



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

Fourth Meeting  
Rome, 17-20 November 2014

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

Rome, 17-20 November 2014

Prepared by the UNIDROIT Secretariat

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## Overview of the 4<sup>th</sup> Meeting of the Working Group

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 fourth meeting in Rome from 17 to 20 November 2014. UNIDROIT hosted the meeting at its headquarters.

2. The Secretary-General of UNIDROIT, Mr. Estrella Faria, opened the meeting by welcoming all attendees and thanking them for their contributions. He offered the apologies of Prof. Cafaggi who was unable to attend, and acknowledged the attendance of several new participants as observers from various interested stakeholders and organizations.

3. The Working Group for this meeting was composed of the following members: Professor Marcel Fontaine (emeritus, Catholic University of Louvain Law School, Belgium); Professor Henry Gabriel (Elon University School of Law, Greensboro, USA); Professor Paripurna P. Sugarda (University of Gadjah Mada Faculty of Law, Yogyakarta, Indonesia); Professor Kassia Watanabe (São Paulo State University (UNESP) , Brazil); Professor A. Bryan Endres (University of Illinois, USA) (participating via teleconference); Professor Paola Iamiceli (University of Trento, Italy) (participating via teleconference). The Food and Agriculture Organization (FAO) participated as a partner organisation and co-author of the Guide. The following intergovernmental organisations were also represented: the International Fund for Agricultural Development (IFAD) and the World Bank / International Finance Corporation. Observers representing professional and trade interests likewise attended, i.e. the World Farmers' Organization (WFO), and one agribusiness association.<sup>2</sup> 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: the complete "Zero Draft" of the Guide (UNIDROIT 2014 – Study 80A – Doc. 19) and a Working Paper annotated with comments received during the consultation rounds (WP1); a Secretariat proposal for revisions to the Introduction Chapter (WP2); a summary and consolidation of the issues and comments raised during the consultation rounds (UNIDROIT 2014 – Study 80A – Doc. 23, with addenda); a summary of the comments on the Zero Draft received from members of the Working Group (UNIDROIT 2014 – Study 80A – Doc. 24, with addendum); and a UNIDROIT Secretariat proposal for recommendations for each chapter (UNIDROIT 2014 – Study 80A – Doc. 25 rev).

## Information on partnerships and development of the project

5. The Secretary-General of UNIDROIT acknowledged the value of the partnerships underlying the project. He emphasised the essential support from FAO at every stage and he expressed special thanks to IFAD for its technical and financial support that have been instrumental in organising the regional consultations on the project, and in holding two meetings of the Working Group. He also mentioned that the United Nations Commission on International Trade Law (UNCITRAL) and the Hague Conference on Private International Law, although not represented at the meeting, had sent comments on the draft chapters. He concluded by expressing special acknowledgment to all the persons and institutions who had participated in the regional consultations and had thus provided very useful inputs to the project, as well to those who had sent comments on the consolidated zero draft.

6. The Secretary to the Working Group (UNIDROIT Secretariat) described the consultation process that has taken place since the last meeting of the Working Group, noting that several Working Group members had participated in the various events. She reminded that the consultations had several objectives: promoting awareness and understanding of the economic, social and legal dimensions of contract farming; discussing the diversity of approaches of several countries in the legal framework

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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.

applicable to contract relations between producers and buyers; sharing stakeholders' experiences, recommendations, and best practices focusing on contract negotiation and conclusion, performance of parties' obligations, as well as non-performance and dispute resolution; informing the content, scope, and purpose of the forthcoming Guide. One additional important objective was to explore the future use of the Guide and serve to build a network within target groups that will participate in the future implementation of the Guide. Since the third meeting of the Working Group, the following consultations were held:

7. Buenos Aires, Argentina (25 March 2014): The workshop, entitled "Contract Farming today, the right equilibrium," was held as a thematic workshop in the framework of the General Assembly of the World Farmers Organisation (WFO) in Buenos Aires (25 - 28 March 2014). Organised jointly by WFO and UNIDROIT, with the cooperation of FAO and IFAD, the workshop offered a unique opportunity to reach out to the global farming community. Taking advantage of their participation in the WFO annual General Assembly meeting, a number of representatives of agricultural producer organisations from countries in other continents – especially Africa – were able to participate in the workshop. A large number of participants from public institutions, the Argentinean academic legal circles and legal practice attended, also as a result of the support given by the Argentinean Institute of Agrarian Law, and through UNIDROIT's institutional network. Altogether, approximately 50 persons participated in the workshop.<sup>3</sup>

8. Bangkok, Thailand (26 September 2014): The workshop (organised in partnership with FAO and IFAD) focused on the legal aspects of the parties' agreement based on practical experiences and the treatment of contract farming in domestic legislation in the Southeast Asia region. The European Union provided support for the simultaneous interpretation English/Thai/English of the discussions, and as well as in funding the participation of a number of stakeholders' representatives. The workshop was primarily addressed to a broad audience of stakeholders in contract farming relationships in the Southeast Asia region, i.e. producer organizations, private sector representatives, IGOs and development agencies, NGOs, public entities and the legal academic circles. Altogether, nearly 70 persons participated in the workshop.<sup>4</sup>

9. Rome, Italy (10 October 2014): The Rome consultation event (organised in partnership with FAO and IFAD) focused on the perspective of the agribusiness interests, as essential stakeholders in contract farming operations. The event brought together nearly 70 persons, including a large number of representatives from major agribusinesses coming from Africa, the Americas, Europe and Asia. The workshop had the following objectives: considering private sector commitments in promoting good contract practices and discussing lessons learned by professionals in their field; discussing how procurement and sourcing policies influence arrangements between agricultural producers and their buyers; sharing experiences on critical issues, recommendations, and best practices in relation to the various aspects of the farming contract; and informing the content, scope, and purpose of the forthcoming UNIDROIT/FAO Legal Guide on Contract Farming with the inputs and discussions of the workshop.<sup>5</sup>

10. Addis Ababa, Ethiopia (31 October 2014): The workshop (organised in partnership with FAO and IFAD) focused on the legal aspects of the parties' agreement based on practical experiences and the treatment of contract farming in domestic legislation in Africa, mainly in Eastern and Southern Africa. Altogether, approximately 35 persons participated in the workshop, representing a broad audience of stakeholders in contract farming relationships i.e. producer organizations, private sector representatives, IGOs and development agencies, NGOs, public government entities and the legal academic circles.<sup>6</sup>

3 See the Report on the Buenos Aires Workshop: UNIDROIT 2014, Study S80A – Doc. 18.

4 See the Report on the Bangkok Workshop: UNIDROIT 2014, Study S80A – Doc. 20.

5 See the Report on the Rome Workshop: UNIDROIT 2014, Study S80A – Doc. 21.

6 See the Report on the Addis Ababa Workshop: UNIDROIT 2014, Study S80A – Doc. 22.

11. Internet Consultation (24 September – 31 October 2014): UNIDROIT invited interested stakeholders to submit comments on the Zero Draft of the Legal Guide on Contract Farming, which was made available on the UNIDROIT website. Comments were sent by three intergovernmental organisations (the World Bank, UNCITRAL, the Hague Conference on Private International Law), two UNIDROIT members States (Department of Justice, Canada and Ministry of Justice, France), one non-governmental national institution (Fondation de droit continental, France), as well as six individuals, three of whom had participated in earlier works on the project or a regional consultation event.<sup>7</sup>

12. The Secretary to the Working Group indicated that the reports on the consultation events contained extensive material including all the papers and PowerPoint presentations by speakers and participants, as well as a summary of interventions and of the discussions which had a potential relevance for the drafting of the Guide.<sup>8</sup>

#### Finalisation of the work of preparation of the Guide

13. Work Plan and Timelines: During the month of December, the Unidroit Secretariat will revise the Zero Draft to incorporate the comments of the Working Group. Around this time, the draft will be sent for initial translation into French. The draft will be circulated to the Working Group for final comments by the end of January. By the end of March, and upon completion of another round of in-house revision, the publication will be submitted to the UNIDROIT Governing Council members with a view to its adoption by the Governing Council at its 94<sup>th</sup> session (6-8 May). Afterwards, the Guide will go into pre-publication.

