



UNIDROIT 1991
Study L - Doc. 50
(Original: English)

U n i d r o i t

INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW
=====

WORKING GROUP FOR THE PREPARATION OF PRINCIPLES
FOR INTERNATIONAL COMMERCIAL CONTRACTS

Chapter 1

GENERAL PROVISIONS

(Draft and Comment prepared by Professor Michael Joachim Bonell,
University of Rome I, "La Sapienza")

Rome, December 1991

1991 TROSTER
OF 1991 - 1991
(Original: English)

1991 TROSTER

1991 TROSTER
OF 1991 - 1991
(Original: English)

1991 TROSTER
OF 1991 - 1991
(Original: English)

1991 TROSTER

1991 TROSTER

1991 TROSTER
OF 1991 - 1991
(Original: English)

Note:

THIS CONSULTATIVE DOCUMENT IS CIRCULATED FOR COMMENT ONLY. IT DOES NOT REPRESENT THE FINAL VIEWS OF THE INSTITUTE.

1991 TROSTER

CHAPTER 1

These Principles are intended to lay down general rules for international commercial contracts. (Application of the Principles) to international contracts.

(1) These Principles are intended to lay down general rules for international commercial contracts.

(2) For the purpose of these Principles:
(a) a contract is international whenever it involves a choice between the laws of different countries;
(b) a contract is of a commercial nature whenever it is made by both parties in the course of their trade or profession.

(3) The Principles will apply when the parties have agreed that their contract be governed by them.

(4) The Principles may be applied
(a) when the parties have agreed that their contract be governed by "general principles of law", the "lex mercatoria" or the like;
(b) when the parties have not chosen any legal system or rules of law to govern their contract.

(5) These Principles may be used to interpret or supplement instruments of international uniform law.

COMMENTS

a. Scope of the Principles

The Principles open with the statement that they "are intended to lay down general rules for international commercial contracts" (paragraph 1). There are two basic reasons for limiting the scope of the Principles to "international" contracts only. First of all, it is when a given transaction presents factual links with more than one State that conflicts between the

respective national laws may arise, and this not only in the absence of any international legislation, but also where the applicable uniform laws are obscure as to their precise meaning or present true gaps. Secondly, given the considerable differences which continue to exist between the various countries or regions as to their economic and political structure and development, and the reluctance shown by most States to give up the peculiarities characteristic of their national legal system, it would be entirely unrealistic to attempt to lay down on a world-wide basis rules intended also to cover purely domestic transactions. After all, the Principles are not intended to unify existing national laws, but rather to enunciate principles and rules which are common to the existing legal systems or, where such a "common core" cannot be established, to select the solutions which seem best adapted to the special requirements of international commercial contracts.

As to the restriction to "commercial" contracts, this is in no way intended to take over the distinction traditionally made in some legal systems between "civil" and "commercial" parties and/or transactions, i.e. to make the application of the Principles dependent on whether the parties have the formal status of "merchants" ("commerçants"; "Kaufleute"). The idea is rather that of excluding from the scope of the Principles so-called "consumer transactions" which within the various legal systems are increasingly subjected to special rules aiming at the protection of the consumer, i.e. the party which enters into the contract otherwise than in the course of its trade or profession.

b. Criteria for the determination of the "international" and "commercial" character of contracts

1. "International" contracts (Article 1.1(2)(a))

There is a great variety of ways in which the international character of a contract may be defined. The solutions range from a reference to the difference of nationalities of the parties or to their domicile or residence in different countries, to the adoption of more general criteria such as the contract having "significant connections with more than one State", or the contract "involving a choice between the laws of different States".

By opting for this latter formula the Principles intentionally adopt a broad definition of "international" contracts which practically excludes only those cases where no international element at all is involved, i.e. where all the relevant elements of the contract in question are connected with only one country.

Illustration 1: Company A, a subsidiary of foreign mother company C, enters into a distributorship agreement with Company B for the sale of C's goods on the domestic market. The mere fact that the agreement concerns goods which have to be imported is sufficient for a choice between the laws of different countries to be involved and thereby to render it "international" in character for the purposes of the application of the Principles.

