



Principles of International Commercial Contracts
Working Group on Long-Term Contracts
Second session
Hamburg, 26 – 29 October 2015

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REPORT

(prepared by the UNIDROIT Secretariat)

Item No. 1 – Adoption of the agenda and organisation of the meeting

1. The *Working Group on Long-Term Contracts*, set up for the purpose of formulating proposals for possible amendments and additions regarding long-term contracts to the black letter rules and comments of the *UNIDROIT Principles of International Commercial Contracts (2010)*, met in Hamburg and was kindly hosted by the Max Planck Institute for Comparative and International Private Law, from 26 to 29 October 2015. Background documents for the discussions of the Group included the Report of the Group's first session in January 2015 in Rome (Study L – Misc. 31 Rev.), a Note summarising the conclusions of the Group's first session prepared by the UNIDROIT Secretariat (portions of which are excerpted below in the relevant sections), and drafts on each particular topic submitted by the responsible Rapporteurs in advance of the session for the Group's consideration. A list of participants is attached to this Report as Annex 1.

2. The annotated draft Agenda (Study L – Misc. 1 rev.) was adopted as proposed and is attached to this Report as Annex 2.

Item No. 2 – Examination of the drafts

3. Pursuant to the adopted Agenda, the discussions focused on examining the drafts submitted by the respective Rapporteurs in the following order:

- (a) Notion of "long-term contracts" – M.J. Bonell and N. Cohen;
- (b) Termination for compelling reasons – Sir Vivian Ramsey and R. Zimmermann;
- (c) Contracts with open terms – Sir Vivian;
- (d) Restitution after ending contracts entered into for an indefinite period – R. Zimmermann;
- (e) Agreements to negotiate in good faith – N. Cohen;
- (f) Contracts with evolving terms – M.J. Bonell;
- (g) Supervening events – N. Cohen;
- (h) Co-operation between the parties – M.J. Bonell; and
- (i) Post-contractual obligations – C. Chappuis.

4. Copies of the drafts examined at the session are contained in Annexes 3-11 respectively, together with the revised drafts ultimately agreed by the Group. The revised drafts show in red the Group's recommended amendments and additions to the 2010 edition of the Principles.

(a) Notion of "long-term contracts"

5. The Note indicated the following points to be considered in the new draft:

- To amend Comment 2 to the Preamble to highlight the fact that the new edition of the Principles gives due consideration to the special needs of long-term contracts;
- To provide a definition of the notion of long-term contracts in Article 1.11 [...] and to include in the comments cross-references to the articles and/or comments where additions to or amendments of the existing edition of the UNIDROIT Principles were made to take into account the special nature and needs of long-term contracts;
- To replace in Comment 1 to Article 7.3.6 the words "contracts to be performed over a period of time" with "long-term contracts", and to delete the last 2 sentences of the first paragraph; and
- To replace in Article 7.3.7 in the title and in the text the words "contracts to be performed over a period of time" with "long-term contracts", and to amend Comment 1 accordingly.

6. The Group was seized of a draft prepared by the Rapporteurs (Doc. 128, Annex 3).

7. The draft contained a new paragraph in Comment 2 to the Preamble that the Group agreed upon with a few linguistic changes, and it replaced the existing second paragraph in the 2010 edition of the Principles.

8. With respect to the definition of long-term contracts in Article 1.11, the draft contained the following proposal: "Long-term contracts' refer to contracts which, contrary to simple exchange contracts to be performed at one time, involve, to a varying degree, performances extended over a period of time, complexity of the transaction, and a relationship between the parties". The Group agreed, after thorough discussion, to replace it with new language, so as to read as follows: "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". The reason for this change was that it was felt that the essential element of long-term contracts was the duration of the contract, while the complexity of the transaction and an ongoing relationship between the parties, though normally present to varying degrees, are not required.

9. It was decided that Comment 3 should be modified first of all to reflect the changes made to the definition of long-term contract. The Group also decided to insert additional examples of such contracts into the second paragraph of Comment 3. Finally, the references in the third and fourth paragraphs regarding long-term contracts were considered to be appropriate.

10. As to the Rapporteurs' proposed amendments and additions to Article 7.3.6, including modifications to Comment 1, and to Article 7.3.7, including modifications to Comments 1 and 2, the Group agreed on them, subject to linguistic changes.

11. For the final version of the draft, reflecting all agreed modifications, see Doc. 128 rev., Annex 3.

(b) Termination for compelling reasons

12. The Note indicated the following points to be considered in the new draft:

- To add in Chapter 6 a third Section entitled "Termination for Compelling Reasons" and composed of one (or more) Article(s) stating that:
 - a. "Long-term contracts may be terminated by either party for compelling reasons. There is a compelling reason if, having regard to all the circumstances of the specific case and balancing the interest of both parties, it would be manifestly unreasonable to expect the terminating party to continue the relationship";
 - b. "The right to terminate the contract for compelling reasons is exercised by notice to the other party";
 - c. "With respect to the effects of termination for compelling reasons Articles 7.3.5 and 7.3.7 apply with appropriate adaptations";
- To state in the comments, among other things, that:
 - a. termination for compelling reasons constitutes an exceptional remedy, applicable in particular, though not exclusively, in the context of so-called relational contracts, and to be distinguished from the termination of contracts for an indefinite period (Article 5.1.8), termination for fundamental non-performance (Articles 7.3.1 et seq.) and hardship (Articles 6.2.1 et seq.);
 - b. for there to be a compelling reason for a party to terminate, it is neither required, nor sufficient, that the other party has been at fault, the decisive tests being the balancing of the interests of the parties and the manifest unreasonableness of continuing the relationship (with examples of cases in which there are compelling reasons and of cases in which there are no compelling reasons for termination: for such examples, see Study L - Misc. 31, paras. 84, 85, 86, 87, 88);
 - c. as to the effects of termination for compelling reasons, Article 7.3.5(2) preserving the right to damages for past non-performances, and Article 7.3.7 excluding restitution of past performances, do not provide a satisfactory solution where no party has been at fault, but one party has incurred considerably higher expenses in the performance of the contract or has acquired, in the interest of the common purpose pursued by the contract, goods or services from third parties: in such cases the rules laid down in Articles 7.3.5(2) and 7.3.7 might have to be adapted,

e.g. by granting that party a sort of compensation for its higher expenses or by setting up a “liquidation” of all assets and debts of the contractual “joint venture” entered into by the parties (for an example see Study L - Misc. 31, para. 101, fn. 4);

- d. if a party gives notice of termination for compelling reasons without there being such compelling reasons, this constitutes a case of anticipatory non-performance (Article 7.3.3), giving the other party the option either to terminate the contract for fundamental non-performance and claim damages, or to keep the relationship alive and resort only to the remedy of withholding its own performance (Article 7.3.4) in the hope that the matter might be resolved in one way or another at a later stage; and
- e. finally, the provision(s) on termination for compelling reasons is (are) of non-mandatory character, and parties may exclude its (their) application altogether or indicate in their contract specific cases of termination for compelling reasons.

13. The Group was seized of a draft prepared by the Rapporteurs (Doc. 135, Annex 10).

14. Regarding the proposed additions in Chapter 6 of a third section entitled “Termination for Compelling Reasons,” the draft contained three Articles addressing respectively: (1) the right to terminate for compelling reasons; (2) the effects of termination for compelling reasons; and (3) restitution on termination for compelling reason.

15. Regarding the proposed Article on the right to terminate for compelling reasons, after careful examination, the Group agreed on the following modifications. With respect to the proposed language in the first paragraph that “[a] party may terminate a contract to be performed over a period of time on notice to the other party with immediate effect if there are compelling reasons for doing so”, the Group agreed upon the following language, after careful examination: “A party may terminate a long-term contract if there is compelling reason to do so.”

16. In agreeing upon this modification, the Group made the following decisions. First, it was decided to remove the language “to be performed over a period of time on notice to the other party with immediate effect”. It was felt that the language “to be performed over a period of time” was rendered extraneous by the insertion of the term “long-term contract.” It was also felt that the language “on notice to the other party with immediate effect” was better placed in separate paragraphs dealing with how to terminate under this Section and when such termination takes effect, which resulted in the third paragraph (“The right of a party to terminate the contract is exercised by notice to the other party”) and fourth paragraph (“Termination of the contract for compelling reason takes effect as from the time of notice.”) respectively. Second, it was decided that the term “compelling reasons” should not be plural as a single “compelling reason” would be sufficient to warrant termination of a long-term contract under this Section.

17. With respect to the draft’s proposed language in the second paragraph that “[t]here are compelling reasons if, having regard to all the circumstances of the case and balancing the interests of the parties, it would be manifestly unreasonable for the terminating party to be expected to continue the contract relationship”, the Group agreed on the following two

modifications after careful review. First, as already decided, the term “compelling reasons” was made singular. Second, the language on “balancing the interests of the parties” was removed as it was felt that such balancing was covered by the language requiring “regard to all the circumstances of the case.”

18. With respect to the comments to this Article, after lengthy discussion, it was decided to take the draft’s proposed Comment on termination for compelling reasons and separate it into multiple comments – with supplementation as necessary – to address: (1) the meaning of the term “compelling reason”; (2) termination for compelling reason and other provisions dealing with termination; (3) inappropriate termination for compelling reason; (4) non-mandatory nature of right to terminate; and (5) termination by notice.

19. Regarding the meaning of the term “compelling reason,” the Group agreed, consistent with its decision at the first session, to emphasise that termination for compelling reason constituted an exceptional remedy, which could be resorted to only if the breakdown of the parties’ relationship was irreparable. For there to be a compelling reason to terminate, the Group agreed that the decisive test was “whether it would be manifestly unreasonable for the terminating party to be expected to continue the contractual relationship.” The Group further agreed that this determination had to be made by “taking into account all the circumstances of the case,” which was felt to cover the balancing of the interests of the parties and that language was removed as it had been from the black letter rule. This was to be set forth in a new Comment 1.

20. Regarding termination for compelling reason and other provisions dealing with termination, the Group agreed upon the importance of explaining the distinction between these provisions in a new Comment 2. It was agreed, in particular, to address in this Comment the distinction between termination for compelling reason and hardship (Articles 6.2.1 et seq.), force majeure (Article 7.1.7), and fundamental non-performance (Articles 7.3.1 et seq.), none of which specifically addressed “the situation where there is an irreparable breakdown in the relationship between parties to long-term contracts.” Regarding non-performance specifically, the Group confirmed that it was “neither necessary, nor sufficient for one party to be in breach of contract for other to be granted a right to terminate for compelling reason.” In cases of fundamental non-performance, it was agreed to add the clarification that “[i]f there also exist circumstances which make it manifestly unreasonable to continue the relationship, then that party will also be able to terminate for compelling reason.” Lastly, the Group agreed upon the importance of adding Illustrations, which were discussed by the Group at length, and four Illustrations were ultimately inserted to this Comment to provide examples of termination for compelling reason and how it was distinct from other provisions dealing with termination.

21. Regarding inappropriate termination for compelling reason, the Group agreed upon the text that had been proposed in the draft, subject to linguistic modifications, and it became Comment 3.

22. Regarding the non-mandatory nature of the right to terminate, consistent with guidance received from the Governing Council at its 94th session (Rome, 6-8 May 2015), the Group decided to emphasise – in a new Comment 4 – the non-mandatory nature of the provisions on termination for compelling reason and to explain briefly that parties may exclude or limit their application, or indicate in their contract specific cases which entitle a party to terminate for compelling reason.

23. Regarding termination by notice, the Group agreed to insert a Comment (which would become Comment 5) briefly elaborating upon paragraphs (3) and (4) of the proposed Article 6.3.1, noting that, among other things, “[t]he notice is effective when the other party receives it”, consistent with Article 1.10.

24. With respect to the draft’s proposed Articles on the effects of termination for compelling reason and restitution on termination for compelling reason respectively, the Group agreed to combine these two articles into one in a new Article 6.3.2 as follows: “As to the effects of termination of a long-term contract for compelling reason in general, and as to restitution, the provisions in Articles 7.3.5 and 7.3.7 apply.” The reason for this modification was that it was felt that, after thorough discussion, there was not a sufficient justification to break away from the default rules in Articles 7.3.5 and 7.3.7. Accordingly, the Group further agreed that the explanation in the Comment to this Article should be consistent with the relevant portions of the comments to Articles 7.3.5 and 7.3.7.

25. For the final version of the draft, reflecting all agreed modifications, see Doc. 135 rev., Annex 10.

(c) Contracts with open terms

26. The Note indicated the following points to be considered in the new draft:

- To add in paragraphs (1) and (2) of Article 2.1.14 a reference to the possibility that the missing term is determined by one of the parties, and to amend Comment 2 to Article 2.1.14 accordingly;
- To replace in Article 5.1.7(3) the words “cannot or will not” by “does not” so as to use the same formula as adopted in Article 2.1.14(2)(b), and to amend Comment 3 to Article 5.1.7 accordingly;
- To add in Comment 3 to Article 5.1.7 a sentence to the effect that the parties are free to fix a standard by which the third party must comply and, if it does not, then the parties can challenge that determination;
- To add in Comment 3 to Article 5.1.7 a sentence to the effect that the parties may wish to fix differing standards depending on whether the task of the third party was to determine terms or mere facts; and
- To make any further amendment to the comments to Articles 2.1.14, 4.8, 5.1.2 and 5.1.7 necessary to take account in particular of long-term contracts.

27. The Group was seised of a draft prepared by the Rapporteur (Doc. 129, Annex 4).

28. Regarding the proposed additions to paragraphs (1) and (2) of Article 2.1.14 of a reference to the possibility that the missing term be determined by one of the parties, the Group agreed, subject to a linguistic modification of paragraph (2)(b).

29. The Group also agreed to the proposed changes in Comments 1 and 2 to reflect the change made in the text of Article 2.1.14.

30. Regarding Comment 3 to Article 2.1.14, the Group similarly agreed to conforming changes and decided not to refer to individual Articles but to refer generically to the Sections of Chapters 5 and 6 containing those Articles, with the exception of providing one particular example from each (i.e. Articles 5.1.7(1) and 6.1.1).

31. It was felt that a new Comment 4 should be added to Article 2.1.14 to address the special relevance of terms deliberately left open in the context of long-term contracts and to provide two Illustrations (which would become Illustrations 3-4).

32. With respect to the proposed addition to Comment 1 to Article 4.8, it was felt that this statement deserved to be elaborated upon and dealt with in a separate paragraph.

33. Regarding Comment 2 to Article 4.8, apart from a few minor linguistic and stylistic modifications, it was felt that the interplay between the gap-filling provisions and Article 4.8 on the one hand and Article 5.1.2 on the other hand was better described by replacing the last sentence ("This Article [i.e. Article 4.8] then applies, leading to the missing term being supplied on the basis of Article 5.1.2.") with the following formulation: "This Article [i.e. Article 4.8] then applies (but see also Article 5.1.2)."

34. Regarding Comment 3 to Article 4.8, the Group agreed to delete, in the first line, the proposed reference to Article 5.1.2 and to add, among the factors to which regard is to be had to determine what is an "appropriate term," a reference to "any preamble to the contract."

35. Regarding the proposed changes in Article 5.1.7(3) so as to conform it with the formulation in Article 2.1.14(2)(b), such changes were agreed, as were the corresponding additions in Comment 2 to that Article.

36. With respect to Comment 3 to Article 5.1.7, linguistic modifications to the first paragraph were agreed. The Group further agreed to replace the proposed new second paragraph with the following further developed wording: "The parties are free to fix the standards or procedure with which the third person must comply in determining the price. The parties can challenge the determination if it does not comply with those standards or that procedure. The parties may also set out the grounds on which the determination of a price by a third person can be challenged, which may vary depending on the nature of the determination. As an example, if the agreed standard concerns an opinion as to 'market price' the parties may agree that the price determined by an expert can be challenged on the basis that it is 'manifestly unreasonable'. In another case, if the standard concerns the ascertainment of a fact, such as 'mid-point of an index', the parties may agree the price can be challenged if it is 'erroneous'."

37. For the final version of the draft, reflecting all agreed modifications, see Doc. 129 rev., Annex 4.

(d) Restitution after ending contracts entered into for an indefinite period

38. The Note indicated the following points to be considered in the new draft:

- To change the title of Article 5.1.8 into "Termination of contracts for indefinite period" and to replace in the text the words "may be ended" by "may be terminated";

- To amend Article 5.1.8 so as to make it clear that, once a contract for an indefinite period has been ended, as far as restitution is concerned the rules laid down in Articles 7.3.5 and 7.3.7 apply; and
- To revise the comments to Article 5.1.8 accordingly.

