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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

INFORMAL WORKING GROUP ON THE PROGRESSIVE CODIFICATION

OF INTERNATIONAL TRADE LAW

REPORT ON THE MEETING HELD IN LOUVAIN-LA-NEUVE

FROM 11 to 13 APRIL 1983

(prepared by the Secretariat of UNIDROIT)

Rome, June 1983

1. At the invitation of the President of Unidroit, the Informal Working Group on the progressive codification of international trade law held its third meeting in Louvain-la-Neuve at the Centre de droit des obligations from 11 to 13 April 1983. The meeting was attended by Professor Drobnič of the Max-Planck Institute Hamburg, Professor Fontaine of the Centre de droit des obligations, Professor Lando of the Institute of European Market Law at the Copenhagen School of Economics, Professor Maskow of the Institut für Rechtsvergleichung of Potsdam-Babelsberg, Professor Rajski of the Institute of Comparative Civil Law of the University of Warsaw, Professor Tallon of the Service des Recherches Juridiques Comparatives of Ivry and Professor Wade of the Asser Institute of the Hague. The Secretariat of Unidroit was represented by Professor Bonell who took the chair and by M. Mengin, who acted as secretary to the Group.

2. The first item on the agenda was the reading of the three draft chapters relating to formation, interpretation and validity of contracts, as revised following the discussions at the meeting of the enlarged Study Group held in Rome in 1979 and 1982.

3. The Group first proceeded to a careful analysis of individual articles of the revised Draft Chapter on Formation and Interpretation (UNIDROIT 1983 - Study L Doc.25).

As to the new Article X, intended to be placed in the preliminary chapter of the Rules, the question was raised whether it would be proper to refer at the same time to formation, interpretation and performance of a contract when laying down the principles of good faith and fair dealing. In particular, the reference not only to interpretation but also to formation and performance could be misleading since it could be understood as if the above-mentioned principles might be invoked not in relation to the behaviour of the parties but rather to the content of the contract or the rights or duties of the parties arising under the contract. There was general agreement within the Group that this was not the purpose of the provision and that it was clearly intended to lay down mere rules of conduct to be observed by the parties, not only when interpreting their contract but also during the process leading up to its formation and subsequently in the course of its performance. As to the reference to international cooperation, it was decided to replace it by the words "in international contracts" and this in order to make it clear that what is intended is not to add a new substantive principle to those of good faith and fair dealing but simply to clarify that those latter principles have to be applied according to internationally accepted standards. It was also agreed to insert in the English text only the words "and enforcement" after the word "performance" so as to specify that not only the acts of performance but also the possible resort to remedies in case of breach of contract are

covered by the provision (see sec. 1-203 U.C.C.).

As to Article 1, the question was raised whether its purpose was intended more or less to correspond to that of Article 4, i.e. to require for the conclusion of the contract an agreement between the parties on these terms which for the respective type of transaction can be considered as being essential terms. According to a majority in the Group, this was not the case, since the article clearly refers to the exceptional case where one of the parties expressly declares that he intends to be bound by the contract only if an agreement will be reached on one or more specific aspects, whether or not of an essential character. In order to avoid any misunderstanding in this respect it was decided not to place this article at the beginning of the Chapter but to insert it between Articles 13 and 14, and to reformulate it in a manner which would express more clearly its purpose, which is to protect the specific needs of one single party ("Where according to the intention expressed by one of the parties in the course of negotiations the conclusion of the contract is dependent on the agreement on specific terms, the contract shall be deemed to be concluded only where the parties have reached such an agreement").