Also with respect to the distinction between consumer and non-consumer contracts the criteria adopted at both national and international level vary. While the formula used, for instance, by Article 2 CISG ("This Convention does not apply to sales: (a) of goods bought for personal, family or household use [...]") defines the consumer transactions for the purpose of excluding them, the formula used in the Principles and which is inter alia inspired by the 1987 English Consumer Protection Act would appear to be more appropriate for the positive definition of what is to be considered a non-consumer or "commercial" transaction.

Illustration 2: Company director A stays in a hotel during his/her business trip abroad and rents both a room for personal use and a conference room for a business meeting. In the first case he/she acts as a consumer, while in the second he/she acts "in the course of his/her trade or profession", with the consequence that only the second visit to the hotel can be considered to be commercial in character for the purposes of the application of the Principles.

Also with respect to the distinction between consumer and non-consumer contracts the criteria adopted at both national and international level vary. While the formula used, for instance, by Article 2 CISG ("This Convention does not apply to sales: (a) of goods bought for personal, family or household use [...]") defines the consumer transactions for the purpose of excluding them, the formula used in the Principles and which is inter alia inspired by the 1987 English Consumer Protection Act would appear to be more appropriate for the positive definition of what is to be considered a non-consumer or "commercial" transaction.

Illustration 2: Company director A stays in a hotel during his/her business trip abroad and rents both a room for personal use and a conference room for a business meeting. In the first case he/she acts as a consumer, while in the second he/she acts "in the course of his/her trade or profession", with the consequence that only the second visit to the hotel can be considered to be commercial in character for the purposes of the application of the Principles.

Also with respect to the distinction between consumer and non-consumer contracts the criteria adopted at both national and international level vary. While the formula used, for instance, by Article 2 CISG ("This Convention does not apply to sales: (a) of goods bought for personal, family or household use [...]") defines the consumer transactions for the purpose of excluding them, the formula used in the Principles and which is inter alia inspired by the 1987 English Consumer Protection Act would appear to be more appropriate for the positive definition of what is to be considered a non-consumer or "commercial" transaction.

Also with respect to the distinction between consumer and non-consumer contracts the criteria adopted at both national and international level vary. While the formula used, for instance, by Article 2 CISG ("This Convention does not apply to sales: (a) of goods bought for personal, family or household use [...]") defines the consumer transactions for the purpose of excluding them, the formula used in the Principles and which is inter alia inspired by the 1987 English Consumer Protection Act would appear to be more appropriate for the positive definition of what is to be considered a non-consumer or "commercial" transaction.

c. The Principles as rules of law governing the contract

1. Express choice by the parties (Article 1.1(3))

As the Principles represent a comprehensive system of rules of contract law which are common to the existing national legal systems and/or best adapted to the special requirements of international commercial transactions, there might be good reasons for the parties to choose them expressly as the rules applicable to their contract, in lieu of one or another particular domestic law.

Traditionally the freedom of choice of the parties in designating the law governing their contract is limited to the law of single States. Therefore, a party's reference to the Principles will as a rule only amount to an agreement to incorporate them into the contract, with the result that the proper law of the contract will still have to be determined separately on the basis of the rules of the private international law of the forum, while the Principles will bind the parties only to the extent that they do not affect the rules of the proper law from which the parties may not derogate.

The situation may be different if the parties agree to submit the disputes arising from their contract to arbitration. Arbitrators are not necessarily bound by a particular domestic law. This is self-evident if they are authorised by the parties to decide *ex aequo et bono* (see Article VII(2) of the 1961 Geneva Convention on International Commercial Arbitration; Art. 28(3) of the 1985 UNCITRAL Model Law on International Commercial Arbitration). But even in the absence of such an authorisation there is a growing tendency to permit arbitrators to base their decisions on principles and rules different from those adopted by State courts. This tendency has recently received a significant confirmation by the UNCITRAL Model Law, where it is expressly stated that "[t]he arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute" (Art. 28(1)), and that only "[f]ailing any designation by the parties the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable" (Art. 28(2)). Following this approach, the parties would be free to choose the Principles as the "rules of law" according to which the arbitrators shall decide the dispute, with the result that the Principles would apply to the exclusion of any particular national law.

