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INSTITUT INTERNATIONAL POUR L'UNIFICATION DU DROIT PRIVE

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**UNIDROIT Working Group  
for the preparation of a Legal Guide  
on Contract Farming**

***Second Meeting***  
**Rome, 3 – 5 June 2013**

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**Report on Second Meeting of the UNIDROIT Working Group for the  
preparation of a Legal Guide on Contract Farming**

**Rome, 3 – 5 June 2013**

*(prepared by the UNIDROIT Secretariat)*

1. The *UNIDROIT Working Group for the preparation of a Legal Guide on Contract Farming* – set up pursuant to a decision taken by the UNIDROIT Governing Council at its 91<sup>st</sup> session (Rome, 7-9 May 2012)<sup>1</sup>, held its second meeting in Rome at the seat of UNIDROIT from 3 to 5 June 2013.
2. The Working Group was composed of the following members: Professor Fabrizio Cafaggi (European University Institute, Italy); Mr Eduardo Alexandre Chiziane (Eduardo Mondlane University, Faculty of Law, Maputo, Mozambique); Professor Marcel Fontaine (emeritus, Catholic University of Louvain Law School, Belgium); Professor Henry Gabriel (Elon University School of Law, Greensboro, USA); Professor A. Bryan Endres (University of Illinois, USA); Professor Paripurna P. Sugarda (University of Gadjah Mada Faculty of Law, Yogyakarta, Indonesia). Professor Horacio Roitman (University of Cordoba Faculty of Law, Argentina) was excused. The Food and Agriculture Organization (FAO) participated as partner organisation and co-author of the Guide. The following intergovernmental organisations were represented as observers: the International Fund for Agricultural Development (IFAD) and the World Food Programme (WFP). Observers representing professional and trade interests, *i.e.*, the World Farmers' Organization (WFO), and from one agribusiness company likewise attended.<sup>2</sup>
3. The meeting was chaired by Professor Henry Gabriel, member of the UNIDROIT Governing Council.
4. The Working Group used the following documents as a basis for its deliberations: Draft Introduction (UNIDROIT 2013 – Study 80 A – Doc. 3) and Draft Chapter I – Parties to the contract (UNIDROIT 2013 – Study 80 A – Doc. 4) (prepared by the UNIDROIT Secretariat); Draft Chapter III – Parties' obligations: Contractor's obligations (prepared by Professor Henry Gabriel) (UNIDROIT 2013 – Study 80 A – Doc. 5) – Producer's obligations (prepared by Professor Marcel Fontaine) (UNIDROIT 2013 – Study 80 A – Doc. 6). The documentation for the session also included one Working Paper reproducing comments submitted by Mr Andrew W. Shepherd (UNIDROIT 2013 – Study 80 A – W.P. 1).

### **Opening of the meeting and inter-organisation co-operation**

5. The UNIDROIT Secretary-General welcomed all participants and thanked them as well as the institutions they represented for their participation in the meeting and their contribution to the process of preparation of the future Legal Guide on Contract Farming.
6. He expressed special acknowledgements to FAO for its strong support and its interest in participating in the project as co-author of the Guide. Such a level of partnership in preparing the future instrument was highly valued in view of FAO's expertise and extensive field work in the area of contract farming. UNIDROIT also very much appreciated FAO's interest in disseminating and implementing the Guide once adopted.
7. He reiterated the importance for UNIDROIT to work in synergy with multilateral organisations conducting development programmes based on contract farming operations or other modalities, first and foremost the need to build upon the practical experience of producers and the private sector so as to ensure that the Guide meets practical needs and provides useful good practices recommendations.
8. The UNIDROIT Secretariat recalled that with a view to facilitating the deliberations of the Working Group, it had set up an internal dedicated website providing access to materials and resource references relating to the contract farming project,<sup>3</sup> sharing information also with the FAO Contract Farming Resource Centre.<sup>4</sup> The WFO's representative pointed out that WFO would develop a section of its website devoted to contract farming, reporting on case studies and best practices which would also support the current work of preparation of the legal Guide.

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<sup>1</sup> UNIDROIT 2012 – C.D. (91) Misc. 3: Summary of the conclusions.

<sup>2</sup> See the list of participants reproduced in Appendix to this report.

<sup>3</sup> With a view to facilitating the deliberations of the Working Group, the UNIDROIT Secretariat had set up an internal dedicated website providing access to material and resource references relating to the contract farming project. See [www.unidroit.org/contractfarming](http://www.unidroit.org/contractfarming) (username: farming – password: Study80a)

<sup>4</sup> Access to a wealth of bibliographical references (including legal material) and contract samples. <http://www.fao.org/ag/ags/contract-farming/index-cf/en/>

## General remarks

9. The Chairman emphasised that the various working documents submitted for the consideration of the Group were to be considered preliminary drafts. They were intended to provide a first basis for discussion of the substantive issues involved, but the *rapporteurs* were aware that much work still needed to be done not only on the content but also with a view to ensuring adequate co-ordination between the different parts so as to achieve a coherent overall structure and a proper internal consistency of the Guide. Style, drafting and presentation would be harmonised in due course. In particular, consistent terminology should be adopted in designating the transaction and the contract as well as the parties. Therefore, in discussing the drafts, members of the Group were invited to focus their comments on substantive and policy issues.

10. The UNIDROIT Secretary-General recalled that it had been agreed at the first session of the Group that, while analysing contract practice and national legislation was essential in the process of preparation of the Guide, no specific reference or citation would appear in the final document, except, as the case might be, for global international instruments or documents from international organisations. This was seen as necessary to maintain a fair level of generality and to avoid potentially sensitive political implications.

11. Issues of methodology and presentation were discussed during the session, in order also to reflect nuanced approaches or possible exceptions to general descriptions, statements or wording. It was suggested that footnotes could be included to that effect, at least during the drafting phase.

12. As to the structure of the document, several decisions were made during the discussions which are here reported under the relevant headings and summarised below for the convenience of the reader.

- The section presently in Section D “Approach taken in the Guide to legislative and contractual issues” in the general Introduction (Doc. 3) should be part of the preface of the Guide.
- The overarching public law environment, both at international and domestic levels, should be briefly presented in the Introduction: relevant areas should include: safety regulations, human rights, environmental law, social and labour law, tax law, investment law, etc.
- A section should be added in the Introduction presenting the main methodology principles and policy objectives of the Guide, which could also serve as guidance for drafters during the drafting process.
- A glossary could be added to the Guide at the final stage of preparation, probably at the end of the Introduction, where definitions would be found together.
- Elements and issues relevant to both the producer and contractor’s obligations and possibly relevant to the other chapters as well deserve a general discussion, presentation or analysis, in anticipation of more specific development to be found subsequently in the Guide. Further thought is needed as to the appropriate place for such overall discussion which, depending on the particular subject matter, may take place either in the context of the general Introduction, in a dedicated chapter, or as an introduction to the chapters on parties’ obligations or on remedies (see also below under para. 61 *et seq.*).
- In Chapter III, the section on producer’s obligations should come first. This was justified essentially on account of the characteristic performance of the contract, *i.e.*, to produce. As a consequence, discussion on Doc. 6 would precede that on Doc. 5.

## DRAFT INTRODUCTION – STUDY 80 A – DOC. 3

13. The UNIDROIT Secretariat introduced the draft introduction to the Guide, indicating that it contemplated two broad sections. Part I would provide a general introduction to contract farming from an economic and business perspective. Part II would define the types of transaction that the Guide would address, *i.e.*, the agricultural production contract, discuss the legal regime applicable to

such contracts, and present an overview of relevant legal sources in the context of contract farming arrangements.

14. It was agreed that a section should be added in the Introduction, presenting the main methodology principles and policy objectives of the Guide, which could also serve during the drafting process as guidance for drafters.