A lengthy discussion also took place with respect to Article 2 dealing with the problem of confidential information obtained in the course of negotiations. As to the substance of the rule laid down therein which is to be considered as an application of the general principle of good faith in the course of the formation of the contract, there was general agreement. The question was however raised whether it was necessary that the party providing such information should declare that the information supplied was confidential in character or whether such a character could also be determined on the basis of objective criteria so that the provision could apply also in cases where the party receiving such information, even in the absence of an express declaration of the other party, should have known that given information was to be considered as confidential. While admitting that in practice the most frequent case is that the party giving the information will also draw the attention of the other to its confidential character, the Group felt that it would be opportune not to preclude the other possibility. It was therefore decided to change the present wording in the following way: "If information is given as confidential by one party in the course of negotiations, such information shall not be disclosed by the other party who is otherwise liable in damages whether or not a contract is subsequently concluded". It was furthermore decided to find a more suitable place for this provision in order to avoid the Chapter on formation starting with a rule contemplating a situation of a rather exceptional nature.

With respect to Article 3, it has been decided to alter the opening words of paragraph 1 in the following way "Unless the applicable law or

these rules otherwise provide...". The reason was that an express reference to the contrary intention of the parties was not necessary since, with the exception of those rules which are expressly declared to be mandatory, all the others may be derogated from by the parties to a given contract. On the contrary a distinction should be made between the applicable national law and the present Rules since it cannot be excluded that special requirements as to form will be laid down for specific kinds of contracts also by the Rules themselves.

As to paragraph 2, it was felt that the provision laid down therein was nothing more than an application of the general rule provided for in Article 1. For this reason, it was decided to delete the paragraph.

As to paragraph 3, the Group, while being in agreement as to its substance, expressed its preference for a wording similar to that to be found in Article 13 of CISG. It was furthermore suggested placing this rule in the preliminary section together with the other provisions containing definitions. A lengthy discussion took place as to whether or not a provision similar to that contained in Article 29, paragraph 2 of CISG should be included as a new paragraph of the present article. Some members of the Group expressed their opposition to the principle laid down in the above-mentioned article of CISG whereas others insisted on its importance and stressed the fact that its content reflects a fair compromise between the different positions traditionally taken by the different national systems on this point. It was finally decided to include in the text a provision corresponding to that of Article 29 of CISG and at the same time to stress in the commentary the importance of the exception to the general principle as envisaged in the second sentence.

The reading of Articles 4, 5, 6 7 and 8 gave rise to no substantive objection. It was simply decided to amend article 7 so as to read "Any offer is terminated when a rejection reaches the offeror".

As to Article 9, it has been decided to add a new paragraph containing a provision similar to that found in Article 19, paragraph 3 of CISG and which would read as follows "Additional or different terms relating, among other things, to the price, payment, place and time of performance, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially".

No changes have been proposed to relation to Articles 10, 11 and 12.

Three important changes have been made to Article 13 paragraph 1. First, the addition, after the opening word "Where", of "within a reasonable time" in order to exclude from the application of the provision those cases where a written document is sent to the other party only at a later

stage during performance. Secondly, it was decided to require from a recipient who wishes to avoid being bound by the additional or varying terms contained in the written confirmation, to object without delay. Thirdly it was agreed to delete any reference to those terms which were in accordance with practices which the parties have established between themselves or with usages since such terms by their very nature do bind the parties from the moment an agreement has been reached, whereas according to the present text, their application could be unilaterally excluded by the party receiving a written confirmation containing them. The new wording of paragraph 1 reads as follows: "Where within a reasonable time after the conclusion of a contract, one party sends the other a document which is intended to be a written confirmation of their agreement but which contains terms that add to or vary those of that agreement, these terms will become part of the contract, unless they materially alter the terms of the contract and the recipient without undue delay objects as provided in Article 9 (2)".

As to paragraph 2, it was decided to delete the words after "an invoice". It was furthermore suggested that in the commentary the attention should be drawn to the fact that the provision is intended to cover cases where according to commercial practice, invoices are often used for purposes similar to those of so-called letters of confirmation.