14. Dissemination and Promotion of the Guide: It was noted that the World Exposition 2015 to be held in Milan (1 May-31 October) will be centred on nutrition and natural resources issues (with "Feeding the Planet, Energy for Life" as a central theme), and that different opportunities may come up to give visibility to the Guide in this context, including on the occasion of the WFO General Assembly which will take place at the end of June in Milan at the Expo.

15. A major objective shared by IFAD and FAO going forward is a translation of the Legal Guide into operational tools than can be utilized in projects at the country and regional level, relying on different linguistic versions. IFAD is considering proposing a grant to finance activities for the implementation and distillation of the Legal Guide. These efforts may include a database with a community of practice open to all involved in the development of, and consultation process for, the Guide. Furthermore, it will be necessary to conduct an analysis of the ongoing efforts on contract farming to see where future efforts in implementation will fit in most effectively. The Secretary-General expressed the appreciation of UNIDROIT for the cooperation and support of IFAD and FAO, both at the institutional and personal level. The World Bank confirmed similar objectives as IFAD and a desire to operationalize the Guide so it can be used in projects. It was noted that all of these objectives may link with a possible future collaborative project promoted by UNIDROIT through the World Bank's platform, Global Forum for Law, Justice and Development.

#### General comments on the content of the Guide

16. Editorial Issues: The Guide will contain forewords by the relevant entities. As discussed and agreed by the Group, the final Guide will contain no footnotes other than references to international instruments. Thus, there will be no references to domestic legislation, case law or literature. The terminology used throughout the Guide must be harmonized (for example: change of circumstances rather than hardship; supply chain rather than value chain). With respect to authorship, the Secretary-General noted that UNIDROIT intends to follow its usual practice, where the listed authors for

<sup>7</sup> See Document UNIDROIT 2014, Study S80A – Doc. 23, Doc. 23 Add, Doc. 23 Add.2, Add. 3.

<sup>8</sup> The relevant observations from the various consultations were reported in Doc. 23 (and addendum) submitted to the meeting of the Working Group.

the Guide are UNIDROIT/FAO, and the Working Group contributing authors will be listed at the beginning of the publication. Because many members have commented or contributed to several of the chapters, it will not be suitable to list individual chapter authors.

17. Title of the Guide: It was noted by several members of the Group that the title "Legal" Guide may not accurately characterize the publication's full content, because it does also try to cover some policy and practical business aspects. This is particularly relevant in response to some of the received comments which take a narrow view on what the content of the Guide should include.

18. Recommendations: The Working Group originally intended to consider a set of draft recommendations put forward by the UNIDROIT Secretariat. These recommendations consisted of short points with core messages from the chapters, and were intended to be included at the end of each chapter. However, it was noted that the recommendations would have an authoritative character and that it would be justified to devote more time to development and consultations so that they receive a depth of treatment that is similar to the rest of the Guide. This opinion was generally supported as it was felt that a stand-alone product that better reflects the content of the Guide would facilitate dissemination of the Guide. It was agreed that the preparation of recommendations would stand as a follow-up project, subject to defining modalities and funding for the consultations.

#### Chapter-Specific Comments

19. The section below attempts to distil and summarize the major issues raised in the meeting and the key points on which the Working Group reached general agreement. It is not intended to be a comprehensive transcript of the meeting. The discussions are organized by chapter and by whether the comment relates to one paragraph (or set of paragraphs), or to the whole chapter more broadly. Due to the nature of the back-and-forth deliberations during the Working Group meeting, this report does not acknowledge the individual sources of comments made during meeting. Except when specifically mentioned, the discussions reflected below are based on Document W.P.1 (the annotated zero draft which included revisions proposed to give effect to the comments or proposals during the consultation round).

#### Introduction

##### General Comments

20. Proposals for the Introduction: The UNIDROIT Secretariat outlined a proposal from the Secretariat to revise the Introduction, reflected in Document WP2. The main revisions, against the Introduction in WP1, are the following:- Preface: some new text has been added regarding the project history (a); missing paragraphs have been restored (4 to 4-2); a section has been added as (d) presenting the Principles for Responsible Investment in Agriculture and Food Systems and the UN Global Compact which are particularly relevant as recent international efforts in international forums to promote good practices in agriculture and business activities, with a particular relevance to contract farming operations under the Guide. - Section I-C on "Outline of principal benefits and risks of contract farming": as suggested by the UNIDROIT Secretariat at the third meeting of the Working Group (see Doc. 8, footnote 6), this section has been redrafted based on a different structure and completed. - Section II-A "Characteristic features of an agricultural production contract under the Guide" and B "Variety of forms of control exerted by the contractor over the production": missing text has been restored (38-1 and 41-1 to 41-5). Title B – "the agricultural production contract" and paras. 49 to 51 have been deleted.

21. Differences between commodities: The Group considered how various commenters asked for a deeper explanation of the differences in contract farming between commodities. It was noted that the Guide already attempts to make these distinctions but perhaps further improvements could be made.

22. Cross references: Particularly in the Introduction chapter, the Group agreed that many more cross references to relevant sections of the Guide could be added.

#### Paragraph-Specific Comments

23. Preface: It was noted that para. 0-6 should be revised in due course to reflect FAO's procedure. It was suggested to insert a short section in the Preface that explains how to use the Guide. The Group suggested to not include the proposed text in para. 1 because this will be covered elsewhere, including in a glossary, and here it opens up more questions than it answers (what is a sponsor...?). The following sentence, midway through the paragraph, should be deleted: "Contractual advice or recommendations may be provided as a result of analysis and discussion when considered meaningful." In para. 2bis, the proposal of added text was approved. In para. 4-3 to 4-11, it was noted that many international documents promoting good practices in agriculture and business activities could be seen as relevant in this context, and selecting 2 or 3 (as is currently reflected) will necessarily leave out many that are equally relevant, and would become obsolete by future instruments. It was suggested that the drafting could make it clearer that these are just examples of many relevant instruments, or else to shorten and balance the text so it stays general. It was also suggested to bring into this section, paragraphs from p. 32 Doc 23 ADD: "While the Legal Guide..." and "Investing in agricultural systems..." (Second and third paragraphs). It was agreed that FAO will work with the UNIDROIT Secretariat on a revised version of the Preface. Part I: A. Concept of Contract Farming and B. Variety of Operations in Practice: It was suggested that para. 6 could be rephrased for clarity, though the word "decent" is a technical word and could stay. It was generally accepted that para. 10 could be removed after making sure all content is covered elsewhere. In para. 16, it was suggested that some of the proposed added language is too prescriptive, so the language should be softened. It was also noted that here could be a good place for a cross reference to the Chapter on Obligations, with respect to risks for multiyear investments and long term financing of facilities. With respect to para. 19, the Group agreed that the concept of "identity preserved goods", should be better explained, for example by a wording along the lines: "production contracts are often used where it is of importance to be able to trace the origin of the goods and that part of it has retained certain characteristics throughout the value-chain". It was agreed to remove the added wording at the end of para. 19 and to add a cross-reference to the Chapter on Obligations. The Group suggested that para. 21 can be deleted, as this may fit better in the Chapter on Remedies or Obligations.