2. The Principles applied as "lex mercatoria" (Article 1.1(4))

In practice, parties to an international commercial contract, especially in the field of the construction industry or of the exploitation of natural resources, quite frequently state that their contract shall be governed by "the general principles universally recognised by civilised nations", by "the usages and customs of international trade", by "the lex mercatoria", etc. Equally, arbitrators, irrespective of whether or not authorised to act as "amiable compositeurs", and unless the parties have expressly subjected their contract to a particular national law, instead of applying the law of a single State, increasingly base their decisions on principles and rules which are universally accepted and/or considered to be particularly suitable for international contracts.

Until now such reference by the parties, or recourse by the arbitral tribunals, to not better identified principles and rules of a supra-national or transnational character has been criticised inter alia because of the extreme vagueness and arbitrariness of a solution of this kind. The application of a comprehensive and well-defined set of rules such as the Principles instead of a solution worked out on an ad hoc basis could considerably reduce such uncertainty.

3. The Principles as a means of interpreting and supplementing existing international instruments (Article 1.1(5))

Any legislation, whether of international or national origin, raises questions concerning the precise meaning of its individual provisions. Moreover, such legislation is by its very nature unable to anticipate all the problems to which it will be applied. In applying domestic statutes one can rely on long established principles and criteria of interpretation to be found within each legal system. The situation is far more uncertain with respect to instruments which, although formally incorporated into the various national legal systems, have been prepared and agreed upon at international level.

According to the traditional view even in such cases recourse should be made to the principles and criteria provided in domestic law, be it the law of the forum or the law which, according to the relevant rules of private

international law, would be applicable in the absence of the uniform law.

Nowadays both State courts and arbitral tribunals tend more and more to abandon such a nationalistic or "conflictual" method and instead seek to interpret and supplement the international instruments according to autonomous and internationally uniform principles. This approach, which has even been expressly sanctioned in the most recent conventions (cf. Article 7 CISG), is based on the assumption that uniform law, even after its incorporation into the various national legal systems, only formally becomes an integrated part of the latter, whereas from a substantive point of view it does not lose its original character of a special body of law autonomously elaborated at international level and intended to be applied in a uniform manner throughout the world.

So far such autonomous principles and criteria for the interpretation and supplementing of the international instruments have had to be found each single time by the judges and arbitrators themselves on the basis of a comparative survey of the solutions adopted in the different national legal systems. The Principles could considerably facilitate their task in this respect.

Article 1.2

(Freedom of contract)

The parties are free to enter into a contract and to determine its content.

COMMENTS

a. Freedom of contract as a basic principle in the context of international trade

The principle of freedom of contract is of paramount importance in the context of international trade. The right of businessmen to decide freely to whom to offer their goods or services and from whom to be supplied, together with the possibility for them freely to agree on the terms of the single transactions, are the cornerstones of an open, market-oriented and competitive international economic

order.

b. Economic sectors without competition

There are of course a number of possible exceptions to the principle laid down in the present article.

As far as the freedom to conclude contracts with whomsoever is concerned, there are economic sectors which States may in the public interest decide to exclude from open competition. In such cases the goods or services concerned cannot but be requested from the only available supplier, which will usually be a public body, and which may or may not be under a duty to conclude a contract with whomsoever makes a request, within the limits of the availability of the goods or services.

c. Limitation of the parties' autonomy by mandatory rules

With respect to the freedom to determine the content of the contract, first of all the Principles themselves contain provisions from which the parties may not derogate (see Art. 1.5). Moreover, there are both public and private law rules of mandatory character enacted by States (e.g. anti-trust, exchange control or price laws; laws imposing special liability regimes or prohibiting grossly unfair contract terms, etc.), which may prevail over the rules contained in the Principles (see Art. 1.4).

Article 1.3

(Binding character of the agreement)

A contract validly entered into is binding upon the parties. It cannot be modified or terminated except by agreement or as otherwise provided under these Principles.

COMMENT

a. The principle "pacta sunt servanda"

This article lays down another basic principle of

contract law, i.e. the principle of pacta sunt servanda.