Articles 14 and 15 gave rise to particularly in-depth examination. The Group agreed that the subject matter of these two articles presented two aspects, one of substance and one of procedure, and that the two aspects should be dealt with separately. As to the substance, all the members declared that they were not satisfied with the principle at present laid down in Article 14 and in Article 15 paragraph 2. While some openly favoured the opposite rule, that is to say one according to which the contract should be considered as valid even if the parties have not provided in what manner the missing term would subsequently be determined in the event of their failing to reach agreement, others hesitated to go so far. In particular, they drew attention to the fact that such a rule could hardly be accepted where the missing term was of an essential character and that in any event, the problem still remained of who should eventually determine the missing term in those cases where neither the parties themselves agreed on it nor the third party designated by them was in a position to fulfill his task. Admittedly, according to some legal systems a court intervention could be envisaged, but it was equally well known that in many other jurisdictions courts would not be prepared to substitute themselves for the parties in drawing up the contract. The Group finally agreed on the following solution: the two articles should be merged into one single article, the first paragraph of which would read as follows: "When the parties have left a term of the contract to be agreed upon in further negotiations or to be determined by a third person, they should provide

in what manner such term shall be rendered definite in the event of their failure to reach an agreement or of the third party not having made the determination". The purpose of this provision was to draw the attention of the parties to the problem which might occur whenever they themselves or a third person designated by them are not in a position to determine at a later stage a contractual term intentionally left open in their original agreement. It is true that failure to comply with such a recommendation would remain without sanction. It was however felt that this provision would nevertheless serve a useful purpose, be it only from a pedagogical point of view. This provision should then be followed by a second paragraph according to which "The fact that no agreement is reached or the manner in which, failing such an agreement, the term shall be rendered definite has not been provided or the third person has not determined the term, does not in itself prevent a contract from having come into existence". Should the parties not abide with the recommendation laid down in paragraph 1, this would not by itself be sufficient to make the contract null and void. The precise fate of the contract would instead depend on the intention of the parties and the circumstances of each single case. Thus, an important element to be taken into account would certainly be whether or not performance has already started since in the first case the contract could be held null and void ab initio, whereas in the second it would be possible to envisage its termination ex nunc. Nor could it be excluded that the contract might be completed by a court if such a procedure were admitted under the applicable law.

As to Article 16, no objections were raised with respect to paragraph 1. With respect to paragraph 2 it was decided to delete the reference to general conditions adopted by an association to which both parties belong. This was because such a reference was not only too vague but could also give rise to difficulties where the same association has issued more than one set of general conditions. It was also decided to replace in the last but one line the word "previous" by "similar" and in the last line the word "use" by "incorporation". Still in connection with paragraph 2, a suggestion was made to require for the effectiveness of the general conditions therein envisaged that they may be "reasonable" in their content. The majority of the Group preferred however not to insert this new criterion which might further complicate matters. After all, it was argued that it was unlikely that, given the definition of usage in Article 21, "unreasonable" general conditions could ever be incorporated under the present provision. Nor should it be overlooked that the problem of unfair or unjust general conditions was already touched upon in a general manner in both Article 17 of the present Chapter, and in Article 7 of Section 1 of Chapter III.

In connection with paragraph 3, it was felt that the problem of the so-called battle of forms should better be dealt with in a separate

provision which might read as follows "Notwithstanding the provisions of these Rules governing offer and acceptance, if both parties refer to different general conditions with conflicting terms, the contract shall be considered to have been concluded without the conflicting terms unless one party without undue delay informs the other that he does not intend to be bound by the contract".

Only slight modifications of a purely drafting character were decided in relation to Articles 17 and 18.

The Group decided to delete Article 19.

Concerning Article 20, the last four lines have been changed in the following way: "...when it is made orally to him, delivered by any other means to him at his place of business or mailing address or, if he does not have a place of business or mailing address, at his place of habitual residence". The whole article should be placed in the preliminary chapter and it was also decided to delete in the first line the words "of this chapter" so as to make it clear that in principle the rule laid down by this article should apply as a general rule whereas possible exceptions to it would have to be expressly stated in each case.