## **Part I – General Introduction to Contract Farming**

### **A - Concept of contract farming**

15. As regards para. 4, the following suggestions were made: – the term “guidance” would be more appropriate than “support”; also, more flexibility would need to be introduced in the contractor’s obligations as these might vary greatly; – introduce an express reference to “farmer” and “agreement”, as these were essential concepts in defining contract farming; – to introduce the concept that the product must meet certain specifications, including with regard to production methods; on a related aspect, it was noted that the producer not only undertook to produce, but also to follow the contractor’s instructions regarding production methods; – in practice ,the price could be agreed upon after the agreement was made, and therefore was not always predetermined; – it was noted that para. 4 indeed contemplated a legal approach, as opposed to para. 3 which offered an economic approach.

16. In addition, it was noted that although the Guide would focus on the contract between producer and contractor, the implications for the contract deriving from the complex supply chain structure as well as the specificity of supply chains based on the particular commodity would be dealt with in the appropriate sections of the Guide, insofar as they were relevant. The main focus of the Guide was on the private law aspects of the transaction, but social (including human rights) and environmental issues involved in contract farming that were relevant from a public policy perspective would be mentioned in an appropriate place in the Guide.

### **B – Variety of contract farming operations in practice**

17. It was noted that this section was still no more than an outline. It was suggested:

– regarding the market: to illustrate the potential that production contracts offered not only for established markets, but also and quite importantly, for the development of new markets for new products (an example in point being the bio fuel market which had developed in the United States based on production contracts); to discuss the situation where the market was fully controlled by the Government; to refer to the increased concentration and performance of food markets; to make a specific reference to markets as being increasingly consumer-driven; to indicate that a growing number of contract farming transactions were taking place across borders, this being likely to occur when a retailer under a private label contracts directly with a producer;

– regarding the parties: considerations regarding farmers in developing countries should not be limited to “small” farmers; mention could be made of producers coming together in order collectively to advocate their position in the contract relationship; the nature of the parties leading to the application of a foreign law could be mentioned; mention could be made of the complexity of the value chain;

– regarding the nature of the commodity: the impact of the different types of commodity in the contractual relationship could be developed. It was noted that among the materials available relating to the different commodities in accessible data bases, in particular contract samples, none referred to forestry or aquaculture. Further information on how production contracts dealing with these commodities were structured would be useful.

### **C – Outline of principal economic and social benefits and risks of contract farming**

18. As regards the benefits of contract farming in general, it was suggested that the environmental dimension should have a place in the analysis, in addition to economic and social aspects. Mention was made of the global benefits to be derived by supply chain participants from a more certain and stable availability of supply. It was reiterated in this context that contract farming typically opened opportunities for developing new commodities and new markets.

19. As regards the benefits for the parties, it was noted that contract farming offered protection against market fluctuations. Regarding paras. 13 and 14, it was noted that for the parties, certainty would derive from mechanisms built into the contract, either by the contractor exercising decisional power (generally based upon its own choice rather than through a “delegation of tasks by the producer”) or by the allocation of shared responsibilities and control. It was observed that in certain contract farming operations, it would be for the contractor to take advantage of the producer’s know-how and expertise. The wording should more appropriately reflect that performances by the contractor *may* be supplied – but that this would not always be the case.

20. As regards potential problems associated with agricultural production contracts, in the context of imbalance of economic power (para. 18), it was mentioned that often, contracts are based upon standard forms rather than being individually negotiated – a distinction that should be analysed in particular in the context of contract formation, but the implications of which should also be discussed in the various chapters of the Guide. It was mentioned that producers were often bound by privacy clauses and confidentiality clauses; small producers generally lacked knowledge, information and trust as to how contract farming operates and would rather engage in oral contracts. A major problem that needed to be stressed was poor legal enforcement mechanisms.

21. Regarding the regulatory aspects (para. 21), the suggestion was made to refer to food safety issues and traceability requirements. As to the labour and environmental dimension, it was noted that rather than take advantage of a weak local framework, under certain circumstances, contract farming could foster the implementation of higher standards, <sup>7</sup> which should be seen as a benefit.

### **D – Overview of selected issues with a special relevance in the context of contract farming**

22. The UNIDROIT Secretariat recalled that this section was intended to provide a (still incomplete) overview of issues that might have an impact on the mutual obligations of the parties under a contract farming agreement, and would be further developed under the various chapters of the Guide.

23. Proposed section on “land related issues”: it was suggested that it might be relevant to refer to public policies in relation with land, such as agrarian law reforms, land tenure forms etc. It was suggested that the implications of collective rights to land should be further analysed, for example – but not only – under customary law. The point was made that in certain instances, contract farming might expose producers to being deprived of their land, where the contract granted the land as collateral in security for the performance of obligations, or contained a penalty clause, or gave the use of the land to the contractor. It was noted that the producer was often required to provide land as collateral to secure long-term investment requirements, for example to build facilities for poultry production: under these circumstances, the producer should be informed of the risks involved if the event of the production contract being terminated before the debt was repaid. The recommendation could be made in the Guide to limit the scope of the mortgage to a portion of the land upon which the new facility was constructed as opposed to the entirety of the parcel.

24. Proposed section on “the agricultural production contract as a financial support vehicle”: it was suggested that the situation should also be discussed where the contractor provided a corporate or personal guarantee in support of the producer’s repayment obligations towards a bank. It was also suggested that when the commodity was provided as collateral to secure repayment of finance or performance under a production contract, in the interest of the producer the duration of the lien should not last beyond the duration of the contract. Mention was made of the situation where a third

party creditor stepped into the shoes of the contractor and claimed the commodity granted as collateral. As to microcredit, it was acknowledged that it might not be relevant in the first place in relation to contract farming, but that it was certainly important in other contexts. As to insurance, this was recognised to be of critical importance but further reflection would be needed as to the most appropriate place to deal with the subject.

25. Proposed section on "commodities": it was agreed that this section should present the variety of commodities as this might have an impact on the contract. It was suggested that mention could also be made in this section of the importance of the processes involved in production, and that it would be appropriate to place the section on certification immediately afterwards, which dealt with issues closely related to the type of commodity and process involved.

26. Proposed section on "certification": it was suggested that this should refer rather to "standards and certification", or to "compliance mechanisms", which is a broader concept as it would cover not only the intervention of a third party but also verification by the parties themselves, including, for example, any procedures of self-certification required under the existing regulations.

## **Part II – The agricultural production contract covered by the Guide**

### **A – The concept of "agricultural production contract" covered under the Guide**

#### *1 – Characteristic features of an agricultural production contract*

27. The UNIDROIT Secretariat recalled that this section was intended to describe the type of transaction that the Guide was concerned with in the first place. This approach would clearly not interfere with how concepts of "contract farming" or "production contracts" might be understood or dealt with under national law or in practice, which could be much broader or differently characterised than the type of transaction contemplated in the Guide.

28. It was agreed that the focus of the Guide would be on the typical situation involving two parties: a producer and a contractor. It was acknowledged, however, that a larger number of parties could be involved under the same contract – for example several producers, a public entity, an input supplier, a banking institution; or that a number of separate contract relationships might either affect or be themselves affected by the production contract. It was felt that it would be appropriate to discuss the specificities deriving from the participation of other parties only insofar as they might affect the "internal" obligations and remedies of the producer and the contractor. Therefore, a legal analysis of the global value chain would go beyond the purpose of the Guide.

29. However, it would be useful to point out the broad range of issues that parties – especially the producer and stakeholder (for example government authorities advising farmers) – should be aware of, as the production contract is generally part of a complex transaction. In this context, reference was made to Doc. 4 on "Parties involved in an agricultural production contract", Part II of which was centred on the "other parties".

