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Long-Term Contracts: New Regulation for International Commercial Arbitrations

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The last 40 years or so has experienced increased growth in the number of transactions concluded internationally, departing from classical one-shot contracts such as the simple sale of goods contract. These complex contracts involve in many instances a mix of private and public issues as is seen in regulatory sectors (telecommunications, oil and gas). The rise of complex international contracts gave birth in some cases to a new approach to their design.

Nowadays, international arbitral tribunals generally deal with disputes related to long-term contracts. Although these contracts often are heavily negotiated and carefully drafted, it has been difficult for arbitrators to assess the agreement of the parties against a national law due to the fact that long-term contracts are largely unregulated under domestic legal systems. Needless to say, no matter how well a contract is drafted, certain issues that were not previously contemplated will arise during its performance.

With a view to addressing the special needs of long-term contracts, UNIDROIT set up a working group aimed at drafting amendments and additions to the black-letter rules and comments of the *UNIDROIT Principles of International Commercial Contracts 2010*, successfully approving a new 2016 edition that was recently published in spring 2017.¹⁾ To clarify, the 2010 UNIDROIT Principles also covered long-term contracts, but a number of issues were not taken into account; this was the work that was developed in the 2016 edition.

Readers of the 2016 UNIDROIT Principles will not find a chapter dealing with long-term contracts as such, but they will find a novel definition and an increased number of provisions, examples, and comments within the Principles that are specially focused on the needs and particularities of long-term contracts. Significantly, the working group conducted their discussions from the viewpoint that international commercial arbitration is the normal way to resolve disputes in this area, while also taking into account other dispute resolution methods, such as dispute boards.

The 2016 edition defines a long-term contract as one which is to be performed over a period of time and which normally involves, in varying degrees, complexity of the transaction and an ongoing relationship between the parties (art.1.11). As explained in Comment 3 of that provision, 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 in varying degrees, but are not required. Examples of long-term contracts may include those involving commercial agency, distributorship, outsourcing, franchising, leases (e.g. equipment leases), framework arrangements, investments or concessions, professional services, operation and maintenance, supply (e.g. raw materials), construction/civil works, industrial cooperation, or joint ventures.

International arbitrators will also find in the 2016 edition new additions and modifications to the Principles focusing on matters that are key to long-term contracts: open terms; agreements to negotiate in good faith; evolving terms; supervening events; co-operation between the parties; restitution after ending contracts entered into for an indefinite period; and post-contractual obligations.

The only departure from the text as originally proposed by the working group was the omission of provisions on termination for compelling reasons. After public exposure of the draft during a seminar held at the University of Oslo's Faculty of Law, serious concerns were expressed with respect to the recommended provisions on termination for compelling reasons. Several other voices within the UNIDROIT Governing Council joined to oppose these provisions, and so a vast majority of Council members ultimately opposed them as well, based primarily on the argument that they would create too much uncertainty.

For decades, lawyers and arbitrators have been struggling with the challenges that long-term contracts present, particularly during their long performance. The new international regulation of these contracts by the 2016 UNIDROIT Principles will provide guidance as well as enhance certainty and security for contracting parties and international arbitral tribunals.

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References

At its [95th session](#) (Rome, 18-20 May 2016), the UNIDROIT Governing Council adopted amendments and additions to the 2010 UNIDROIT Principles and authorised the Secretariat to prepare and publish the 2016 edition. The Principles may be found [here](#). For the time being, in English and French while other languages edition is being prepared.

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