Also with respect to Article 21, it was decided to transfer it to the preliminary chapter. Moreover, instead of giving a mere definition of the meaning of usages, the provision should also positively provide that the parties may be bound by usages in the course of formation of as well as in the performance of the contract. To this end, it was felt that Article 9 of CISG could be used as a model. A lengthy discussion took place as to whether usages should be applicable only to when they can be considered reasonable. In favour of such a solution, it was pointed out that usages may very well prove to be "unreasonable" i.e. unfair and unjust for one of the parties to a given contract, in particular in relation to parties belonging to Third World countries. To exclude such usages would be all the more necessary since, given the non mandatory character of the Rules, usages are in general supposed to prevail over them. Against the proposal it was however recalled that it would be very difficult to find at international level a common understanding on the precise meaning of reasonable usages. In addition, attention was drawn to the fact that the necessary requirements for the usages to be applicable were already considerably severe in the sense that one could hardly imagine any usage which, though in international trade widely known to and regularly observed by parties to contracts of the type involved in the particular trade concerned, nevertheless would amount to an "unreasonable" usage.

As to Articles 22 to 29 dealing with the interpretation of contracts, no objection was raised as to their substance. As to their formal presen-

tation, it was felt opportune to combine paragraph 1 of Article 22 and paragraph 1 of Article 23 in a single article and also to merge paragraph 2 of each of these articles in a single article. With respect to the last words of Article 25, it was decided to align them with the formula used in Article 9 (3) of ULIS. It was finally suggested consolidating Articles 26, 28 and 29 in a single article.

4. The Group then proceeded to an analysis of the individual articles of the revised Draft Chapter on Substantive Validity of International Contracts - Section 1: Mistake, Fraud, Threat and Gross Disparity (UNIDROIT 1983 Study L - Doc.26).

As to Articles 1 to 4, the Group decided the following changes in drafting: to delete in Article 2, paragraph 1 a letter a) the words "in accordance with the principles of interpretation laid down in Chapter 2"; to leave the provision contained in Article 4 in square brackets and to transfer it to Article 2, paragraph 2 where it should become a new sub-paragraph (c).

Whereas no changes have been decided with respect to Articles 5 and 6, it was agreed with respect to Article 7, to replace in the second line the word "making" by "conclusion" and to speak in sub-paragraph (b) of "the economic circumstances and the purpose of the contract".

Although one participant expressed strong reservations as to the substance of the rule laid down in Article 8, paragraph 1, relating to initial impossibility, the Group decided to maintain the provision as it stood.

With respect to Article 9, it was agreed to replace in paragraph 1 the words "a third party for whose acts the other party is responsible" by "a third person acting on behalf of the other party" and in paragraph 2 the words "a third party for whose acts the other party is not responsible" by "any other third person".

In Article 10 the indication of paragraph 1 should be deleted when referring to Article 14.

As to Article 11, it was decided to replace the word "promptly" by "without undue delay".

In connection with Article 12, the question was raised as to whether in its present form, the provision contained therein did not go too far since it envisaged the adaptation of the contract not only by a court or competent arbitration tribunal but even by a conciliator or any other third person. The Group decided to delete any reference either to the

conciliator or to third persons in general so as to make it clear that at the request of one of the parties only a judicial body already competent for the settlement of possible disputes which might arise from the contract may intervene and revise the contract. Having decided this, it was felt that the provision could be maintained without square brackets. As to its wording, it was agreed to replace in the second line of paragraph 1 the words "an undue hardship" by "an unfair detriment".

As to Article 13, the Group favoured amending the text in the following way: "A declaration of avoidance of the contract is effective only if made by a notice which reaches the other party".

Article 14 was left unchanged.

In Article 15, the opening sentence was changed so as to read "If the parties regard the contract or the terms of the contract as severable and a ground of avoidance affects only such a severable term...".

Articles 16 and 17 were maintained without any alteration.

Article 18 was also approved in its present form. However the Group noted in this connection that its final fate would in any event depend on whether a special provision would be included in the preliminary chapter indicating which of the articles contained in the various chapters of the Rules were to be considered as mandatory.