30. It was agreed that this section would be better defined by referring to the "scope" of the Guide. For example, para. 51 could state rather: "whether or not title vests with one party or the other is not a criteria for defining *the scope* of the Guide". It was suggested, however, that this indication would be more appropriately situated in para. 52 or 53 dealing with the product rather than with the parties.

31. It was suggested that in describing the transaction (para. 49) it should be made clearer that the producer needed to be an independent contractor as opposed to a subordinated employee.

## 2 – Control exerted by the contractor over production

32. The earlier observation regarding the certainty of supply for the contractor was reiterated in this context (para. 56). Likewise the fact that sometimes it was for the contractor to seek the expertise of the farmer: although this might be considered a rather marginal situation (that could be referred to in a footnote), it was noted that it could apply where codes of conduct incorporated in the contract referred to local production practices.

## 3 – Producer as independent contractor as opposed to contractor's employee

33. The importance of this part of the Guide was emphasised, since one of the most recurrent criticisms of contract farming relationships was the issue of employment.

34. As to the extent of the control exercised by the contractor, it was noted that the situation where a relationship might possibly be characterised as employment should be distinguished from the situation of economic dependency that might be present in a highly integrated economic relationship. It was agreed that the opening sentence of para. 64 should be clarified, and that the particular features or problems arising from the producer's condition of economic dependency should be dealt with under the headings dealing with the obligations of the parties.

35. As regards the criteria referred to in para. 64 as possibly characterising an employment contract in a national setting, it was observed that under certain circumstances, where a very tight control exerted by the contractor leads to the conclusion that the contract farming is the undertaking of the contractor, the persons working for a producer could be seen as employees of the contractor and thus would be entitled to labour law protection from the contractor.<sup>5</sup> It was also suggested that clearer mention should be made of the possible relevance of disciplinary sanctions. Regarding the relevant international instruments, it was suggested that reference should be made in particular to the ILO Labour Inspection (Agriculture) Convention, 1969 (No. 129). Finally, the suggestion was made to redraft the opening sentence of para. 60.

## B – The legal regime applicable to agricultural production contracts

36. The UNIDROIT Secretariat recalled that this section was intended to provide introductory elements to the treatment of production contracts under national law. The approach taken by the Guide was to emphasise the mixed nature of the contract, which could be treated as a *sui generis* form whenever no special legislation was applicable to this particular type of contract.

37. The point was made that an increasing number of contract farming transactions were taking place across borders, involving parties situated in different countries. It was agreed that while this phenomenon might be mentioned in the section dealing with the "Variety of contract farming

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<sup>5</sup> Cf. the Indian Minimum Wages Act 1948: "'employee" means any person who is employed for hire or reward to do any work, skilled or unskilled, manual or clerical, in a scheduled employment in respect of which minimum rates of wages have been fixed; and includes an out-worker to whom any articles or materials are given out by another person to be made up, cleaned, washed, altered, ornamented, finished, repaired, adapted or otherwise processed for sale for the purposes of the trade or business of that other person where the process is to be carried out either in the home of the out-worker or in some other premises not being premises under the control and management of that other person."

When under a contract farming arrangement: contractor has an exclusive right for the inputs provided to the producer; is in know-how of scientific methods to apply to the production, and has a right to supervise, inspect of test the crop; is exclusively entitled to the entire production; – while the producer is bound by obligation not to disclose any proprietary information passed on to him by the contractor and has no right to sell the produce any other party than the contractor: all of the above facts are together interpreted by legal experts as the "contract farming being the undertaking of the Contractor" and therefore "employees of the producer having 'Employer – Employee relationship' with the Contractor". This puts the liability of the compliance with labor laws on the contractor. *Explanations kindly provided by Mr Suhas Joshi.*

operations in practice”, the discussion relating to the parties and the applicable law would be found under the relevant parts of the Guide.

38. As regards the issue of ownership and type of commodity (paras. 70-74), the point was made that although it was common for crops to be dealt with under an ownership transfer and livestock without an ownership transfer, there were exceptions. In certain legal systems, crops could remain in the property of the contractor, which would generally be the case for specialised varieties, while under legal systems where this would not be possible, the contractor would rather hold intellectual property rights.

39. Regarding sub-section 3: “The agricultural production contract as a *sui generis* contract” – para. 75, second sentence: change “can” for “may”; paras 75-77, the suggestion was made to expand on the legal provisions which would regulate an agricultural production contract under different legal systems, *i.e.*, general contract law, private/civil law, a sub-category such as agrarian law, special regulations, etc. It was noted that the applicable legal regime would also encompass regulatory standards. The point was also made that general principles should likewise be discussed in this context, rather than under the subsequent section in paras. 87-88. Also, in para. 75, last sentence: add “subject to the applicable mandatory provisions” – para 77: the point was made that contractual freedom could bring efficiency, but not necessarily for both parties.

### **C – Relevant legal sources in the context of contract farming arrangements**

40. There was speculation as to whether “private standards” (paras. 89-90) – which should preferably be designated as “voluntary” standards – should indeed be dealt with under this section, which latter appeared to cover the regulatory framework, whereas voluntary standards would be incorporated into the contract as product or process specifications. It was suggested to illustrate how standards were enforced, and how the various sources took precedence. It was observed that “trade usages” would probably be correlated with “voluntary standards”, but this point deserved further reflection.

41. As regards “traditional and customary rules”, it was observed that, in certain contexts, such rules could indeed be relevant to a production relationship, as relying on customary law could make it easier for the contractor to deal with the community (paras. 92-95). As a consequence, it was suggested to reword para. 95.

### **D – Approach taken in the Guide to legislative and contractual issues**

42. The UNIDROIT Secretary General suggested that this section should ideally become the preface of the Guide.

## **DRAFT CHAPTER 1: PARTIES INVOLVED IN AN AGRICULTURAL PRODUCTION CONTRACT – STUDY 80 A – DOC. 4**

43. The UNIDROIT Secretariat introduced draft Chapter 1, indicating that it contemplated two broad sections: Part I dealing with the parties to the core transaction, *i.e.*, the agricultural producer and the contractor; and Part II dealing with the other parties having an interest in an agricultural production contract.

### **Part I – Parties to an agricultural production contract**

#### **A – The agricultural producer**

44. As regards the concept of agricultural producer: it was noted that although the informal sector was highly relevant and often referred to in this Chapter, no definition was provided. Although it was

acknowledged that there was no universally defined concept (which differed depending on whether an economic, sociological, or legal approach was taken), a tentative description could be provided. In this connection, it was suggested that a glossary could be added to the Guide, probably following the Introduction, where definitions would be found together.

45. A number of suggestions/comments were made:

In general, to make some reference to the growing attention devoted in legislation to small or micro enterprises, which might be relevant for agricultural producers;

- in para. 3: to move the second sentence elsewhere as this paragraph addressed the parties themselves;
- in para. 5 dealing with the concept of “agricultural producer” (rather than the word “notion” in the title of subsection 1): it was agreed that it should be redrafted, if at all necessary. The definition of producer should be found in the glossary;
- in para. 11: to mention that some civil law countries did not distinguish between civil and commercial matters, which presently appeared in para. 13;
- in para. 14: to reword this reference appropriately, to the effect of contrasting a merchant not necessarily with a person without schooling, but, for example, with a hobby farmer who has taken up farming as a lifestyle challenge;
- in para. 18: to consider adding that producers increase their productive and earning capacities “through the increase of economic skills”. Mention should be made of the fact that an increase in bargaining power works also to the companies’ benefit;
- in para. 19: to consider stating that it is suitable for a producer to have a legal form;
- in para. 24: to delete the last sentence as it refers to a bad practice, which is anyway rather marginal. It was felt that the Guide should not emphasise parties’ illegal and unethical behaviour.

46. As regards the forms for conducting an agricultural production activity, the point was made that this section would probably need to be condensed and focused, to indicate more clearly what is relevant to parties entering into contract farming arrangements.