24. Part I C. Benefits and Risks of Contract Farming: Group members from FAO agreed with the restructuring of this section encompassed by para. 22 et seq., and will work with the UNIDROIT Secretariat on polishing editorial and terminology issues. It was noted that the new structure (with a possible change of the title) would enable moving some of the content on policy aspects in the chapter on the legal framework to this sector. It was suggested that the original version of para. 25 should be used (since the substantive discussion would be covered in the Chapter on Obligations), and should reflect the concept of profitability in addition to stability. Perhaps: "sustainable mutual benefit." The Group suggested that the last sentence of para. 26 doesn't belong here; it was agreed that the proposed additional text in para. 27 should be left out. In paras. 30-33, it was noted that there may be a place for further discussion of collateralization here, as these issues are relevant in cases of contractor and third party financing. But, it was also agreed that the most appropriate place for such further discussion would be the Chapter on Obligations. It was noted that the language of para. 36 needs to be reworked, to take into account ownership patterns in different commodities and to encourage the parties to consider carefully the impacts of new technology, etc. It was noted that the sentences in para. 36 pack in too many different ideas which need to be teased out to be more useful. It was noted that several of the concerns expressed in para. 36-2 may belong more appropriately in the Chapter on Obligations or the Chapter on Remedies, such as the discussion on side selling. The Group suggested that the level of detail is too deep in para. 36-2, so it could be revised to make it more streamlined. The Group suggested several revisions to para. 36-3. Thus, it was suggested that the first sentence could be redrafted. It was suggested that the following sentence is overly negative and unclear and could be nuanced or removed ("In certain instances, private enforcement mechanisms provided by professional or trade entities, raise issues of independence and impartiality.") The last sentence of para. 36-3 is repetitive of the previous paragraph. It was generally agreed that para. 36-4 could be reworked to make it more connected

with the topic of contract farming, less negative, and to separate the multiple concepts mixed together. As a matter of presentation, it was noted that para. 36-5 is a conclusion for the whole broader section, rather than in its own subsection, but it was suggested that this paragraph could be deleted.

25. Part II: Scope of the Guide: In para. 37, it was suggested to add one sentence to emphasise that the Guide is not focusing on traditional contracts, but rather on one specific kind of defined contract, i.e. the agricultural production contract. As regards para. 38 and comments in the consultations suggesting to expand the scope of an agricultural production contract under the Guide. The Group agreed that the Guide should pursue its current choice for the scope of the agricultural production contract. It was noted that the term "undertaking" in this paragraph is meant to refer to enterprises, and thus perhaps the word could be changed to enterprises. It was agreed that the content of the proposed additional text for para. 38 was covered elsewhere in the Guide and could therefore be omitted. It was suggested that para. 38-1 should be left out as not necessary. In para. 39, the proposed sentence on exceptions and India should not be included, as it does not fit well. Rather than "conditions and prices" use the word "terms" in the fourth line of the paragraph. The first proposed added sentence in this paragraph could be deleted also for being unnecessary and potentially misleading. In para. 40, there was some discussion on whether the price is indeed a characteristic feature of agricultural production contracts as compared to other contract types, and the suggestion was to delete the paragraph. Regarding the section on "Agricultural production contract v. partnership" it was noted in response to comments, that the topic of agency was discussed in the context of the Chapter on Parties, Contract Formation and Contract Form. It was suggested that para. 42bis may not fit here, as it was probably more relevant for the Chapter on Obligations and could be deleted. It was suggested that perhaps a more suitable location could be found for the proposed added sentences in para. 44. Finally, it was suggested to bring some of this deleted information in former paras. 49-51 up to the very beginning of the Guide, as it provided a short description of the subject matter of the Guide.

## Chapter I: The Legal Framework

### General Comments

26. Setting the context for the chapter: Certain received comments suggested restructuring the chapter around a few new topics. After deliberations, it was generally agreed that the chapter could possibly address these concerns by one or two paragraphs at the beginning to provide the context for the chapter: freedom of contract, subject to mandatory rules, privity of contract and third parties, incorporation by reference. It was also noted that some clarification should be added in the appropriate place regarding the treatment of the UNIDROIT Principles which constitute a reference throughout the Guide, as representative of general principles of contract law.

### Paragraph-Specific Comments

27. In para. 1, the proposed added text was agreed. The Group supported the idea of removing para. 4bis (doc. 19 para. 5). It was generally agreed by the Group that para. 8 (doc. 19 para. 9) should be nuanced and reframed as describing how regulations sometimes prescribe certain pre-contractual information.

### Part I – The applicable private law regime

28. Domestic legal sources: In para. 15 (doc. 19, para. 16) second sentence, it was agreed to add the words "whether expressed in legislation, case law etc..." after "a number of policy limitations". It was asked whether the following sentence (referring to ambiguous terms or omitting key provisions) could be deleted, and this was agreed as the best solution. The suggested added words "exhaustive"

and “source of interpretation” were approved. In para. 16 (doc. 19, para. 17), the proposed revisions were seen as essentially of a matter of drafting and were accepted.

29. The Group agreed that para. 18 (doc. 19, para. 20) should be left as it was without the proposed added text because the need for balanced legislation and the concerns about disincentivizing effects of regulation which would provide overprotection to the weaker party are covered elsewhere. It was widely agreed that para. 19 (doc. 20, para. 20) could be simplified and it was suggested that it could be rephrased as: “In many legal systems, the freedom of the parties to agree on the terms of the contract, or the exercise of the rights under the contract, apart from possible limitations from mandatory law, may also be interpreted in accordance with principles or standards of conduct such as ...” followed by a list and not defining such principles and standards. The Group highlighted that it is important to disclaim that the scope of each of these principles could be different in various legal systems, as it was illustrated in para. 20. It was noted that the proposed additional sentence in para. 24 could be revised for improved clarity. It was suggested that the proposed additional text in para. 25 should be considered in the context of the Chapter on Dispute Resolution. In para. 27, the Group generally agreed to remove the proposed text.