39. The Group was seized of a draft prepared by the Rapporteur (Doc. 134, Annex 9).

40. Regarding the title of Article 5.1.8, the draft proposed the following title: "Termination of a contract entered into for an indefinite period". The Group, however, determined that the use of the terms "entered into" was unnecessary and ultimately agreed upon the following title: "Termination of a contract for an indefinite period". Regarding replacement of the words "may be ended" with "may be terminated" in the first sentence of Article 5.1.8, the Group agreed.

41. Regarding the amendment of Article 5.1.8 in relation to the rules laid down in Articles 7.3.5 and 7.3.7, the draft proposed the addition of the following sentence: "The rules set out in Articles 7.3.5 and 7.3.7 apply." The Group agreed, upon examination, to replace the proposed language with the following sentence: "As to the effect of termination in general, and as to restitution, the provisions in Articles 7.3.5 and 7.3.7 apply." The reason for this change was that it was felt to clarify the relationship between the Articles.

42. Regarding revision of the comments to Article 5.1.8 in accordance with the modifications to the black letter rule, the Group agreed to add a second Comment and Illustration on termination and its consequences to explain the new sentence concerning Articles 7.3.5 and 7.3.7 that was added to the black letter rule. For Comment 1, the Group agreed upon the conforming change with respect to the use of the terms "may terminate" instead of "may end". The Group also agreed upon the conforming changes to Illustration 1. For the new proposed Comment 2 and Illustration 2, the Group agreed, subject to the addition of "in general" after "[t]he effects of termination" in the first sentence of the Comment for clarification and linguistic modifications in the last paragraph.

43. For the final version of the draft, reflecting all agreed modifications, see Doc. 134 rev., Annex 9.

(e) Agreements to negotiate in good faith

44. The Note indicated the following points to be considered in the new draft:

- To amend the last paragraph of Comment 2 to Article 2.1.15 by deleting the word "expressly" before "agree", by replacing "all the remedies" by "all appropriate remedies" and replacing "for breach of contract" by "for non-performance of the agreement";
- To mention in that same Comment 2 that the duty to negotiate in good faith means a duty to negotiate seriously, with an intent to conclude an agreement, and that in particular in the context of complex long-term contracts parties might wish to further define such duty, e.g. by describing the procedure to be followed, by agreeing on a time table, etc.;
- To point out that for the determination of the content of the duty to negotiate in good faith reference should also be made to Article 1.8 on the

prohibition of inconsistent behavior, to Article 2.1.16 on the duty of confidentiality and to Article 1.9 in the sense that parties should stick to practices established between themselves and relevant trade usages;

- To add in the comments to Article 5.1.4 a new paragraph mentioning that in international contract practice, especially in the context of long-term contracts, it is quite common to speak, instead of a “duty to negotiate in good faith”, of a “duty to use best efforts” with a view to finding a commonly acceptable solution, and that even in the absence of such language the duty to negotiate in good faith amounts to a duty of best efforts;
- To point out that especially in the context of complex long-term contracts a duty of best efforts to find commonly acceptable solutions may be stipulated not only with respect to the formation of the contract but also, if not even more frequently, with respect to unexpected difficulties that may arise in the course of the performance; and
- To make a cross-reference to Article 5.1.4 in all the relevant provisions of the UNIDROIT Principles, i.e. not only in Comment 2 to Article 2.1.15 but also, e.g., in Comment 3 to Article 6.2.3, emphasising their particular relevance in the context of long-term contracts.

45. The Group was seized of a draft prepared by the Rapporteur (Doc. 130, Annex 5).

46. Regarding the draft’s proposed amendments to the last paragraph of Comment 2 to Article 2.1.15 and the mention of the meaning of the duty to negotiate in good faith and its relevance in the context of long-term contracts, the proposed changes were agreed, subject to addition of the word “specifically” in place of “expressly” to emphasise that such a duty is agreed upon by the parties, linguistic modifications and movement of that paragraph to a new Comment 3 entitled “Agreement to negotiate in good faith”. In so doing, the last paragraph of Comment 2 thus became the first paragraph of the new Comment 3.

47. Regarding the explanation that the duty to negotiate in good faith means a duty to negotiate seriously with an intent to conclude an agreement and that parties may wish to further define such a duty in the context of long-term contracts, the Group agreed to the proposed addition, subject to linguistic modifications.

48. Regarding the references to Articles 1.8 (Prohibition of inconsistent behaviour), 2.1.16 (Duty of confidentiality) and 1.9 (Usages and practices), the Group decided to modify the proposed addition of the references to Article 1.8 and 2.1.6 to streamline it to state simply that an agreed-upon duty to negotiate in good faith “does not displace other duties under the Principles (e.g. Articles 1.8 and 2.1.6).” In doing so, the Group decided to drop the reference to Article 1.9 as unnecessary.

49. Regarding the first Illustration, the Group decided to split the last sentence into two sentences in order to clarify it.

50. Regarding the proposed addition in the comments to Article 5.1.4 of a new paragraph regarding long-term contracts, the Group agreed upon the new paragraph (which would become Comment 3) subject to streamlining it and linguistic modifications. In particular, the Group decided to delete the following content from the proposed paragraph: “In the context of complex

long-term contracts, such a duty to use best efforts to find commonly acceptable solutions is often provided for particularly with respect to unexpected difficulties that may arise in the course of the performance of the contract. Even in the absence of language expressly providing for such a duty, inasmuch as a duty to negotiate in good faith means a duty to negotiate seriously with an intent to conclude an agreement (see Article 2.1.15, Comment 3).” It was felt that this content was already sufficiently covered by other sentences in the paragraph. The Group further decided that the reference to Comment 3 to Article 2.1.15 was the only one that was particularly relevant and in need of inclusion in this paragraph, and that reference was added back in at the end of the last sentence.

51. For the final version of the draft, reflecting all agreed modifications, see Doc. 130 rev., Annex 5.

(f) Contracts with evolving terms

52. The Note indicated the following points to be considered in the new draft:

- To add a new Comment 3 to Article 4.3, which under the heading “Practices established between parties and conduct subsequent to the conclusion of contract particularly relevant in interpretation of long-term contracts” states that in view of the fact that long-term contracts often involve performances of a complex nature and are “evolutionary” in nature, i.e. require adaptations in the course of performance, the criteria in sub-paragraphs (b) and (c) are particularly relevant with respect to these types of contract. Since such contracts involve repeated performance (and repeated opportunity for a party to object if the party is displeased), especially the conduct occurring after the conclusion of the contract can provide the basis for inferences as to what the parties believe their obligations are and, thus, be a useful tool in contract interpretation;
- At the same time that Comment should point out that according to Article 4.3(c) the subsequent conduct of the parties can only be an interpretative tool, i.e. be used to explain or amplify, but not to contradict, the terms of the contract as originally agreed between the parties;
- The Comment should further mention the possibility to set up a special organ (e.g. an “auditing committee” composed by representatives of each of the parties) with the task of monitoring the developments in the course of performance and possibly submitting to the parties suggestions for revision of the contract terms; and
- To replace the present Comment 3 to Article 4.3 by a new Comment 4 which under the heading “‘Merger’ and ‘No oral modification’ clauses” states that parties that wish to limit or totally exclude any relevance of subsequent conduct might include in their contract so-called “merger clauses” and “no oral modification clauses”, and refer as to their meaning and effects to Articles 2.1.17 and 2.1.18 respectively.

53. The Group was seized of a draft prepared by the Rapporteur (Doc. 131, Annex 6).

54. The Group examined the proposed new Comment 3 to Article 4.3 and agreed in substance, subject to a number of modifications to language and structure.

55. With respect to the proposed Illustration 5 to Comment 3, the Group decided to replace it with a different example, as well as adding another example (which would become Illustration 6), to explain better the relevance of subsequent conduct in interpreting a long-term contract.

56. With respect to the proposed Illustration 6 (which would become Illustration 7), the Group decided to reformulate its language, as well as add another example (which would become Illustration 8) to provide a case where the long-term contract required the establishment of an auditing body with the task of monitoring the parties' performance.

57. With respect to the proposed new Comment 4, the Group agreed in substance with only very minor linguistic modifications.

58. For the final version of the draft, reflecting all agreed modifications, see Doc. 131 rev., Annex 6.

(g) *Supervening events*

59. The Note indicated the following points to be considered in the new draft:

- To add a new Comment 5 to Article 7.1.7 with the heading "Force majeure and long-term contracts", which opens with the general statement that in the context of long-term contracts, where normally neither party would have an interest in terminating a relationship that may have lasted for years and/or involved large investments, parties may wish to make in their contract not only for the case of hardship but also for the case of *force majeure* provision for the continuation, whenever possible, of their business relationship, and to envisage termination only as a last resort;
- The same Comment could then indicate that a first device to this effect would be expressly to provide in the contract that, except where it is clear from the outset that the impediment is of a permanent nature and subject to the question of who is to bear the costs, the obligation(s) of the party affected by the force majeure are suspended for a fixed period of time or for a "a reasonable time" and that the other party may terminate the contract only at the end of a specified period of time (e.g. 30 days, one year, etc.) after receiving notice of the impediment;
- Finally, parties may also wish to consider whether to provide in their contract that, in case the impediment persists even after the expiry of a fixed time limit, they shall enter into negotiations with a view to adapting the contract to the changed circumstances and that termination should be permissible only if those negotiations do not lead to any agreement within a certain period of time; and
- Moreover, the parties may wish to consider providing in their contract for the establishment of a permanent body (e.g. a so-called "dispute review board", composed of one or three persons with special expertise) with the task of aiding them in resolving their disagreements and disputes by issuing either mere recommendations or making veritable decisions, and that only if such recommendations or decisions are not accepted by the parties, may they resort to arbitral or judicial proceedings.

60. The Group was seised of a draft prepared by the Rapporteur (Doc. 132, Annex 7).

61. Regarding the addition of a new Comment 5 to Article 7.1.7, the draft proposed a new two paragraph Comment. With respect to the first paragraph, the Group agreed to eliminate as unnecessary the first sentence, to split the remainder of that paragraph into two paragraphs, and to make a few linguistic modifications.

62. With respect to the draft's proposed second paragraph, the Group agreed to attach that paragraph's first sentence to the prior paragraph, to cut down the remainder of the paragraph because the Group felt that it was too detailed, and to convert the remainder of the paragraph into an Illustration. The Group agreed that the Illustration (which would become Illustration 3) would thus provide the example of a provision on force majeure in a long-term contract and make reference to a dispute board for resolving disputes in this regard.

63. For the final version of the draft, reflecting all agreed modifications, see Doc. 132 rev., Annex 7.

(h) Co-operation between the parties

64. The Note indicated the following points to be considered in the new draft:

- To split the present single Comment to Article 5.1.3 into two separately numbered comments, i.e. Comment 1 indicating the relevance of the duty of co-operation for all kinds of contract, including ordinary exchange contracts with instantaneous performance, and Comment 2 pointing out the special importance of that duty in the context of long-term contracts;
- To state in Comment 1 that the duty of co-operation constitutes an application of the general principle of good faith and fair dealing as stated in Article 1.7, and that its most significant instances are expressly or impliedly provided for in the Principles either in the black letter rules (see Article 5.3.3 (Interference with conditions), Article 7.1.2 (Interference by the other party), and Article 7.4.8 (Mitigation of harm)) or in the comments (see e.g. Comment 3(a) to Article 6.1.14 concerning the duty to assist the other party in obtaining a public permission, and Comment 10 to Article 7.1.4 concerning the aggrieved party's duty to permit the non-performing party's cure of the non-performance);
- To move Illustration 1 in the present single Comment to Article 5.1.3 to Comment 1 to Article 7.1.2; and
- To state in Comment 2 that in the context of long-term contracts, especially those involving performance of a complex nature and ongoing relationship between the parties, there might be required a higher degree of co-operation (or "co-operativeness"). Comment 2, in stressing the special importance of the duty of co-operation in the context of long-term contracts, could refer to some particularly significant examples in this respect, such as the duty of the purchaser in contracts for the construction of industrial works to provide the contractor with certain types of information relevant to its performance (e.g. information concerning safety or environmental laws in force in the country of the purchaser) and to co-operate in other ways with the contractor (e.g. by storing the contractor's equipment or materials), or, in case of an inter-firm agreement, the

duty of the individual member firms not to interfere with each other's professional practice (e.g. by seeking to hire the other's personnel, etc.), always of course within the limit of reasonable expectations (for further examples, see Study L - Misc. 31, paras. 61 and 63). Should such duties go beyond that limit and imply not insignificant expenses, the creditor may either refuse or be entitled to compensation.

65. The Group was seized of a draft prepared by the Rapporteur (Doc. 133, Annex 8).

66. With respect to the proposed new Comment 1, the Group decided to retain the opening paragraph of the Comment to Article 5.1.3 as contained in the 2010 edition of the Principles.

67. As to the remainder of the proposed new Comment 1, the Group agreed in substance, subject to stylistic changes to the cross-references and minor linguistic modifications.

68. With respect to the Illustrations to the new Comment 1, the deletion of Illustration 1 as contained in the 2010 edition of the Principles was agreed. Illustration 2 became Illustration 1, subject to a replacement in the last sentence of new Illustration 1 of the words "may be required to assist B in its application for the permission" with "can be expected to give at least some assistance to B". It was further agreed to add the two proposed new Illustrations (which would become Illustrations 2-3), subject to linguistic modifications.

69. With respect to the new Comment 2, the Group decided to alter the formulation regarding the level of cooperation by replacing the words "might require from the parties a higher degree of co-operation or a more accentuated attitude of 'cooperativeness' throughout the life of the contract to make it work" with "may especially need co-operation throughout the life of the contract in order for the transaction to work, although always within the limit of reasonable expectations". It was also decided to delete in the subsequent sentence the initial example of an employer being required "to inform the contractor about extraordinary hydrological and climatic conditions at the site which he had ascertained personally". In addition, regarding the last paragraph of the text of the proposed new Comment 2, it was decided to delete the final sentence on the grounds that the issue of costs and reimbursement thereof in the context of co-operation was too complex to be addressed concisely here and better not addressed at all.

70. Regarding the two proposed Illustrations to the new Comment 2, the Group accepted them, and they became Illustrations 4-5, subject only to linguistic modifications to the latter one.

71. With respect to the proposed movement of Illustration 1 of the Comment to Article 5.1.3 as contained in the 2010 edition of the Principles to Comment 1 to Article 7.1.2, the Group preferred instead to delete that example.

72. For the final version of the draft, reflecting all agreed modifications, see Doc. 133 rev., Annex 8.

(i) Post-contractual obligations

73. The Note indicated the following points to be considered in the new draft:

- To amend Comment 3 to Article 7.3.5 by adding a new paragraph stating that so-called post-contractual obligations are particularly frequent in the context of long-term contracts and may be of two different kinds, i.e. they either relate to the winding up of the past relationship, or they already existed before the end of the contract and survive in the future for a certain period of time (for examples of both types, see Study L. – Doc. 126, paras. 44 and 45 and Study L- Misc. 31, paras. 111, 112 and 114);
- to point out that if the contract is silent on this issue, to determine which obligations, if any, exist even after the end of the contract is a question of contract interpretation; and
- to avoid any unnecessary uncertainty in this respect parties may wish to indicate in their contract specifically which obligations, if any, exist even after the end of the contract, what is their precise content and whether they are binding on one or both of the parties, what are the remedies in case of breach, their compatibility with applicable mandatory domestic rules, etc.

74. The Group was seized of a draft prepared by the Rapporteur (Doc. 136, Annex 11).

75. Regarding the draft's proposed addition to Comment 1 of Article 7.3.5, the Group decided not to insert that particular content there as it was felt to be better addressed in Comment 3.

76. Regarding the amendments to Comment 3, the draft proposed modification of the existing paragraph to insert examples of provisions not affected by termination, addition of three more paragraphs, and insertion of two additional Illustrations. With respect to the proposed modification to the existing paragraph, the Group agreed upon the addition of the examples and made linguistic modifications to that paragraph. With respect to the three proposed paragraphs and two Illustrations, the Group agreed that these additions were better addressed in a new Comment 4 entitled "Post-termination obligations in long-term contracts". The Group further agreed upon the insertion of another Illustration (which would become Illustration 3) for Comment 3.

77. Regarding the three additional paragraphs moved to make up the new Comment 4, the Group agreed to shorten them and to combine them into one, as it was felt that the paragraphs were too detailed. In doing so, the Group again confirmed that post-termination obligations are particularly relevant for long-term contracts and agreed to provide explanation concerning issues to be considered and ways in which parties may deal with surviving provisions. The Group further agreed that it was unnecessary to point out the role of contract interpretation in instances in which a contract was silent regarding post-termination obligations, but that it was important for contract drafters to "pay close attention to the compatibility of the surviving duties with mandatory domestic law (e.g. limitations on prohibitions to compete)."