47. For example (and in relation to para. 26), it had been noted earlier (see *supra*, para. 35) that under certain legal systems, courts would consider farm workers to stand in a direct relationship with the contractor if the farmer was working exclusively for that contractor as a supplier, thereby disregarding the legal entity established by the producer. Also, the point should be made that establishing under a limited liability company would not shield the producer from all liability as creditors would invariably seek to secure their interest by obtaining a bill of exchange signed by the producer, or a mortgage over the land. And in the instance of cooperatives, banks would very often require the board directors to provide a personal guarantee. Depending on the particular market or legal system, different practices and legal mechanisms would be used by the parties. For example, under certain legislation protecting family property from attachment, producers would register the entire farm as family household.

48. The point was made that communities (para. 21) may be subject to a variety of forms. A community could work as a producer organisation, with members having their own assets and the head of the community being authorised to enter into contracts for the community; or members could also have common ownership of the community property. It was pointed out that most often there would be no written documents evidencing title or relations within the community, but there would be a general knowledge – inside the community and most often also among people dealing with the community, such as contractors – about title or identification of the community or its members. As to the legal regime, it was indicated that a written contract signed by the head of the community (in his own name but on behalf of the community) would be subject to statutory law, whereas relations among members would be regulated by community rules.

49. The following suggestions/comments were made:

- in para. 27 and where liability is incurred involving also joint and several liability of the other members of the partnership or the group: it could be underlined that this would have a peer monitoring effect within the producers' group;
- in para. 28: to specify that in this particular situation, the entity had a separate legal personality, so as to make a clear distinction with the situation addressed in para. 27; also, to reconsider the content of the penultimate sentence;
- in para. 29: with regard to the forms under the section dealing with "corporate structures", it was pointed out that in general, large companies, for example those owned by multinational concerns, would not enter into production contracts with contractors. Large structures might, however, be involved in the case of cooperatives dealing with contractors on behalf of primary producers. There, a number of issues should be clarified, especially with regard to liability and enforcement issues.
- in para. 34: as to the relation between the "non-for-profit" company form and the cooperative form addressed under paras. 39-42, it was explained that para. 34 referred to "social companies" under certain legislations, which have a double purpose: to conduct an economic activity but at the same time to re distribute the earnings and power on a social basis. Such entities were almost cooperatives but claimed to be companies.
- para. 35 et seq.: attention was drawn to situations where the contract was concluded with individual farmers but the cooperative was responsible for input supply, etc. What would happen if the cooperative failed to perform to expectations? Also, who was liable in case a cooperative signed a contract to supply specified products to the cooperative but farmers failed to deliver? Also, attention was drawn to "leading farmers" working with neighbouring farmers to obtain sufficient production to meet market demand. These supplied inputs and bought the produce but were basically little more than advanced farmers. In reply, it was indicated that in most cases, leading farmers only supported the production process: they merely provided the service of aggregating and supporting the farmers and handling their production, but they did not assume either responsibility or liability. On the contrary, when a leading farmer took responsibility for production, it could be seen as acting as an agent between the producer and the contractor.
- para. 36: it was pointed out that self-help groups – which were not-for-profit organisations, either registered or not registered, that assisted farmers with production, for example providing technical assistance, receiving and distributing inputs, monitoring the correct performance of the contract – might act as a party to the contract, generally in the context of a multiparty contract;
- para. 39: it was felt that the concepts of "primary cooperatives" and "apex entities" should be explained.

## **B – The contractor**

### *Description of the contractor*

50. Para. 43: it was suggested to keep in mind, not only in this particular context but in the whole section and indeed in the whole Guide, the variety of contractors that might intervene in the contract. These could be not only processors and manufacturers, but also wholesalers and exporters. It was recalled that the Guide would not deal with transactions directly concluded between producers and final consumers.

51. Para. 47: the suggestion was made to add a reference to the "integrator", a designation found in certain legislations describing or characterising the agreement as an "integrated contract", thus also reflecting a certain degree of economic and business dependency of the producer towards the contractor.

*Section dealing with intermediaries*

52. As regards terminology, it was recommended to refer to “intermediary” or “agent”, rather than use the term “middleman”.

53. It was noted that the kind of intermediary referred to in this context was the intermediary acting as some sort of agent of the contractor. However, another category should be mentioned which would refer to aggregators, which were independent of the company and operated to aggregate the produce for purposes of marketing out. In other words, they were free agents in the market.

54. It was noted that it is essential for the producer to understand when the intermediary was a party to the contract and when it was not. Often, this situation was not clear and raised problems of allocation of liability between the parties.

55. Para. 57: further explanation was requested on the situation where an intermediary acted without authority or acted beyond the scope of its authority, and on whether this should not be dealt with under the section on remedies. It was agreed, however, that the discussion in the document was overly complex, and that it might be sufficient to refer to the fact that there were situations where someone appeared to be acting on someone else’s behalf and the different legal systems had different ways of addressing them, under agency law, which is a very complicated area of the law.

56. Para. 61: in reply to a question as to whether there were governments purchasing under contract farming agreements, it was noted that most public purchases were made on the basis of specifications rather than by controlling the production process. Certain contracts were concluded by public-private entities such as the cotton development authority in Kenya.

**Part II – Other parties with an interest in an agricultural production contract**

57. The point was made that a number of parties should be referred to: consumers, which are at the end of the value chain, but also organisations creating private standards, such as codes of conduct or guidelines; also, insurers and third parties providing inputs should be referred to. As to finance providers, a number of considerations had been expressed when discussing the section on “the agricultural production contract as a financial support vehicle” (Introduction, Doc. 3) which could be relevant in this context.

58. It was agreed that connections between the parties to the production contract and other parties having an interest in the contract relationship should be discussed in this context, by explaining how contracts might be linked together and become interdependent. It was suggested that mention could be made of the legal doctrine of third party beneficiary contracts, although it varied in different legal systems.

59. With regard to the role of Governments, the point was made that a discussion on the role of public authorities in enforcing the terms of the contract would be welcome in this context, and it was suggested that mention be made of the fact that public authorities had an important role not only in facilitating negotiations but also in acting as mediators in the event of a dispute between the parties.

60. It was suggested that the role of inter-professional agreements, which were a very common device, should be further explained (para. 81), since they participate in the regulatory chain.

**DRAFT CHAPTER 3: PARTIES' OBLIGATIONS**

61. As a result of the decision that the section on producer's obligations in Chapter III should recede the section on contractor's obligations (see supra para. 12), Doc. 6 was discussed before Doc. 5.

62. A number of observations made during the discussions are relevant to both sections on producer's and contractor's obligations. These may be summarised as follows:

63. It was noted that, as described in the Introduction (Doc. 3, paras. 75-77), the approach in the Guide should regard the contract as a mixed, *sui generis*, contract in the first place: in analysing specific obligations and the applicable legal regime, the rules relating to specific contract types might come in but would not always be restricted to a sale, nor should they focus on a strict distinction from "services", a concept which was differently understood and addressed under different legal systems and, depending on the particular legal meaning, might trigger different remedies. It was noted that most obligations would flow from the ownership of the goods, or from the passing of title. Also, certain obligations would entail obtaining a specific result or employing best efforts.

64. In dealing with parties' obligations (and this would indeed apply to all chapters), reference should be made to the law applying to the contract, in particular the general law of contracts and specific laws and regulations, both default rules and mandatory rules, as well as expressed terms in the contract, trade usages and any voluntary standards that might be relevant. While the legal regime of the contract will be discussed in the general introduction, specific references will be found under the various issues dealt with in the core chapters. The importance of regulations was much emphasised for a number of operations involved in production, which imposed corresponding duties on the parties. It was agreed that the overarching public law environment, both at international and domestic levels, should be presented in the introduction. Relevant areas would include: safety regulations, human rights, environmental law, social and labour law, tax law, investment law, etc.