The binding character of the contractual agreement obviously presupposes that an agreement has actually been concluded by the parties and that the agreement reached is not affected by any ground of invalidity. The rules governing the conclusion of contractual agreements are laid down in Chapter 2 of the Principles, while the grounds of invalidity are dealt with in Chapter 3. Additional requirements for the valid conclusion of contracts may be found in the applicable national or international mandatory rules.

b. Exceptions

A corollary of the principle of pacta sunt servanda is that a contract may be modified or terminated whenever the parties so agree. Modification or termination without agreement are on the contrary the exception and can therefore be admitted only in the cases expressly provided for in the Principles. Cases of an imposed modification of the originally agreed terms of the contract are dealt with in Articles 3.8(2) and (3), 3.12 and 5.2.3, while cases of an imposed termination of the contract are indicated in Articles 5.1.23, 5.2.3, 6.1.5, 6.3.1 and 6.3.3.

Article 1.4

(Mandatory rules enacted by States)

Nothing in these Principles shall restrict the application of mandatory rules enacted by States which are applicable in accordance with the relevant rules of private international law.

COMMENTS

a. Prevalence of mandatory rules enacted by States

Given the particular nature of the Principles, they cannot be expected to prevail over mandatory rules enacted by States.

b. Mandatory rules applicable in case of a mere incorporation of the Principles into the contract

In cases where the parties' reference to the Principles is considered to be only an agreement to incorporate them into the contract, the Principles will first of all encounter the limit of the mandatory rules of the proper law of the contract, i.e. they will bind the parties only to the extent that they do not affect the rules of the proper law from which parties may not contractually derogate. In addition, the mandatory rules of the forum, and possibly also of third States, will likewise prevail, provided that they claim application whatever the law which governs the contract and, in case of rules of third States, there is a close connection between those States and the single contract.

c. Mandatory rules applicable if the Principles are the law governing the contract

Yet, even where, as may be the case if the dispute is brought before an arbitral tribunal, the Principles are applied as the law governing the contract, they cannot prejudice the application of those rules of domestic law which are mandatory irrespective of which law is applicable to the contract.

d. Recourse to the conflict of laws rules relevant in each single case

In view of the fact that both national courts and arbitral tribunals differ considerably in the way in which they determine the mandatory rules applicable to international commercial contracts, the present article deliberately refrains from entering into the merit of the various questions involved and refers for their solution to the conflict of laws rules which are relevant in each single case.

Article 1.5

(Exclusion or derogation by the parties)

The parties may exclude or derogate from any one or more of these Principles, except as otherwise provided in the Principles.

COMMENTS

a. The non-mandatory character of the Principles

The rules laid down in the Principles are in general of a non-mandatory character, i.e. the parties may in each single case either simply exclude their application or modify their content so as to adapt them to the specific needs of the kind of transaction involved.

b. The "pedagogical" role of the Principles

Some of the provisions of the Principles are of an eminently "pedagogical" character in that they are intended to assist the parties in identifying the main legal issues involved in the different types of contracts concerned and in suggesting possible solutions, rather than to provide hard and fast rules of an operative character. Examples of such provisions, which will therefore almost necessarily have to be adapted or further specified in each single case, are Articles 5.1.2 and 5.1.3 on the distinction between a duty of diligence and a duty to achieve a specific result, Article 5.1.11 on price, or Articles 5.2.2 and 6.1.5 on hardship and force majeure.

c. Exclusion or derogation may be express or implied

The exclusion of, or derogation from, one or more provisions of the Principles by the parties may be made either expressly or impliedly. The parties expressly exclude, or derogate from, the provision(s) of the Principles when they specifically indicate which provision(s) they intend to exclude or to modify. There is an implicit exclusion or derogation when the parties expressly agree on a contract term which is wholly or partially inconsistent with provisions of the Principles. To this effect it is irrelevant whether the contract term in

question has been stipulated individually or forms part of standard terms incorporated by the parties in their contract.

d. Mandatory provisions to be found in the Principles

A few provisions of the Principles are exceptionally of a mandatory character, i.e. it is expressly stated that parties may not exclude or derogate from them. This is the case of Article 1.7 on good faith and fair dealing, and of the provisions of Chapter 3 on substantive validity, except insofar as they relate or apply to mistake and to initial impossibility (see Art. 3.18).