78. Regarding the additional Illustrations moved to Comment 4, the Group agreed upon them, subject to linguistic modifications, and upon insertion of another example, thereby providing three Illustrations (which would become Illustrations 4-6) for the new Comment 4.

79. For the final version of the draft, reflecting all agreed modifications, see Doc. 136 rev., Annex 11.

Item 3 on the Agenda: Any other business

80. The Secretary-General of UNIDROIT discussed the procedure for finalising the proposed amendments and additions to the Principles. Although the draft on termination for compelling reason was agreed in substance during the session, the particular wording of the Comments and Illustrations was to be revised by the Co-Rapporteurs and circulated via email for a subsequent review by the Group. The other drafts were to be updated to reflect the Group's agreed modifications and to be circulated for a final linguistic review by the experts as well.

81. For ease of reference, the few modifications agreed as a result of this procedure were incorporated where necessary into the discussions of the respective drafts above.

Item 4 on the Agenda: Closing of the meeting

82. No other questions or points having been raised, the Chair of the Working Group thanked the participants for their contributions to the discussion, praised the Max Planck Institute for Comparative and International Private Law and Professor Zimmermann for their outstanding hospitality, and closed the meeting.

ANNEX 1**LIST OF PARTICIPANTS****MEMBERS**

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ANNEX 2**Principles of International Commercial Contracts
Working Group on Long-Term Contracts****Second session
Hamburg, 26 – 29 October 2015**UNIDROIT 2015
Study L – Misc. 1 rev.
English only
October 2015**ANNOTATED DRAFT AGENDA**

1. Adoption of the agenda and organisation of the meeting
2. Examination of the drafts
3. Any other business
4. Closing of the meeting

ANNOTATIONS

Item No. 1 – Adoption of the agenda and organisation of the meeting

1. Subject to confirmation by the Working Group, the meeting hours will be as follows:

Morning sessions: 9.00 a.m. – 12.30 p.m.

Afternoon sessions: 2.30 p.m. – 6.00 p.m.

There will be morning and afternoon breaks for coffee and tea and lunch breaks.

Item No. 2 – Examination of the drafts

2. Subject to confirmation by the Working Group, the drafts will be examined in the following order:

- *Monday morning*
Doc. 128 – Notion of “long-term contracts”

- *Monday afternoon*
Doc. 135 – Termination for compelling reasons

- *Tuesday morning*
Doc. 135 – Termination for compelling reasons (continued)

- *Tuesday afternoon*
Doc. 129 – Contracts with open terms

- *Wednesday morning*
Doc. 130 – Agreements to negotiate in good faith
Doc. 134 – Restitution after ending contracts entered into for an indefinite period

- *Wednesday afternoon*
Doc. 131 – Contracts with evolving terms
Doc. 132 – Supervening events

- *Thursday morning*
Doc. 133 – Co-operation between the parties

- *Thursday afternoon*
Doc. 136 – Post-contractual obligations

ANNEX 3**Principles of International Commercial Contracts
Working Group on Long-Term Contracts****Second session
Hamburg, 26 – 29 October 2015**UNIDROIT 2015
Study L – Doc. 128
English only
September 2015**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 (or to import; or to adopt) 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 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]”, one of the *Model Clauses for the Use of the UNIDROIT Principles of International Commercial Contracts* (see <http://www.unidroit.org/instruments/commercial-contracts/upicc-model-clauses>).~~

The Principles were originally conceived mainly for simple exchange contracts such as ordinary contracts of sale and contracts for services to be performed at one time, but in view of the development and increasing importance of more complex transactions – in particular long-term contracts – they 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 contracts”, 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 contracts” refer to contracts which, contrary to simple exchange contracts to be performed at one time, involve, to a varying degree, performances extended over a period of time, complexity of the transaction, and a 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 simple exchange contracts such as ordinary contracts of sale and contracts for services to be performed at one time. The definition of “long-term contracts” in this Article is intentionally flexible and open-ended so as to apply when appropriate to a wide range of contracts in which the three elements of duration, complexity, and relationship are present in varying degrees. The indispensable requisite of a long-term contract is that performance extends over a period of time. The extent to which the other elements must also be present varies with the

nature of the provision or comment involved, depending on which elements contribute to the rationale for the provision or comment. For instance, Articles 6.3.1 et seq. on termination for compelling reasons presuppose contracts of a strong relational character, and Comment 2 to Article 5.1.3 on cooperation between the parties presupposes a transaction involving both performance of a complex nature and an ongoing relationship between the parties. For the application of Article 7.3.7 on restitution with respect to long-term contracts, the relevant element clearly is that the obligations of one or both parties are to be performed over a period of time, and complexity of performance and the relationship between the parties are not necessary. Thus, there is no fixed formula for the extent to which the elements of complexity and relationship must be present so long as the element of duration, along with the elements of complexity and relationship to the extent they appear, are together sufficient to invoke the relevant provision or comment.

Depending on the context, examples of long-term contracts may include leases (e.g. equipment leases), contracts involving commercial agency, distributorship, out-sourcing, franchising, concession agreements, 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 2; 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 7.1.7, Comment 5; Article 7.3.5, Comment 1 and 3; Article 7.3.6, Comment 1; Article 7.3.7 and Comment 1.

However, several other provisions and/or comments are particularly relevant (also) 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; 6.3.1 to 6.3.3; 7.1.3; 7.1.4; 7.1.5; 7.1.6; 7.1.7; 7.3.5.

4. “Obligor” – “obligee”

[...]

5. “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. However, a contract of sale where the purchase price has to be paid in instalments will also fall under this Article because the obligation to pay the price is not the one that is characteristic of the contract.~~

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. Long-term contracts to be performed over a period of time

~~Contracts to be performed over a period of time are at least as commercially important as contracts to be performed at one time, such as contracts of sale where the object of the sale 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. With respect to long-term contracts as defined in Article 1.11, this Article provides that, contrary to the rule laid down in Article 7.3.6 with respect to contracts to be performed at one time, on termination restitution can only be claimed for the period after termination has taken effect, provided the contract is divisible. Indeed, because Performances under such contracts performance could ~~can~~ have been made over a long period of time before the contract is terminated, ~~and~~ it may ~~thus~~ be inconvenient to unravel these performances. 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 performances 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 performances made in the past. To the extent that there is restitution under this Article, it is governed by the provisions under Article 7.3.6.

ANNEX 3**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 an 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.

ANNEX 4**Principles of International Commercial Contracts
Working Group on Long-Term Contracts****Second session
Hamburg, 26 – 29 October 2015**UNIDROIT 2015
Study L – Doc. 129
English only
September 2015**Contracts with open terms ^(*)**

(Draft prepared by Sir Vivian Ramsey)

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

ARTICLE 2.1.14*(Contract with terms deliberately left open)*

(1) If the parties intend to conclude a contract, the fact that they intentionally leave a term to be agreed upon in further negotiations or to be determined by one of the parties or by a third person does not prevent a contract from coming into existence.

(2) The existence of the contract is not affected by the fact that subsequently

(a) the parties reach no agreement on the term; or

(b) one of the parties does not determine the term; or

(c) the third person does not determine the term,

provided that there is an alternative means of rendering the term definite that is reasonable in the circumstances, having regard to the intention of the parties.

COMMENT**1. Contract with terms deliberately left open**

A contract may be silent on one or more issues because the parties simply did not think of them during the negotiations. Provided that the parties have agreed on the terms essential to the type of transaction concerned, a contract will nonetheless have been concluded and the missing terms will be supplied on the basis of Articles 4.8 or 5.1.2 (see Comment 1 on Article 2.1.2). Quite different is the case dealt with in this Article: here the parties intentionally leave open one or more terms because they are unable or unwilling to determine them at the time of the conclusion of the contract, and refer for their determination to an agreement to be made by them at a later stage, or to a determination to be made by one of them or by a third person.

This latter situation, which is especially frequent in, although not confined to, long-term transactions, gives rise in essence to two problems: first, whether the fact that the parties have intentionally left terms open prevents a contract from coming into existence and second, if this is not the case, what will happen to the contract if the parties subsequently fail to reach agreement or if one of the parties or the third person fails to make the determination.

2. Open terms not in themselves an impediment to valid conclusion of contract

Paragraph (1) states that if the parties intended to conclude a contract, the fact that they have intentionally left a term to be agreed upon in further negotiations or to be determined by one of the parties or by a third person does not prevent a contract from coming into existence.

In cases where it is not expressly stated, the parties' intention to conclude a contract notwithstanding the terms left open may be inferred from other circumstances, such as the non-essential character of the terms in question, the degree of definiteness of the agreement as a whole, the fact that the open terms relate to items which by their very nature can be determined only at a later stage, the fact that the agreement has already been partially executed, etc.

Illustration

1. A, a shipping line, enters into a detailed agreement with B, a terminal operator, for the use of B's container terminal. The agreement fixes the minimum volume of containers to be discharged or loaded annually and the fees payable, while the fees for additional containers are

left to be determined if and when the minimum volume is reached. Two months later A learns that B's competitor would offer better conditions and refuses to perform, claiming that the agreement with B never resulted in a binding contract because the question of the fees had not been settled. A is liable for non-performance because the detailed character of the agreement as well as the fact that both A and B began performance immediately indicate clearly that their intention was to enter into a binding agreement.

3. Failure of mechanism provided for by parties for determination of open terms

If the parties are unable to reach agreement on the open terms or if one of the parties or the third person does not determine them, the question arises as to whether or not the contract comes to an end. According to paragraph (2) of this Article the existence of the contract is not affected "provided that there is an alternative means of rendering the term definite that is reasonable in the circumstances, having regard to the intention of the parties".

~~A first alternative exists whenever~~ The alternative means of supplying the missing term will generally be by the application of the "gap-filling" provisions in Articles 5.1.3, 5.1.6, 5.1.7, 6.1.1, 6.1.6, 6.1.7 or 6.1.10 where those provisions can be appropriately supply the relevant term. There may be cases, particularly in the case of long-term contracts, where those provisions may not be appropriate even where they cover the subject matter of the missing term. In such cases, the alternative means of supplying the term will be by the application of Article 4.8 leading to the missing term being supplied on the basis of Article 5.1.2.

~~Where;~~ if the parties have deferred the determination of the missing term to a third person to be nominated by an named institution or person such as, for instance, such as the President of ~~the~~ a Tribunal, or ~~of the~~ a Chamber of Commerce, etc., if the nominated third person does not determine the term, it may also consist in the appointment of a new third person may be nominated. The cases in which it will be necessary to nominate a new third person are likely to a given contract may be upheld by resorting to such alternative means will, however, be quite rare in practice. Few problems should arise as long as the term to be implemented is of minor importance. If, on the other hand, the term in question is essential to the type of transaction concerned, there must be clear evidence of the intention of the parties to uphold the contract: among the factors to be taken into account in this connection are whether the term in question relates to items which by their very nature can be determined only at a later stage, whether the agreement has already been partially executed, etc.

Illustration

2. The facts are the same as in Illustration 1, except that when the minimum volume of containers to be loaded or unloaded is reached the parties fail to agree on the fees payable in respect of the additional containers. A stops performing, claiming that the contract has come to an end. A is liable for non-performance, since the fact that the parties have started performing without making future agreement on the missing term a condition for the continuation of their business relationship is sufficient evidence of their intention to uphold the contract even in the absence of such agreement. The fees for the additional containers will then generally be determined according to the criteria laid down in Article 5.1.7.

ARTICLE 4.8

(Supplying an omitted term)

(1) Where the parties to a contract have not agreed with respect to a term which is important for a determination of their rights and duties, a term which is appropriate in the circumstances shall be supplied.

- (2) In determining what is an appropriate term regard shall be had, among other factors, to
- (a) the intention of the parties;
 - (b) the nature and purpose of the contract;
 - (c) good faith and fair dealing;
 - (d) reasonableness.

COMMENT

1. Supplying of omitted terms and interpretation

Articles 4.1 to 4.7 deal with the interpretation of contracts in the strict sense, i.e. with the determination of the meaning which should be given to contract terms which are unclear. This Article addresses a different though related issue, namely that of the supplying of omitted terms. Omitted terms or gaps occur when, after the conclusion of the contract, a question arises which the parties have not regulated in their contract at all, either because they preferred not to deal with it or simply because they did not foresee it. In other cases the parties may intentionally leave open terms, particularly in long-term contracts, and this type of omitted term is dealt with in Article 2.1.14.

2. When omitted terms are to be supplied

In many cases of omitted terms or gaps in the contract the Principles will themselves provide a solution to the issue (see, for example, Articles 5.1.6 (*Determination of quality of performance*), 5.1.7 (*Price determination*), 6.1.1 (*Time of performance*), 6.1.4 (*Order of performance*), 6.1.6 (*Place of performance*) and 6.1.10 (*Currency not expressed*). ~~See also, in general, Article 5.1.2 on implied obligations.~~ However, even when there are such suppletive, or “stop-gap-filling” solutions which may be generally applicable, rules of a general character they may not be applicable in a given case, particularly in long-term contracts because they would not provide a solution appropriate in the circumstances in view of the expectations of the parties or the special nature of the contract. This Article then applies, leading to the missing term being supplied on the basis of Article 5.1.2.

3. Criteria for the supplying of omitted terms

The terms supplied under this Article and Article 5.1.2 must be appropriate to the circumstances of the case, particularly in relation to long-term contracts. In order to determine what is appropriate, regard is first of all to be had to the intention of the parties as inferred from, among other factors, the terms expressly stated in the contract, prior negotiations or any conduct subsequent to the conclusion of the contract.

Illustration

1. The parties to a construction contract agree on a special interest rate to be paid by the purchaser in the event of delay in payment of the price. Before the beginning of the work, the parties decide to terminate the contract. When the constructor delays restitution of the advance payment the question arises of the applicable interest rate. In the absence of an express term in the contract dealing with this question, the circumstances may make it appropriate to apply the special interest rate agreed for delay in payment of the price by the purchaser also to delay in restitution by the constructor.

If the intention of the parties cannot be ascertained, the term to be supplied may be determined in accordance with the nature and purpose of the contract, and the principles of good faith and fair dealing and reasonableness.

Illustration

2. A distribution franchise agreement provides that the franchisee may not engage in any similar business for a year after the termination of the agreement. Although the agreement is silent on the territorial scope of this prohibition, it is, in view of the particular nature and purpose of the franchise agreement, appropriate that the prohibition be restricted to the territory where the franchisee had exploited the franchise.

ARTICLE 5.1.2

(Implied obligations)

Implied obligations stem from

- (a) the nature and purpose of the contract;**
- (b) practices established between the parties and usages;**
- (c) good faith and fair dealing;**
- (d) reasonableness.**

COMMENT

This Article describes the sources of implied obligations. Different reasons may account for the fact that they have not been expressly stated. The implied obligations may for example have been so obvious, given the nature or the purpose of the obligation, that the parties felt that the obligations “went without saying”. Alternatively, they may already have been included in the practices established between the parties or prescribed by trade usages according to Article 1.9. Yet again, they may be a consequence of the principles of good faith and fair dealing and reasonableness in contractual relations.

Illustrations

1. A rents a full computer network to B and installs it. The contract says nothing as to A’s possible obligation to give B at least some basic information concerning the operation of the system. This may however be considered to be an implied obligation since it is obvious, and necessary for the accomplishment of the purpose of such a contract, that the provider of sophisticated goods should supply the other party with a minimum of information (see Article 5.1.2(a)).

2. A broker who has negotiated a charterparty claims the commission due. Although the brokerage contract is silent as to the time when the commission is due, the usages of the sector can provide an implied term according to which the commission is due, for example, only when the hire is earned, or alternatively when the charterparty was signed, regardless of whether or not the hire will effectively be paid (see Article 5.1.2(b)).

3. A and B, who have entered into the negotiation of a co-operation agreement, conclude an agreement concerning a complex feasibility study, which will be most time-consuming for A. Long before the study is completed, B decides that it will not pursue the negotiation of the co-operation agreement. Even though nothing has been stipulated regarding such a situation, good faith requires B to notify A of its decision without delay (see Article 5.1.2(c)).

ARTICLE 5.1.7
(Price determination)

(1) Where a contract does not fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have made reference to the price generally charged at the time of the conclusion of the contract for such performance in comparable circumstances in the trade concerned or, if no such price is available, to a reasonable price.

(2) Where the price is to be determined by one party and that determination is manifestly unreasonable, a reasonable price shall be substituted notwithstanding any contract term to the contrary.

(3) Where the price is to be fixed by one party or a third person, and that party or third person ~~cannot or will~~ does not do so, the price shall be a reasonable price.

(4) Where the price is to be fixed by reference to factors which do not exist or have ceased to exist or to be accessible, the nearest equivalent factor shall be treated as a substitute.