65. As to terminology, it was noted that legal systems refer to "obligations", "implied terms" or "warranties" depending on the context, and it was suggested that such concepts could be explained in the Guide.

66. In discussing the main or typical problems and solutions in legislation and practice, the Guide would be as specific as possible while retaining an inevitable level of generality across legal systems and countries. Reference could be made, as appropriate, to international Conventions (such as the *United Nations Convention on the international sale of goods* or the *UNIDROIT Principles of International Commercial Contracts*), in particular on account of their neutral approach and their balanced solutions.

67. A number of elements and issues relevant to both the producer and contractor's obligations, and possibly relevant to the other chapters as well, deserved a general discussion, presentation or analysis, in anticipation of more specific developments found elsewhere in the Guide. Further thought was needed as to the appropriate place for such overall discussion which, depending on the particular subject matter, might take place either in the context of the general introduction, in a dedicated chapter, or as an introduction to the chapters on parties' obligations or on remedies. Certification, inputs, insurance could be examples of such elements.

68. General principles would be dealt with in the section of the Introduction dealing with the legal regime, noting that principles were not universally understood and accepted in the same way in all jurisdictions. Among these general principles would be good faith and fairness in contracting (with the related discussion on parameters used to control fairness of terms and practices).

69. It was felt that although the Chapter dealing with dispute resolution would discuss the role of arbitration and alternative dispute resolution mechanisms, the role of third party mediators in helping the parties sort out disagreements throughout the life of the contract should be emphasised in general.

**PRODUCER'S OBLIGATIONS – STUDY 80 A – DOC. 6**

70. Professor Fontaine introduced the draft section on producer's obligations, pointing out that this was a preliminary draft, which had been prepared mainly by analysing contracts, but was still to be completed, in particular by references to domestic and international rules. Three main sets of obligations were presented, *i.e.*, to produce the goods in accordance with contract specifications, to deliver the goods, and to pay for contractor's inputs.

71. It was agreed that safety obligations, both with regard to the product and the process, should be further expanded. Confidentiality clauses, although not perhaps to be found in many contracts, were nevertheless common under certain practices and should be discussed, indicating that they were at times prohibited. Assignment of producer's obligations should also be discussed in this section.

**1 – Production of goods in accordance with contract specifications and requirements**

*Quantity – the following suggestions/comments were made:*

72. Further explanation could be provided regarding the concepts of "whole production" and "exclusivity", in particular whether they would apply to a particular field, or to particular inputs provided by the contractor, or to all the property of the producer, or the person of the producer; in the latter case, issues of cooperation and fairness (including confidentiality or competition law aspects) might arise.

73. The difference between a specified quantity and a minimum quantity was illustrated: it was suggested that undertaking to deliver a minimum quantity might help the producer to obtain credit from a bank.

74. Reference was made to the concept known under the US legal system as "output contract" (*i.e.*, a producer agrees to sell its entire production to the buyer, which in turn agrees to purchase the entire output – as opposed to "requirements contract": *i.e.*, a seller agrees to supply the buyer with as much of a good or service as the buyer wants, in exchange for the buyer's agreement not to buy that good or service elsewhere), which could be of assistance when discussing the obligations that derived from such contracts.

75. The question as to whether a producer would be entitled to acquire the product from other suppliers to meet the quantity or quality requirements should be discussed.

76. The concept of exclusivity would apply to production irrespective of whether it met quality requirements, as was typically the case for commodity protected under intellectual property rights, and the producer would not be entitled to sell the rejected produce to another party. Under other types of agreement, the producer could be entitled to sell the rejected produce to another party, for example on the local market, or to keep part of the crop for personal use.

77. The point was made that, even when the producer is bound to exclusive delivery, to leave some flexibility by allowing producers a small margin for sale outside the contractual relationship – although producers would still be bound to repay inputs and services provided by the contractor – was seen by companies as a way of avoiding non-compliance or side selling.

78. As an exception in the context of exclusive delivery, it was noted that some contracts would include "pass-over clauses", entitling the contractor not to purchase the produce from a certain parcel of land.

79. Exclusivity had implications under the competition law perspective, and might entail that workers hired by the producer would be considered employees of the contractor.

*Quality requirements*

80. The importance of quality and, most importantly, safety standards under national regulations was stressed again in this context, as well as the important role of voluntary standards incorporated into the contract (para. 76); regulatory and voluntary standards generally involved control requirements which applied at delivery and sometimes also during the production process; control took place through different forms of verification, including certification.

81. The suggestion was made to distinguish the essential quality of a product - which referred to the characteristics and the nature of the product itself - from non-essential quality, determined by the parties often in reference to voluntary standards. It was noted that quality requirements may be defined by legal rules or under the contract. The distinction would also be useful in the context of remedies.

82. The point was made that the contractor would also bear certain responsibilities in relation to quality: one aspect related to the definition of quality standards, and ensuring that the producer was aware of the standards that would be applicable at the time of quality control; this could be a particularly important issue in cases where the product was exported and was subject to compulsory requirements under a foreign regulation. Under a different perspective, it was noted that certain obligations in relation to product quality would also bear upon the contractor since the latter controlled the quality (para. 78);

83. The advantages of having measurable criteria were stressed, in particular as it would help the producer dealing with quality assessment during production, which might not always be the case when sophisticated measures were needed to comply with certain quality requirements;

*Methods of production*

84. Professor Fontaine indicated that many aspects were addressed in this section, which did not purport to be exhaustive, nor applicable to all kinds of contract. The intention had been, rather, to draw the producer's attention in the Guide to the importance of contract clauses being sufficiently precise, without, however, advocating overly complex drafting.

85. It was noted that the very long list of items concerning methods of production could give the impression that the producer was subject to an enormous quantity of obligations, while the purpose was to examine all items which appear in practice under agricultural production contracts - but not necessarily all of them in all contracts - to give advice as to the main issues to be clarified in each case. It was agreed that the list included several aspects which did not strictly belong to "methods of production" and that the title and the internal structure of the section should be revised.

86. Regarding inputs, an exchange of views took place on the appropriate manner of dealing with intellectual property-protected products (seeds, but potentially also other types of goods) and genetically modified organisms (GMO). It was pointed out that national legislations regulated intellectual property rights and the question was raised of whether private parties could grant a license and, if so, what the scope of such license would be. Approaches varied widely under national legislations and raised complex and sensitive policy issues; however, it was felt that the Guide could not ignore the implications of this kind of input. As a consequence, subject to final decision, it was suggested that the section providing a general presentation of inputs describe that there were different ways in which legal systems dealt with intellectual property-protected products in respect of the patentability of GMOs and the obligations deriving therefrom; and the section on the producer's obligations should discuss the obligation either to pay a royalty or not to reuse the seed for other purposes. It was also noted that due attention should be paid to corresponding obligations of the contractor, to be discussed in the relevant section.

87. As to insurance (paras. 120-126), it was noted that recourse to insurance would vary depending on the region of the world, as would the financial implications for farmers, although the

availability of micro-insurance was reported in some countries. Insurance coverage should be discussed, *e.g.*, whether it could cover not only third party liability but also defects in producer's performance. It was suggested to recommend that a specialist should be consulted or a risk evaluation undertaken in any insurance product. In relation to the transfer of the benefit of the insurance to the contractor, it was suggested to highlight the implications of designating a particular beneficiary in the insurance policy.

88. It was observed that, although producers would often rely on risk mitigation systems other than insurance, insurance could be expected to grow also in developing countries. One reason was the increasing support for public-private partnerships or subsidised insurance schemes within certain countries. In one country, the subsidised insurance provided by the contractor was widely used as a sustainability mechanism to encourage producers to reinvest in the system.

