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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

WORKING GROUP FOR THE PREPARATION OF PRINCIPLES
FOR INTERNATIONAL COMMERCIAL CONTRACTS

Chapter 1

GENERAL PROVISIONS

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CHAPTER 1

General Provisions

Article 1.1
(Purpose and scope of the Principles)

These Principles set forth general rules for international commercial contracts.

COMMENTS

a. Purpose of the Principles

The Principles open with the statement that they "set forth general rules for international commercial contracts" (Article 1.1).

The purpose of the Principles is thus that of providing a comprehensive system of rules intended to be applied to international commercial contracts.

The rules contained in the Principles relate to the most important aspects of general contract law, and range from statements of principle, such as those of freedom of contract (see Article 1.3) and of the binding character of the contractual agreement (see Article 1.4), to more detailed provisions, such as those on the avoidance of contracts for mistake (Articles 3.2 *et seq.*) or on hardship (Articles 5.2.1 *et seq.*).

b. Scope of the Principles

1. *"International" contracts*

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. Moreover, given the considerable differences which continue to exist between the various countries or regions of the world as to their economic and political structure and development, the legal regimes of purely domestic contracts still vary considerably from country to country; on the contrary, with respect to international transactions States, also in view of the necessity to ensure that their own nationals have the same opportunities enjoyed by their foreign competitors, are in general more reluctant to impose their own law and more prepared to grant contracting parties the widest possible autonomy in regulating their relationships.

There is a great variety of ways in which the international character of a contract may be defined. The solutions adopted in both national and international legislation 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", "involving a choice between the laws of different States", or "affecting the interests of international trade".

The Principles do not expressly opt for any of these criteria. The assumption, however, is that the concept of "international" contracts should be given the broadest possible interpretation, so as ultimately to exclude 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. Yet even in this latter case parties may, if they so desire, agree to apply the Principles to their contract, subject to the mandatory rules of their domestic law.

2. *"Commercial" contracts*

The restriction to "commercial" contracts is in no way intended to take over the distinction traditionally made in some legal systems between "civil" and "commercial" parties and/or transactions, i.e. to make the application of the Principles dependent on whether the parties have the formal status of "merchants" ("commerçants"; "Kaufleute"). 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 mostly of mandatory character 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.

Also with respect to the distinction between consumer and non-consumer contracts the criteria adopted at both national and international level vary. The Principles do not provide any express definition, but the assumption is that the concept of "commercial" contracts should be understood in the broadest possible way, so as to include not only trade transactions for the supply or exchange of goods or services, but also other types of economic transactions, such as investment and/or concession agreements, contracts for legal services, etc.

Article 1.2

(Application of the Principles)

(1) The Principles shall be applied when the parties have agreed that their contract shall be governed by them.

(2) 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; or

(b) when the parties have not chosen any law to govern their contract.

(3) The Principles may provide a solution to the issue raised when it proves impossible to establish the relevant rule of the applicable law.

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

COMMENTS

a. The Principles as rules of law governing the contract

1. *Express choice by the parties (Article 1.2(1))*

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 act as "amiable compositeurs". 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 *1985 UNCITRAL Model Law on International Commercial Arbitration*, 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, subject only to the application of those rules of domestic law

which are mandatory irrespective of which law is applicable to the contract (see *infra* Article 1.5).

Parties who wish to adopt the Principles to the exclusion of any domestic law, are therefore well advised to include also an arbitration agreement in their contract, together with the reference to the Principles.

Also under the *1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States*, the ICSID Arbitration Tribunal shall decide the disputes in accordance with the "rules of law as may be agreed by the parties" (Article 42(1)). If in disputes falling under this Convention the parties were to choose the Principles, these might even be applicable to the exclusion of any domestic rule of law.

2. *The Principles applied as "lex mercatoria" (Article 1.2(a))*

Parties to international commercial contracts, who cannot agree on the choice of a particular domestic law as the law applicable to their contract, quite frequently state that it shall be governed by the "general principles of law", 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 made an express choice of 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.

Under the *1965 ICSID Convention* the Arbitration Tribunal is even bound to apply, in the absence of any express choice of law by the parties, the law of the contracting State which is party to the dispute together with "such rules of international law as may be applicable" (Article 42(1)).