5. The Group then proceeded to examine the Draft Chapter on Substantive Validity of International Contracts - Section 2: Public Prohibitions and Permission Requirements (UNIDROIT-1983: Study I - Doc. 27)

With respect to Article 1, there was a general agreement as to the necessity of their being at the beginning of the section a specific article providing a definition of the main concepts used in the following provisions. The article was however considered as not being entirely satisfactory in its present form. It was first of all suggested combining the present paragraphs 1 with 5 and 2 with 6 and to try to find a more concise wording. In paragraph 1, the present wording should be replaced by "...mainly directed at the implementation of a general policy of the State and not mainly aimed at justice between the parties," a formula already used e.g. in German case law for the distinction between prohibition rules of a public and a private law character. In paragraph 2, instead of "an organ of the State or an organ acting on behalf of the State," one should speak of "an institution exercising public authority". As to paragraphs 5 and 6, the precise meaning of the concepts of "nullity" and "ineffectiveness" was questioned. In order to avoid possible misunderstandings, or conflicting

constructions, it was felt advisable to avoid their use and instead to say "the contract is null and void" and "the contract does not take full effect". In this case, the present paragraph 3 could be deleted. As to paragraph 4, while fully agreeing on the substance of the two requirements laid down, therein, the Group was of the opinion that the first of the two should possibly be mentioned in connection with the general definition of public prohibition and public permission requirements (see the two new paragraphs resulting from the merger of the present paragraphs 1 with 5 and 2 with 6). As to the second requirement which clearly has private international law implications, it was suggested not to mention it in connection with Article 1 but to include it within a special provision dealing with all the aspects of private international law at present foreseen in the section.

With respect to Article 2, the purpose of which is to lay down the conditions under which public prohibitions and permission requirements of a particular State are to be taken into account, a new and more concise text has been proposed which reads as follows"

(1) The provisions of this section apply to public prohibitions and permission requirements provided in legal rules which claim application to the contract whatever be the law governing the contract and have a close and significant connection with the contract.

(2) Foreign public prohibition and permission requirements may be refused application if they do not satisfy the essential requirements of international trade or the legitimate interests of other States having a close and significant connection with the contract.

(3) Nothing in these rules shall apply the application of legal rules of the forum which claim application to the contract."

It was observed that the last paragraph of this new text is drafted in a broader way since the last sentence to be found in the corresponding paragraph of the original text ("...provided the law of the forum has a close and significant connection with the contract") has been deleted. While admitting that such a further requirement might be regarded as superfluous as long as the matter had to be decided by a State tribunal, doubts were expressed as to whether it might not prove necessary if on the contrary the matter were to be dealt with by an arbitrator. Attention was also drawn to the fact that the rule contained in paragraph 3 of the original text was missing in the new draft.

With respect to Article 3, paragraph 1, it was decided to delete the opening words "unless otherwise provided" since the non-mandatory character of the rule already flows from Article 7. Different opinions

were expressed as to which of the parties should have the duty to take the necessary measures in order to obtain the permission. The rule presently laid down in the first sentence of the paragraph was generally considered to be acceptable. As to the rule laid down in the second sentence, it could give rise to difficulties if the public permission were required not for a single act of performance but for the contract as a whole. The Group decided to replace the rule by a more flexible one according to which the duty to seek to obtain the permission lies with the party who is in the best position or who is the best able to do so.

A lengthy discussion took place with respect to paragraph 3, which was, in its present form, unanimously found to be too heavy. First of all, it was decided to speak instead of "the party required to take such measures as are necessary to obtain public permission" of "the applicant party". As to the substance of the provision, it was pointed out that at present only two situations are envisaged, i.e. where the applicant party does not fulfil its duties and where it fails to obtain the permission, whereas there is still a third situation not contemplated, i.e. where permission has been refused. It was equally felt that by simply stating that in the first two cases the innocent party may withdraw from the contract, the question remains open as to what would be the fate of the contract if the right to withdraw from it were not exercised. In any case, the concept of withdrawal was far from being sufficiently defined. In this respect, it was suggested to speak rather of termination (a "résolution" in French) of the contract.

As to paragraphs 4 and 5, it was decided to merge them into one single paragraph and to leave the question of the kind of damages which could be claimed to the general rules on damages to be found in a later chapter of the Rules.