COMMENT

1. General rule governing price determination

A contract usually fixes the price to be paid, or makes provision for its determination. If however this is not the case, paragraph (1) of this Article presumes that the parties have made reference to the price generally charged at the time of the conclusion of the contract for such performance in comparable circumstances in the trade concerned. All these qualifications are of course significant. The provision also permits the rebuttal of the presumption if there is any indication to the contrary.

This Article is inspired by Article 55 CISG. The rule has the necessary flexibility to meet the needs of international trade.

It is true that in some cases the price usually charged on the market may not satisfy the reasonableness test which prevails elsewhere in this Article. Recourse would then have to be made to the general provision on good faith and fair dealing (see Article 1.7), or possibly to some of the provisions on mistake, fraud and gross disparity (see Chapter 3, Section 2).

Some international contracts relate to operations which are unique or at least very specific, in respect of which it is not possible to refer to the price charged for similar performance in comparable circumstances. According to paragraph (1) the parties are then deemed to have made reference to a reasonable price and the party in question will fix the price at a reasonable level, subject to the possible review by courts or arbitral tribunals.

Illustrations

1. A, a firm specialised in express mailing throughout the world, receives from B a parcel to be delivered as soon as possible from country X to country Y. Nothing is said as to the price. A should bill B with the price usually charged in the sector for such a service.
2. The next order which A receives from B is one to deliver another parcel as soon as possible to remote and not easily accessible country Z, where a team of explorers is in need of urgent supplies. Again, nothing is said as to price, but since no possible market comparison can be made A must act reasonably when fixing the price.

2. Determination of price by one party

In some cases the contract expressly provides that the price will be determined by one of the parties. This happens frequently in several sectors, for example the supply of services. The price cannot easily be determined in advance, and the performing party is in the best position to place a value on what it has done.

In those cases where the parties have made such a provision for determining the price, it will be enforced. If the party does not determine the price then the price will be a reasonable price. To avoid possible abuses however, paragraph (2) enables judges or arbitrators to replace a manifestly unreasonable price by a reasonable one. This provision is mandatory.

3. Determination of price by third person

A provision that the price will be determined by a third person can give rise to serious difficulty if that third person is unable to accomplish the mission (not being the expert he or she was thought to be) or ~~refuses to~~ does not do so. Paragraph (3) provides that the price, possibly determined by judges or arbitrators, shall be reasonable. If the third person determines the price in circumstances that may involve fraud, gross disparity or threat, Article 3.2.8(2) may apply.

The parties are free to fix the terms with which the third person must comply in determining the price and the parties can challenge the determination if it does not comply with those terms. Those terms may differ depending on the task (such as determining terms or facts) to be performed in determining the price.

4. Determination of price by reference to external factors

In some situations the price is to be fixed by reference to external factors, typically a published index, or quotations on a commodity exchange. In cases where the reference factor ceases to exist or to be accessible, paragraph (4) provides that the nearest equivalent factor shall be treated as a substitute.

Illustration

3. The price of a construction contract is linked to several indexes, including the “official index of charges in the construction sector”, regularly published by the local Government. Several instalments of the price still have to be calculated when that index ceases to be published. The Construction Federation, a private trade association, decides however to start publishing a similar index to replace the former one and in these circumstances the new index will serve as a substitute.

ANNEX 4

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

**Second session
Hamburg, 26 – 29 October 2015**

UNIDROIT 2016
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Contracts with open terms ^(*)

(Draft prepared by Sir Vivian Ramsey)

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

ARTICLE 2.1.14*(Contract with terms deliberately left open)*

(1) If the parties intend to conclude a contract, the fact that they intentionally leave a term to be agreed upon in further negotiations or to be determined by one of the parties or by a third person does not prevent a contract from coming into existence.

(2) The existence of the contract is not affected by the fact that subsequently

(a) the parties reach no agreement on the term; ~~or~~

(b) the party who is to determine the term does not do so; or

(c) the third person does not determine the term,

provided that there is an alternative means of rendering the term definite that is reasonable in the circumstances, having regard to the intention of the parties.

COMMENT**1. Contract with terms deliberately left open**

A contract may be silent on one or more issues because the parties simply did not think of them during the negotiations. Provided that the parties have agreed on the terms essential to the type of transaction concerned, a contract will nonetheless have been concluded and the missing terms will be supplied on the basis of Articles 4.8 or 5.1.2 (see Comment 1 on Article 2.1.2). Quite different is the case dealt with in this Article: here the parties intentionally leave open one or more terms because they are unable or unwilling to determine them at the time of the conclusion of the contract, and refer for their determination to an agreement to be made by them at a later stage, or to a **determination to be made by one of them or by a third person**.

This latter situation, which is especially frequent in, although not confined to, long-term **transactionscontracts**, gives rise in essence to two problems: first, whether the fact that the parties have intentionally left terms open prevents a contract from coming into existence and second, if this is not the case, what will happen to the contract if the parties subsequently fail to reach agreement or **if the party or third person failswho is to make the determination does not do so**.

2. Open terms not in themselves an impediment to valid conclusion of contract

Paragraph (1) states that if the parties intended to conclude a contract, the fact that they have intentionally left a term to be agreed upon in further negotiations or to be determined by **one of the parties or by** a third person does not prevent a contract from coming into existence.

In cases where it is not expressly stated, the parties' intention to conclude a contract notwithstanding the terms left open may be inferred from other circumstances, such as the non-essential character of the terms in question, the degree of definiteness of the agreement as a whole, the fact that the open terms relate to items which by their very nature can be determined only at a later stage, the fact that the agreement has already been partially executed, etc.

Illustration

1. A, a shipping line, enters into a detailed agreement with B, a terminal operator, for the use of B's container terminal. The agreement fixes the minimum volume of containers to be discharged or loaded annually and the fees payable, while the fees for additional containers are left to be determined if and when the minimum volume is reached. Two months later A learns that B's competitor would offer better conditions and refuses to perform, claiming that the

agreement with B never resulted in a binding contract because the question of the fees had not been settled. A is liable for non-performance because the detailed character of the agreement as well as the fact that both A and B began performance immediately indicate clearly that their intention was to enter into a binding agreement.

3. Failure of mechanism provided for by parties for determination of open terms

If the parties are unable to reach agreement on the open terms or **if the party or the third person who is to make the determination does not determine them do so**, the question arises as to whether or not the contract comes to an end. According to paragraph (2) of this Article the existence of the contract is not affected “provided that there is an alternative means of rendering the term definite that is reasonable in the circumstances, having regard to the intention of the parties”. **A first alternative exists whenever the missing term can be supplied on the basis of Article 5.1.2; if**

The alternative means of supplying the missing term will generally be application of the “gap-filling” provisions in Section 1 of Chapter 5 and Section 1 of Chapter 6, for example, by determining the price under Article 5.1.7(1) or by fixing the time for performance under Article 6.1.1 where those provisions can appropriately supply the relevant term. There may be situations, particularly in respect of long-term contracts, where those provisions may not be appropriate even where they cover the subject matter of the missing term. In such situations, the term will be supplied by Article 4.8 or Article 5.1.2.

Where the parties have deferred the determination of the missing term to a third person to be nominated by **an instance named institution or person** such as the President of **the** Tribunal, or **of the** Chamber of Commerce, etc., **it may also consist in the appointment of if the nominated third person does not determine the term, a new third person may be nominated.** The cases in which **a given contract may be upheld by resorting it will be necessary to such alternative means will, however, nominate a new third person are likely to** be quite rare in practice. Few problems should arise as long as the term to be implemented is of minor importance. If, on the other hand, the term in question is essential to the type of transaction concerned, there must be clear evidence of the intention of the parties to uphold the contract: among the factors to be taken into account in this connection are whether the term in question relates to items which by their very nature can be determined only at a later stage, whether the agreement has already been partially executed, etc.

Illustration

2. The facts are the same as in Illustration 1, except that when the minimum volume of containers to be loaded or unloaded is reached the parties fail to agree on the fees payable in respect of the additional containers. A stops performing, claiming that the contract has come to an end. A is liable for non-performance, since the fact that the parties have started performing without making future agreement on the missing term a condition for the continuation of their business relationship is sufficient evidence of their intention to uphold the contract even in the absence of such agreement. The fees for the additional containers will **then generally** be determined according to the criteria laid down in Article 5.1.7.

4. Open terms in long-term contracts

As stated above and particularly in the case of long-term contracts, the parties may leave a term to be agreed when that term applies only to obligations at a later stage of the contract. For example, the parties may agree a price which is only to apply during the first year of the contract, leaving open the price to apply for the second or subsequent years. Equally, the parties may leave open the date for delivery because, for instance, the delivery of a piece of machinery may depend on the completion of a building before it is delivered. In such circumstances the term as to price

may not be appropriately supplied by reference to Article 5.1.7 nor may time of performance be appropriately supplied by reference to Article 6.1.1. The appropriate term would then be supplied by Article 4.8 or Article 5.1.2.

Illustrations

3. The facts are the same as in Illustration 1, except that the fees payable in respect of the additional containers are fixed for the first year but there is no provision as to the fees to be charged for the second or subsequent years. In such a case it may not be appropriate to determine the fees in accordance with Article 5.1.7 by reference to a price “at the time of the conclusion of the contract”. Instead, it may be appropriate to fix a fee by reference to the date at the end of the first year. A term to that effect could be supplied under Article 4.8 or Article 5.1.2.

4. X is a power company and has decided to construct a new power station. X is purchasing a generator from Y. The generator will be installed directly onto the foundations in the generator building at the power station after that building has been completed. A generator can be delivered no earlier than 3 years after it is ordered. X has not yet entered into a construction contract for the power station but the generator building will only take 6 months to complete once the construction contract starts. X places a contract now for the generator so that it will be ready in time but cannot yet fix a time for delivery. The parties leave the date of delivery as “to be agreed”. If they do not agree a date for delivery, it may not be appropriate to determine the time for delivery as being “within a reasonable time after conclusion of the contract” between X and Y, in accordance with the provisions of Article 6.1.1. It may be appropriate to fix a term by reference to the completion of the generator building. A term to that effect could be supplied under Article 4.8 or Article 5.1.2.

ARTICLE 4.8

(Supplying an omitted term)

(1) Where the parties to a contract have not agreed with respect to a term which is important for a determination of their rights and duties, a term which is appropriate in the circumstances shall be supplied.

(2) In determining what is an appropriate term regard shall be had, among other factors, to

- (a) the intention of the parties;**
- (b) the nature and purpose of the contract;**
- (c) good faith and fair dealing;**
- (d) reasonableness.**

COMMENT

1. Supplying of omitted terms and interpretation

Articles 4.1 to 4.7 deal with the interpretation of contracts in the strict sense, i.e. with the determination of the meaning which should be given to contract terms which are unclear. This Article addresses a different though related issue, namely that of the supplying of omitted terms. Omitted terms or gaps occur when, after the conclusion of the contract, a question arises which the parties have not regulated in their contract at all, either because they preferred not to deal with it or simply because they did not foresee it.

However, in other cases the parties may intentionally leave open terms, with the terms to be agreed upon in further negotiations or to be determined by one of the parties or by a third person. This will occur with particular frequency in long-term contracts. If the parties fail to agree or the party or third person fails to determine the term, Article 2.1.14 applies.

2. When omitted terms are to be supplied

In many cases of omitted terms or gaps in the contract the Principles will themselves provide a solution to the issue (see, for example, Articles 5.1.6 (~~Determination of quality of performance~~), 5.1.7 (~~Price determination~~), 6.1.1 (~~Time of performance~~), 6.1.4 (~~Order of performance~~), 6.1.6 (~~Place of performance~~) and 6.1.10 (~~Currency not expressed~~). See also, in general, Article 5.1.2 on implied obligations). However, even when there are such ~~suppletive, or “stop-gap”, rules of a general character-filling”~~ solutions which may be generally applicable, they may not ~~be applicable~~ apply in a given case, particularly in long-term contracts because they would not provide a solution appropriate in the circumstances in view of the expectations of the parties or the special nature of the contract. This Article then applies: (but see also Article 5.1.2).

3. Criteria for the supplying of omitted terms

The terms supplied under this Article must be appropriate to the circumstances of the case, particularly in relation to long-term contracts. In order to determine what is appropriate, regard is first of all to be had to the intention of the parties as inferred from, among other factors, the terms expressly stated in the contract, any preamble to the contract, prior negotiations or any conduct subsequent to the conclusion of the contract.

Illustration

1. The parties to a construction contract agree on a special interest rate to be paid by the purchaser in the event of delay in payment of the price. Before the beginning of the work, the parties decide to terminate the contract. When the constructor delays restitution of the advance payment the question arises of the applicable interest rate. In the absence of an express term in the contract dealing with this question, the circumstances may make it appropriate to apply the special interest rate agreed for delay in payment of the price by the purchaser also to delay in restitution by the constructor.

If the intention of the parties cannot be ascertained, the term to be supplied may be determined in accordance with the nature and purpose of the contract, and the principles of good faith and fair dealing and reasonableness.

Illustration

2. A distribution franchise agreement provides that the franchisee may not engage in any similar business for a year after the termination of the agreement. Although the agreement is silent on the territorial scope of this prohibition, it is, in view of the particular nature and purpose of the franchise agreement, appropriate that the prohibition be restricted to the territory where the franchisee had exploited the franchise.

ARTICLE 5.1.2
(Implied obligations)

Implied obligations stem from

- (a) the nature and purpose of the contract;**
- (b) practices established between the parties and usages;**
- (c) good faith and fair dealing;**
- (d) reasonableness.**

COMMENT

This Article describes the sources of implied obligations. Different reasons may account for the fact that they have not been expressly stated. The implied obligations may for example have been so obvious, given the nature or the purpose of the obligation, that the parties felt that the obligations “went without saying”. Alternatively, they may already have been included in the practices established between the parties or prescribed by trade usages according to Article 1.9. Yet again, they may be a consequence of the principles of good faith and fair dealing and reasonableness in contractual relations.

Illustrations

1. A rents a full computer network to B and installs it. The contract says nothing as to A’s possible obligation to give B at least some basic information concerning the operation of the system. This may however be considered to be an implied obligation since it is obvious, and necessary for the accomplishment of the purpose of such a contract, that the provider of sophisticated goods should supply the other party with a minimum of information (see Article 5.1.2(a)).
2. A broker who has negotiated a charterparty claims the commission due. Although the brokerage contract is silent as to the time when the commission is due, the usages of the sector can provide an implied term according to which the commission is due, for example, only when the hire is earned, or alternatively when the charterparty was signed, regardless of whether or not the hire will effectively be paid (see Article 5.1.2(b)).
3. A and B, who have entered into the negotiation of a co-operation agreement, conclude an agreement concerning a complex feasibility study, which will be most time-consuming for A. Long before the study is completed, B decides that it will not pursue the negotiation of the co-operation agreement. Even though nothing has been stipulated regarding such a situation, good faith requires B to notify A of its decision without delay (see Article 5.1.2(c)).

ARTICLE 5.1.7

(Price determination)

(1) Where a contract does not fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have made reference to the price generally charged at the time of the conclusion of the contract for such performance in comparable circumstances in the trade concerned or, if no such price is available, to a reasonable price.

(2) Where the price is to be determined by one party and that determination is manifestly unreasonable, a reasonable price shall be substituted notwithstanding any contract term to the contrary.

(3) Where the price is to be fixed by **one party or** a third person, and that **party or third person ~~cannot or will~~does** not do so, the price shall be a reasonable price.

(4) Where the price is to be fixed by reference to factors which do not exist or have ceased to exist or to be accessible, the nearest equivalent factor shall be treated as a substitute.

COMMENT

1. General rule governing price determination

A contract usually fixes the price to be paid, or makes provision for its determination. If however this is not the case, paragraph (1) of this Article presumes that the parties have made reference to the price generally charged at the time of the conclusion of the contract for such performance in comparable circumstances in the trade concerned. All these qualifications are of course significant. The provision also permits the rebuttal of the presumption if there is any indication to the contrary.

This Article is inspired by Article 55 CISG. The rule has the necessary flexibility to meet the needs of international trade.

It is true that in some cases the price usually charged on the market may not satisfy the reasonableness test which prevails elsewhere in this Article. Recourse would then have to be made to the general provision on good faith and fair dealing (see Article 1.7), or possibly to some of the provisions on mistake, fraud and gross disparity (see Chapter 3, Section 2).

Some international contracts relate to operations which are unique or at least very specific, in respect of which it is not possible to refer to the price charged for similar performance in comparable circumstances. According to paragraph (1) the parties are then deemed to have made reference to a reasonable price and the party in question will fix the price at a reasonable level, subject to the possible review by courts or arbitral tribunals.

Illustrations

1. A, a firm specialised in express mailing throughout the world, receives from B a parcel to be delivered as soon as possible from country X to country Y. Nothing is said as to the price. A should bill B with the price usually charged in the sector for such a service.