Article 1.6 (Interpretation of the Principles)

In the interpretation of these Principles, regard is to be had to their international character and to the need to promote uniformity in their application and the observance of good faith in international trade.

COMMENTS

1. Interpretation of the Principles as opposed to the interpretation of the contract

The Principles, like any other legal text, be it of a legislative or contractual nature, may give rise to doubts as to the precise meaning to be given to their content. However, the interpretation of the Principles is different from the interpretation of the individual contracts to which they apply. Even if they are considered to bind the parties only at a contractual level, i.e. their application is made dependent on their incorporation into the individual contracts, they remain an autonomous set of rules elaborated with a view to being applied in a uniform manner to an indefinite number of contracts of different types entered into in the various parts of the world. As a consequence they have to be interpreted in a manner different from the terms of each individual contract. The rules for the interpretation of the latter are laid down in Chapter 4 of

the Principles. The present article instead deals with the manner in which the Principles are to be interpreted.

b. Regard to the international character of the Principles

The first criterion laid down by the present article for the interpretation of the Principles is that regard is to be had to their "international character". This means that their terms and concepts are to be interpreted autonomously, i.e. in the context of the Principles themselves and not by referring to the meaning which might traditionally be attached to them within a particular domestic law.

Such an approach becomes necessary if one considers that the Principles are the result of thorough comparative studies carried out by lawyers representing sometimes totally different cultural and legal backgrounds. When drafting the single provisions, these experts had to find sufficiently neutral language on which they could reach a common understanding. Even in the exceptional cases where terms or concepts peculiar to a given national law are employed, it was never intended to use them in their traditional meaning.

c. Uniformity of application

One of the aims of the Principles is that of providing a comprehensive system of rules in the field of contract law which, because of its well-balanced and cosmopolitan content, is equally acceptable to businessmen and/or judges and arbitrators throughout the world. It is therefore important that in practice they are to the largest possible extent interpreted and applied in the same way in the different countries.

d. Observance of good faith in international trade

Good faith is not only a yardstick for the behaviour of the parties in the course of the formation and the performance of individual contracts or for their interpretation (see Article 1.7 below), but is also a canon of interpretation of the Principles as such. There are cases where possible distortions in the application of the single provisions of the Principles are avoided by an express rule;

see, for example, Article 6.1.4(4) with respect to Article 6.1.4(3). Yet, also the other provisions of the Principles should be interpreted and applied in a manner consistent with the principle of good faith in international trade. Thus, for instance, in the determination of whether or not an additional or different term contained in an acceptance "materially" alters the terms of the offer for the purposes of Article 2.10(2), it might be appropriate not always to rely on formal and rigid criteria but to take into account whether the offeree under the circumstances of the case had reason to believe that the modifying term was acceptable to the offeror. Similarly, the fact that according to Article 5.2.3(2) in case of hardship the request for renegotiation does not in itself entitle the disadvantaged party to withhold performance, does not exclude that under special circumstances (e.g. a dramatic alteration of the equilibrium of the contract rendering performance on the part of the aggrieved party virtually impracticable) a suspension might be justified.

The reference to "good faith in international trade" first of all makes it clear that in the context of the Principles the principle of good faith may not be applied according to the standards ordinarily adopted within the different national legal systems. In other words, such national standards may be taken into account only to the extent that they prove to be commonly accepted at a comparative level. A further implication of the formula used is that the principle of good faith must be construed in the light of the special conditions and requirements of international trade. Current standards of business practice are far from being uniform in different parts of the world, so that a particular line of conduct, which may reasonably be expected from businessmen operating within the same region, could hardly be imposed on a party belonging to a region with a different economic and social structure.

Article 1.7

(Good faith and fair dealing)

(1) The formation, interpretation, performance and enforcement of a contract shall be in accordance with the principle of good faith and fair dealing in international trade.

(2) The parties may not exclude or derogate from the rule laid down in paragraph (1).

