



UNIDROIT 1985
P.C. - Misc. 7

U n i d r o i t

INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

Working Group on the Progressive Codification
of International Trade Law

N O T E

of the Secretariat of Unidroit concerning the
Draft Chapter 4 on Public Permission Requirements

Rome, October 1985

1. - At its 64th session, held in Rome from 13 to 17 May 1985, the Governing Council of Unidroit proceeded to a closer examination of the first four chapters of the draft rules on international commercial contracts, as prepared by the Working Group. On that occasion Chapter 4 dealing with public permission requirements (Study L - Doc. 32) was also discussed at length. During this discussion several members of the Council expressed their views on both the need for the proposed chapter and the merits of its individual provisions.

2. - Given the number of interesting suggestions made, the relevant section of the Report on the Council's session as prepared by the Secretariat (UNIDROIT 1985 - C.D. 64 - Doc. 14; Orig. English, pp. 31 - 35) is reproduced below in full:

"/.../ Chapter 4 - Public Permission Requirements (Study L - Doc. 32)

Mr Bonell briefly recalled the history of the chapter which had originally been combined with Article X. In view however of the severe criticism of Article X by some members of the Council at its 63rd session, the group had placed Articles A to E in a separate chapter so that they might stand alone in the event, which had now come to pass, of Article X being deleted. With regard to Article A, this dealt with the question of public permission requirements without however specifying which requirements might be relevant. That question would be determined by the applicable law, including if necessary the appropriate rules of private international law.

The purpose of Articles B to E was to regulate for the first time at international level the rights and duties of parties subject to permission requirements. This was an important matter in the field of international commercial contracts but hitherto few legislations had attempted to regulate it. In some cases, for example where INCOTERMS applied, the question would be settled and it was therefore the intention of the drafters that the proposed rules would primarily in the absence of contractual stipulation by the parties.

Mr von Overbeck noted the close link between the provisions of Chapter 4 and the former Article X and he found the draft rules and the commentary on them rather vague. Reference was made to the case of embargo but the character of permissions varied greatly from case to case, some being of paramount strategic importance and others merely matters of routine. In his view the whole chapter needed to be considerably clarified and if there were not forthcoming sufficiently persuasive arguments in favour of its retention then it should be deleted.

Mr Bennett considered that the rule laid down in Article B was subject not only to agreement to the contrary by the parties but also to the applicable law, for example the question of who must make an application for an export licence. Moreover the provision seemed to assume that only one party had a place of business but it might well happen that both the importer and the exporter had a place of business in the country where the permission was to be sought and the articles did not appear to deal with that situation.

Mr Loewe stated that to a large extent he shared the hesitations of Mr von Overbeck concerning Chapter 4. The rules contained therein constituted a legislative innovation aimed at regulating matters already dealt with satisfactorily in practice. Moreover they had a certain private international flavour reminiscent of Article X. Mr Bennett's intervention had convinced him that Article B, which he had hitherto seen as the most important article in the chapter, had little if any value and this led him to question the utility of the chapter as a whole.

As regards Article A the words "wholly or in part affect the validity of the contract" caused him difficulty. Now that Article X had been deleted matters were still more complicated as the same contract might be considered invalid in one country and valid before a judge in another, not for reasons connected with private law but because the restriction of the first country would be taken into account by the judge in that country but not by the judge in the second. The words he had quoted had still perhaps some sense but the validity of the contract would be affected in different ways in different countries. Another problem he had with the text derived from the fact that something was missing. If, for example, a party engaged

in foreign trade than that party had, in his opinion, no duty to enquire into the administrative obstacles to performance facing the party in the other country. This group of articles should, if maintained, contain a provision on the responsibility of each party to disclose to the other the obstacles with which performance might meet. What this led to was to be found in Article D which left it unclear who should pay damages. In his view, a party who failed to take the necessary steps to obtain the permission should be liable in damages to the other party, but what if he had done all that he could but still failed to obtain the permission? The text conveyed the impression that in such cases there would be no liability on the party failing to perform but he was not sure that this ought always to be the case, especially if the party who had not obtained the permission had omitted to inform the other party of the need to obtain it. These were matters which fell within the sphere of liability for non-performance and should not be dealt with in this part of the rules. Performance of the contract included the obligation to do all that was necessary to permit performance and he could not accept that by means of Article D a solution would be reached to a problem which had been the subject of many arbitrations involving parties from free market and from planned economies, in the sense that parties from the latter could excuse their non-performance on the ground that performance was prohibited by their authorities. It would therefore be most undesirable if a text intended for worldwide distribution were to include a solution which had been systematically refused by arbitrators.

Mr Farnsworth associated himself with the remarks made by Mr von Overbeck and Mr Loewe. He also considered that it was preferable not to maintain the articles in their present form although he thought that it might be useful to attempt to salvage some of the rules. He had the impression that the authors of Chapter 5 had been struggling to fill out the chapter and perhaps some of Chapter 4 might in a modified form find a more appropriate place in Chapter 5. The question at issue was in effect the nature of the duty of the party required to obtain the permission. Was it a strict obligation or was it one of due diligence? The authors themselves seemed to have some doubts on the matter and he therefore proposed the deletion of Chapter 4 and the introduction in Chapter 5 of a rule determining the precise character of the obligations of the applicant party.