2. The next order which A receives from B is one to deliver another parcel as soon as possible to remote and not easily accessible country Z, where a team of explorers is in need of urgent supplies. Again, nothing is said as to price, but since no possible market comparison can be made A must act reasonably when fixing the price.

2. Determination of price by one party

In some cases the contract expressly provides that the price will be determined by one of the parties. This happens frequently in several sectors, for example the supply of services. The price cannot easily be determined in advance, and the performing party is in the best position to place a value on what it has done.

In those cases where the parties have made such a provision for determining the price, it will be enforced. To avoid possible abuses however, paragraph (2) enables judges or arbitrators to replace a manifestly unreasonable price by a reasonable one. This provision is mandatory.

If the party does not determine the price, paragraph (3) provides that the price, possibly determined by judges or arbitrators, shall be reasonable.

3. Determination of price by third person

A provision that the price will be determined by a third person can give rise to serious difficulty if that third person is unable to accomplish the mission (not being the expert he or she was thought to be) or ~~refuses to~~ does not do so. Paragraph (3) provides that the price, possibly determined by judges or arbitrators, shall be reasonable. If the third person determines the price in circumstances that may involve fraud, ~~threat or~~ gross disparity ~~or threat~~, Article 3.2.8(2) may apply.

The parties are free to fix the standards or procedure with which the third person must comply in determining the price. The parties can challenge the determination if it does not comply with those standards or that procedure. The parties may also set out the grounds on which the determination of a price by a third person can be challenged, which may vary depending on the nature of the determination. As an example, if the agreed standard concerns an opinion as to “market price” the parties may agree that the price determined by an expert can be challenged on the basis that it is “manifestly unreasonable”. In another case, if the standard concerns the ascertainment of a fact, such as “mid-point of an index”, the parties may agree the price can be challenged if it is “erroneous”.

4. Determination of price by reference to external factors

In some situations the price is to be fixed by reference to external factors, typically a published index, or quotations on a commodity exchange. In cases where the reference factor ceases to exist or to be accessible, paragraph (4) provides that the nearest equivalent factor shall be treated as a substitute.

Illustration

3. The price of a construction contract is linked to several indexes, including the “official index of charges in the construction sector”, regularly published by the local Government. Several instalments of the price still have to be calculated when that index ceases to be published. The Construction Federation, a private trade association, decides however to start publishing a similar index to replace the former one and in these circumstances the new index will serve as a substitute.

ANNEX 5

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

**Second session
Hamburg, 26 – 29 October 2015**

UNIDROIT 2015
Study L – Doc. 130
English only
September 2015

Agreements to negotiate in good faith ^(*)

(Draft prepared by Professor Neil Cohen)

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

ARTICLE 2.1.15*(Negotiations in bad faith)*

(1) A party is free to negotiate and is not liable for failure to reach an agreement.

(2) However, a party who negotiates or breaks off negotiations in bad faith is liable for the losses caused to the other party.

(3) It is bad faith, in particular, for a party to enter into or continue negotiations when intending not to reach an agreement with the other party.

COMMENT**1. Freedom of negotiation**

[...]

2. Liability for negotiating in bad faith

A party's right freely to enter into negotiations and to decide on the terms to be negotiated is, however, not unlimited, and must not conflict with the principle of good faith and fair dealing laid down in Article 1.7. One particular instance of negotiating in bad faith which is expressly indicated in paragraph (3) of this Article is that where a party enters into negotiations or continues to negotiate without any intention of concluding an agreement with the other party. Other instances are where one party has deliberately or by negligence misled the other party as to the nature or terms of the proposed contract, either by actually misrepresenting facts, or by not disclosing facts which, given the nature of the parties and/or the contract, should have been disclosed. As to the duty of confidentiality, see Article 2.1.16.

A party's liability for negotiating in bad faith is limited to the losses caused to the other party (paragraph (2)). In other words, the aggrieved party may recover the expenses incurred in the negotiations and may also be compensated for the lost opportunity to conclude another contract with a third person (so-called reliance or negative interest), but may generally not recover the profit which would have resulted had the original contract been concluded (so-called expectation or positive interest).

~~Only~~ On the other hand, if the parties have expressly agreed on an affirmative duty to negotiate in good faith, will the all appropriate remedies for breach of contract non-performance of that agreement will be available to the aggrieved party, including the remedy of the right to performance and other appropriate remedies reflecting the so-called expectation or positive interest.

A duty to negotiate in good faith means, at the least, a duty to negotiate seriously with an intent to conclude an agreement. In addition, other aspects of the general obligation of good faith remain relevant. For example, in negotiations a party may not act inconsistently with an understanding it has caused the other party to have and upon which that other party reasonably has acted in reliance to its detriment (see Article 1.8) and may not disclose confidential information or to use it improperly for its own purposes (see Article 2.1.6). In addition, in negotiations the parties are bound by any usage to which they have agreed and by any practices which they have established between themselves, as well as by a usage that is widely known to and regularly observed in international trade by parties in the particular trade concerned (see Article 1.9).

In the case of a complex long-term contract, parties might wish further to define the duty to negotiate in good faith in light of the nature of the contract and its commercial context by, for example, describing the procedure to be followed, agreeing on a timetable, etc.

Illustrations

1. A learns of B's intention to sell its restaurant. A, who has no intention whatsoever of buying the restaurant, nevertheless enters into lengthy negotiations with B for the sole purpose of preventing B from selling the restaurant to C, a competitor of A's. A, who breaks off negotiations when C has bought another restaurant, is liable to B, who ultimately succeeds in selling the restaurant at a lower price than that offered by C, for the difference in price.
2. A, who is negotiating with B for the promotion of the purchase of military equipment by the armed forces of B's country, learns that B will not receive the necessary import licence from its own governmental authorities, a pre-requisite for permission to pay B's fees. A does not reveal this fact to B and finally concludes the contract, which, however, cannot be enforced by reason of the missing licences. A is liable to B for the costs incurred after A had learned of the impossibility of obtaining the required licence.
3. A enters into lengthy negotiations for a bank loan from B's branch office. At the last minute the branch office discloses that it had no authority to sign and that its head office has decided not to approve the draft agreement. A, who could in the meantime have obtained the loan from another bank, is entitled to recover the expenses entailed by the negotiations and the profits it would have made during the delay before obtaining the loan from the other bank.
4. Contractor A and supplier B enter into a pre-bid agreement whereby they undertake to negotiate in good faith for the supply of equipment in the event that A succeeds in becoming prime contractor for a major construction project. A is awarded the construction contract, but after preliminary contacts with B refuses to continue the negotiations. B may request enforcement of the duty to negotiate in good faith.

3. Liability for breaking off negotiations in bad faith

[...]

ARTICLE 5.1.4

*(Duty to achieve a specific result.
Duty of best efforts)*

- (1) To the extent that an obligation of a party involves a duty to achieve a specific result, that party is bound to achieve that result.**
- (2) To the extent that an obligation of a party involves a duty of best efforts in the performance of an activity, that party is bound to make such efforts as would be made by a reasonable person of the same kind in the same circumstances.**

COMMENT

1. Distinction between the duty to achieve a specific result and the duty of best efforts

[...]

2. Distinction provides criteria for determining whether a party has performed its obligations

[...]

3. Long-term contracts

In international contract practice, especially in the context of long-term contracts, when provision is made for a requirement that parties work together to find commonly acceptable solutions to issues that may arise, it is quite common to speak of a duty “to use best efforts” with a view to finding such solutions instead of a duty “to negotiate in good faith.” In the context of complex long-term contracts, such a duty to use best efforts to find commonly acceptable solutions is often provided for particularly with respect to unexpected difficulties that may arise in the course of the performance of the contract. Even in the absence of language expressly providing for such a duty, inasmuch as a duty to negotiate in good faith means a duty to negotiate seriously with an intent to conclude an agreement (see Article 2.1.15, Comment 2), when the parties to a long-term contract have agreed on an affirmative duty to negotiate in good faith to find solutions to problems that may arise that duty amounts, for all practical purposes, to a duty of best efforts. A similar observation may be made about the duty to renegotiate in good faith in the case of hardship (see Article 6.2.3, Comment 5).

ANNEX 5

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

**Second session
Hamburg, 26 – 29 October 2015**

UNIDROIT 2016
Study L – Doc. 130 rev.
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Agreements to negotiate in good faith ^(*)

(Draft prepared by Professor Neil Cohen)

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

ARTICLE 2.1.15*(Negotiations in bad faith)*

(1) A party is free to negotiate and is not liable for failure to reach an agreement.

(2) However, a party who negotiates or breaks off negotiations in bad faith is liable for the losses caused to the other party.

(3) It is bad faith, in particular, for a party to enter into or continue negotiations when intending not to reach an agreement with the other party.

COMMENT**1. Freedom of negotiation**

[...]

2. Liability for negotiating in bad faith

A party's right freely to enter into negotiations and to decide on the terms to be negotiated is, however, not unlimited, and must not conflict with the principle of good faith and fair dealing laid down in Article 1.7. One particular instance of negotiating in bad faith which is expressly indicated in paragraph (3) of this Article is that where a party enters into negotiations or continues to negotiate without any intention of concluding an agreement with the other party. Other instances are where one party has deliberately or by negligence misled the other party as to the nature or terms of the proposed contract, either by actually misrepresenting facts, or by not disclosing facts which, given the nature of the parties and/or the contract, should have been disclosed. As to the duty of confidentiality, see Article 2.1.16.

A party's liability for negotiating in bad faith is limited to the losses caused to the other party (paragraph (2)). In other words, the aggrieved party may recover the expenses incurred in the negotiations and may also be compensated for the lost opportunity to conclude another contract with a third person (so-called reliance or negative interest), but may generally not recover the profit which would have resulted had the original contract been concluded (so-called expectation or positive interest).

~~Only if the parties have expressly agreed on a duty to negotiate in good faith, will all the remedies for breach of contract be available to them, including the remedy of the right to performance.~~

Illustrations

1. A learns of B's intention to sell its restaurant. A, who has no intention whatsoever of buying the restaurant, nevertheless enters into lengthy negotiations with B for the sole purpose of preventing B from selling the restaurant to C, a competitor of A's. A, who breaks off negotiations when C has bought another restaurant, is liable to B, ~~who ultimately succeeds in selling the restaurant at a lower price than that offered by C,~~ for B's losses. ~~These losses may include the difference in price, and whatever other losses may be established.~~

2. A, who is negotiating with B for the promotion of the purchase of military equipment by the armed forces of B's country, learns that B will not receive the necessary import licence from its own governmental authorities, a pre-requisite for permission to pay B's fees. A does not reveal this fact to B and finally concludes the contract, which, however, cannot be enforced by reason of

the missing ~~licence~~ licence. A is liable to B for the costs incurred after A had learned of the impossibility of obtaining the required licence.

3. A enters into lengthy negotiations for a bank loan from B's branch office. At the last minute the branch office discloses that it had no authority to sign and that its head office has decided not to approve the draft agreement. A, who could in the meantime have obtained the loan from another bank, is entitled to recover the expenses entailed by the negotiations and the profits it would have made during the delay before obtaining the loan from the other bank.

3. Agreement to negotiate in good faith

By contrast, if the parties have specifically agreed on a duty to negotiate in good faith, all appropriate remedies for non-performance will be available, including the right to performance (such as by directing the parties to negotiate) and other remedies reflecting the expectation or positive interest (to the extent that the requirements for such remedies can be demonstrated).

An agreed-upon duty to negotiate in good faith means, at the least, a duty to negotiate seriously with an intent to conclude an agreement. Of course, this duty does not displace other duties under the Principles (e.g. Articles 1.8 and 2.1.6). In the case of a complex long-term contract, parties who agree on a duty to negotiate in good faith may wish to further define that duty in light of the nature of the contract and its commercial context. For example, they may set standards of confidentiality, agree on a timetable for the negotiation, etc.

Illustration

4. Contractor A and supplier B enter into a pre-bid agreement whereby they undertake to negotiate in good faith for the supply of equipment in the event that A succeeds in becoming prime contractor for a major construction project. A is awarded the construction contract, but after preliminary contacts with B refuses to continue the negotiations. B may request enforcement of the duty to negotiate in good faith.

34. Liability for breaking off negotiations in bad faith

[...]

ARTICLE 5.1.4

(Duty to achieve a specific result.

Duty of best efforts)

(1) To the extent that an obligation of a party involves a duty to achieve a specific result, that party is bound to achieve that result.

(2) To the extent that an obligation of a party involves a duty of best efforts in the performance of an activity, that party is bound to make such efforts as would be made by a reasonable person of the same kind in the same circumstances.

COMMENT

1. Distinction between the duty to achieve a specific result and the duty of best efforts

[...]

2. Distinction provides criteria for determining whether a party has performed its obligations

[...]

3. Long-term contracts

In international contract practice, especially in the context of long-term contracts, when provision is made for parties to work together to resolve issues that may arise, it is common to speak of a duty “to use best efforts” to resolve such issues rather than a duty “to negotiate in good faith.” When the parties to a long-term contract have agreed on such a duty to use best efforts, that duty may amount, for all practical purposes, to a duty to negotiate in good faith (see Article 2.1.15, Comment 3).

ANNEX 6

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

**Second session
Hamburg, 26 – 29 October 2015**

UNIDROIT 2015
Study L – Doc. 131
English only
September 2015

Contracts with evolving terms^(*)

(Draft prepared by Professor Michael Joachim Bonell)

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

ARTICLE 4.3

(Relevant circumstances)

In applying Articles 4.1 and 4.2, regard shall be had to all the circumstances, including

- (a) preliminary negotiations between the parties;
- (b) practices which the parties have established between themselves;
- (c) the conduct of the parties subsequent to the conclusion of the contract;
- (d) the nature and purpose of the contract;
- (e) the meaning commonly given to terms and expressions in the trade concerned;
- (f) usages.

COMMENT

1. Circumstances relevant in the interpretation process

[...]

2. “Particular” and “general” circumstances compared

[...]

3. Practices established between parties and conduct subsequent to the conclusion of the contract particularly relevant in interpretation of long-term contracts

In view of the fact that long-term contracts often involve complex performances and are “evolutionary” in nature, i.e. may require adaptations in the course of performance, the criteria in sub-paragraphs (b) and (c) are particularly relevant with respect to these types of contract. Because such contracts involve repeated performance (and repeated opportunity for a party to object if displeased), the conduct occurring after the conclusion of the contract can especially provide the basis for inferences as to what the parties believe their obligations are.

As a rule the subsequent conduct of the parties can only be an interpretative tool, i.e. be used to explain or amplify, but not to contradict, the terms of the contract as originally agreed between the parties.

Illustration

5. Employer A entered into an agreement with Contractor B for the engineering and construction of a FPSO (Floating Production Storage and Offloading of crude oil) vessel (hereinafter the “Vessel”). The contract provided that the Vessel shall be “fit for purpose”, i.e. capable of a specified level of productivity, and among the necessary equipment and material to be provided by B indicated a certain quantity of electrical cables “or any greater quantity if necessary”. In the course of performance of the contract the parties further specified the design of the Vessel and it became clear that, in order to reach the envisaged level of productivity, the quantity of cables required was greater than that indicated in the contract. B is entitled to be fully compensated for the additional quantity of cables provided.

To avoid any uncertainty as to the effects of subsequent conduct on the content of the contract, the parties may wish to adopt particular mechanisms for possible variations and adjustments of

the contract in the course of performance. They may, for instance, require formal “variation orders” to be submitted and accepted by duly authorised representatives of the parties (e.g. in construction contracts the “Employer’s Representative” and the “Contractor’s Representative”, respectively), or establish special bodies composed of representatives of both parties or of independent experts (so-called “contract management committees”, “auditing bodies” or the like), with the task of monitoring both parties’ performance and possibly also of suggesting adjustments of the content of the contract so as to bring it in line with supervening developments. Obviously, the more precisely the parties regulate the procedure to be followed for variations of the terms of the contract as originally agreed upon, the less relevant any informal conduct of the parties would be.

Illustration

6. Employer A and Constructor B enter into a DBO (Design, Build and Operate) contract for a nuclear power plant (hereinafter the Contract). The Contract provides detailed rules of the procedure to be followed in case of variations of its content. In the course of performance of the Contract engineers of both parties informally discuss and agree on changes in technology, which B subsequently implements without any reaction on the part of A. When B requests payment for the additional costs, A is entitled to object that the changes had not been formally proposed to and approved by A’s Representative as required by the Contract.