COMMENTS

a. "Good faith and fair dealing" as a general principle of the Principles

There are a number of provisions throughout the different chapters of the Principles which constitute a direct or indirect application of the principle of good faith and fair dealing: see, for instance, Articles 2.3(2)(b), 2.14, 2.15, 2.16(3), 2.19, 3.3, 3.6, 3.8, 4.1(2), 4.2(2), 4.5, 4.7, 5.1.2, 5.1.5, 5.1.6, 5.1.10, 5.1.23(2), 5.1.24(1), 5.2.3(3)(4), 6.1.2, 6.1.5, 6.2.2(b)(c), 6.4.8, 6.4.13 and 6.4.14. This means that good faith and fair dealing may be considered to be one of the "general principles" or basic ideas of the Principles. By expressly stating that all the different stages in the life of the contract, from its formation to the performance and enforcement of the single obligations arising out of it, are to be governed by the principle of good faith and fair dealing, the present article makes it clear that even in the absence of special provisions in the Principles the parties' behaviour must always conform to good faith and fair dealing.

Illustration 1

Buyer A is granted by Seller B an extension of twenty-four hours of the time fixed for acceptance. When A the following day tries to contact B to communicate its acceptance, nobody answers the telephone, nor is a telephone answering machine connected which can take the message. If B had given A assurances that A would always be able to leave a message, either with an employee or on an answering machine, B could not in good faith object that A did not accept the offer in time.

Illustration 2

A contract for the supply and installation of a special production line contains a provision according to which Seller A is obliged to communicate to Purchaser B any improvements it makes to the technology of that line. After a year B finds out about an important improvement of which it was not informed. When B complains to A, A replies that the production of that particular type of production line is no longer its responsibility but that of Company C, a wholly-owned affiliated company of A, specifically set up to take over this task. B may nevertheless claim that A is in breach, since A may not in good faith invoke the separate entity of C to avoid its contractual obligations vis-à-vis B.

Illustration 4

Contractor A discovers during the performance tests of the works, that some of its components are defective. It immediately offers Purchaser B to cure the defects at its own expense, and to compensate B for any additional loss it may have suffered in the meantime. B does not reply but allows the personnel sent by A to enter the premises and to begin repairs. B should no longer be permitted to terminate the contract, since having implicitly accepted A's offer to cure, it would be against good faith to resort to a remedy which would deprive A of the possibility of completing its attempt to cure the defects.

b. "Good faith and fair dealing in international trade"

As to the meaning of the reference to the principle of "good faith and fair dealing in international trade", the same explanations apply as those given above under Article 1.6.

Illustration 1

In accordance with the terms of a contract for the construction of an industrial plant, Contractor A, after the completion of the plant, provides a training course to teach the employees of Purchaser B how to operate the plant. Nothing is said in the contract about the qualifications which trainees must possess. During the course some of B's employees, who lack the necessary technical skills, have difficulties in following the programme. A refuses to suspend the course and to start it all over again with other employees. B cannot complain, as it was up to it to make

sure that the employees it designated for the course were sufficiently qualified.

Illustration 2

The same contract as under Illustration 1, but with the training course held at A's factory. In teaching B's employees, A follows the same standard course it uses for all plants of this type. Back home, B's employees have great difficulties in operating the plant properly. B is right in complaining, as A should have taken into account the operational conditions which B's employees would later encounter in their country of origin.

c. The mandatory nature of the principle of good faith and fair dealing

The observance of good faith and fair dealing in the formation, interpretation, performance and enforcement of a contract is not only a general principle of the Principles: it is also a fundamental one, in the sense that parties may not contractually exclude it. As to specific applications of the general prohibition to exclude the operation of the principle of good faith and fair dealing between the parties, see Articles 3.18, 6.4.13 and 6.4.14.