#### *Visits of the contractor's representatives – advice and control*

89. With regard to the presence of a contractor's representative for certain operations (para. 140), it was reported that the situation not infrequently arose where the contractor failed to appear at the appropriate time. The producer might be faced with several possibilities: for example he might lose a peak opportunity for harvesting and suffer a deterioration in the quality of the product, or he might ignore the requirement that the contractor's representative be present and proceed in order to preserve the value of the crop. Although this discussion would probably be best situated in the Chapter on remedies, it was agreed that a mention would be made in this context.

90. The question was raised whether defects found by the contractor would trigger a joint obligation upon the contractor and the producer to solve the problem thus identified. It would be sensible for the contract to contain a provision whereby, for example, the contractor would inform and advise the producer who would act accordingly, rather than to rely on fair dealing and good faith of the parties.

91. On a related aspect, it was considered that cooperation and joint resolution of problems and disputes should be encouraged at all stages of contract performance, rather than allowing the contractor to take sole initiative. It was agreed that this would also be discussed in the Chapter on dispute resolution.

92. There was speculation as to whether defects found at some stage of production – *e.g.*, in input quality – would trigger an obligation to inform other parties, for example participants further down the value chain, and on which party such obligation would fall. This would probably depend on which party had actual knowledge of the defect and the product, and on which party was the best informed of the other parties involved. It was agreed that this needed further discussion.

## **2 – Delivery of the goods**

93. It was suggested to discuss the possible application of Incoterms under the contract, as well as the relevance of the *United Nations Convention for the International Sale of Goods (CISG)* and the *UNIDROIT Principles of International Commercial Contracts* which contained detailed provisions on delivery.

94. The importance was stressed of delivery times being precisely fixed, and of the contractor giving advance notice of the date it has unilaterally set (para. 148). This could be recommended in the Guide, and depending on the legal system, might also be considered as an implied obligation of reasonableness.

95. As to tolerated levels of failure under the contract (para. 164), the question was raised whether this was intended as a disclaimer or as a performance standard, a question that was relevant under the remedy perspective. A related consideration was the relationship between standards of performance under the contract, and parameters of compliance under certification schemes.

96. The importance of preserving a sample of the delivered product was emphasised (para. 168) as evidence in the event of future claims concerning the quality of the product. The role of independent third parties was again highlighted in the context of delivery. By way of a terminological clarification, it was pointed out that the concept of "certification" of "certified" would generally apply to a production process or a producer having been found to meet certain standards, while the procedure taking place at delivery referred rather to quality assurance against set standards.

97. It was noted that although in a number of circumstances, the producer would proceed to quality verification, this would be a task typically conducted by the contractor, as it triggered acceptance and payment.

### **3 – Payment of inputs**

98. It was recommended that the contract should explain in a fairly detailed manner what would be the basis of payment, finance, charges, interests, etc. and how they would be calculated.

99. It was suggested that a contractor's input provision may involve other implications – such as environmental and social considerations – which would not necessarily be reflected in the price; for example, inputs might be provided not to be used directly in the contract farming agreement, but on account of environmental sustainability issues.

100. It was noted that considerations in this section dealt only with the case of inputs delivered by the contractor, as opposed to a third party.

## **CONTRACTOR'S OBLIGATIONS – STUDY 80 A – DOC. 5**

101. Professor Gabriel introduced the draft section on contractor's obligations, recalling that proper coordination with the other sections had still to be made. An exchange of views took place as a general discussion on the nature of the contract and the way in which the obligations under the contract should be analysed. As this discussion relates to both parties' obligations, it is referred to above (see *supra* para. 63).

### **General**

102. Para. 21: it was suggested that the final part of the paragraph should be nuanced to the effect that clear contract terms "reduce" uncertainty and disputes rather than "avoid" them;

103. Para. 23: it was observed that "management" was a responsibility that had to vest in the producer since, if it were to devolve on the contractor, certain implications would follow, in particular the fact that the relationship would be closer to an employment relationship.

### **Determination of quality and quantity**

104. The question was raised of the role of the contractor in drafting the contract document, which was related to its responsibility for ensuring that the producer understood the contract. It was agreed that the Guide should promote best practices in this regard, and that this point would also be reflected in the Chapter on contract formation.

105. Para. 28: it was noted that the description (second sentence) tended to reflect the situation in one particular jurisdiction, and that the variety of approaches under different legal systems should be taken into consideration.

106. Para. 29: it was noted that fraud or unfair situations could be prevented in different ways, not only through the intervention of a third party but also, for example, by pre-arranged quality assurance mechanisms or some sort of arbitration at delivery.

### **Transfer of title**

107. Para. 30: with regard to natural events preventing performance of the contract and causing rejection of the goods, it was suggested to include a reference to excuses for non-performance which would be dealt with in the Chapter on remedies. It was suggested that when produce was rejected, and the producer was not entitled to sell it to another buyer – which would generally be the case when intellectual property rights, particularly GMOs, were involved –, it might be appropriate to recommend that the contractor pay the producer compensation.

108. Para. 35: the point was made that the producer might need to turn to a bank to obtain finance, so as not to have to rely on the contractor's input provision. It was felt that the producer's right to use the crop it owns as collateral should not be restricted. On the contrary, if the producer did not own the crop, it should not be entitled to grant any right to the crop to a third party. The effect of contract clauses whereby the producer agrees not to grant any legal claim to the commodity to a third party could be further discussed, probably in the section dealing with producer's obligations.

109. As regards provision of finance by a third party, it was noted that a bank might loan funds on the expected income stream using the contract as a guarantee, rather than on the collateralisation of the produce itself.

110. Para. 39: it was noted that the situation where the contractor provided the funds or even the materials for building fixed facilities would generally involve a secured position rather than an actual title over the property for the contractor.

111. As regards the specific obligations bearing upon the contractor, it was suggested that the Chapter might be restructured to avoid overlaps. For example, it was noted that most categories of operation in relation to the production contract would be subject to regulatory requirements, in particular food safety and quality standards, or translated into contractual obligations, but that it would not be possible to discuss every situation in detail.

112. It was noted that rational business practice might indicate operations typically performed by either the producer or the contractor, as opposed to legal obligations which would depend upon the particular applicable legal system. In this context, reference was made to the concept of good business practices developed in certain jurisdictions in relation to good faith. The importance of the contract being clear in specifying each party's obligations was emphasised. However, it was noted that when an obligation is imposed on the producer by the contractor, the latter would often have a corresponding obligation towards other parties deriving from its relationship within the supply chain, for example towards retailers.

### **Storage and packaging**

113. Para. 43: it was suggested to introduce the concept of "labelling" since certain countries did not have obligations related to "traceability". Depending on the legislation, the applicable provisions could be based on food safety, food quality or product management-related issues.

### **Transportation**

114. Para. 49: It was suggested to discuss the possible application of Incoterms for delivery, which would then determine liabilities for loss of the product, and which party was responsible for obtaining licences.

### **Types of contract**

115. Discussion reverted again to the legal nature of the contract (see *supra* para. 63).

116. Para. 50: the point was made from a perspective of production contract practice in developing countries that the prevailing model was based upon the sales type rather than the service type. It was

reported that paying a premium in addition to a price, or paying a premium based on a comparative ranking in a group of farmers, was not common practice in such countries. Similarly, the practice referred under para. 54 based on "passed acre" clauses was not a common practice as it referred to a specific jurisdiction.

117. Para. 54: it was noted that the practice described was not common in most countries and was probably specific to one particular jurisdiction.

### **Overview of pricing mechanisms**

118. It was suggested that price determination issues should be discussed, in particular with regards to fairness implications: whether the price was determined by a procedure defined at the time of contracting, or was to be determined subsequently, by one party, by both parties, or else by a third party.

119. It was noted that price mechanisms often referred to a market, and that it was important to define the particular market concerned, global or local, and the specific crop of reference, which was especially relevant where new commodities and new markets were involved.