Until now such reference by the parties, or recourse by arbitrators, 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 arbitariness of a solution of this kind. The application of a comprehensive and well-defined set of rules

such a the Principles instead of a solution worked out on an *ad hoc* basis could considerably reduce such uncertainty.

3. *The Principles as a substitute for the domestic law otherwise applicable (Article 1.2(3))*

Yet, the Principles may become relevant even where the contract is governed by a particular domestic law. This is the case whenever with respect to a specific issue it proves impossible to establish the relevant rule of that particular domestic law and a solution can be found in the Principles. The reasons for the impossibility to settle the issue on the basis of the applicable law generally lies in the rudimentary character of the legal sources and/or the difficulty of having access to them.

Recourse to the Principles as a substitute for the domestic law otherwise applicable is of course to be seen as a last resort; on the other hand it may be justified not only in case of an absolute impossibility to establish the relevant rule of the applicable law, but also whenever the research would involve disproportionate efforts and/or costs. The current practice of courts in such situations is that of applying the *lex fori*; recourse to the Principles would have the advantage of avoiding the application of a law which in most cases will favour one of the parties.

4. *The Principles as a means of interpreting and supplementing existing international instruments (Article 1.2(4))*

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 o 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 of the *1980 UN Convention on Contracts for the International Sale of Goods*), 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 1.3
(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 businesspeople 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 1.4

(Binding character of the agreement)

A contract validly entered into is binding upon the parties. It can only be modified or terminated in accordance with its terms or 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 cases where it is in conformity with the terms of the contract or where it is expressly provided for in the Principles (see Articles 3.8(2), 3.8(3), 3.12, 5.1.8, 5.1.24, 5.2.3, 6.1.5, 6.3.1 and 6.3.3).

c. Effects on third persons not dealt with

While as a rule a contract produces effects only between the parties, there may be cases where it affects also third persons. Thus, under some domestic laws a seller may be under a contractual duty to protect the physical integrity and property not only of the buyer but also of the accompanying persons during their presence on the seller's premises; equally, the consignee of a cargo may be entitled to sue the carrier for a breach of a contractual duty the carrier undertook in its contract of carriage with the sender. By stating the principle of the binding force of the contract between the parties, the present article does not intend to prejudice any effect which under the applicable law the same contract may have vis-à-vis third persons.

Article 1.5
(Mandatory rules)

Nothing in these Principles shall restrict the application of mandatory rules, whether of national, international or supranational origin, which are applicable in accordance with the relevant rules of private international law.

COMMENTS

a. Prevalence of mandatory rules

Given the particular nature of the Principles, they cannot be expected to prevail over mandatory rules, whether of national, international or supranational origin. In other words, as a rule mandatory provisions, whether enacted by States autonomously or to implement international conventions, or adopted by supranational organisations, cannot be overruled by the Principles.

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 rules of private international law 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 rules of private international law which are relevant in each single case.

Article 1.6

(Exclusion or modification by the parties)

The parties may exclude or derogate from or vary the effect of any of these Principles except as otherwise indicated herein.

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. Exclusion or modification may be express or implied

The exclusion or modification of 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 modification 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.

If the parties expressly agree on the application of only some of the chapters of the Principles (e.g. "As far as the performance and non-performance of this contract is concerned, the UNIDROIT Principles shall apply"), it is presumed that the chapters concerned will be applied together with the general provisions of Chapter 1.

d. Mandatory provisions to be found in the Principles

A few provisions of the Principles are of a mandatory character, i.e. their importance in the system of the Principles is such, that parties should not be permitted to dispose of them as they wish. It is true that given the particular nature of the Principles the non-observance of this precept may remain without any consequence. On the other hand, it should be noted that the provisions in question sanction standards of behaviour and rules which are of a mandatory character also under most domestic laws.

The provisions of the Principles which are mandatory are normally expressly indicated as such. This is the case of Article 1.8 on good faith and fair dealing and of the provisions of Chapter 3 on substantive validity, except in so far as they relate or apply to mistake and to initial impossibility (see Art. 3.18). Exceptionally the mandatory character of a provision is only implicit and follows from the content and purpose of the provision itself. This is the case of Article 1.7 and of Articles 6.4.13 and 6.4.14.