Article 1.8

(Courses of dealing and Usages)

(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

(2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

COMMENTS: The present article lays down the principle according to which the parties are in general bound by courses of dealing and usages which meet the requirements set forth in the article. Furthermore, these same requirements must be met by courses of dealing or usages for them to be applicable in the cases and for the purposes expressly indicated in the Principles (i.e. Articles 2.5(3) (determination of the mode of acceptance), 5.1.14(1) (determination of the form of payment), 4.3 (interpretation of the contract or of single statements or other conduct of the parties) and 5.1.2 (determination of implied obligations)).

a. Courses of dealing and usages in the context of the Principles

The present article lays down the principle according to which the parties are in general bound by courses of dealing and usages which meet the requirements set forth in the article. Furthermore, these same requirements must be met by courses of dealing or usages for them to be applicable in the cases and for the purposes expressly indicated in the Principles (i.e. Articles 2.5(3) (determination of the mode of acceptance), 5.1.14(1) (determination of the form of payment), 4.3 (interpretation of the contract or of single statements or other conduct of the parties) and 5.1.2 (determination of implied obligations)).

b. Practices established between the parties

A course of dealing or practice established between the parties to a particular contract is automatically binding, except where the parties have expressly excluded its application. When a particular practice can be deemed to be "established" between the parties will of course depend on the circumstances of the case, but the behaviour shown on the occasion of only one previous transaction between the parties will normally not suffice.

Illustration 1

Supplier A has repeatedly accepted claims from Customer B for quantitative or qualitative defects of the goods even two weeks after their delivery. Faced with yet another notice of defects given by B only after a fortnight, A cannot object since the late notice amounts to a practice established between it and B, which will be binding on it.

c. Agreed usages

By stating that the parties are bound by usages to which they have agreed, paragraph (1) of the present article merely applies the general principle of freedom of contract laid down in Article 1.2. Indeed, the parties may either negotiate all the terms of their contract, or for certain aspects simply refer to other sources including usages. The

parties may stipulate the application of any usage including a usage developed within a trade sector to which neither party belongs, or a usage relating to a different type of contract. It is even conceivable that the parties agree on the application of what are sometimes misleadingly called usages, i.e. a set of rules issued by a particular trade association under the title of "Usages", but which reflect only in part established general lines of conduct.

d. Other applicable usages

Paragraph (2) lays down the criteria for the identification of usages applicable in the absence of a specific agreement by the parties. In the first instance the usage must be one "of which the parties knew or ought to have known". This requirement is intended to make sure that, at least as a rule, there will be a link between the application of a particular usage and the parties' intention. Furthermore, the usage must be one "which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned". The fact that the usage must be regularly observed within the particular trade to which both parties belong (e.g. wheat trade; trade with industrial machinery, etc.) and for contracts of the type involved (e.g. contracts for the construction of industrial works; different kinds of banking contracts, etc.) is a condition for the application of any usage, be it at international or merely at national or local level. The additional requirement that the usage concerned be widely known in international trade is intended to avoid usages developed for and confined to domestic transactions being invoked also in transactions with foreigners.

Illustration 1

Shipbuilders from country X may not rely on usages regularly observed with domestic customers when dealing with customers from other countries, even if such usages are so widely known within country X that the foreign party either knew or at least should have been aware of them.

Only exceptionally may usages of a purely local or national origin be applied without any reference thereto by the parties. Thus, usages existing at certain commodity exchanges, trade exhibitions or ports, should be applicable provided that they are regularly followed with respect to

foreigners also. Another exemption concerns the case of a businessperson who in a foreign country has already entered into a number of similar contracts and should therefore be bound by the usages established within that country for such contracts.

Illustration 2

Terminal operator A invokes a particular usage of the port where it is located vis-à-vis a foreign carrier. The latter may not object that the usage is of a local nature if the former can prove that the usage in question has been regularly observed with respect to all customers, irrespective of their place of business and of their nationality.

Illustration 3

Sales agent A from country X is confronted with a request by one of its customers in country Y for the customary 10% discount upon payment of the price in cash. It may not object to the application of such a usage because of its being restricted to country Y if it has been doing business in that country for a certain period of time.

e. Usages prevail over Principles

Both courses of dealing and usages, once they are applicable in a given case, prevail over conflicting provisions contained in the Principles. The reason for this is that they bind the parties as implied terms of the contract as a whole or of single statements or other conduct on the part of one of the parties. As such, they are superseded by any express term stipulated by the parties, but, in the same way as the latter, they prevail over the Principles, the only exception being those provisions which are specifically declared to be of a mandatory character.

Article 1.9

(Notice)

(1) Notice given pursuant to these Principles has effect if given by any means, whether in writing or otherwise, appropriate to the circumstances.