30. Standard terms: Paras. 28-33 (doc. 19, 28-32): the Group highlighted that this section needs to distinguish three areas: (1) standard contract terms and contractual documents; (2) technical standards (here, it was noted that there should be a reference in the Chapter on Formation to these coming into the contract, either as part of the contract, or as part of interpretation); and (3) soft law, including labour standards (e.g. ILO guidance documents), and human rights standards. To adequately reflect this approach, it was suggested that the Guide should use a different title for the section: instead of “... applicable to the contract”, perhaps “... informing the content of the contract.” Some discussion took place regarding the concept of “soft law” which might seem unclear to some readers but it was decided to keep it as less confusing than trying to doctrinally explain the concept in all references. It was suggested that para. 29 (new proposed paragraph) could be rephrased as a more neutral narrative statement, with more nuanced language, and omitting the second half of the paragraph after “Finally...” Some discussion took place regarding the relevance of the last sentence of para. 31 (doc. 19, para. 30) and it was agreed it would find an appropriate place in relation to global standards in the context of the restructuring. The Group suggested that, in para. 33 (doc. 19, para. 32) the terms “by analogy” should be removed.

31. Contracts with an international element: In para. 38 (doc. 19, para. 37), it was noted in relation to CISG that the wording here in this paragraph, and elsewhere in the text, should be careful not to imply application of the CISG where it otherwise would not apply.

## Part II – Regulatory Environment

32. Group members from FAO agreed to work on a revised version of this section to align it with the approach of the Guide. As a general comment for the whole section, but with a particularly relevance for the developments dealing with “Agricultural finance and support” and “human rights”, the point was made that it should focus more on the regulatory elements and less on the policy dimension, which could rather and when appropriate be moved to the restructured section of the Introduction “Outline of principal benefits and risks of contract farming”, or the Chapter on Obligations. As a consequence, no detailed discussion took place on this part of the document. However, a few specific comments were made on: Para. 42 (doc. 19, para. 41): it was suggested to reword the proposed added sentence to refer to “unnecessarily burdensome or intrusive regulation...”; and in para. 51 (doc. 19, para. 49), the Group fully relied on FAO’s knowledge and experience and accepted the proposed deletion.

## Chapter II: Parties to the Contract, Contract Formation and Contract Form

### Part I – Parties

33. Section A. The Agricultural Producer: In para. 8, it was agreed to take out the proposed content and instead add a clause at the end of the previous sentence ", whether individually or part of a group." For improved clarity, the sentence at the end of para. 11 should be revised along the lines of: "Whether that party is considered to be a merchant or a professional, or falls short of that status...". The proposed additional term for para. 12 was supported. It was agreed to not delete the last sentence of para. 20. The proposed addition to para. 23 was supported. It was agreed that this proposed content forming para. 23bis will not be included because the concept is already covered elsewhere. The proposed additional text at the end of para. 24 was supported. It was agreed by the Group that the present content in para. 26 sufficiently covers the legal implications of the first sentence, so no changes are required to respond to the comment received. It was agreed that the content of para. 28 perhaps could be combined with the previous section. In the first sentence of para. 29, the language should be softened to "many countries" rather than "most countries."

34. Section B. The Contractor: It was agreed that the proposed added text for para. 34 will not be included. It was that the second sentence of para. 35 should be reworked to be clearer, and to delete the last sentence of para. 35. It was agreed to not include the proposed sentence in para. 38, but rather incorporate it perhaps in the Introduction in the section relating to the elements that the parties should take into account. The proposed change to para. 42 was supported.

35. Section C. Other parties interested in an agricultural production contract: Para. 43 (passim); the term "supply chain" should be used consistently, rather than "value chain". The proposed new language in para. 48 was supported. The Group supported the proposed added text at the end of para. 53. It was agreed that the proposed added content at the end of the para. 54 will not be included. Rather than a full deletion of paras. 55-56, it was agreed that some mention of insurers should be left here as a part of a list of relevant parties. Furthermore, this section could be redrafted to more clearly focus each paragraph around a clearly identified category of participant.

### Part II – Contract Formation

#### General comment

36. It was highlighted that this section relies too strongly on US law rules and backing. It was requested to check the content and the language and ensure that it could apply to different systems. One specific example was in para. 69 ("parol evidence"); similarly, in paras. 85-86, the statements could take further care to nuance and allow appreciation of the variability of the rules across different legal systems. For example, the second to last sentence in para. 86 is too specific and clearly from common law. Similarly, undue influence is based in common law. The validity chapter of the UPIICC could be a useful substituting reference.

#### Paragraph-Specific Comments

37. It was agreed that the proposed change to para. 64 was adequate. The small addition in the middle of para. 65 was accepted as adequate to be more nuanced on the issue of good faith in different legal systems. Regarding the proposed content at the end of the paragraph, it was suggested that this goes too far, and if maintained, should be nuanced (for example by referring to "... might be useful ...").

38. Offer and Acceptance It was suggested that the suggested added language in para. 72 (i.e. a definition of "agreement to agree") was appropriate. In para. 73, it was suggested to add the concept of cultural differences to the list provided, in addition to other circumstances. It was suggested that the sentence in para. 75 before the new language "Although this performance..." could be deleted because it may be seen as raising more questions than it answers. The last sentence of added text may not be correct in all legal systems and thus it will need to be adjusted, perhaps by

using a more general wording such as "Domestic legal systems provide different solutions for this. For international contracts to which the CISG applies, the solution is...". As regards para 76, it was felt that the proposal to split the paragraph, as it deals with different elements, could be considered by the Secretariat as a structural question.

39. Capacity and Consent: In para. 80bis, it was suggested to redraft the proposed mention of third party facilitators along the following lines: "In practice it has been observed that third party facilitators might play an important role in ..." and moved to paragraph 89's treatment of facilitators (and it was noted that the added language is duplicative of the sentence below it). It was likewise suggested to rephrase the last sentence in a more neutral framework, "The parties should be aware that the contract may be avoidable if one of the parties did not understand the terms of the contract." With respect to para. 81, it was generally agreed that the proposed added text should not be included, because there are many other parties that could be consulted. There was agreement that the text was adequate as is, without the addition.

40. Role of Third Parties: In para. 89, the Group agreed on the proposed added language, with the term "investor" being replaced with "contractor." It was noted that the proposed added content in para. 90bis strays more into the realm of government policy rather than strict legal guidance. However, it was also noted that the Guide contains a lot of policy advice, and that many governments are very active or interventionist in the context of contract farming. It is important to acknowledge that the practice exists. It was suggested that this content may fit elsewhere, for example in the Introduction or in the first part of this chapter which lists other parties (para. 40-42). In para. 92-93, it was noted that it is important to distinguish that it is not mandatory to negotiate through producer organizations; there is a choice. The Group highlighted that in para. 94, the term "contract farming agreement" must be replaced with "agricultural production contract."

### Part III – Contract Form and Contract Content:

41. Contract Form: In para. 95 et seq., it was generally agreed not to go into the level of detail of electronic contracting. It was generally agreed to keep the additions in para. 96. The first sentence of para. 96bis could be simplified, including removing "very" and "In these situations." With respect to para. 97, it was agreed to omit the opening words of the third sentence and to redraft it as follows: "Producers may also appreciate standardized contracts..." It was agreed that the proposed added sentence at the end of the paragraph should be left out. In para. 98, it was suggested to leave out the proposed content, and to shape the existing sentence to end after "... in favour of the stronger party."

