals with certain individual obligations in regard to the application for permission, provision of information about the result of the application and a particular consequence of failing to provide information.

1. Which measures have to be taken depends on the relevant regulations and the normal modes of procedure in the enacting State.
2. Furnishing the other party with information is important, since, either expressly or impliedly, commencement of the activities necessary to perform the contract is dependent on the granting of the permission (null-date). Accordingly, the fact of refusal or permission must also be communicated, whether or not the decision to refuse is to be appealed.

The final sentence of paragraph 2 makes it clear that a party is not in breach of contract if his acts or omissions are due to a lack of information about the contract taking full effect. For example, the applicant party will not be permitted to insist on delivery dates based on the date of the grant of permission if he

failed to inform the other party of the grant. Other consequences, including claims for damages are not excluded but will be covered by the general provisions of other Chapters. The same is true for the case where the other party obtains reliable knowledge of the grant of permission from other sources. Here the principle of good faith might lead to the conclusion that he must begin acting in performance of the contract without waiting for information from the applicant party.

Article D: Termination of the contract

Both parties are entitled to terminate the contract if, notwithstanding the fact that the applicant party took all measures required, he failed to obtain a grant of permission within an agreed period or, where no period has been agreed, within a reasonable period from the conclusion of the contract.

Comment

This Article establishes the conditions for termination of a contract subject to permission requirements.

Where the applicant party did not take all measures required he is not entitled to terminate the contract, but the other party may do so and claim the sanctions generally provided in cases of non-performance. If the applicant party fails to obtain permission he is also entitled to terminate the contract, since he is not responsible for the success of his efforts, only for the doing of all acts required to obtain permission.

In these cases termination means that the putative effect which was attributed to the contract ceases.

A fixed time-limit for the case where the parties have not agreed on a specific period of time has not been established since the length of time to be granted is dependant on the type of transaction involved and the particular circumstances.

Article E: Absence of a place of business

For the purpose of this section, if a party does not have a place of business, reference is to be made to his habitual residence.

Comment

This provision corresponds to Article 10 (b) CISG. It supplements Article B.