Article 1.7

(Interpretation and supplementation of the Principles)

(1) 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.

(2) Issues within the scope of these Principles but not expressly settled by them are so far as possible to be settled in accordance with the ideas underlying the Principles.

COMMENTS

a. 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 businesspeople 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. Supplementation of the Principles

A number of issues which would fall under the scope of the Principles are not settled expressly by them. The need to promote uniformity in the application of the Principles implies that in case of such gaps a solution should be found, whenever possible, within the system of the Principles itself before resorting to domestic laws.

The first attempt to be made is to settle the unsolved question by means of an analogical application of specific provisions. Thus, the rule laid down in Article 2.12 may be applied also in the case where both parties agree that the contract should not be concluded until there is agreement on specific matters or in a specific form. Similarly, Article 5.1.13 on place of performance should govern also restitution. If the issue cannot be solved by a mere extension of specific provisions dealing with analogous cases, recourse has to be made to "the ideas underlying the Principles", i.e. to the principles and rules which because of their general character may be applied on a much wider scale. Some of these fundamental ideas or principles are expressly stated in the Principles (see, e.g., Arts. 1.3, 1.4, 1.6 and 1.8). Others must be extracted from specific provisions, i.e. the particular rules therein contained must be analysed in order to see whether they can be considered as an expression of a more general principle, and as such capable of being applied also to cases different from those specifically regulated.

Article 1.8

(Good faith and fair dealing)

(1) Each party must act in accordance with good faith and fair dealing in international trade.

(2) The parties may not exclude or limit this duty.

COMMENTS

a. "Good faith and fair dealing" as a fundamental idea underlying 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, 5.1.3, 5.1.10, 5.1.12, 5.1.24(2), 5.1.25(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 fundamental ideas underlying the Principles. By stating in general terms that each party must act in accordance with 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 throughout the life of the contract, including the negotiation process, must 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. B could not in good faith object that A did not accept the offer in time since it was up to B to make sure that, at least during the normal office hours, messages could be received by an employee or left on the answering machine.

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 3

Under a distributorship agreement distributor A is entitled to deliveries within the limits of those needed for a reasonable inventory for A's current sales, while manufacturer B has an option to end the contract with a 30-day cancellation notice. Learning that manufacturer B is about to exercise the option to end the contract, A places an order for goods sufficient to meet estimated needs for six months. B is not liable for refusing to fill A's order since A's order for goods for six months was not made in good faith.

Illustration 4

Exporter A, knowing that importer B is in financial difficulties, grants B the right to pay the price of the goods in four instalments over a period of 24 months after the conclusion of the contract. After the payment of the first two instalments A, under the pretext of B's persistent financial difficulties, asks B for adequate assurance of payment of the remaining two instalments and meanwhile withholds its own performance. B may reject A's request as contrary to good faith and hold A liable for breach since A knew of B's difficulties when entering into the contract and the situation has not worstened since then.

b. <u>"Good faith and fair dealing in international trade"</u>

The reference to "good faith and fair dealing in international trade" first of all makes it clear that in the context of the Principles the two concepts are not to be applied according to the standards ordinarily adopted within the different national legal systems. In other words, such domestic standards may be taken into account only to the extent that they prove to be generally accepted at a comparative level. A further implication of the formula used is that good faith and fair

dealing must be construed in the light of the special conditions of international trade. Standards of business practice may indeed vary considerably from one trade sector to another, and even within a given trade sector they may be more or less stringent depending on the external conditions in which the enterprises operate, their size and technical skill, etc.

Illustration 1

Constructor A, when asked to compensate Owner B for the loss of profit suffered as a result of the delay in completing the plant, invokes a provision contained in the standard terms incorporated in the contract which excludes any liability on the part of the constructor for consequential damages. B may not object that it could not reasonably have expected such a provision in the standard terms and that it therefore is not bound by it, if A can prove that in the construction industry such a provision is common practice.

Illustration 2

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 3

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 parties' duty to act in accordance with good faith and fair dealing is of such a fundamental nature that the parties may not contractually exclude or limit it. As to specific applications of the general prohibition to exclude or limit the principle of good faith and fair dealing between the parties, see Articles 3.18, 6.4.13 and 6.4.14.