42. Contract Content: the suggestion to add a table or checklist of typical elements that should be in the contract was discussed. It was noted however that this would vary greatly depending on the particular context, jurisdiction and commodity, and that no single model could be put forward. It was agreed that the recommendations while not meaning to be exhaustive, could usefully point out the main elements to be included in the contract. The Group agreed that the proposed additional language in para. 103 should not be included. The first proposed addition of para. 106 was agreed as acceptable; the last sentence should be reviewed for grammar and clarity but the content was acceptable. It was suggested that para. 108 will have to be reworked highlighting the use of the preamble in interpreting the content of the contract and especially the intention of the parties. It was suggested to keep the addition to para. 110.

43. Consequences of breach of required form or content: It was suggested that para. 124 may have to be rephrased to make it clearer, perhaps as: "There are legal systems where the written form is required..." This paragraph is not dealing with conditions in the contract. It was also suggested to clarify what happens when the written form is not used.

### Chapter III: Obligations of the Parties

#### General Comments

44. Different commodities: It was noted that in general, the Guide has tried to distinguish when necessary between commodities, but perhaps this could be improved in some cases.

45. Pre-contractual obligations: One commenter asked whether the Guide should treat pre-contractual obligations (obligations to disclose certain information, breach of negotiations). It was noted that this area is variable across legal systems. It was suggested that perhaps one simple statement acknowledging that there may be pre-contractual liability could be added.

46. Insurance: There are provisions on insurance in Chapter 2, 3, and 4, and these provisions need to be coordinated. The main location for this topic could be expanded to include further discussion of this important area, such as on micro-insurance, with cross references to the other chapter treatments of this section.

#### Paragraph-Specific Comments

47. Part I - Intro and Risk Allocation: The proposed changes to para. 3 were generally accepted, and it was noted that there is no need to limit the language to narrower than any retaliatory termination. With respect to para. 9, it was suggested not to retain the proposed added content which enter into too much detail. Also in para. 9, it was suggested that perhaps the content needs to be qualified as "but under a default rule applied in some systems..." It was suggested that the first added proposed sentence in para. 13 should be edited for clarity, and possibly presented as a warning, calling for the attention of the parties. It was suggested to delete the last sentence of para. 13 and perhaps insert a cross reference to another section where these issues are treated in greater detail. In para. 15, the Group noted that the addition of the word "volume" seems sensible in this context. With respect to para. 18, it was noted that the added content could be reworked, possibly along the lines "It is important for the parties to bear in mind that erratic pricing and poor management of risk is often the result of poor market information...". Starting with para. 22, the Group noted that it may be important to nuance the discussion of side selling. If the product is owned by the contractor or if the contract is for all production, then side selling is prohibited. It was suggested that it was important to distinguish the case where production is for a set quantity and there are excesses, in which case the excess could be sold, possibly after right of first refusal. The term "side selling" should be included in the glossary. The last sentence (proposed addition) should be deleted. Also in para. 22, it was noted that the earlier addition of method of payment (cash) was very relevant in many countries. It was noted that what is important is not just immediate payment, but rather any payment that comes earlier than the payment from the contract, and it was agreed to redraft as, "the possibility of earlier or immediate payment".

#### Part II – Core Obligations of the parties – A - The product

48. Quantity: It was agreed that the proposed added content in para. 27 may not be necessary because quality is dealt with in the following sections. The Group noted a few issues in para. 29: that the last sentence of this paragraph has nothing to do with exclusivity; perhaps, the word liability should be changed to accountable, to reflect a common concern that poor performance leads to not getting contracts in the future; it was also noted that as reflected in the corresponding footnote, this concept belongs in the chapter in excuses for non-performance. At para. 34, it was agreed that a missing paragraph from an earlier draft (para. 31 from doc. 7, Feb. 2014) dealing with situation where the contract provided for the delivery of determined quantities of goods, should be reinstated. In para. 37, it was generally agreed that the proposed addition is unnecessary and could be deleted. It was suggested that the proposed addition to para. 44 is unnecessary because it complicates issues. It was also suggested that this paragraph goes too far in discouraging cover transactions, however, it was also noted that this is different in fungible goods versus proprietary goods. It is suggested to soften the language to "may not be allowed...".

49. Quality: In para. 46, it was suggested to add “typically results in non-conforming goods.” It was generally agreed that the existing language in para. 48 is correct and noncontroversial and can be left as is. It is suggested to rephrase the first sentence of para. 49 in the active voice to make it clearer. Perhaps, “There are legal systems that impose restrictions on limiting liability... and therefore [a] clause that provides that the producer...” At the end of the paragraph this could be rewritten, “depending on the applicable law, the liability of the contractor might be commensurate with the level of instructions given...” The Group agreed to delete the proposed addition at the very end of para. 49. It was suggested to delete the proposed addition in para. 50 as confusing, mingling two different concepts. In para. 56, the Group agreed to change the reference from “international trade” to “international markets”. The first sentence of para. 57 could be rewritten as “In many legal systems, general contract law provides default rules to define performance standards...”. The proposed drafting “... must deliver goods that are fit for the purpose” was accepted. Also in para. 57, it was noted that the in-line reference to UPICC should be moved to a footnote which transfers to the final version (references to international instruments will stay). The Group noted that the proposed redrafting of the first sentence in para. 60 may require some reworking: it was suggested to remove or revise the proposed examples, especially the last example on educating the public which is outside the scope of the relationship; for the other examples, it may be necessary to make a reference to “...under the applicable law or the contract.”; in the second to last sentence, quality requirements can be equally mandatory to safety; there was general agreement to delete the last two sentences of the paragraph (including the proposed addition) noting that this concern belongs to the Chapter on Remedies. The first sentence of para. 61 may need to be softened to say “may be” because it is broad, and perhaps reworded as “The ability of the parties to comply with safety standards will depend largely on the risk assessment and management measures as required by applicable law. The parties’ obligation to abide by safety standards would cover the entire process, not distinguishing between production and delivery.” The Group noted that the core issue in para. 63 is maintaining certification. Thus, the first sentence should read along the lines of “become certified and maintain certification...” and then this would take away the need for the second proposed sentence which can then be deleted. The penultimate sentence should be revised to take into account the consideration in the last sentence: perhaps as “Assurance of compliance may be provided by the producer itself and/or the contractor jointly with a third party certifying body.” FAO has offered to help revise para. 63, in a way that keeps the mention to the two-step process.

