

FIRST COURT DECISION REFERRING TO THE UNIDROIT PRINCIPLES IN RELATION TO THE CURRENT PANDEMIC SITUATION

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On 30.4.2020 the Rechtbank Amsterdam has rendered a decision, which to our best knowledge is the first court decision referring to the UNIDROIT Principles with respect to the impact of the COVID-19 pandemic on the performance and non-performance of international commercial contracts.

In late December 2019 Claimant, a US company based in New York, and Defendant, a Dutch company, signed a letter of intent (LOI) according to which Defendant would acquire Claimant's 50% stake in an equestrian show-jumping business ("the Business"). The LOI provided that either party could refuse to execute this agreement (hereinafter "the Transaction Agreement" or "Agreement"), before the deadline set for 2 March 2020, by paying the other party a EUR 30 million "fee". When Defendant failed to sign the Transaction Agreement within the agreed deadline, Claimant initiated a summary proceeding before the Rechtbank Amsterdam seeking, in the first place, an order for Defendant to take the 50% stake of the Business and pay for it the agreed price of EUR 169 million (hereinafter "the Main Claim") or, in the alternative, an order to pay the EUR 30 million "fee" (hereinafter "the Alternative Claim"). Defendant objected that the Transaction Agreement was never concluded and that the Euro 30 million "fee" should be reduced or modified in some way by the Court in accordance with Art. 6:258 of the Dutch Civil Code, due to the COVID-19 pandemic and its devastating consequences on the Business.

The Court, after stating that the law applicable to the dispute was Dutch law, dismissed Claimant's Main Claim on the ground that there was no enforceable contract entered into by the parties. As to the payment by Defendant of the 30 million "fee", after pointing out that there was no well-established case law on COVID-19 and its impact on existing business transactions, referred among others, to recent writings by Dutch scholars which all acknowledged the extraordinary impact of the pandemic thereby justifying the recourse to Art. 6:258, which however in their view imposed first of all on the parties a duty to renegotiate the terms of their agreement and that only absent consensus the court may intervene to adjust the contract so that the harm is borne by the parties in a 50/50 allocation. In support of such approach reference was made to Art. 6:111 of the Principles of European Contract and to Art. 6.2.3(4)(b) of the UNIDROIT Principles of International Commercial Contract, together with Comment 7 to that article, defined as "the general international standard on this topic". In the case at hand, however, the Court, stressing that in a summary proceeding its assessment can only be made on a preliminary basis without prejudice to a subsequent action on the merits, decided not to adjust the Transaction Agreement and exclusively to rely on the parties' judgment which were experienced

professionals, ably counselled by an array of experts, and which expressly stated that *"each of [them] confirms that the fee ... is reasonable and waives any and all rights to claim the contrary"*.