



INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW
INSTITUT INTERNATIONAL POUR L'UNIFICATION DU DROIT PRIVE

Principles of International Commercial Contracts
Working Group on Long-Term Contracts

Second session
Hamburg, 26 – 29 October 2015

UNIDROIT 2016
Study L – Doc. 128 rev.
English only
January 2016

Notion of “long-term contracts” (*)

(Drafts prepared by Professors M.J. Bonell and Neil Cohen)

(*) Cf. Study L – Doc. 127, Issue (a).

PREAMBLE

(Purpose of the Principles)

These Principles set forth general rules for international commercial contracts.

They shall be applied when the parties have agreed that their contract be governed by them.^(*)

They may be applied when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like.

They may be applied when the parties have not chosen any law to govern their contract.

They may be used to interpret or supplement international uniform law instruments.

They may be used to interpret or supplement domestic law.

They may serve as a model for national and international legislators.

COMMENT

The Principles set forth general rules which are basically conceived for “international commercial contracts”.

1. “International” contracts

[...]

2. “Commercial” contracts

The restriction to “commercial” contracts is in no way intended to take over the distinction traditionally made in some legal systems between “civil” and “commercial” parties and/or transactions, i.e. to make the application of the Principles dependent on whether the parties have the formal status of “merchants” (*commerçants, Kaufleute*) and/or the transaction is commercial in nature. The idea is rather that of excluding from the scope of the Principles so-called “consumer transactions” which are within the various legal systems being increasingly subjected to special rules, mostly of a mandatory character, aimed at protecting the consumer, i.e. a party who enters into the contract otherwise than in the course of its trade or profession.

~~The criteria adopted at both national and international level also vary with respect to the distinction between consumer and non-consumer contracts. The Principles do not provide any express definition, but the assumption is that the concept of “commercial” contracts should be understood in the broadest possible sense, so as to include not only trade transactions for the supply or exchange of goods or services, but also other types of economic transactions, such as investment and/or concession agreements, contracts for professional services, etc.~~

^(*) Parties wishing to provide that their agreement be governed by the Principles might use ~~the following words, adding any desired exceptions or modifications:~~

~~“This contract shall be governed by one of the Model Clauses for the Use of the UNIDROIT Principles (2010) [except as to Articles ...]”.~~

Parties wishing to provide in addition for the application of the law of a particular jurisdiction might use the following words:

~~“This contract shall be governed by the UNIDROIT Principles (2010) [except as to Articles...], supplemented when necessary by the law of [jurisdiction X]”.~~ *International Commercial Contracts* (see <http://www.unidroit.org/instruments/commercial-contracts/upicc-model-clauses>).

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 – in particular long-term contracts – the Principles have subsequently been adapted to take into account also the characteristics and needs of these transactions. For a definition of the notion of “long-term contract”, see Article 1.11.

3. The Principles and domestic contracts between private persons

[...]

ARTICLE 1.11

(Definitions)

In these Principles

- “court” includes an arbitral tribunal;
- where a party has more than one place of business the relevant “place of business” is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract;

— “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;

- “obligor” refers to the party who is to perform an obligation and “obligee” refers to the party who is entitled to performance of that obligation;

– “writing” means any mode of communication that preserves a record of the information contained therein and is capable of being reproduced in tangible form.

COMMENT

1. Courts and arbitral tribunals

[...]

2. Party with more than one place of business

[...]

3. Long-term contracts

The Principles, both in the black letter provisions and the comments, refer to “long-term contracts” as distinguished from ordinary exchange contracts such as sales contracts to be performed at one time. Three elements typically distinguish long-term contracts from ordinary exchange contracts: duration of the contract, an ongoing relationship between the parties, and complexity of the transaction. For the purpose of the Principles, the essential element is the duration of the contract, while the latter two elements are normally present to varying degrees, but

are not required. The extent to which, if at all, one or the other of the latter elements must also be present for the application of a provision or the relevance of a comment referring to long-term contracts depends on the rationale for that provision or comment. For instance, Articles 6.3.1 et seq. presuppose an ongoing relationship, and Comment 2 to Article 5.1.3 presupposes an ongoing relationship between the parties and a transaction involving performance of a complex nature.

Depending on the context, examples of long-term contracts may include contracts involving commercial agency, distributorship, out-sourcing, franchising, leases (e.g. equipment leases), framework agreements, investment or concession agreements, contracts for professional services, operation and maintenance agreements, supply agreements (e.g. raw materials), construction/civil works contracts, industrial cooperation, contractual joint-ventures, etc.

Provisions and comments of the Principles that explicitly refer to long-term contracts are the Preamble, Comment 2; Article 1.11, Comment 3; Article 2.1.14, Comments 1 and 3; Article 2.1.15, Comment 3; Article 4.3, Comments 3 and 4; Article 4.8, Comments 1, 2 and 3; Article 5.1.3, Comments 1 and 2; Article 5.1.4, Comment 3; Article 5.1.8 and Comment 2; Article 6.2.2, Comment 5; Article 6.3.1 and Comment; Article 6.3.2 and Comment; Article 7.1.7, Comment 5; Article 7.3.5, Comments 1 and 3; Article 7.3.6, Comment 1; Article 7.3.7 and Comment 1.