## Part II – Core Obligations of the parties – B Production process

50. Inputs: In para. 68 et seq., the group agreed to leave to the Secretariat the issues of titles for the section on inputs. With respect to para. 69, at the end it may be useful to add a further mention of the role of “credit back” to the producer, rather than just giving back. Thus, “... returning unused inputs against credit as appropriate under the contract...” Earlier in the sentence above should ready, “This may come with certain correlated obligations...” In para. 71, the Group referred to the fact that, given the variety of different possible results under domestic law in the absence of an express price determination, a general drafting along the lines of: “it would be in the interest of the parties to have a price mechanism that promotes clarity, even though price can be determined by default rules” and that “final price determination could take into consideration the following issues...” Reference was also made to Art. 55 of the CISG. The Group noted that para. 91 et seq. would be a proper location for additional information on financing, including for example: language drawing awareness to the connection between duration of the contract and duration of the financing; interest rates; lines of credit; scope of the collateral (title to the land or to the equipment possibly subject to a lien by the contractor that offered the financing, as well as liens on the crops or livestock being produced - the example of specific legislation was provided in this regard, i.e. in the U.S., the Perishable Commodities Act and Packers Act, excepted from U.S. bankruptcy law, US statutes, which puts all proceeds and inventory held by a purchaser in trust for the benefit of an unpaid seller); and that corresponding remedies be dealt with in the appropriate chapter.. In para. 94 and others, it was noted that there should be distinctions made regarding mentions of interests because there are countries where charging interest may be illegal. Perhaps the language can be softened to say,

"where available", though it was noted that the question of interest is dealt elsewhere separately. It was generally agreed that the last sentence of para. 105 could be removed because it was seen as superfluous. In para. 106, the Group noted that there is an issue with terminology: guarantee should be used instead of warranty. Furthermore, the Group suggested that para. 106 could be simplified by keeping only the first sentence, and adding a qualifier of "within certain limits ...". The rest of the paragraph may not be universal and therefore can be left out. At the beginning of para 106, the first sentence should say "applicable law" rather than national law. The Group suggested that the middle sentence of para. 107 should be rephrased for clarity.

51. Production methods, compliance and control: In para. 116, the proposed wording may be redundant, but, it was suggested to give a few extra examples beyond the last sentence. It was suggested to change the ending term in the parenthesis to "monitoring reports". In para. 117, the Group agreed on the proposed deletion of language. The Group agreed to reintroduce the former paragraph (para. 121 doc. 7 Feb 2014) on fertilizers at para. 118. The Group noted several issues with para. 124: the first sentence is misleading by referring to codes of conduct with mandatory requirements, so codes of conduct could be moved to a new sentence; perhaps phrase the new sentence as "Industry codes of conduct often encourage..."; the word "govern" should be replaced with "apply"; it was suggested that examples should refer not only to crop production but also to livestock, a concern which was seen as applicable throughout para. 125-127. It was agreed that para. 137 might be the best place for a discussion of risks of loss for perishable goods, in relation to delivery, while acknowledging that this issue was mentioned in para. 138. In para. 144, it was noted that this paragraph does not belong here and can be deleted or moved to the relevant part of the Guide. It was additionally noted that these are obligations typically in the contract further up the chain, depending on how one defines processing. The insertion of the term "sugarcane" in para. 145 was accepted by the Group. With respect to para. 151, it was agreed to remove the reference to criminal consequences. The last sentence of para. 152 may mix concepts of mistake and wrongfulness and could be clarified. What was intended to be said was, that "the contractor would not be entitled to reject the goods if he improperly evaluates the conformity, for instance by using the wrong ..."

52. Price and Payment and Additional Obligations: The Group felt that the last sentence of para. 157 went too far, and although it may make sense to have a clause for renegotiating certain terms, that the whole paragraph could be deleted and that the issue should be dealt with under the Chapter on Excuses. The last sentence in para. 158 could be softened to "can also be perceived as..." There were no objections to the introduced language in para. 160. While the language of the proposed addition at the end of para. 162 could be improved, the underlying content was approved. The language in the proposed added sentence in para. 163 should be softened: "A set market price helps to address market volatility..." It was widely agreed that this proposed paragraph labelled as para. 163bis should not be included because it was seen as opening up an area which goes beyond the scope of the Guide. There was general assent to the proposed addition of examples in paras. 169-170, but the language here may need to be polished. It was suggested to include a reference to the payment of inputs in para. 171 et seq., although a detailed discussion is not necessary in this context. In the middle sentence of para. 171, after Footnote 145, "default contract terms" should be replaced with "default terms." The Group noted with respect to currency in paras. 176-177 that mention may be added that some domestic legislation requires that contracts use the local currency. A small part on letters of credit is included in the Chapter on Remedies, so perhaps a cross reference could be added in this context. It was agreed not to move para. 184 et seq., as had been suggested by online comments. It was agreed to keep the addition in para. 184, maybe by using more neutral terms so that it does not sound like a recommendation. It was agreed to leave para. 187 in its current position.

## Chapter IV: Excuses for Non-performance

### Paragraph-Specific Comments

53. Part I - Supervening Events In para. 2, it was noted that the proposed definition leaves out distinctions for causes out of the control of the parties. The Group highlighted that the most important thing is to distinguish supervening event from force majeure. The first sentence could be rephrased as "Performance may be affected by certain supervening events. Some of these supervening events will draw particular attention because they may provide legal excuses..." As an editorial matter, the Group suggested that in para. 4 and throughout the Guide, all references to "said" should be removed. The proposed added word "risk" in para. 4 should be replaced with "possibility," and the term "enhanced" should be replaced with "increased." There was general agreement that para. 8 is descriptive of actual practice, correct and sufficiently nuanced. It was suggested that the first proposed added clause of para. 12 could be misleading ("uncertainty due to lack of decisions...") and should be left out. The addition at the end of para. 12 and deletion of para. 24 were acceptable to the Group. In para. 17, the sentence beginning with "It is interesting..." may need to be clarified to make it clear and tease out the two concepts. Also, remove the lead in "It is interesting" from the sentence. With respect to paras. 16-19, the general content of the proposed additions was agreed, but the content must be coordinated to make sure it is consistent with the chapter on obligations. Also in para. 19, the word "worsening" should be removed as unnecessary; it was also noted that the treatment of insurance should be coordinated with the other Chapters of the Guide.

54. Part II - Qualifying Events: In para. 20, it was agreed that the proposed additional clause in the last but one sentence, is unnecessary and can be deleted, On the other hand the last added sentence should be kept, and the word should be "intentions." The word "Interestingly" should be removed from the second sentence of para. 21, and perhaps the sentence could be redrafted in more descriptive terms. With respect to para. 22, it was suggested that the modern concept of force majeure is generally more flexible than as presently reflected in the text and that "As a rule" should be replaced by a softer wording such as "is generally considered ...". For para. 24, it was suggested that some examples can be drawn from the footnotes, up into the text, though this must be coordinated as a choice over all the chapters. It was noted that other sections include examples, and this paragraph would provide a good place. For the last sentence of para. 25, it was suggested to rephrase as: "Courts tend to generally interpret the notion of exempting events narrowly..." With respect to para. 36, the Group agreed not to enter into details regarding evidence gathering in the context of this paragraph, and agreed that the importance for the producer of documenting both the force majeure event and its consequences on the production (such as requesting experts or government officials to visit the fields and to document the situation, taking pictures and detailed notes of the extent of the losses or damages caused by force majeure, collecting newspaper articles etc.) might find a more appropriate place in the Recommendations.

55. Part III - Consequences: For paras. 38-54, it was noted that there could be improvements in the presentation of the topics in these paragraphs to distinguish between the cases of force majeure and change of circumstances. This could be done by making a few adjustments. There is an imbalance in the treatment of these two topics. In para. 39, at the beginning of the paragraph, it was noted that this concern is indeed very relevant. It was agreed to remove the proposed added content at the end of the para. 39. The second sentence of para. 40 should be rephrased as "The recent tendency, however, is..." Proposed examples for para. 42 should illustrate how suspension is sometimes possible for some commodities and not possible for others. It is important to rephrase the first sentence to make it clear that if the suspension goes on forever, then we move into the realm of termination. It was highlighted that an important factor is when the underlying cause of force majeure is no longer present. In para. 51, it was suggested to add a cross-reference to the Chapter on Remedies. The Group suggested that the last sentence of para. 57 can be deleted as unnecessary.