With respect to Article 4, it was first of all suggested to change its present title so as to read "Granting of public permissions". It was further decided to insert in paragraph 1 "fully" between the words "becomes" and "effective" and to change the last words of the provision so as to read "unless another date is indicated in the permission".

In Article 5, it was decided to delete the words "or subsidiary" so as to make it clear that the rule is intended to apply only where the party has a branch operating in a State where no prohibition or permission requirement exists.

In relation to Article 6, it was felt that its present wording should be amended so as to take into account first of all the changes which had been introduced in Article 3. In addition, as to the concluding words ("...unless it becomes apparent that the parties would not have concluded

it without that term"), it was suggested to replace them by the formula used in a similar context in Article 15 of Section 1 of Chapter III ("...if, giving due consideration to all circumstances of the case, it is reasonable to uphold the remaining contract").

With respect to Article 7, the question was raised to what extent Article 1, which is intended to deal merely with definitions, could be regarded as being of a mandatory character. In this respect, the more general problem was discussed relating to the precise meaning of "mandatory" within the framework of rules not necessarily to be incorporated in a binding Convention. The Group decided to postpone for the time being a more detailed discussion on this point which after all will have to be clarified also in connection with Article 18 of Section 1 of Chapter III.

6. The second item on the agenda was a first examination of the "Proposed Rules on Hardship with introduction and explanatory report" prepared by Professor D. Maskow (UNIDROIT 1983 Study L - Doc.24).

All the members of the Group expressed their great appreciation for the excellent work accomplished by Professor Maskow with respect to a subject which not only is of an extreme complexity but which by reason of its novelty has not so far been the object of sufficiently elaborated rules either at international or at national level. Unfortunately, due to lack of time available, the Group had to limit itself to a first exchange of views on the general features of the proposed rules.

As to their title, it was felt preferable to avoid the term "hardship" and to speak more generally of "changed circumstances" (in French "changement de circonstances"). With respect to Article(a) the heading of which should read "Claim for Renegotiation" it was generally felt that the variant presently foreseen in paragraph 1 should not be adopted, so as to avoid the risk of confusion between the cases contemplated by the present rules and those of "force majeure". Doubts were furthermore expressed as to the precise meaning of the expression "aims recognizeably pursued with the contract by this party". Some reservations were equally made with respect to the rule laid down in paragraph 2. The view was expressed that the present paragraphs 2 and 3 should be replaced by one single and more flexible rule stating the duty of the disadvantaged party to exercise his right to claim renegotiation without undue delay. A lengthy discussion took place with respect to the three variants of paragraph 5 of Article(b). While some members expressed their preference for variant 2, others objected to it on the ground that a simple recommendation made by a Court to the parties for the adaptation of the contract which is not assisted by any kind of sanction for non-observance would not be of any great use. With respect to variant 1, attention was drawn to the fact that in many jurisdictions courts are traditionally reluctant themselves to provide for

an adaptation of the contract. Since arbitrators may have fewer hesitations in this respect, it was questioned whether the Rules should not recommend to the parties to agree on recourse to a third person in case of a failure of the renegotiation between themselves, and to foresee the solution at present contained in variant 3 in cases where the parties could not reach an agreement to this effect. On this extremely difficult issue, as well as on the other problems raised by the draft, the Group finally decided that it would resume examinations of them as soon as possible at one of its next meetings.

7. The third and last item on the agenda concerned the work to be carried out with respect to the remaining part of Chapter IV relating to the performance of the contract. In this connection, two preliminary studies have been prepared, one by the Centre de Droit des Obligations of the University of Louvain-la-Neuve directed by Professor M. Fontaine (UNIDROIT 1983 Etude L - Doc.28) and the other by Professor J. Rajski (UNIDROIT 1983 Etude L - Doc.29). The Group expressed its gratitude to the two Rapporteurs and stressed the admirable way in which the various issues to be dealt with in the framework of the rules on performance had been presented in the two papers. It asked the two Rapporteurs to continue their studies along the proposed lines and to submit a completed preliminary draft at one of its next meetings.