4. “Merger” and “No oral modification” clauses

Parties to international commercial transactions in general, and to complex long-term contracts in particular, frequently include a provision indicating that the contract document completely embodies the terms on which they have agreed (so-called “merger” or “entire agreement” clauses) and that any modification to the contract or specific terms of it must be made in writing (so-called “no oral modification clauses”). For the effect of these so-called “merger” or “integration” the former type of clauses, in particular whether and to what extent they exclude the relevance of preliminary negotiations between the parties, albeit only for the purpose of the interpretation of the contract, see Article 2.1.17 (*Merger clauses*). As to the latter type of clauses see Article 2.1.18 (*Modification in a particular form*), and the limitation of the rule therein contained by virtue of the principle of prohibition of inconsistent behaviour laid down in Article 1.8 (*Inconsistent behaviour*).

Illustration

7. Manufacturer A enters into an agreement with Distributor B for the distribution of its products in Country X. The agreement expressly states that the distributorship is non-exclusive and, in fact, in Country X A’s products are distributed also by Distributor C. The agreement between A and B also contains a “no-oral modification” clause according to which any modification of its terms has to be in writing and approved by A’s parent company. Subsequently C ceases its activity and B acts as though it has become the exclusive distributor of A’s products in Country X, among others by presenting itself as such to C’s clients, without any reaction on the part of A. When A replaces C with a new distributor, B may not object that by their conduct A and B have modified their original agreement turning it into an exclusive agreement.

ANNEX 6**Principles of International Commercial Contracts
Working Group on Long-Term Contracts****Second session
Hamburg, 26 – 29 October 2015**UNIDROIT 2016
Study L – Doc. 131 rev.
English only
January 2016**Contracts with evolving terms^(*)**

(Draft prepared by Professor Michael Joachim Bonell)

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

ARTICLE 4.3*(Relevant circumstances)*

In applying Articles 4.1 and 4.2, regard shall be had to all the circumstances, including

- (a) preliminary negotiations between the parties;**
- (b) practices which the parties have established between themselves;**
- (c) the conduct of the parties subsequent to the conclusion of the contract;**
- (d) the nature and purpose of the contract;**
- (e) the meaning commonly given to terms and expressions in the trade concerned;**
- (f) usages.**

COMMENT**1. Circumstances relevant in the interpretation process**

[...]

2. “Particular” and “general” circumstances compared

[...]

~~3. “Merger” clauses~~**3. Practices established between parties and conduct subsequent to the conclusion of the contract relevant particularly in interpretation of long-term contracts**

Conduct subsequent to the conclusion of the contract can assist in determining what the parties intended their obligations to be. This may be the case particularly in the context of long-term contracts, which often involve complex performance and are “evolutionary” in nature, i.e. may require adaptations in the course of performance. Such contracts may involve repeated performance by one party with the opportunity for the other to assert that such performance does not conform to the contract.

As a rule the subsequent conduct of the parties can only be an interpretative tool, i.e. be used to explain or amplify, but not to contradict, the terms of the contract as originally agreed between the parties.

Illustrations

5. Supplier A enters into a five-year contract with Shopping Mall B to supply B’s need for “salt” to clear ice in its parking lot and on its sidewalks. For the first two winters, Supplier A provides an ice-melting substance which is not a “salt,” with no objection being raised by B. At the start of the next winter, B objects that the substance is not a “salt” as stated in the contract. The fact that for two winters both A and B performed as though the supplied substance satisfied the contract permits the inference that the parties intended the contract’s reference to “salt” to include such an ice-melting substance.

6. Contractor A agrees to provide Client B with concrete slabs of a particular thickness in a building at a unit price of X without specifying whether that price applies to a square metre of those slabs or cubic metres of concrete. The parties perform over several months without any objection as though the unit price applied to square metres of slabs. A dispute subsequently arises

regarding the proper unit of measure. The fact that for several months A and B had performed as though the proper unit of measure was square metres of slabs permits the inference that the parties intended that to be the proper unit of measure.

To avoid any uncertainty as to the effects of subsequent conduct on the content of the contract, the parties may wish to adopt particular mechanisms for possible variations and adjustments of the contract in the course of performance. They may, for instance, provide for the issuance of “variation orders” by one party for acceptance by the other party (e.g. in construction contracts the “Employer’s Representative” and the “Contractor’s Representative”, respectively), or establish special bodies composed of representatives of both parties or of independent experts (so-called “contract management committees”, “auditing bodies” or the like), with the task of monitoring both parties’ performance and possibly also of suggesting adjustments to the contract so as to bring it in line with developments. Obviously, the more precisely the parties regulate the procedure for adjustments to the contract, the less relevant any informal conduct of the parties would be to the interpretation of the contract.

Illustrations

7. A construction contract between Employer A and Contractor B provides that A’s “Representative” has the authority to give instructions regarding additions, omissions or other changes in work to be performed by B. So long as those additions, omissions or other changes fall within the overall scope of work under the contract, B will be bound to perform them and they will have the effect of changing the relevant work provided for in the original contract.

8. Contractor A enters into a Design, Build and Operate (DBO) contract with Company B to design and build a factory and operate it for twenty years. The contract provides for the parties to appoint jointly an independent and impartial Auditing Body whose purpose is to audit and monitor the compliance of each of the parties with the operation management requirements set out in the contract. The contract may also provide that, if the Auditing Body determines that a party has failed to comply, that party must take appropriate corrective action. Therefore, if in a given case the Auditing Body determines that A has not complied with its obligations under the contract, A is bound to take the appropriate action.

4. “Merger” and “No oral modification” clauses

Parties to international commercial transactions in general, and to complex long-term contracts in particular, frequently include a provision indicating that the contract document completely embodies the terms on which they have agreed. ~~For the effect of these so-called “merger” or “integration”~~ (so-called “merger” or “entire agreement” clauses) and that any modification to the contract or specific terms of it must be made in writing (so-called “no oral modification clauses”). For the effect of the former type of clauses, in particular whether and to what extent they exclude the relevance of preliminary negotiations between the parties, albeit only for the purpose of the interpretation of the contract, see Article 2.1.17. As to the latter type of clauses, see Article 2.1.18, and the limitation of the rule therein contained by virtue of the principle of prohibition of inconsistent behaviour laid down in Article 1.8.

Illustration

9. Manufacturer A enters into an agreement with Distributor B for the distribution of its products in country X. The agreement expressly states that the distributorship is non-exclusive and, in fact, in country X A's products are distributed also by Distributor C. The agreement between A and B also contains a "no-oral modification" clause according to which any modification of its terms has to be in writing and approved by A's parent company. Subsequently C ceases its activity and B acts, to A's knowledge, as though it has become the exclusive distributor of A's products in country X by, among others things, holding itself out as such to C's clients, without any reaction on the part of A. When A replaces C with a new distributor, B may not object that by their conduct A and B have modified their original agreement, turning it into an exclusive agreement.

ANNEX 7**Principles of International Commercial Contracts
Working Group on Long-Term Contracts****Second session
Hamburg, 26 – 29 October 2015**UNIDROIT 2015
Study L – Doc. 132
English only
September 2015**Supervening events ^(*)**

(Draft prepared by Professor Neil Cohen)

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

ARTICLE 7.1.7
(Force majeure)

(1) **Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.**

(2) **When the impediment is only temporary, the excuse shall have effect for such period as is reasonable having regard to the effect of the impediment on the performance of the contract.**

(3) **The party who fails to perform must give notice to the other party of the impediment and its effect on its ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, it is liable for damages resulting from such non-receipt.**

(4) **Nothing in this Article prevents a party from exercising a right to terminate the contract or to withhold performance or request interest on money due.**

COMMENT

1. The notion of force majeure

[...]

2. Effects of force majeure on the rights and duties of the parties

[...]

3. Force majeure and hardship

This Article must be read together with Chapter 6, Section 2 of the Principles dealing with hardship (see Comment 6 on Article 6.2.2).

4. Force majeure and contract practice

[...]

5. Long-term contracts

In the context of long-term contracts, there is a close relationship between the doctrines of hardship and force majeure (see Comment 3 on this Article). Hardship is typically relevant in long-term contracts (see Comment 5 on Article 6.2.2), and the same facts may present both hardship and force majeure (see Comment 6 on Article 6.2.2). In the case of hardship, the Principles encourage negotiation between the parties to the end of continuing the relationship rather than dissolving it (see Article 6.2.3). Similarly, in the context of long-term contracts, parties can anticipate that, in light of the duration of the relationship and, possibly, large initial investments whose value would be realized only over time, they would have an interest in continuing rather than terminating their business relationship in the case of force majeure. Accordingly, the parties may wish to provide in their contract for the continuation, whenever possible, of the business relationship even in the case of force majeure, and envisage termination only as a last resort.

Such provisions could take a number of forms. For example, building on paragraph (2) of this Article, a first device to this effect could be a contract provision to the effect that, except where it is clear from the outset that the impediment to performance is of a permanent nature, the obligation(s) of a party affected by the impediment are suspended for a fixed period of time (or for a “a reasonable time”), and that, even if the non-performance is fundamental, the other party may terminate the contract only at the end of a specified period of time (e.g., 30 days, one year, etc.) after receiving notice of the impediment. The parties might also provide that, if the impediment persists even after the expiry of the period of suspension, they shall enter into negotiations with a view to adapting the contract to the changed circumstances and that termination will be permissible only if those negotiations do not lead to any agreement within a certain period of time. In some contexts, the parties’ interest in continuing their relationship might lead to a decision to include in their contract a provision establishing a body such as a “dispute review board” (likely composed of a small number of persons with special expertise) charged with the task of aiding the parties in resolving their disagreements and disputes; this task might be accomplished by providing that the issuance of recommendations or decisions that must be considered by the parties and that recourse to arbitral or judicial proceedings could occur only if and when a party declares that it does not accept the recommendation or decision.

ANNEX 7

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

**Second session
Hamburg, 26 – 29 October 2015**

UNIDROIT 2016
Study L – Doc. 132 rev.
English only
January 2016

Supervening events ^(*)

(Draft prepared by Professor Neil Cohen)

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

ARTICLE 7.1.7
(Force majeure)

(1) Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

(2) When the impediment is only temporary, the excuse shall have effect for such period as is reasonable having regard to the effect of the impediment on the performance of the contract.

(3) The party who fails to perform must give notice to the other party of the impediment and its effect on its ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, it is liable for damages resulting from such non-receipt.

(4) Nothing in this Article prevents a party from exercising a right to terminate the contract or to withhold performance or request interest on money due.

COMMENT

1. The notion of force majeure

[...]

2. Effects of force majeure on the rights and duties of the parties

[...]

3. Force majeure and hardship

This Article must be read together with Chapter 6, Section 2 of the Principles dealing with hardship (see Comment 6 on Article 6.2.2).

4. Force majeure and contract practice

[...]

5. Long-term contracts

Force majeure, like hardship, is typically relevant in long-term contracts (see Comment 5 on Article 6.2.2), and the same facts may present both hardship and force majeure (see Comment 6 on Article 6.2.2). In the case of hardship, the Principles encourage negotiation between the parties to the end of continuing the relationship rather than dissolving it (see Article 6.2.3).

Similarly, in the case of force majeure, parties to long-term contracts can anticipate that, in light of the duration and nature of the relationship and, possibly, large initial investments whose value would be realised only over time, they would have an interest in continuing rather than terminating their business relationship. Accordingly, the parties may wish to provide in their contract for the continuation, whenever feasible, of the business relationship even in the case of force majeure, and envisage termination only as a last resort. Such provisions can take a number of forms.

Illustration

3. A long-term contract contains a provision to the effect that, except where it is clear from the outset that an impediment to a party's performance is of a permanent nature, the obligations of the party affected by the impediment are temporarily suspended for the length of the impediment, but for no more than 30 days, and any right of either party to terminate the contract is similarly suspended. The provision also states that, at the end of that time period, if the impediment continues the parties will negotiate with a view to agreeing to prolong the suspension on terms that are mutually agreed. It also states that, if such agreement cannot be reached, disputed matters will be referred to a dispute board pursuant to the *ICC Dispute Board Rules*. The parties are bound by that procedure.

ANNEX 8**Principles of International Commercial Contracts
Working Group on Long-Term Contracts****Second session
Hamburg, 26 – 29 October 2015**UNIDROIT 2015
Study L – Doc. 133
English only
September 2015**Co-operation between the parties ^(*)**

(Draft prepared by Professor Michael Joachim Bonell)

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

ARTICLE 5.1.3*(Co-operation between the parties)*

Each party shall cooperate with the other party when such co-operation may reasonably be expected for the performance of that party's obligations.

COMMENT**1. Duty of co-operation as an application of the general principle of good faith and fair dealing**

~~A contract is not merely a meeting point for conflicting interests but must also, to a certain extent, be viewed as a common project in which each party must cooperate. This view is clearly related to the principle of good faith and fair dealing (see Article 1.7) which permeates the law of contract, as well as to the obligation to mitigate harm in the event of non-performance (see Article 7.4.8).~~

The parties' duty to cooperate with each other to the extent that such co-operation may reasonably be expected for the performance of their respective obligations, as laid down in this Article, constitutes an application of the general principle of good faith and fair dealing (Article 1.7). While its most significant instances are expressly or implicitly provided for in the Principles either in the black-letter rules (see Article 5.3.3 (*Interference with conditions*), Article 7.1.2 (*Interference by the other party*), and Article 7.4.8 (*Mitigation of harm*)) or in the comments (see e.g. Comment 3 to Article 6.1.6 concerning the duty of the party changing its place of business after the conclusion of the contract to inform the other party thereof in time, Comment 3(a) to Article 6.1.14 concerning the duty to assist the other party in obtaining a public permission, and Comment 10 to Article 7.1.4 concerning the aggrieved party's duty to permit the non-performing party's cure of the non-performance), there are many other instances in which the parties may be requested to cooperate with each other in the course of contract formation or contract performance.

The duty of co-operation must of course be confined within certain limits, (the provision refers to reasonable expectations), so as not to upset i.e. it only exists to the extent that co-operation may reasonably be expected to enable the other party to perform, without upsetting the allocation of duties in the performance of the contract. Although the principal concern of the provision is the duty not to hinder the other party's performance, there may also be circumstances which call for more active co-operation. However, within these limits each party may be under a duty not only to refrain from hindering the other party from performing its obligation(s), but also to take affirmative steps required to enable the other party's performance.

Illustrations

~~1. — A, after contracting with B for the immediate delivery of a certain quantity of oil, buys all the available oil on the spot market from another source. Such conduct, which will hinder B in performing its obligation, is contrary to the duty of co-operation.~~

21. A, an art gallery in country X, buys a sixteenth century painting from B, a private collector in country Y. The painting may not be exported without a special authorisation and the contract requires B to apply for that permission. B, who has no experience of such formalities, encounters serious difficulties with the application whereas A is familiar with such procedures. In these circumstances, and notwithstanding the contractual provision, A can be expected to give at least some assistance to B.

2. Company A and Company B enter into a contract for the sale of electricity by A to B. The contract is never performed, prompting A to sue B for breach of contract and damages. B objects that the contract is null and void for lack of registration in the Public Registry. According to the applicable law the registration of the contract is a joint task of the parties, and since B has not done what it was required to do in order to obtain the registration, B is not entitled to rely on the lack of registration of the contract.

3. Seller A, situated in Country X, concludes with Buyer B, situated in Country Y, a contract for the sale of goods to be delivered in installments. After the discovery by B of alleged defects in part of the goods delivered, A agrees to a price reduction and an extension of payment, but in turn asks B promptly to submit a formal notice of the defects together with other documents A needs to explain to the export and exchange control authorities of its country the reasons for the reduced price and the extended date of payment, so as to avoid severe penalties. Since B only gradually and partially meets A's requests, A informs B that it would make the remaining deliveries conditional upon Buyer's submission of the requested documents and the earlier payment of the goods already delivered. B may not object that in so doing A was breaching the contract (and the subsequent agreement on the extension of payment), since it was B who with its obstructionist behaviour had failed to observe its general duty of co-operation under the contract.

2. Co-operation between parties in the context of long-term contracts

Although this Article states the duty of co-operation in general terms for all types of contract, in practice co-operation is particularly important in the context of long-term contracts. Indeed long-term contracts, especially those involving performance of a complex nature and/or an ongoing relationship between the parties, might require from the parties a higher degree of co-operation or a more accentuated attitude of "cooperativeness" throughout the life of the contract to make it work. Thus, by way of example, in contracts for the construction of industrial works the employer may be required to inform the contractor about extraordinary hydrological and climatic conditions at the site which he had ascertained personally, or to prevent interferences in the contractor's work by other contractors it had employed to carry out other works at the site or close to it. Likewise, in a distributorship agreement the supplier is under a duty to abstain from any conduct that might hinder the distributor from achieving the contractually agreed minimum of orders, or in a franchising agreement the franchisor may be prevented from setting up a competing business in the neighbourhood of the franchisee's business even if the franchise is not exclusive.

