Title:
The Most Recent Legal Principles Adopted by the Arbitral Tribunals under the Auspices of the Cairo Centre, CRCICA-Newsletter, Jan. 1997, page 2 et seq.

Permission Text:
This document is included in TransLex by kind permission of the CRCICA.

Table of Contents:
THE MOST RECENT LEGAL PRINCIPLES ADOPTED BY THE ARBITRAL TRIBUNALS UNDER THE AUSPICES OF THE CAIRO CENTRE
1. Pacta Sunt Servanda:
2. The Good Faith Principle / Bona Fide Principle:
3. The Interpretation of the Contract:
4. The Penal Clause:
5. The Contractual Liability:
6. Release from Contractual Liabilities:
7. Compensation:
8. Damage:
9. Substantial Mistake:
10. Nullification of the Contract for Fraud:
11. Nullification of the Contract for Compulsion:
12. Nullification for False Information:
13. Deliberate Silence as a Cause for the Nullification of the Contract:
14. Force Majeure:
15. The Plea for the Non-Performance of Obligations in Administrative Contracts:
16. The Seat of the Navigating Agent of a Foreign Steamer:
17. The Navigating Agent of a Shipping Line:
18. Supply Contracts:
19. Documentary Credit:
20. The Authority of the Governmental Department to Amend the Contract:
21. Characterization of the parties' Claims:
22. Interests for Delay:
23. Conclusiveness of the Judicial Action:
24. Responsibility of the Consulting Engineer:
25. The Causality Relation:
26. The Contractual Liabilities:

Content:

THE MOST RECENT LEGAL PRINCIPLES ADOPTED BY THE ARBITRAL TRIBUNALS UNDER THE AUSPICES OF THE CAIRO CENTRE

The following are the most recent legal principles adopted by the arbitral tribunals in the cases arbitrated under the auspices of the Cairo Regional Centre for International Commercial Arbitration:

1. Pacta Sunt Servanda:

A Contract, being the private law of parties thereto, cannot be terminated or amended except by the consent of the parties. Such contracts overrides the provisions of the Civil Code except in matters contradicting with the public order.

2. The Good Faith Principle / Bona Fide Principle:

In compliance with modern legal trends, performance phases of all types of contracts have to be carried out in good faith.
This sometimes helps avoid the abusive use of rights on the part of either parties.

3. The Interpretation of the Contract:

As long as the contractual phraseology is clear, it is not deemed allowable to deviate from its semantical essence by interpretation in attempt to make out the underlying intention of parties involved.

4. The Penal Clause:

The realization of a contractual penal clause implies to the contracting parties that an actual damage has occurred. The creditor is not obliged to prove such damage, and on the other hand the debtor shall undertake the burden of either proving that the penal clause has not been realized or that the damage has not taken place.

5. The Contractual Liability:

The contract which is issued by the free will of the contracting parties is the source of the contractual liability. Parties to a contract who freely draw the contract provisions have also the freedom to amend the contractual liabilities but only to the extent permitted by the public order and the applicable laws.

6. Release from Contractual Liabilities:

The contracting parties may mutually agree to release the debtor from any liability arising from actions that do not constitute a fault. By this token, the debtor would be held liable with no release only for intentional faults or gross negligence.

7. Compensation:

The agreement on the amount of compensation in the contract, does not prevent the judge from reviewing this estimated amount by decreasing it when it is proved that this agreement has been at least partially fulfilled, or the amount of compensation fixed was exaggerated in the first place.

8. Damage:

There should be a distinction between the compensation for probable damages and the compensation for loss of opportunities. The former can be compensated for only under certain conditions while the compensation for the latter is subject to no conditions.

9. Substantial Mistake:

To nullify the contract for mistake, the following conditions should be met: (1) the mistake should be substantial (Article 120 of the Egyptian Civil Code); (2) A party to a contract who committed a substantial mistake may request the nullification of the contract, if the other party has also committed the same mistake or had knowledge thereof, or could have easily detected the mistake but did not.

10. Nullification of the Contract for Fraud:

A contract may be nullified for fraud, since it leads to a substantial mistake on the other party's side.

11. Nullification of the Contract for Compulsion:

Compulsion which negatively affects the will and the legal conduct is that sort of pressure targeting the fulfillment of an illegitimate end even when employing legitimate means.
12. Nullification for False Information:

It is admitted in the rulings of the Egyptian Judiciary that if either parties to a contract attempts to give false information then this is deemed an act of fraud as far as it leads the other party to enter into the contract provided that it were not possible for this other party to inspect the whole truth on its own in a reasonable manner.

13. Deliberate Silence as a Cause for the Nullification of the Contract:

Deliberate concealment of information regarding an incident or a coincident its considered a fraudulent act if it was ]proved that the party negatively affected by the act would not have entered into the contract had it known beforehand about the concealed incident or coincident.

14. Force Majeure:

It is commonly admitted that the Force Majeure or an externally intervening cause has to be totally , unpredictable and completely unavoidable. The force majeure does not release the party from its contractual obligations unless it results in a strong cause preventing the performance of such obligations. In accordance with the administrative judiciary and jurisprudence, the application of the theory of contingencies is subject to the occurrence, during the execution phase of an administrative contract, of certain unavoidable circumstances or incidents whether natural or economic which were not predictable at the time of concluding the contract and which later became unavoidable and caused such exorbitant losses that resulted in a major imbalance of the economic interests of the contract.