(2) If pursuant to these Principles one party gives notice to the other because of the other's non-performance or because such non-performance is reasonably anticipated by the first party and the notice is properly dispatched or given, a delay or error in the transmission of the notice or its failure to arrive does not prevent it from having effect.

(3) In any other case, notice does not have effect unless and until it reaches the person to whom it is given.

(4) For the purpose of this article, a notice "reaches" the person to whom it is given when it is made orally to that person, delivered by any other means to it at its place of business or mailing address or, if it does not have a place of business or mailing address, at its habitual residence.

(5) For the purpose of this article, "notice" includes a declaration, demand, request or any other form of communication.

COMMENTS

a. Form of notices

This article first of all lays down the principle that notices or any other kind of communication (declarations, demands, requests, etc.) required by single provisions of the Principles are not subject to any particular requirement as to form, but may be given by any means appropriate to the circumstances. Which means are appropriate will depend on the actual circumstances of the case, in particular on the availability and the reliability of the various modes of communication, and the importance and/or urgency of the message to be delivered. Thus, if the postal service is unreliable, it might be more appropriate to use telex or fax for a communication which has to be made in writing, or the telephone if an oral communication is sufficient. In choosing the means of communication the sender must as a rule take into account the situation which exists in both

its and the addressee's country.

b. Dispatch principle for cases of non-performance

Whenever a party has to give notice in order to preserve its rights in cases of an actual or anticipated non-performance of the other (see Articles 6.1.4 (notice allowing an additional period of time for performance); 6.2.1 and 6.2.2 (request for specific performance); 6.3.2 (notice of termination); 6.3.4 (demand of assurance of due performance)), it would not be fair to place the risk of loss, mistake or delay in the transmission of the message on the former. Consequently, paragraph (2) of the present article states that in such cases, if the notice is properly dispatched or given, a delay or error in the transmission of the notice or its failure to arrive does not prevent it from having effect.

Illustration 1

Facing a fundamental breach by its Sales Agent A, Principal B intends to terminate the agency contract. B sends A a letter to this effect by fax. The fax is received by A, but the last sentence containing the statement of termination is illegible. The contract is nonetheless terminated since the risk of a faulty transmission of B's notice is on A.

c. Receipt principle in all other cases

In all other cases notices, declarations, demands, requests or any other form of communication between the parties, the so-called "receipt" principle applies, i.e. they do not have effect unless and until they reach the person to whom they are given. For some communications this is expressly stated in the provisions dealing with them (see Articles 2.2(1) (offer); 2.2(2) (withdrawal of offer); 2.4 (rejection); 2.5 (acceptance); 2.7(1) (instantaneous communication fixing period for acceptance) and 2.9 (withdrawal of acceptance). The purpose of paragraph (3) of the present article is to indicate that the same will also be true in the absence of an express statement to this effect (see e.g. Articles 3.12 (declaration of willingness to perform contract as understood by party entitled to avoid); 3.13 (notice of avoidance); 5.1.22 (notice of the grant or refusal of permission); 5.2.3 (request for renegotiations in cases of hardship); and 6.1.5 (notice of impediment and its effect on the party's ability to

perform)).

d. "Reaches"

In the cases where the receipt principle applies, it is important to determine with precision when the communications in question "reach" the addressee. In an attempt to define the concept, paragraph (4) of the present article distinguishes between oral communications and any other form of communication. The former "reach" the addressee if they are made personally to it or to another person authorised by it to receive them. The latter "reach" the addressee as soon as they are delivered either to the addressee personally or to its place of business or mailing address or, if it does not have a place of business or a mailing address, to its habitual residence. The single communication in question need not come into the hands of the addressee. It is sufficient that it is placed in the mailbox or handed over to an employee of the addressee authorised to accept it.

Article 1.10

(Court and arbitral tribunal)

In these Principles "court" includes arbitral tribunal.

COMMENTS

The importance of the Principles for the purpose of the settlement of disputes by means of arbitration has already been stressed (see above comments to Article 1.1). In order to avoid heaviness in language, however, in the text of the Principles only the term "court" is used on the understanding that it covers both state courts as well as arbitral tribunals.