On the other hand nothing prevents parties from providing in their contract the duty to observe more stringent standards of behaviour.

Article 1.9
(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 bound by a usage that is widely known to, and regularly observed in international trade by, parties in the particular trade concerned except where the application of such a usage would be unreasonable.

COMMENTS

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), 5.1.15(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 1.3. 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. The fact that the usage must be "widely known to, and regularly observed [...] by, parties in the particular trade concerned" is a condition for the application of any usage, be it at international or merely at national or local level. The additional qualification "in international trade" is intended to avoid usages developed for and

confined to domestic transactions being invoked also in transactions with foreigners.

Illustration 1

Real estate agent A invokes a particular usage of the profession in its country vis-à-vis a foreign customer. The latter may object to its application in view of the fact that the usage is of local nature and relates to a trade which is eminently domestic.

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 port is normally used by foreigners and 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. Application of usage unreasonable

A usage may be regularly observed by the generality of businesspeople in a particular trade sector but still be unreasonable in content. The reason for this may lie in the oligopolistic structure of the respective markets and/or in a particular way of understanding business relations. Such unreasonable usages are not binding upon the

parties, notwithstanding the fact that they meet all the other requirements for their application in a given case.

f. 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 1.10
(Notice)

(1) Where notice is required it may be given by any means appropriate to the circumstances.

(2) A notice is effective when it reaches the person to whom it is given.

(3) For the purpose of paragraph (2) a notice "reaches" a person when given to the person orally or delivered to that person's principal place of business or mailing address.

(4) 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, fax or other forms of electronic communication 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. Receipt principle

With respect to all kinds of notices the Principles adopt the so-called "receipt" principle, 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 (2) 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 2.8 (declaration by addressee of a late acceptance); 2.10 (objection to a modified acceptance); 3.12 (declaration of willingness to perform contract as understood by party entitled to avoid); 3.13 (notice of avoidance); 5.1.23 (notice of the grant or refusal of permission); 5.2.3 (request for renegotiations in cases of hardship); 6.1.4 (notice allowing an additional period of time for performance); 6.1.5 (notice of impediment and its effect on the party's ability to perform); 6.2.1 and 6.2.2 (request for specific performance); 6.3.2 (notice of termination); and 6.3.4 (demand of assurance of due performance)).

c. Dispatch principle to be expressly stipulated

The parties are of course always free to stipulate expressly for the application of the dispatch principle. This may be appropriate in particular with respect to the notices a party has to give in order to preserve its rights in cases of an actual or anticipated non-performance of the other, when it would not be fair to place the risk of loss, mistake or delay in the transmission of the message on the former. This is all the more true when one considers the difficulties which may arise at international level in proving effective receipt of a notice.

d. "Reaches"

In the context of the receipt principle it is important to determine with precision when the communications in question "reach" the addressee. In an attempt to define the concept, paragraph (3) 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. The single communication in question need not come into the hands of the addressee. It is sufficient that it is handed over to an employee of the addressee authorised to accept it, or placed in the mailbox, or received by the telex, fax or computer of the addressee.

Article 1.11
(Definitions)

In these Principles

-"court" includes arbitration tribunal;

- if a party has more than one place of business the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract.

COMMENTS

a. Courts and arbitration tribunals

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 1.2). 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.

b. Party with more than one place of business

For the purpose of the application of the Principles a party's place of business becomes relevant in a number a cases: as the place for the delivery of notices (Article 1.10(3)); for a possible extension of the time of acceptance because of a holiday falling on the last day (Article 2.7(2)); as the place of performance (Article 5.1.13); and for the determination of which party should apply for public permission (Article 5.1.22(a)).

With reference to a party with multiple places of business (normally a central office and various branch offices) the present article lays down the rule that the relevant place of business should be considered that which has the closest relationship to the contract and to its performance. Nothing is said with respect to the case where the place of the conclusion of the contract and that of the performance differ, but in such a case it is submitted that it is the latter which is the more relevant one. In the determination of which place of business has the closest relationship to a given contract and to its performance, regard is to be had to the circumstances known to or contemplated by both parties at any time before or at the conclusion of the contract. Facts known only to one of the parties or of which the parties became aware only after the conclusion of the contract cannot be considered.