120. Para. 58: it was suggested that many factors would impact on prices that could be explained, and that perhaps "political instability" would more appropriately be mentioned in the chapter on remedies.

121. Para. 59: it was suggested that a change in market price should be added to the circumstances under which a price renegotiation might occur.

122. Para. 60 (a): it was noted that fixed pricing might not work in the same way for both parties: this would be the case, in particular, for a contractor able to hedge in a futures market and insure against a change of price, whereas the producer, especially a small holder in a developing country, might not have such opportunities.

123. Para. 60 (d): it was suggested that further details be provided regarding the price formula based on consignment, which might entail risks for the producer as payment would be delayed. Recommendations should be included in the Guide in this context.

124. Para. 60 (f): the last sentence referred to the possibility that prices might be discounted when the contractor had incurred additional processing costs for non-conforming commodities: it was noted that this could technically be seen as a way of incorporating the consequences of the breach into a price reduction clause, which in a certain respect was different from scaling mechanisms, and made the distinction between performance and remedies difficult to draw.

### **Choice of price mechanisms**

125. It was suggested that the currency used in pricing the contract and the possible effects of currency fluctuations should be mentioned, in particular the impact of inflation with respect to long-term payment practices or delayed payment.

### **Paying the price**

126. It was pointed out that under certain contracts, a producer would receive periodic or partial payments during the production cycle and the balance would be paid either at delivery or later, depending on the parties' agreement. It was suggested to discuss the allocation of such payments, whether they would apply first and fully to the reimbursement of the contractor's advanced expenses or inputs or whether they would constitute some disposable income for the producer to live on during the production cycle. It was noted that this situation would also be related to split pricing under para. 60 (e).

127. Para. 73: with regard to producer's protection against contractor's payment default, there was some speculation as to whether insurance would exist to cover political instability. However, it was noted that protection mechanisms such as credit insurance to cover political risks as well as other cases of default, for example insolvency, were probably not available for producers in most parts of the world, and it was doubtful that letters of credit would be issued by contractors. The last sentence of the paragraph referred to bonds under a mechanism based on a legislation passed in one jurisdiction (the United States of America) to protect producers by obliging contractors to hold money in trust for the benefit of an unpaid producer. In some situations, this might be considered good practice, compelling contractors to set up a reserve fund in the event of bankruptcy so as to assure that producers were not left without income. It was also pointed out that there was increased concern in the European agricultural policy to protect farmers' income, possibly by extending insurance funds beyond a function strictly related to weather conditions.

### **Providing inputs**

128. Para. 79: it was noted that the paragraph was useful, although it should be brought into line with the general description of contract farming in the Introduction, according to which the contractor would most often provide the inputs. However, this would not be a distinct or necessary feature, as situations would be covered where the contract contained specifications regarding not only the product, but also the production methods.

129. Para. 80: it was suggested that the situation where the contractor designated a third party from which the producer should obtain the product might trigger a specific liability on the part of the contractor, for example for giving wrong advice or recommendations which would amount to *culpa in eligendo*.

130. Paras. 80 and 82: it was suggested to expand on input quality: besides third party verification or certification, it was noted that inputs were frequently subject to regulatory requirements which the contractor was bound to follow. This was typically the case of chemical products such as pesticides or fertilisers. In relation to pesticides, it was suggested that rejection on the grounds of presence of residues could derive either from the wrong pesticides having been used or from faulty use of the proper pesticides.

131. The question was raised whether it could be assumed that, if the contractor had complied with regulatory requirements, it would then be discharged from liability. It was agreed that these issues should be dealt with in the Chapter on remedies.

132. It was also pointed out that inputs should have particular attributes required to achieve the desired result. It was noted in this context that a contractor might artificially mark up a generic input. It was suggested that "fake" inputs could better be described as defective inputs, in that they would not comply with the technical specifications regarding their intended chemical, biological or physical attributes or with the standards they were supposed to meet. The question was also raised whether fake inputs could also refer to a situation where intellectual property rights had been infringed.

133. It was noted that in contract practice, input provision was often associated with instructions and technical assistance, and more generally that there might be situations where the contractor required the use of a certain type of technology, know-how or product, for which technical assistance was needed. The question was discussed as to whether and to what extent the contractor would have a duty to provide such assistance and supervise the producer's performance, and whether in that case, the producer might have a comparative negligence defence for default. Some countries imposed a legal obligation to provide information in relation to input supply, but it would be a matter of policy whether the Guide should advocate the provision of technical assistance together with the provision of specific inputs. It was suggested that considerations to be taken into consideration would include the type of inputs concerned, and also the producer's experience.

## Physical inputs

134. As a general comment, it was suggested that a clearer focus on the contractor's legal obligations would be useful in the entire section. It was noted that the general approach of the document was a functional one, which considered the use of the inputs rather than the legal basis under which the inputs were delivered – for example, under a sale, a lease, a use, etc. –; however, the characterisation of the underlying transaction would have potential consequences for the obligations of the parties. As to para. 83, it was suggested to broaden the examples provided.

135. *Land*: it was suggested that the land would be relevant in particular for crop production, as opposed to livestock. The point was made that often in developing countries, the land is officially owned by the State and communities with rights over the land may be involved. It was pointed out that one of the contractor's obligations was to ensure that the land rights of the farmers were duly registered, which might need to be done in partnership with the local government.

136. *Equipment and fuel*: the question was raised whether "fuel" should be discussed since it was mentioned in the title. Regarding equipment, it was noted that the contractor was likely to provide such when specialised and expensive technology is required for a relatively brief period of time but at a critical time in the cycle. This might raise the issue of the effective availability of the equipment at the precise moment it was needed, as well as other problems such as weather or mechanical failure. It was suggested to mention that the producer would have a corresponding obligation to use the equipment properly. On the other hand, while it was justified that the contractor to be concerned about environmental impact, it was unclear why the contractor should have to take into consideration whether the equipment would be useful after the agreement had been concluded. Also, it was suggested that producer's payment obligations did not need to be dealt with in this context.

137. *Facilities*: it was agreed that the penalties referred to for delay in the contractor's performance regarding the facilities might also apply to other categories of inputs. It was suggested that when referring to the licence to be obtained by the producer, mention be made of compliance with industry and regulatory standards, which should be provided by the contractor.

138. *Seeds, Fertilizer & Herbicide*: it was suggested to add pesticides to this section. However, it was noted that seeds and chemicals should be dealt with separately as they involved specific issues, which were also covered under other sections of the draft Chapter. It was noted that countries generally addressed pesticides in special legislation because of the potential impact on human health and the environment (for example, chemical drift). Also, pesticides might entail additional obligations for the parties: for example, aerial spray would require a special permit and the question would arise as to the extent of the contractor's obligation to verify that the producer had obtained the necessary permit and to monitor the operations.

139. With respect to seeds, and in particular GMO seeds, it was noted that there was often a requirement placed on the seed developer to have certain growing restrictions implemented by the farmer. It must be written into the contract that the producer should follow these requirements that are attached to the seeds, but the obligations for compliance still rested on the permit holder, *i.e.*, the contractor or the seed developer. Therefore, the contractor must make sure that the use of the seeds comply with any permits or restrictions with regard to those seeds.

140. *Animals*: it was noted that the section should concern aquatic animals as well. It was felt that title over the animals may have to be discussed. It was generally observed that there was an increasing amount of public regulation regarding animal production, relating to a large number of health and environmental issues, dealing with waste management which covered not only disposal of carcasses, but also water, manure, etc. Most often, there would be a legal obligation to notify a disease to the competent authorities. It was noted that para. 101 dealt with insurance, and it was suggested that a specific section could be devoted to risk mitigation mechanisms, which would discuss compensation mechanisms, insurance schemes, etc.