Obviously also in the context of long-term contracts the parties' duty to cooperate exists only within the limit of reasonable expectations. Should it go beyond that limit and involve not insignificant expenses, the party concerned may either refuse or be entitled to compensation.

Illustrations

4. Contractor A is awarded by B, a Governmental Agency in Country X, a contract to build a 3000 house complex in Country X. Since it is a greenfield project, also electricity and water have to be brought in, and the respective works have to be executed in a certain sequence so as not to conflict with each other. B awards the electrical contracts to local contractors, but then completely fails to coordinate their work with A's work with the result that A has to interrupt repeatedly its work thereby causing considerable loss. B is liable for this loss since in the circumstances it should have actively coordinated the work of the local contractors so as not to interfere with A's work.

5. Company A, situated in Country X, and Company B, situated in Country Y, enter into a joint venture agreement for participation in a public bidding procedure in Country X. The contract is finally awarded to a third party. According to A, the adjudication was improper, but B

refuses to join A in appealing against the adjudication before the competent authority, thereby hindering A from pursuing the appeal. Provided that A's appeal against the awarding of the contract to the third party was not manifestly frivolous, by its refusal to join A in the proceedings B has breached its general duty of co-operation under the joint venture agreement.

ARTICLE 7.1.2

(Interference by the other party)

A party may not rely on the non-performance of the other party to the extent that such non-performance was caused by the first party's act or omission or by another event for which the first party bears the risk.

COMMENT

1. Non-performance caused by act or omission of the party alleging non-performance

This Article can be regarded as providing two excuses for non-performance. However conceptually, it goes further than this. When the Article applies, the relevant conduct does not become excused non-performance but loses the quality of non-performance altogether. It follows, for instance, that the other party will not be able to terminate for non-performance.

Two distinct situations are contemplated. In the first, one party is unable to perform either wholly or in part because the other party has done something which makes performance in whole or in part impossible.

Illustrations

1. A, after contracting with B for the immediate delivery of a certain quantity of oil, buys all the available oil on the spot market from another source. A's conduct will hinder B in performing its obligation, with the consequence that A cannot rely on B's non-performance of the contract.

~~2.~~ A agrees to perform building work on B's land beginning on 1 February. If B locks the gate to the land and does not allow A entry, B cannot complain that A has failed to begin work. B's conduct will often amount to non-excused non-performance either because of an express provision entitling A to access the land or because B's conduct infringes the obligations of good faith and co-operation. This result does not however depend on B's non-performance being non-excused. The result will be the same where B's non-performance is excused, for instance because access to the land is barred by strikers.

The Principles contemplate the possibility that one party's interference result only in a partial impediment to performance by the other party. In such cases it will be necessary to decide the extent to which non-performance was caused by the first party's interference and that to which it was caused by other factors.

2. Non-performance caused by event for which party alleging non-performance bears the risk

[...]

ANNEX 8

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

**Second session
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Co-operation between the parties ^(*)

(Draft prepared by Professor Michael Joachim Bonell)

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

ARTICLE 5.1.3*(Co-operation between the parties)*

Each party shall cooperate with the other party when such co-operation may reasonably be expected for the performance of that party's obligations.

COMMENT**1. Duty of co-operation as an application of the general principle of good faith and fair dealing**

A contract is not merely a meeting point for conflicting interests but must also, to a certain extent, be viewed as a common project in which each party must cooperate. This view is clearly related to the principle of good faith and fair dealing (see Article 1.7) which permeates the law of contract, as well as to the obligation to mitigate harm in the event of non-performance (see Article 7.4.8).

This Article states the parties' duty to cooperate with each other to the extent that such co-operation may reasonably be expected for the performance of their respective obligations. Instances of such duty are expressly or implicitly provided for in the Principles either in the black letter rules (see Article 5.3.3, Article 7.1.2, and Article 7.4.8) or in the comments (see e.g. Comment 3 to Article 6.1.6, Comment 3(a) to Article 6.1.14, and Comment 10 to Article 7.1.4). However, there are many other instances in which the parties may be requested to cooperate with each other in the course of contract formation or contract performance.

The duty of co-operation must of course be confined within certain limits ~~(the provision refers to reasonable expectations), so as not to upset~~, i.e. it only exists to the extent that co-operation may reasonably be expected to enable the other party to perform, without upsetting the allocation of duties in the ~~performance of the contract. Although the principal concern of the provision is the duty not to hinder~~ contract. Within these limits each party may be under a duty not only to refrain from hindering the other party from performing its obligation(s), but also to take affirmative steps to enable the other party's performance, ~~there may also be circumstances which call for more active co-operation.~~

Illustrations

~~1. A, after contracting with B for the immediate delivery of a certain quantity of oil, buys all the available oil on the spot market from another source. Such conduct, which will hinder B in performing its obligation, is contrary to the duty of co-operation.~~

~~21.~~ A, an art gallery in country X, buys a sixteenth century painting from B, a private collector in country Y. The painting may not be exported without a special authorisation and the contract requires B to apply for that permission. B, who has no experience of such formalities, encounters serious difficulties with the application whereas A is familiar with such procedures. In these circumstances, and notwithstanding the contractual provision, A can be expected to give at least some assistance to B.

~~2.~~ Company A and Company B enter into a contract for the sale of electricity by A to B. The contract is not performed by B, prompting A to sue B for breach of contract and damages. B objects that the contract is null and void for lack of registration in the Public Registry. According to the applicable law the registration of the contract is a joint task of the parties; since B has not done what it was required to do in order to obtain the registration, such registration could not be

accomplished. B is not entitled to rely on the lack of registration of the contract, as a defence to A's claim.

3. Seller A, situated in country X, concludes with Buyer B, situated in country Y, a contract for the sale of goods to be delivered in installments. After the discovery by B of alleged defects in part of the goods delivered, A agrees to a price reduction and an extension of payment dates, but in turn asks B promptly to submit a formal notice of the defects together with other documents A needs to explain to the export and exchange control authorities of its country the reasons for the reduced price and the extended dates of payment, so as to avoid severe penalties. Since B only gradually and partially meets A's requests, A informs B that it will make the remaining deliveries conditional upon B's submission of the requested documents and the prompt payment of the goods already delivered. B may not object that in so doing A was breaching the contract (and the subsequent agreement on the extension of payment), since it was B who with its obstructionist behaviour had failed to observe its general duty of co-operation under the contract.

2. Co-operation between parties in the context of long-term contracts

Although this Article states the duty of co-operation in general terms for all types of contract, in practice co-operation may be particularly important in the context of long-term contracts. Indeed a long-term contract, particularly one involving performance of a complex nature or an ongoing relationship between the parties, may especially need co-operation throughout the life of the contract in order for the transaction to work, although always within the limit of reasonable expectations. Thus, by way of example, in a contract for the construction of industrial works the employer may be required to prevent interferences in the contractor's work by other contractors it employs to carry out other works at the site. Likewise, in a distributorship agreement the supplier is under a duty to abstain from any conduct that might hinder the distributor from achieving the contractually-agreed minimum of orders, or in a franchising agreement the franchisor may be prevented from setting up a competing business in the immediate neighbourhood of the franchisee's business even if the franchise is not exclusive.

Obviously also in the context of long-term contracts the parties' duty to cooperate exists only within the limit of reasonable expectations.

Illustrations

4. Contractor A is awarded by B, a Governmental Agency in country X, a contract to build a 3000 house complex in country X. Since it is a greenfield project, also electricity and water have to be brought in, and the respective works have to be executed in a certain sequence so as not to conflict with each other. B awards the electrical contracts to local contractors, but then completely fails to coordinate their work with A's work with the result that A repeatedly has to interrupt its work thereby causing A considerable loss. B is liable for this loss since, in the circumstances, it should have actively coordinated the work of the local contractors so that A's work would not be interrupted in such manner.

5. Company A, situated in country X, and Company B, situated in country Y, enter into a joint venture agreement for participation in a public bidding procedure in country X. The contract is finally awarded to a third party. The procedure was manifestly improper, but B refuses to join A in appealing against the award before the competent authority, thereby hindering A from pursuing the appeal. By its refusal to join A in the proceedings B has breached its general duty of co-operation under the joint venture agreement.

ANNEX 9

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

**Second session
Hamburg, 26 – 29 October 2015**

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Restitution after ending contracts entered into for an indefinite period ^(*)

(Draft prepared by Professor Reinhard Zimmermann)

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

ARTICLE 5.1.8*(Termination of contract entered into for an indefinite period)*

A contract for an indefinite period may be ~~ended~~ terminated by either party by giving notice a reasonable time in advance. The rules set out in Articles 7.3.5 and 7.3.7 apply.

COMMENT**1. Contract for an indefinite period**

The duration of a contract is often specified by an express provision, or it may be determined from the nature and purpose of the contract (e.g. technical expertise provided in order to assist in performing specialised work). However, there are cases when the duration is neither determined nor determinable. Parties can also stipulate that their contract is concluded for an indefinite period.

~~This~~The Article provides that in such cases either party may ~~end~~terminate the contractual relationship by giving notice a reasonable time in advance. What a reasonable time in advance will be will depend on circumstances such as the period of time the parties have been cooperating, the importance of their relative investments in the relationship, the time needed to find new partners, etc.

The rule can be understood as a gap-filling provision in cases where parties have failed to specify the duration of their contract. More generally, it also relates to the widely recognised principle that contracts may not bind the parties eternally and that they may always opt out of such contracts provided they give notice a reasonable time in advance.

This situation is to be distinguished from the case of hardship which is covered by Articles 6.2.1 to 6.2.3. Hardship requires a fundamental change of the equilibrium of the contract, and gives rise, at least in the first instance, to renegotiations. The rule in this Article requires no special condition to be met, except that the duration of the contract be indefinite and that it permit unilateral cancellation.

Illustration

1. A agrees to distribute B's products in country X. The contract is concluded for an indefinite period. Either party may ~~cancel this arrangement unilaterally, provided that it gives~~terminate this agreement by giving the other party notice a reasonable time in advance.

2. Termination and its consequences

The effects of termination are those set out in Article 7.3.5. Both parties are released from their obligation to render and to receive future performance.

The fact that, by virtue of termination, the contract is brought to an end, does not deprive one party to the contract of a right to claim damages for any non-performance that may have occurred.

Illustration

2. The facts are the same as in Illustration 1. After the contract has been in operation for five years, B gives notice of termination. It subsequently turns out that for a period of six months during the year before B had given notice of termination, A failed to discharge his obligations under the contract. As a result, B suffered a loss of income. B may still claim damages under the rules set out in Chapter 7, Section 4.

Termination also does not affect any provision in the contract for the settlement of disputes or any other term of the contract which is to operate even after termination.

Performances under a contract for an indefinite period could have been made over a long period of time before the contract is terminated, and it may thus be inconvenient to unravel these performances. Furthermore, termination is a remedy with prospective effect only. Restitution can, therefore, only be claimed in respect of the period after termination. This is set out in Article 7.3.7, with the consequence that, as far as restitution has to be made, the provisions of Article 7.3.6 apply: see Article 7.3.7(2).

ANNEX 9**Principles of International Commercial Contracts
Working Group on Long-Term Contracts****Second session
Hamburg, 26 – 29 October 2015**UNIDROIT 2016
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January 2016**Restitution after ending contracts entered into for an indefinite period^(*)**

(Draft prepared by Professor Reinhard Zimmermann)

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

ARTICLE 5.1.8

(~~Contract~~Termination of a contract for an indefinite period)

A contract for an indefinite period may be ~~ended~~**terminated** by either party by giving notice a reasonable time in advance. **As to the effects of termination in general, and as to restitution, the provisions in Articles 7.3.5 and 7.3.7 apply.**

COMMENT

1. Contract for an indefinite period

The duration of a contract is often specified by an express provision, or it may be determined from the nature and purpose of the contract (e.g. technical expertise provided in order to assist in performing specialised work). However, there are cases when the duration is neither determined nor determinable. Parties can also stipulate that their contract is concluded for an indefinite period.

~~This~~The Article provides that in such cases either party may ~~end~~**terminate** the contractual relationship by giving notice a reasonable time in advance. What a reasonable time in advance will be will depend on circumstances such as the period of time the parties have been cooperating, the importance of their relative investments in the relationship, the time needed to find new partners, etc.

The rule can be understood as a gap-filling provision in cases where parties have failed to specify the duration of their contract. More generally, it also relates to the widely recognised principle that contracts may not bind the parties eternally and that they may always opt out of such contracts provided they give notice a reasonable time in advance.

This situation is to be distinguished from the case of hardship which is covered by Articles 6.2.1 to 6.2.3. Hardship requires a fundamental change of the equilibrium of the contract, and gives rise, at least in the first instance, to renegotiations. The rule in this Article requires no special condition to be met, except that the duration of the contract be indefinite and that it permit unilateral cancellation.

Illustration

1. A agrees to distribute B's products in country X. The contract is concluded for an indefinite period. Either party may ~~cancel this arrangement unilaterally, provided that it gives~~**terminate the contract by giving** the other party notice a reasonable time in advance.

2. Termination and its consequences

The effects of termination in general are those set out in Article 7.3.5. Both parties are released from their obligation to render and to receive future performance.

The fact that, by virtue of termination, the contract is brought to an end does not deprive a party to the contract of its right to claim damages for any non-performance.

Illustration

2. The facts are the same as in Illustration 1. After the contract has been in operation for five years, B gives notice of termination. It is subsequently determined that, for a period of six months during the year before B had given notice of termination, A failed to discharge its obligations under the contract. As a result, B suffered a loss of income. Notwithstanding the termination, B may claim damages under the rules set out in Chapter 7, Section 4.

Termination also does not affect any provision in the contract for the settlement of disputes or any other term of the contract which is to operate even after termination (see Comments 3 and 4 on Article 7.3.5).

Performance of a contract for an indefinite period might have been made over a long period of time before the contract is terminated, and it may thus be inconvenient to unravel such performance. Furthermore, termination is a remedy with prospective effect only. Restitution can, therefore, be claimed only in respect of the period after termination. This is set out in Article 7.3.7(1), with the consequence that, as far as restitution has to be made, the provisions of Article 7.3.6 apply as set out in Article 7.3.7(2).

ANNEX 10

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

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Termination for compelling reasons ^(*)

(Draft prepared by Sir Vivian Ramsey and Professor Reinhard Zimmermann)

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

SECTION 3: COMPELLING REASONS

ARTICLE 6.3.1

(Right to terminate for compelling reasons)

(1) A party may terminate a contract to be performed over a period of time on notice to the other party with immediate effect if there are compelling reasons for doing so.

(2) There are compelling reasons if, having regard to all the circumstances of the case and balancing the interests of the parties, it would be manifestly unreasonable for the terminating party to be expected to continue the contractual relationship.

COMMENT

Termination for compelling reasons

Parties may terminate contracts for an indefinite period under Article 5.1.8 or for fundamental non-performance under Article 7.3.1 and in certain circumstances a court may terminate a contract for hardship under Article 6.2.1. Those provisions do not address the situation where there is an irreparable breakdown in the relationship between parties to long-term contracts. As a party is bound by the terms of a contract it should not be released from its obligation to perform a contract without there being compelling reasons for doing so. Those reasons must therefore be so compelling that, by reference to the circumstances of the case and balancing the interests of the party, they justify the exceptional course of releasing a party from its obligations to perform. It is neither necessary, nor sufficient, for one party to be at fault for there to be an entitlement to terminate. The decisive tests are the balancing of the interests of the parties and the manifest unreasonableness of continuing the relationship. When those grounds are made out, a party is entitled to terminate on notice. If a party gives notice of termination for compelling reasons without there being such compelling reasons, this constitutes a case of anticipatory non-performance under Article 7.3.3, giving the other party the option either to terminate the contract for fundamental non-performance and claim damages, or to keep the relationship alive and resort only to the remedy of withholding its own performance under Article 7.3.4.

The provisions on termination for compelling reasons are not mandatory and parties may exclude their application altogether or indicate in their contract specific cases of termination for compelling reasons.

Illustrations

1. A, an IT software developer, entered into a co-operation agreement with B, another IT software developer to collaborate to produce software programmes for games on smartphones. A belonged to a religious sect opposed to violence and after a period of time B started to develop software for violent war games contrary to A's beliefs. A did not agree to develop software for those games but B wanted A to assist in developing that software under the co-operation agreement. In such circumstances there was a breakdown in the relationship between A and B and balancing the interests of A and B it would be manifestly unreasonable to continue the co-operation agreement.

2. X, a houseowner, engages Y, an architect, to design a house for him to live in. The architect

produces a number of designs which would have provided a house to the specified requirements of X but X was not satisfied that the designs were sufficiently innovative or produced a house which matched X's aesthetic tastes and extrovert character. The architect produced many designs but none of them satisfied X. In such circumstances there was a breakdown in the relationship between X and Y and balancing the interests of X and Y it would be manifestly unreasonable to continue the engagement for architectural services.