## Chapter V: Remedies for Breach

### General Comments

56. Balance between producers and contractors: It was noted that, in the final revision, it is important to ensure a balance of content and approach between producers and contractors. One area that was highlighted was a possible asymmetry between the sections treating producer's and contractor's breach and the aggrieved party's duty to cooperate and duty to mitigate. This issue was considered as being part of the various issues that should be taken care of when reviewing the draft.

57. Balance between common law and civil law: It was noted in the comments that there is too strong a reliance on common law principles.

58. Length of the chapter: Despite reductions, the chapter remains substantially longer than other chapters. It could send the wrong message if the Guide focuses so much on remedies. It was agreed that this chapter should be condensed within the current structure to between 15,000 and 20,000 words (maximum), from over 25,000 now.

59. Treatment of legal principles and normative content: It was noted that in some cases, this chapter may go too far in proclaiming rules as universal which are not universal. It sometimes take a normative perspective, where the authors go too far in describing how they think things should work, rather than describing how they do work. It was generally agreed that the reference to an "escalation principle" described in para. 10 goes too far in proclaiming a widely held principle. Similarly for the "principle of effectiveness" and "principle of cooperation". However, it was also highlighted that later on in the chapter, commenters welcome the cooperation principle; the underlying concepts may need to be phrased in a different way. For example, para. 88: The first sentence goes too far in proclaiming this as a general rule. [Same for para. 96: Second sentence and para. 97: Penultimate sentence. Para. 102: The first sentence goes too far, and this sentence should be hedged with "depending on the applicable law...". Para. 104, first sentence. Para. 106: Anticipatory breach. Para. 113: First sentence. Para. 116: First sentence. Para. 118. Para. 174, first sentence.] It was suggested where appropriate to qualify the drafting by referring to the applicable law, and to insert "may" instead of "would".

60. Simplifying the language: There was wide agreement that the language and the approach needs to be simplified. FAO and IFAD agreed that the approach of the Chapter could be simplified to make it more usable, practical, and in line with the other chapters. The UNIDROIT Secretariat highlighted however that it was mindful of the considerable value of the in-depth research work made for the Chapter and that it had offered the authors the opportunity to publish in the Uniform Law Review a full-fledged article dealing with remedies in contract farming, reflecting the complete analysis and footnotes.

61. Controversies: It was agreed that the Guide need not enter into the very controversial areas of contract law, such as in paras. 65 and 73.

62. Terminology: It was asked whether there is a more universal term for fundamental breach. It was recommended to explain the concept, explaining that there are legal systems which distinguish between the seriousness of the breach... But at the international level...".

63. Expectation versus Reliance Damages: It was noted that it is important to be sure to distinguish differences in the applicable law, as far as treatment of expectation and reliance damages, and the three passages in the chapter on this topic must be coordinated. The choice between the two is not necessarily open to the preferences of the parties. It was generally agreed that these sections need to be simplified in how they explains the core legal principles.

64. Adding content on linked and multiparty contracts: It was agreed to stay largely out of this area, except to briefly caution readers (in one sentence) that breaches and the exercise of certain

remedies can have consequences or implications along the chain, and the chain can influence the remedies available.

#### Paragraph-Specific Comments

65. Remedies in Production Contracts: It was generally agreed that some of the terminology in this chapter, including "B2B" and "contract disclaimers" in para. 9, should be clarified. Following from comments of the Group, it was suggested that paras. 10-11 could be significantly shortened, and while it was felt that the connection between the seriousness of the breach and the seriousness of the consequences should be reflected, a direct reference to "the principle of escalation" and "the principle of proportionality" should be avoided. In para. 11, the term "unconscionability" may need to be changed for a more international term. It was noted that in para. 13 and throughout the chapter, the references should be made to "agricultural production contracts". In para. 53, it was suggested to remove the parenthetical in the second line. It was noted that the sentences in the second part of para. 53 (starting with "in some cases ...") may need to be nuanced to reflect different systems. There are systems where the penalty may not be disproportionately high, which means that in principle penalty clauses are accepted, but there are also systems which prohibit any form of penalty. Also a penalty clause contrary to the applicable legal standards is not necessarily unenforceable; in certain systems, the judge is entitled to reduce its amount. In view of the variety of approaches, it was suggested to use neutral language describing the phenomenon. In paras. 54-55, it was agreed to take note of the limitations of charging interest generally, and specifically in para. 55, it was suggested to delete "always and automatically...". With respect to paras. 61 et seq., it was noted that the deletion of a paragraph in the section may create perceived imbalance between the contractor's and the producer's duty to mitigate. It was suggested to deal with this omitted content by using cross references in the text to refer back to the other side's content. In para. 65, it was agreed that the last sentence, which emphasised a controversial issue, should be omitted. With respect to paras. 70-74, it was asked, what is the distinction between the right to a last attempt and a right to cure defective performance? Some systems deal with one or the other concept. It was agreed that this section can be condensed and simplified, explaining that legal systems often allow a party in breach some right to fix the problem, avoiding the complications of the different legal terms (cure, last attempt...). It was agreed that the first sentence of para. 75 should be deleted, and the second sentence reworded slightly accordingly, starting with "Although the contract". It was agreed that paras. 77-79 are a general introduction to the subject and should be moved up to above the heading between G and 1. It was suggested that the concept of partial termination in para. 80 needs to be clarified and simplified. It was suggested to rephrase this section to "Where the contract consists of a series of obligations, for example instalments, depending on the applicable law ... the aggrieved party may not have the right to terminate the whole contract. The parties may wish to clarify this in the contract whether and to what extend a non-performance of one party will give the other party the right to terminate the whole contract."

66. Remedies for producer and contractor breach: It was suggested to simplify this discussion in para. 130 by stating something to the effect of: "The parties may agree in advance what constitutes a breach, be it process-related or otherwise." The last sentence of para. 130 should not be moved. The first sentence of para. 135 was suggested to be unnecessary. The last clause of para. 136 may be too prescriptive. Perhaps replace with "In such cases, an adjudicator assessing damages would be likely to..." With respect to para. 159 et seq., it was reiterated that not all legal systems create a duty to mitigate, and that some nuanced description should be made. In para. 170-172, it was noted that there is possibly a missing subparagraph, or else this section is included in the wrong spot. In para. 185, a concern was expressed with regards to the contractor's default and the ensuing problems in terms of priority ranking in acquiring the contractor's assets. It was suggested to add a cross reference to where this topic is addressed in para. 163-164, with possible further additions in para. 185. In para. 189, the Group noted that there is a reference to a section no longer existing on the producer's duty to mitigate.

## Chapter VI: Duration, Renewal and Termination

### General Comments

67. Treatment of general principles: It was felt that when reference is made to general principles in this chapter, it would be useful to remind each time that the applicable law may or may not recognize these principles. In some cases, the language may have to be modified to this effect.

