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WORKING GROUP FOR THE PREPARATION OF
PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS

Draft Provision on

ABUSE OF RIGHTS

(Draft Provision and Comments prepared by Professor P.-A. Crépeau)

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The question raised here is whether it would be necessary or at least useful to include in the *Principles* a black-letter rule on Abuse of Rights. The issue will be considered against the background of the rules currently set forth in the *Principles*.

Abuse of a contractual right may be examined in the light of two distinct criteria: *malice* and *unreasonableness*¹.

I. MALICE

The principle of “Good faith and fair dealing” / “bonne foi”, enunciated in article 1.7, considered to be “one of the fundamental ideas underlying the *Principles*”², could undoubtedly be said to cover cases of abuse of rights that are malicious. The illustrations given under the article, particularly situations 3, 4 and 6, could well be characterized as typical instances of the doctrine of abuse of rights.

It must also be kept in mind that, under article 5.2, all contracts include an implied obligation of good faith and fair dealing. Here again, the malicious exercise of a right would be met with appropriate sanctions.

II. UNREASONABLENESS

It is further to be noted that, quite apart from the concept of good faith and fair dealing, several provisions throughout the chapters of the *Principles*³ refer to concepts such as “improperly”, “reckless”, “unreasonable”, “unfair”, “undue”. These indicate conduct that represents a marked departure from the generally accepted norm of reasonable behaviour.

It must also be remembered that art. 5.2 of the *Principles* also provides that all contracts contain implied obligations rooted in the requirement of reasonable conduct.

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It could then plausibly be argued that all such concepts relating to malicious or otherwise unreasonable conduct could be analysed as particular instances of an “underlying general principle”⁴, that is that no contractual right governed by the *Principles* can be said to be absolute, in the sense that it may be exercised irrespective of its motivation. Rights, in such a context, are recognized in order to promote

¹ It did not seem advisable to suggest a general criterion of “*excessive advantage or disadvantage*”, in view of what I believe to be the exceptional character of the rules relating to Gross disparity (art. 3.10), Hardship (art. 6.2.1 et s.) and Reduction of specified damages (art. 7.4.13 (2)). It seems to me preferable to concentrate on an analysis of the conduct of the obligor rather than on the extent of the damage sustained by the obligee.

And even in the two first instances, the concepts of “unfair advantage” (art. 3.10 (1) (a)) and reasonableness (art. 6.2.2 (b)) form part of the applicable regime.

² See *Principles*, art. 1.7, com. 1, p. 17; also art. 1.6 (2).

³ See the references under art. 1.7, com. 1, p. 16.

⁴ See art. 1.6 (2), com. 3, 4, pp. 14-15.

legitimate interests, and not for the furtherance of behaviour prompted by malice, spite or ill-will, nor for the pursuit of objectively unfair or unreasonable purposes.

CONCLUSION

In the light of the above observations, two conclusions may possibly be drawn, in keeping with the liberal interpretation to be given to the *Principles*⁵.

1. Art. 1.7 of the *Principles* is broad enough to cover both instances of malicious or unreasonable exercise of rights. One would say in favour of such a solution: “Cela va sans dire!”
2. The high level of generality of the concept of good faith and fair dealing in an international context might make it appropriate to refer, in a black-letter rule, to what may be construed as a particularly important and appropriate application of the principle⁶.

One would then say of such a solution: “Cela va mieux en le disant!”

I recommend the second solution and, therefore, I would suggest the insertion, following art. 1.7, para. 1 of the *Principles*, of a paragraph which might read as follows:

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| “In particular, parties may not exercise a right either maliciously or unreasonably”. | « En particulier, les parties ne peuvent exercer un droit de façon malicieuse ou déraisonnable ». |
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Article 1.7 would then read as follows:

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| “Each party must act in accordance with good faith and fair dealing in international trade”. | « Les parties sont tenues de se conformer aux exigences de la bonne foi dans le commerce international ». |
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| “In particular, parties may not exercise a right either maliciously or unreasonably”. | « En particulier, les parties ne peuvent exercer un droit de façon malicieuse ou déraisonnable ». |
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| “The parties may not exclude or limit such duties”. | « Elles ne peuvent exclure ces obligations ni en limiter la portée ». |
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⁵ See art. 1.6, com. 3, p. 15.

⁶ See the observations by O. Lando, Summary Records, of the last meeting held in Rome in June 2002, n° 396, p. 52; also A. el Kohly, *ibid.*, n° 398.