Mr Rolland agreed with the observations of preceding speakers on Articles B to E. The general principles under elaboration dealt with the obligations of private parties in private contracts whereas permission requirements fell within the domain of public law. Moreover they varied greatly from country to country and from time to time. It was not clear what would be the content of the requirements and the consequence of failure to observe them. There was in other words a considerable measure of uncertainty and it might therefore be preferable to delete Articles B to E.

Mr Diamond stated that he thought that the chapter presented a certain interest. He understood the rather vague reference to permission requirements as intended to deal with two familiar practical problems, namely the need to obtain export and import licences and the application of exchange control regulations. The parties might not have thought of the problems or might have ignored certain requirements. What then would be the consequences of a party's failure to obtain the necessary permission and would it be relevant that he had done his best but failed? These were problems in real life and while it was true that they might eventually turn out to be too complex to be dealt with in a modest compass, that was not a reason for failing to study them at all. There were both caselaw and arbitral awards concerning these questions and it should be possible to deduce at least some basic principles which might be of a more restricted field of application, for example to export and import licences. This being said, the present drafting left much to be desired and it would be helpful if the possible alternative solutions could be more clearly indicated. Reference had been made to INCOTERMS and if there were well known standard terms regulating the issues under discussion then as a matter of scientific method they should be followed. He was not in a position at this stage to support or to criticize the solutions offered but if, as it seemed, there were problems in practice, then they should be analysed and an attempt made to find simple solutions to common problems.

Mr Hartkamp, speaking also on behalf of Mr Enderlein in his absence, expressed agreement with Mr Diamond. It was desirable to introduce some rules in this connection, and one idea he would like to see included was that if there is a permission requirement, there is nevertheless a contract and since the parties are bound by it the obligations of good faith and of disclosure are of the utmost importance. He also approved the rule now contained in Article D which permitted a party to terminate the contract without being liable for damages in the circumstances contemplated by that article. Like Mr Farnsworth, however, he thought that it might be more appropriate to deal with the question in the chapter on performance.

Mr Bonell believed that there had been some misunderstanding as to the intentions of the draftsmen. They had not sought to deal with the problem of identifying the State whose public permission requirements must be taken into account in each case. That was the problem which Article X had attempted to regulate and which was now left for determination by the applicable law. Nor was it the purpose of the rules in Chapter 4 to solve the question of contractual liability in respect of failure to obtain a permission, the consequences of such a failure for the contractual liability of the applicant party would be regulated in the chapter on non-performance. What remained was an intermediate period when the contract had come into existence but was still subject to the risk of not being effective pending the granting or denial of the permission. It was in this grey zone, which had not been sufficiently considered until now, that questions of procedu-

ral rights and duties between the parties arose. He stressed the need of not confusing the issue of who must take the necessary steps to obtain the permission with that of who will be liable for failure to obtain it. The former question was dealt with in Article B while Articles C to E were designed to establish the extent to which there must be disclosure between the parties regarding (a) the duty to apply for a permission and (b) the subsequent course of action, for example whether the competent authority replies in time and the content of such a reply. In the absence of such disclosure the other party could be in total obscurity as to what is happening and might begin performance only to be informed subsequently of the rejection of the application and of the avoidance of the contract. It was not, he repeated, the purpose of Article D to determine whether there should be liability in such cases but simply to permit the other party to terminate the contract if the applicant party had failed to obtain the permission within the time agreed or, if no such period had been agreed, then within a reasonable period from the conclusion of the contract. In the absence of a provision such as Article D, such a solution might be questionable and perhaps not even admitted. He undertook however to report back to the group the comments made on Chapter 4 and in particular the proposals for its deletion and for the incorporation of some of its provisions in the chapter on performance. [....]"

3. - The discussion shows that a substantial majority of members of the Governing Council, while rejecting the idea of a separate chapter on public permission requirements, was nevertheless of the opinion that an attempt should be made to see whether some of the provision at present contained in Chapter 4 could not find a more appropriate place in Chapter 5 dealing with performance.

4. - The Working Group might wish to respond to this request by considering the possibility of including in Chapter 5 additional provisions dealing, inter alia, with the following issues arising in the case where the contract as such or the performance of any of the obligations undertaken thereunder by the parties are subject to a permission requirement:

(a) which party is under the duty to apply for the permission (cf. Art. B of Chapter 4)?

(b) what is the nature of the duty to apply for the permission (strict obligation or obligation of due diligence) (cf. Art. C paragraph 1 of Chapter 4) ?

(c) which kind of duty of disclosure is incumbent upon the applicant party vis-à-vis the other party pending proceedings and what are the consequences of a failure to fulfil these duties (cf. Art. C paragraph 2 of Chapter 4) ?

(d) which steps may be taken by the other party if the applicant party fails to obtain permission within an agreed period of time (cf. Art. D of Chapter 4) ?