### Paragraph-Specific Comments

68. Part II: Renewal of Contracts: It was suggested that the last sentence of para. 12 could be rephrased as "... may be prevented from invoking it subsequently under rules or principles of the applicable law, such as the principle prohibiting inconsistent behaviour." It was agreed that the language in para. 17 could be softened to include "may." It was noted that the middle sentence of para. 19 could also be more balanced by adding a sentence which considers the case where the producer has made specific long term investments, perhaps phrased as a sentence added at the very end of the paragraph, with "A producer that is required to make significant capital investments to perform its obligations under the contract, might wish to obtain for itself a similar right. [Cross reference to para. 35]." The language in the penultimate sentence of para. 19 should be revised to "... renew the agreement until the contractor has recouped its advances."

69. Part III: Termination: It was agreed that the separated clause on cancellation in the first sentence of para. 20 could be removed. This could be replaced with, "or equivalent terms that may be used in contract practice." The softened language introduced in paras. 22-23 was supported. In paras. 36-37, it was noted that the concept of "termination for just cause", or even "for cause" which was deemed more appropriate was not universally used, and it was suggested that the subsection might be reorganised, with Point (c) dealing with "Termination for breach, force majeure and hardship" and a new Point (d) on "Termination for all other causes". The proposed softened language in the added sentence at the end of para. 36 should be revised (avoid using "remember"). The Group supported leaving para. 38 largely as it is now. It was generally agreed to accept the addition to para. 39.

## Chapter VII: Dispute Resolution

### General Comments

70. Approach of the chapter: In response to comments received, the Group discussed various possibilities for approaches that this chapter could take. It was agreed by the Group that the current approach of the chapter should be followed, and sufficiently focuses on the concerns of the parties.

71. Connecting with practice: There are many options available in theory which may not be practical in many cases, particularly in the developing country context. Practical situations inform what is most important to focus on. For example, several important elements of arbitration for contract drafting are: choice of law, who will arbitrate, the scope of arbitration, the remedies available to be chosen.

72. Balance: It was noted that it was important to ensure language balance between disputes from the perspective of producers and contractors. It is important to distinguish effects of the imbalance of the parties at the formation stage from the dispute resolution stage.

#### Paragraph-Specific Comments

73. Intro and Part I. Disputes and dispute resolution in agricultural production contracts: Regarding para. 2, the Group agreed that the role of competition law is essential and the reference to it should be left here. As a matter of editing, reference should be made in this paragraph to the Chapter on the Legal Framework, and not to the Introduction. It was highlighted that the proposed text in para. 3 will not be included. It was noted that para. 5 could be presented differently, and generally redrafted. In particular, the premise of the first sentence, including the added clause, was questioned, as the point was made that the dispute resolution mechanism should not aim at creating a balance between stronger and weaker party, but instead should be fair. It was suggested that the second sentence could be revised as "...to make use of the remedies provided for under the contract [cross reference to the Chapter on Remedies]." The third sentence could be revised to "...to enforce the remedies available to the producer..." and in any case not to use "oppose" but rather "resist" or "to react". In the third sentence, delete the mention of "terms." It was agreed that the proposed additional content in para. 7 should be deleted. The paragraph itself may need to be revised to reflect either a chronological sequence or a combination of methods employed at the same time for parts or the whole dispute. It was noted that the chronological approach may not be the best for all cases.

74. Part II. Considerations regarding the various dispute resolution methods available for the parties: In para. 14, it was agreed to insert a sentence to the effect of: "The fairness of the dispute resolution requires the adjudicators to act independently and impartially" to the beginning of the paragraph. It was generally agreed to delete para. 16.

75. Part III: Non-judicial dispute resolution It was agreed that the whole Para. 17 should be revised and simplified. In the middle of the paragraph, it will be necessary to revise the sentence which includes "... a more 'solid' mechanism..." It is further suggested to add content to further emphasise that alternative dispute could be more conducive to preserving trust. It was noted that the proposed reference to a single agency was not accurate and should be removed, and that it would suffice to refer to the possible increased costs (for example to say "however, non-judicial methods may not always be less costly than judicial dispute resolution." Also in para. 17, the last proposed sentence can be condensed. It was suggested that the fourth sentence of para. 18 could be rephrased more neutrally as, "Some of these institutions may be private or government promoted ..." It is important to emphasize promotion rather than involvement of government. The sentence beginning with "These organizations" must be redrafted, perhaps with: "Some trade associations offer dispute resolution services..." In the middle of the paragraph, the addition should be revised to read instead "the rules applicable to the proceedings". It was agreed to delete the proposed added sentence beginning "At the international level..." It was agreed to leave out the last clause of the final proposed sentence in para. 18, "as many will not request the involvement of lawyers." It noted that it may be necessary to improve the drafting of para. 19 along the lines of: "It is important to note that domestic law typically deals with how proceedings are instituted, how panels can resort to court support, the extent to which a court can set aside an arbitral award ... A significant number of jurisdictions around the world have found inspiration for those laws in the UNCITRAL ..., even though they were originally conceived for an international purpose..." The last sentence of para. 19 must be reconsidered to find a different position in the text.

76. A. Amicable Dispute Resolution: It was suggested that the UNIDROIT Secretariat should evaluate the proposed language changes in para. 22. The second sentence of para. 23 should be shortened and redrafted as: "This may be a mandatory obligation.", while the following sentence should be deleted. It was noted that the underlying content of para. 25 does not need to be changed in light of comments received; rather it was agreed to soften the language in this paragraph, for example by changing "generally" to "often"; deleting "frequently"; changing "is" to "may be". Para. 26 should be made more neutral, by deleting the clause midway through ("...and especially the rights of the farmers..."). Here, it was suggested that perhaps a sentence on traditional forms could be added, to the effect of "It is also important to remember that traditional dispute resolution mechanisms might exist parallel to the official ones, for example at village level. Because of their traditional element,

some of them may play an important role, having "official" recognition in their environment." It was agreed that the whole para. 30 should be deleted to avoid confusion.

77. B. Arbitration: The suggested language change for para. 33 was generally accepted. It was generally agreed that the proposed mention of electronic signatures should not be included in para. 34. The inclusion of additional content in para. 35 was rejected. It was agreed to delete the last two sentences in para. 36 which begin with: "The arbitration law in each country will apply for every aspect which is ...". In the second sentence of para. 37, it was agreed to remove the proposed clause "might be advisable due to the special characteristics surrounding contract farming and" and soften the term "invariably" to "often." It was generally agreed that all of para. 39 could be deleted because the first phrase of the first sentence and the last sentence are covered elsewhere. In para. 41, it was agreed to approve the suggested rephrasing for this paragraph. It was agreed that the proposed addition of the concept of emergency arbitrators was useful, but that the concept would need to be better explained. In para. 42, it was noted that the reference to main benefit should be removed in the sentence "The main benefit of arbitral awards over court judgements is that they can be enforced after a simple..." The middle sentence should be revised to remove the reference to foreign: "The enforcement of a foreign arbitral award may usually take place..." The next sentences could be simplified as: "Depending on the rules applicable and in light of the New York Convention, the rules could make it easier to enforce an arbitral award... than enforcement of a judgment..." The last sentence should be deleted.

78. V. Enforcement of settlements or decisions resolving a dispute: It was generally agreed that the proposed added content for para. 49 will not be included.

## ANNEX

## List of Participants

## UNIDROIT INDIVIDUAL EXPERTS

Mr Fabrizio CAFAGGI (excused)  
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