Several other provisions and comments are also particularly relevant in the context of long-term contracts. See Articles 1.7; 1.8; 2.1.1, Comment 2; 2.1.2, Comments 1 and 2; 2.1.6; 2.1.13; 2.1.14; 2.1.15; 2.1.16; 2.1.17; 2.1.18; 3.3.1 and 3.3.2; 5.1.2; 5.1.7, Comment 3; 5.1.8; Article 5.3.1, Comment 5; Article 5.3.4; 6.1.1; 6.1.4; 6.1.5; 6.1.11; 6.1.14 to 6.1.17; 6.2.1 to 6.2.3; 7.1.3; 7.1.4; 7.1.5; 7.1.6; 7.1.7; 7.3.5.

4. “Obligor” – “obligee”

[...]

45. “Writing”

[...]

ARTICLE 7.3.6

*(Restitution with respect to contracts
to be performed at one time)*

(1) On termination of a contract to be performed at one time either party may claim restitution of whatever it has supplied under the contract, provided that such party concurrently makes restitution of whatever it has received under the contract.

(2) If restitution in kind is not possible or appropriate, an allowance has to be made in money whenever reasonable.

(3) The recipient of the performance does not have to make an allowance in money if the impossibility to make restitution in kind is attributable to the other party.

(4) Compensation may be claimed for expenses reasonably required to preserve or maintain the performance received.

COMMENT

1. Contracts to be performed at one time

~~This Paragraph (1) of this Article refers only to contracts to be performed at one time. A different regime applies to contracts or under which at least the characteristic performance is to be made over a period of at one time-, while a different rule applies to long-term contracts (see Article 7.3.7), paragraph (1)). The most common example of a contract to be performed at one time is an ordinary contract of sale where the entire object of the sale has to be transferred at one particular moment. This Article however refers also to, e.g. construction contracts in which the contractor is under an obligation to produce the entire work to be accepted by the customer at one particular time. A turnkey contract provides an important example.~~

Under a commercial contract one party will usually have to pay money for the performance received. That obligation is not the one that is characteristic of the contract. Thus, a contract of sale where the purchase price has to be paid in instalments, will fall under this Article provided that the seller's performance is to be made at one time.

2. Right of parties to restitution on termination

[...]

ARTICLE 7.3.7

*(Restitution with respect to long-term contracts
to be performed over a period of time)*

(1) On termination of a **long-term contract to be performed over a period of time** 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.

COMMENT

1. ~~Contracts to be performed over a period~~ Long-term contracts

Unlike the rule in paragraph (1) of ~~time~~

~~Contracts to be performed over a period of time are at least as commercially important as Article 7.3.6 with respect to contracts to be performed at one time, such as contracts paragraph (1) of this Article provides that, on termination of sale where the object of the sale a long-term contract, restitution can only be claimed for the period after termination has to be transferred at one particular moment. These contracts include leases (e.g. equipment leases), contracts involving distributorship, out-sourcing, franchising, licensing and commercial agency, as well as service contracts in general. This Article also covers contracts of sale where the goods have to be delivered in instalments. Performance taken effect, provided the contract is divisible. Indeed, because under such contracts a performance might have been made over a long period of time before the contract is terminated, and it may thus be inconvenient to unravel these performances that performance. Furthermore, termination is a remedy with prospective effect only; (see Article 7.3.5). Restitution can, therefore, only be claimed in respect of the period after termination.~~

Illustration

1. A contracts to service ~~company~~ B's computer hardware and software for a period of five years. After three years of regular service A is obliged by illness to discontinue the services and the contract is terminated. B, who has paid A for the fourth year, can claim restitution of the advance payment for that year but not for the money paid for the three years of regular service.

Since contracts are terminated only for the future, any outstanding payments for past ~~performance~~~~performance~~ can still be claimed. This Article does not prevent a claim for damages being brought.

Illustrations

2. Company A leases equipment to company B for three years at a rental of EUR 10,000 a month. B pays punctually for the first two months but then fails to make any further payments despite repeated requests by A. After a lapse of five months A terminates the lease. A is entitled to retain the EUR 20,000 already received (see Article 7.3.7 (1)) and to recover the EUR 50,000 accrued due (on the basis of the contract of lease which is terminated only for the future), together with whatever damages for breach it has sustained (see Article 7.3.5 (2)).

3. A, a hospital, engages B to carry out cleaning services for the hospital, the contract to run for three years. After a year B informs A that it cannot continue with the cleaning services unless the price is doubled. A refuses to agree and B ceases to provide the service. On terminating the contract A can recover damages for any additional expense it incurs in hiring another cleaning firm (see Article 7.4.1 in conjunction with Article 7.3.5 (2)), while B is entitled to retain the payments it has received for services already provided (see Article 7.3.7 (1)).

The rule that restitution can only be claimed for the period after termination has taken effect does not apply if the contract is indivisible.

Illustration

4. A undertakes to paint ten pictures depicting one and the same historical event for B's festival hall. After delivering and having been paid for five paintings, A abandons the work. In view of the fact that the decoration of the hall is supposed to consist of ten paintings to be painted by the same painter and showing different aspects of one historical event, B can claim the return of the advances paid to A and must return the five paintings to A.

2. Restitution

This Article is a special rule which, for ~~long-term~~ contracts ~~to be performed over a period of time~~, excludes restitution for ~~performance~~~~performance~~ made in the past. To the extent that there is restitution under this Article, it is governed by the provisions ~~under~~~~of~~ Article 7.3.6.