3. C and D were entrepreneurs who formed a joint venture company to develop a wildlife park. After a few months C started insulting D in front of third parties so that D could no longer attend meetings with third parties which were attended by C. D worked long hours and would telephone C early in the morning or late at night and insist on discussing detailed matters when D was spending time at home with his young family. In such circumstances, there was a breakdown in the relationship between C and D and balancing the interests of C and D it would be manifestly unreasonable to continue the joint venture.

ARTICLE 6.3.2

(Effects of termination for compelling reasons)

On termination of a contract for compelling reasons, the provisions of Article 7.3.5 apply.

ARTICLE 6.3.3

(Restitution on termination for compelling reasons)

(1) On termination of a contract for compelling reasons restitution can be claimed for the period before and after termination has taken effect.

(2) As far as restitution has to be made, the provisions of Article 7.3.6 apply.

COMMENT

The effect of termination for compelling reasons

On termination for compelling reasons the consequences would be the same as those in relation to termination for non-performance under Article 7.3.5(1) in terms of releasing both parties from effecting or receiving future performance. In relation to the financial consequences of termination for compelling reasons, the right to damages for past non-performance would be preserved as in Article 7.3.5(2) but the exclusion of restitution for past performance as in Article 7.3.7 does not provide a satisfactory solution where no party has been at fault, but one party has incurred considerably higher expenses in the performance of the contract or has acquired, in the interest of the common purpose pursued by the contract, goods or services from third parties. Under Article 6.3.3 either party may claim restitution based on a fair allocation of the costs incurred and the benefits received by both parties under the contract.

ANNEX 10**Principles of International Commercial Contracts
Working Group on Long-Term Contracts****Second session
Hamburg, 26 – 29 October 2015**UNIDROIT 2016
Study L – Doc. 135 rev.
English only
January 2016**Termination for compelling reason ^(*)**

(Draft prepared by Sir Vivian Ramsey and Professor Reinhard Zimmermann)

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

SECTION 3: TERMINATION FOR COMPELLING REASON

ARTICLE 6.3.1

(Right to terminate for compelling reason)

(1) A party may terminate a long-term contract if there is compelling reason for doing so.

(2) There is compelling reason only if, having regard to all the circumstances of the case, it would be manifestly unreasonable for the terminating party to be expected to continue the contractual relationship.

(3) The right of a party to terminate the contract is exercised by notice to the other party.

(4) Termination of the contract for compelling reason takes effect as from the time of notice.

COMMENT

1. Compelling reason

In the case of long-term contracts, particularly those characterised by an ongoing relationship of cooperation and trust between the parties, events may occur which lead to a breakdown of that relationship. When that is the case, the contract may be terminated. The right of termination under this Article is an exceptional remedy that can be resorted to only if the breakdown of the relationship is irreparable. The decisive test is whether it would be manifestly unreasonable for the terminating party to be expected to continue the contractual relationship. This has to be determined by taking into account all the circumstances of the case. The reason to terminate, in other words, has to be compelling.

2. Termination for compelling reason and other provisions dealing with termination

The Principles include other provisions dealing with termination, but those provisions do not specifically address the situation where there is an irreparable breakdown in the relationship between parties to long-term contracts. Thus, termination for compelling reason is not available in cases of hardship because a fundamental alteration of the equilibrium of the contract, as envisaged by Article 6.2.2, does not involve an irreparable breakdown of the contractual relationship. In cases of hardship the disadvantaged party is entitled to renegotiations (see Article 6.2.3). Such renegotiations, in turn, would be meaningless if the breakdown is irreparable. Force majeure, under the Principles, does not give rise to a right of termination. The effect of force majeure is that it excuses the non-performing party from liability for damages (see Article 7.1.7). The mere fact that a party is prevented from performing as a result of an impediment beyond its control does not constitute compelling reason to terminate under this Article.

It is neither necessary, nor sufficient, for one party to be in breach of contract for the other to be granted a right to terminate for compelling reason. In cases of fundamental non-performance by one party, the other has a right to terminate under Article 7.3.1. If there also exist circumstances which make it manifestly unreasonable to continue the relationship, then that party will also be able to terminate for compelling reason.

Illustrations

1. A, a manufacturer in country X of sophisticated machines for large volume mailings, appoints B as its exclusive distributor in country Y for a term of fifteen years. Ten years later, B is sold to C, which is a long-time direct competitor of A and, as a consequence of the sale of B to C, C would gain access to A's confidential customer information and customers in country Y. In these circumstances, it would be manifestly unreasonable to expect A to continue the distribution agreement with B. A may therefore terminate that contract for compelling reason.

2. Following its worldwide expansion into both the auditing and consulting business, Company A decides to split its activity into two business units, X and Y: X concentrating on the auditing business and Y concentrating on the consulting business. By an agreement, X and Y undertake, among other things, to coordinate their business practices so as to avoid undue overlap. Over the years, however, the relationship between the two business units deteriorates. X, attracted by the increasingly favourable prospects of the consulting business, begins to develop its own consulting practice, while Y complains that such behaviour constitutes undue interference with its own professional practice. There are numerous failed attempts to resolve their differences. In such circumstances either of them can terminate the agreement because it would be manifestly unreasonable for them to continue the contractual relationship due to their irreconcilable differences as to the precise scope of their respective business practices.

3. A, a software development company, enters into a co-operation agreement with B, another company developing software, to collaborate to produce software programmes for games on smartphones. A finds that its costs of employing software developers increase dramatically because of a shortage of specialist developers resulting from the growth in the smartphone game market. As a result, the profits made by A under the co-operation agreement decrease significantly. Whilst A may be able to demand renegotiation of the contract if the requirements of Article 6.2.2 are met, it is not manifestly unreasonable to expect A to continue the co-operation agreement and, therefore, A cannot terminate that agreement for compelling reason.

4. C and D are companies who form a joint venture agreement to develop a chain of luxury hotels. They agree to provide financing in equal shares but C is finding it difficult to raise capital to meet its financial commitment. The chain of hotels therefore cannot be developed. Whilst D may be able to invoke the provisions on termination for fundamental non-performance under Article 7.3.1, it is not manifestly unreasonable to expect D to continue the joint venture agreement. D cannot, therefore, terminate the agreement for compelling reason.

3. Inappropriate termination for compelling reason

If a party gives notice of termination under this Article without there being compelling reason, this may constitute anticipatory non-performance. The other party may then terminate the contract for fundamental non-performance under Article 7.3.3. Alternatively, that party may keep the relationship alive and withhold its own performance under Article 7.3.4.

4. Non-mandatory nature of right to terminate

The provisions on termination for compelling reason, in line with the general principle laid down in Article 1.5, are not of a mandatory character. The parties may thus exclude or limit their application. They may also indicate in their contract specific cases, which entitle a party to terminate for compelling reason.

5. Termination by notice

The right of a party to terminate a contract for compelling reason is exercised by giving notice to the other party. Termination takes effect as from the time of notice. The notice is effective when the other party receives it (see Article 1.10).

ARTICLE 6.3.2

(Effects of termination for compelling reason)

As to the effects of termination of a long-term contract for compelling reason in general, and as to restitution, the provisions in Articles 7.3.5 and 7.3.7 apply.

COMMENT

The effects of termination for compelling reason in general are those set out in Article 7.3.5. Both parties are released from their obligation to render and to receive future performance.

The fact that, by virtue of termination, the contract is brought to an end does not deprive a party to the contract of its right to claim damages for any non-performance.

Termination also does not affect any provision in the contract for the settlement of disputes or any other term which is to operate even after termination (see Comments 3 and 4 on Article 7.3.5).

Performance of a long-term contract might have been made over a long period of time before the contract is terminated for compelling reason. This may make it inconvenient to unravel such performance. Furthermore, termination is a remedy with prospective effect only. Restitution can, therefore, be claimed only in respect of the period after termination. This is set out in Article 7.3.7(1), with the consequence that, as far as restitution has to be made, the provisions of Article 7.3.6 apply as set out in Article 7.3.7(2).

ANNEX 11**Principles of International Commercial Contracts
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(Draft prepared by Professor Christine Chappuis)

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

ARTICLE 7.3.5*(Effects of termination in general)*

(1) Termination of the contract releases both parties from their obligation to effect and to receive future performance.

(2) Termination does not preclude a claim for damages for non-performance.

(3) Termination does not affect any provision in the contract for the settlement of disputes or any other term of the contract which is to operate even after termination.

COMMENT**1. Termination extinguishes future obligations**

Paragraph (1) of this Article states the general rule that termination has effects for the future in that it releases both parties from their duty to effect and to receive future performance.

Termination, however, does not entirely put an end to the contract, especially where long-term relationships are concerned. So-called post-contractual obligations may be of two different kinds, i.e. either they already existed before the end of the contract and survive for a certain period of time after termination, or they relate to the winding up of the past relationship (see paragraph 3).

This provision also applies to contracts for an indefinite period ended by notice (see Article 5.1.8).

2. Claim for damages not affected

The fact that, by virtue of termination, the contract is brought to an end, does not deprive the aggrieved party of its right to claim damages for non-performance in accordance with the rules laid down in Section 4 of this Chapter.

Illustration

1. A sells B specified production machinery. After B has begun to operate the machinery serious defects in it lead to a shutdown of B's assembly plant. B declares the contract terminated but may still claim damages (see Article 7.3.5(2)).

3. Contract provisions not affected by termination

Notwithstanding the general rule laid down in paragraph (1), there may be provisions in the contract which survive its termination. This is the case in particular with provisions relating to dispute settlement but there may be others which by their very nature are intended to operate even after termination, such as provisions on confidentiality, non-competition, guarantee or interest. The issue is particularly relevant for long-term contracts.

Contract practice on surviving provisions, and the obligations related thereto, shows three main possibilities which can also be combined. First, the parties may adopt a general clause stating that all provisions which by nature are intended to operate after termination will remain in force notwithstanding termination of the contract. Second, in view of achieving more certainty, the parties may list precisely the surviving clauses in a provision usually situated at the end of the contract under a heading such as "continuing effect" or "survival". Third, provisions dealing with a specific duty (e.g. confidentiality, non-competition, IP rights) can specify that they will remain in force notwithstanding termination.

In relation with surviving provisions, the parties should think of addressing following issues particularly relevant for long-term contracts (such as contracts in the field of distribution, construction, information technology, outsourcing of all kinds of services, oil industry, etc.): which are the provisions intended to survive, whether such provisions are binding on one or on both parties, for how long they should survive, who bears the cost, which remedies are available in case of non-performance, etc. Contract drafters should pay close attention to the compatibility of the surviving duties with mandatory domestic law (e.g. prohibitions to compete limited in time). If the contract is silent or unclear, contract interpretation will determine those different questions (see Chapter 4).

Illustrations

2. The facts are the same as in Illustration 1, except that A discloses to B confidential information which is necessary for the production and which B agrees not to divulge for as long as it does not become public knowledge. The contract further contains a clause referring disputes to the courts of A's country. Even after termination of the contract by B, B remains under a duty not to ~~divulge~~ disclose the confidential information, and any dispute relating to the contract and its effects are to be settled by the courts of A's country (see Article 7.3.5(3)).

3. Consultant A undertakes to provide technical, manufacturing and marketing consultancy services for a new product to Client B for an indefinite period (see Article 5.1.8). IP rights arising out of A's creations remain at all times with B, royalty being payable for a period of fifteen years from the date of first sale. B's obligation to pay royalty will survive the termination of the consultancy agreement during the agreed period of time.

Other provisions not affected by termination – or rather, triggered by it – are those concerned with the winding up of the contract. In this respect, the parties may wish to address several issues in order to organise an exit strategy all the more necessary where long-term or complex relationships are at issue: restitution of the remaining stock, return of documents or advertising materials, restitution of confidential information, indemnities, fate of IP rights or a database, exit costs, migration duties, etc. Present, for example, in the oil industry or IT contracts, migration duties can be considered as a form of duty of cooperation (see Article 5.1.3). They may encompass duties to assist the client in finding an alternative provider, and handing over the activity and material (documentation, assets) to the alternative provider. Those duties should be settled expressly in the contract along with the allocation of the costs of such migrating operations. Again, if the contract is silent or unclear, contract interpretation will determine those different questions (see Chapter 4).

Illustration

4. Client A and Provider B are party to a Telecom Services Agreement including hardware, software, telecom equipment and internet access. According to the agreement, B shall, upon termination, assist A in the migration to an alternative provider, supply documentation and provide training to the alternative supplier's personnel. The exit costs are agreed upon. If B refuses to cooperate with A upon termination, A is entitled to resort to the remedies provided for by the contract and/or the Principles (see Chapter 7).

ANNEX 11

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Post-contractual obligations^(*)

(Draft prepared by Professor Christine Chappuis)

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

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COMMENT**1. Termination extinguishes future obligations**

Paragraph (1) of this Article states the general rule that termination has effects for the future in that it releases both parties from their duty to effect and to receive future performance.

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The fact that, by virtue of termination, the contract is brought to an end, does not deprive the aggrieved party of its right to claim damages for non-performance in accordance with the rules laid down in Section 4 of this Chapter.

Illustration

1. A sells B specified production machinery. After B has begun to operate the machinery serious defects in it lead to a shutdown of B's assembly plant. B declares the contract terminated but may still claim damages (see Article 7.3.5(2)).

3. Contract provisions not affected by termination

Notwithstanding the general rule laid down in paragraph (1), there may be provisions ~~in the contract or obligations~~ which survive ~~its~~ termination. This is the case in particular with provisions ~~or obligations~~ relating to dispute settlement ~~and governing law~~ but there may be ~~others~~ other provisions or obligations which by their very nature are intended to ~~continue to~~ operate even after termination, or to operate only upon termination. They may relate to provisions on confidentiality, non-competition, payment of interest, or unwinding of the contractual relationship (e.g., return of inventory, documents or advertising materials; return of media or documents containing confidential information, indemnities, treatment of intellectual property rights or databases, exit costs, etc.).

~~**Illustration**~~~~**Illustrations**~~

2. The facts are the same as in Illustration 1, except that A discloses to B confidential information which is necessary for the production and which B agrees not to ~~divulge~~ disclose for as long as it does not become public knowledge. The contract further contains a clause referring disputes to the courts of A's country. Even after termination of the contract by B, B remains under a duty not to ~~divulge~~ disclose the confidential information, and any dispute relating to the contract and its effects ~~are~~ is to be settled by the courts of A's country (see Article 7.3.5(3)).

3. A, an equipment leasing company established in country X, leases a commercial aircraft to B, an airline operating regional flights in country Z. The aircraft is registered for nationality purposes in country Z in the name of B, as operator. As international aviation regulation prevents the redeployment of the aircraft without it being de-registered from Z, B has contractually agreed to procure that de-registration upon termination. B decides to standardise its fleet and terminates the lease. There is no power of attorney previously issued to A to arrange for the de-registration and export of the aircraft. B has a duty to cooperate with A in obtaining the de-registration and necessary administrative authorisations that will allow A to relocate the aircraft to another country.

4. Post-termination obligations in long-term contracts

The issue of post-termination obligations is particularly relevant for long-term contracts. In relation to surviving provisions, the parties should consider addressing the following issues: which provisions are to survive termination, whether such provisions are binding on one or both parties after termination, how long they survive, who will bear the cost, which remedies are available in case of non-performance, etc. Surviving provisions may be dealt with in various ways: by a general clause stating that all provisions which by their nature are intended to operate even after termination will remain in force; by listing the specific provisions intended to survive; or by stating in the provision concerned that it is to remain in force notwithstanding termination. Contract drafters should pay close attention to the compatibility of the surviving duties with mandatory domestic law (e.g. limitations on prohibitions to compete).

Illustrations

4. The facts are the same as in Illustration 3. The contract between A and B contains an indemnification clause by the latter in favour of the former for losses attributable to the delay in de-registration of the aircraft, which is expressed to survive contractual termination. That indemnification clause operates and is enforceable independent of any damage claim under the terminated contract, though the payment thereof would impact the calculation of damages under such contract.

5. Consultant A undertakes to provide consultancy services for a new product to Client B for an indefinite period. Intellectual property rights arising out of A's services remain at all times with B, with royalties being payable for a period of fifteen years from the date of first sale. Five years after the duty to pay royalties by B to A has arisen, the contract is terminated pursuant to Article 5.1.8. B's obligation to pay royalties will survive termination during the remaining period of ten years.

6. Client A and Provider B are parties to an agreement under which a telecommunication system is to be provided by B to A. According to the agreement, B shall, upon termination, assist A in the migration of the services to an alternative provider and A is to pay the exit costs. The contract is terminated. B is under a duty to assist A in migrating the system with A paying the exit costs.