15. The Plea for the Non-Performance of Obligations in Administrative Contracts:

It has been a standard practice that: in administrative contracts, remuneration is paid after the complete performance of the contractual obligations. The mutual agreement nature of the remuneration clause results in the governmental department's inability to solely effect any amendments thereto and in obligation to fulfill its responsibilities as agreed upon with the other party or else it would face contractual liability. Therefore, a party that enters into a contract with a public authority can resort to either litigation or arbitration, according to the circumstances involved, either requiring the nullification of the contract provided that the said authority incurs all the financial consequences or demanding compensation for damages that have befallen it. On its part, the public authority should enable the contracting party to carry out its obligations in the first place so that the latter would merit earning the agreed upon remuneration. However, the assertion on the mutual-agreement nature of the remuneration clause does not automatically grant the possibility of applying the provisions of the private law in this field. The party contracting with an authority is not entitled to apply the provisions of the Plea for Non-Performance. Article 161 of the Egyptian Civil Code because of the fact that the peculiar nature of administrative contracts does not allow the contracting party to abstain from performing his contractual obligations, however serious the public authority's omissions may be.

16. The Seat of the Navigating Agent of a Foreign Steamer:

The seat of a marine agent of a foreign ship is deemed a domicile for the ship owner in Egypt. All announcements or notifications are thus delivered to this address which is to be considered in all time-distance references. To warrant the validity of notifying a foreign company through its agent in Egypt, the party initiating. the action has to be anyone other than the agent himself.

17. The Navigating Agent of a Shipping Line:

It is legally established that the marine agent has to declare the name of the principal on whose behalf he is authorized to sign contracts as an acknowledgment that he would be the one to whom the consequences and effects of the contract will be binding. In such cases in which either parties claims to be an agent without explicitly stating the name of the constituent to whom the effects of the contract are binding, the party signing the contract is then deemed, himself, a contracting party.
18. Supply Contracts:
Supply Contract whose performance depends on a one-shot supply shall be subjected to the Private Law provisions. On the other hand, the severalfold supply contract shall also be subjected to the Private Law, unless it fulfilled the conditions of the administrative contract, in such case it shall be subjected to the Public Law.

19. Documentary Credit:
The Documentary Credit is not deemed a contract between the seller and the buyer, but it is defined as being a pledge issued on the part of the buyer through its respective bank for the benefit of the seller, hence it becomes a direct obligation between the bank opening the credit and the beneficiary.

20. The Authority of the Governmental Department to Amend the Contract:
The authority of the governmental department to amend the contract or its agreed method of performance is the most significant characteristic which distinguishes between administrative and civil contracts. The right of the governmental department to amend or terminate a contract is derived from the concept of securing the operation of the public utility and the domination of the public interests over the individual interests irrespective of the rule of "pacta sunt servanda": The authority of the governmental department to amend the contract is not absolute however. It is rather restricted by certain conditions; some of them are: (1) The authority to amend the contract does not apply to all the contract's provisions, but it applies only to the provisions pertaining to the operation of the public utility; (2) The authority of the administration to amend the contract's provision shall not exceed a certain limit. Thus, if the administration exceeds this limit, the other party has the right not to perform its obligations and to request the revocation of the contract; (3) The administration must adhere to the legal bounds which implies that any changes must originate from the concerned legislative authority, and hence the instructions issued by the administration to amend the performance of the contract can only enter into effect as of the date of their issuance and absolute notification of the other party of the request for amendment.

21. Characterization of the parties' Claims:
The arbitral tribunal has the jurisdiction to characterize the parties' claims.

22. Interests for Delay:
The law forces severe restrictions in fixing the validity date of the interests for delay stipulating that it shall start as of the date of submitting a judicial request including the claim for interests, unless otherwise agreed upon between the parties.

23. Conclusiveness of the Judicial Action:
It has been settled in the rulings of the judiciary and jurisprudence systems that the judicial action shall not be conclusive unless it is issued by the judicial body having jurisdiction. Hence, a judicial action which is issued by an incompetent court shall not be conclusive to the competent one.

24. Responsibility of the Consulting Engineer:
It is admitted that the consulting engineer is prohibited from receiving salaries or any other payments from the contractor who is under his supervision as this would violate his duties of close and honest supervision. It is upon the contractual agreement between the owner and both the engineer and the contractor, that each of them shall direct his rightful requests to the owner even if the engineer had appointed the contractor or vice versa. The consulting engineer who supervises the performance of the contractor is considered the owner's eye; and the code of ethics obliges him not to enter in any financial deals with the contractor to avoid any suspicions and conflict of interests in his decisions.

25. The Causality Relation:
A definite evidence should be based on the existence of the causality relation between a fault and the claimed damage. The causality relation does not depend on doubts or presumptions since not necessarily does any fault incur compensation. It is only when there is enough evidence on the existence of the causality relation between the fault and the resulting damage that compensation is incurred.

26. The Contractual Liabilities:

the contract imposes certain obligations on the contracting parties. The breach of these obligations shall raise a contractual liability on the defaulting party to compensate the other party. Furthermore, when executing a contract, the mutual intention of the parties and the good faith concept should prevail.

Referring Principles:

- I.1.1 - Good faith and fair dealing in international trade
- IV.1.2 - Sanctity of contracts
- IV.5.1 - Intentions of the parties
- VI.3 - Force majeure
- VI.4 - Promise to pay in case of non-performance
- VII.2 - Principle of foreseeability of loss
- VII.6 - Duty to pay interest