141. *Feed and medicine*: it was suggested to mention that feed conversion was generally related to price determination, linking performance to compensation, which could be discussed in this context, but it was doubtful that the contractor would make up the difference in feed conversion. It was also noted that there were often obligations of information connected to feed and medicines.

142. *Inputs or services provided by third parties*: it was suggested that the situation where the inputs were provided by a third party should be further discussed, involving different scenarios with different implications as to the respective liabilities of the contractor and the third party. It was noted that very often, the third party would deliver the inputs directly to the producer, while the contractor's involvement and liability would relate to recommending a particular supplier. From a different perspective, however, it was suggested that if the contractor had a specific obligation to provide inputs and it delegated that obligation to some other party, it might still be primarily liable. Contractual links should be discussed, and possible doctrines involved – such as privity of contract – to evidence how liabilities would be allocated.

143. *Pricing of inputs*: it was suggested to note that inputs were often considered as an advance paid by the contractor to the producer, which latter was to be reimbursed by deduction from the final price. Fairness in pricing of inputs should be mentioned, in particular where the producer is obliged to obtain the inputs from the contractor. The Guide should recommend that this pricing method should be covered by a contractual clause.

### **Technical assistance**

144. The question was raised whether the considerations in para. 112 were needed there or whether they would not likewise apply to the other sections of the Chapter. References to standards were thought not to be necessarily limited to “high quality” but to any specific quality, and the benefits to be derived for farmers should not be restricted to “small scale” farmers. Also, it was suggested that para. 114 should not be confined to the example provided.

145. As to the provision of technical assistance in relation with the provision of inputs, the observation was made that in certain legal systems, different warranties would follow depending on whether the underlying transaction was seen as a sale or a service, the threshold between the two contract types being the balance between the provision of goods and services: the contract would be a sales contract where the service was instrumental to the sale, whereas it would be a service contract where providing the goods became instrumental to the service.

146. It was suggested that although technical assistance could be seen as encompassing two kinds of service: advisory (technical advice, education, etc.) and technical management, which could be addressed under a different perspective, they would anyhow justify the allocation of a certain liability upon the contractor, especially when considered in combination with other factors.

147. *Supervision and oversight*: it was suggested to refer in the title to “monitor and control”, which is a broader concept than “supervision and oversight”; in para. 116 it was suggested to refer to new inputs and production methods rather than listing them; likewise, examples of specific production procedures were suggested such as organic production or integrated pest management practices.

148. *Extension Services and Training Programmes*: it was noted that most generally, extension services were understood as referring to public services, while monitoring and control were more frequently found in relation to private parties. It was suggested that the last sentence could refer also to producer networks in addition to NGOs and government agencies.

149. *Testing*: it was noted that it would be useful to emphasise that testing facilities should be clearly identified, and that in certain circumstances, typically for certified products, the facilities – such as the laboratories – must be accredited, authorised or recognised; however, it was suggested that this subsection would find a more appropriate location elsewhere, for example under quality control and taking delivery of the product.

150. It was agreed that testing could potentially entail an opportunity to cure – depending also on the applicable law –, and be linked to an obligation to mitigate, which should be mentioned, referring also to the chapter on remedies. It was also recalled that performance standards should be linked to the type of market.

151. As to the producer's presence at delivery, it was suggested to refer also to entities acting in the producer's interest, such as producer organisations or NGOs, since if their participation was not made explicit in the contract, they might be denied access to the verification setting.

152. It was noted that in para. 121, the obligation of accuracy in testing related to both parties and not only to the contractor; the concept of "objective" standards might need to be clarified, for example as to whether it would encompass reasonable standards of the industry. In para. 123, it was suggested that, rather than describe unethical or illegal behaviour, the Guide could describe it as an enticement for the parties to have mechanisms in the contract allowing them to prevent such conduct.

153. *Processing*: it was suggested that "post-harvest operations" would be a more appropriate title for this sub-section.

154. *Marketing*: it was agreed that there this sub-section was probably not necessary.

155. *Capital or Credit Facilities*: it was agreed that this part should be coordinated with the corresponding parts in the Introduction and in Chapter 1 dealing with third party creditors. It was questioned whether the contractor indeed had an obligation to limit the credit provided for the benefit of the producer.

156. *General Duty to Help Producers Meet the Contract Obligations and Avoid Unnecessary Risks*: it was noted that this referred to a general obligation of cooperation, but further discussion would be needed on the specific obligations under the various legal systems. It was noted that from a civil law perspective – and also under the UNIDROIT Principles –, this was one of the main applications of good faith, to be discussed under para. 139. This obligation, which also applies to the producer – albeit to a lesser extent –, should be discussed in the Introduction in the section dealing with the applicable law and the applicable general principles. Application of this principle would be found in the other Chapters as well, for example in the Chapter on formation of contract, where it referred, for example, to the contractor's obligation to provide the necessary documentation to the producer.

### **Other obligations**

157. *Government and private regulations*: it was suggested to add the word "social" when referring to regulations, as the social dimension was not only addressed in national legislation but also in a good number of private standards that served as product specifications. It was noted that para. 136 should be more specific as regarded the contractor's obligations.

158. *Cultural and social issues*: it was suggested that the considerations in para. 137 might find an appropriate place in the introduction of the Chapter, as an advice to parties to be aware of the need for sensitive conduct in certain areas. Such issues might also be particularly relevant in the context of contract formation, where a policy discussion could explain the importance for a country to have in place a regime giving the communities affected the right to be consulted ahead of time. It was noted that similar considerations would apply to para. 142. Also, it was suggested to clarify the extent of contractor's environmental, social and community obligations, namely, whether they would apply strictly in the bilateral relationship with the producer, or whether they would have a broader reach, in which case the question could arise as to the basis for third parties to claim and enforce the corresponding rights.

159. *Good faith and fair dealing*: reference was made to the earlier discussion on the obligation to cooperate. The point was made that under most civil law systems, good faith is a statutory obligation. It was suggested to refer also to fair contract and practices, and in this context mention was made of the current work within the European Union Commission regarding unfair trading practices in the business-

to-business food and non-food supply chain in Europe, and the development of Principles of Good Practice in the vertical relationships in the food supply chain. Mention was made of the *Guiding principles for responsible contract farming operations* that have been approved by FAO.

160. *Proper accounting and invoicing*: it was suggested to nuance the wording regarding the producer's skills regarding accounting and general record-keeping.

161. Assignment of contractor's obligations should also be discussed in this section.

### **Future work**

162. The Group agreed that a third meeting would be held from 3 to 7 March 2014 to consider the revised draft chapters discussed at the second session, *i.e.*, Introduction, Chapter I and Chapter III, and the following first draft chapters: Chapter II: Contract Form and Formation (Professor Bryan Endres), Chapter IV: Excuses for Non-performance (UNIDROIT Secretariat) and Remedies for Breach (Professor Fabrizio Cafaggi), Chapter V: Duration, Renewal and Termination (UNIDROIT Secretariat) and Chapter VI: Applicable Law and Dispute resolution (Professors Paripurna P. Sugarda and Horacio Roitman). A round of consultations would take place during 2014 with a view possibly to having a final meeting of the Working Group at the end of 2014, and the adoption of the final version of the Guide in the first half of 2015.

163. It was agreed that the drafts would be circulated in time for comments before the session, allowing also for earlier circulation of the revised drafts, which would facilitate drafting of the other parts of the Guide. FAO's contribution, in particular regarding the relevant part of the Introduction, would be coordinated with the UNIDROIT Secretariat in the meantime. FAO's representatives reiterated to Group members FAO's availability to provide information on contract practice, or to proceed to targeted enquiries within their network of lawyers and other practitioners.

**ANNEX I****UNIDROIT Working Group for the preparation of a Legal Guide on Contract Farming*****Second Meeting - Rome, 3 – 5 June 2013*****LIST OF PARTICIPANTS****INDIVIDUAL EXPERTS**

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