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for the preparation of a Legal Guide
on Contract Farming

Third Meeting
Rome, 3 – 6 March 2014

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

Rome, 3 – 6 March 2014

(Prepared by the UNIDROIT Secretariat)

Table of contents

Overview of the 3rd Meeting of the Working Group

1. The UNIDROIT Working Group for the preparation of a *Legal Guide on Contract Farming*, set up pursuant to a decision taken by the UNIDROIT Governing Council at its 91st session (Rome, 7-9 May 2012),[1] held its third meeting in Rome from 3 to 6 March 2014. The Food and Agriculture Organization (FAO), partner and co-author of the Guide, hosted the sessions for the second day of the Working Group; sessions for the remaining days were hosted by UNIDROIT.

2. The UNIDROIT Secretary-General opened the 3rd meeting of the Working Group by welcoming all participants and he thanked them for their contributions. The Secretary-General acknowledged the strong support by the partner international organizations based in Rome, and he highlighted the grant awarded by IFAD and administered by FAO to support this project for activities in 2014. Ms. Eugenia Serova, Director of the Rural Infrastructure and Agro-Industries Division of FAO, opened Tuesday's session at FAO by welcoming participants and emphasizing that contract farming is a multifaceted topic which requires a multidisciplinary approach, including the legal aspects covered by this Guide.

3. The Working Group for this meeting was composed of the following members: Professor Fabrizio Cafaggi (National School of Administration/ University of Trento, Italy); Professor Marcel Fontaine (emeritus, Catholic University of Louvain Law School, Belgium); Professor Henry Gabriel (Elon University School of Law, Greensboro, USA); Professor A. Bryan Endres (University of Illinois, USA); Professor Paripurna P. Sugarda (University of Gadjah Mada Faculty of Law, Yogyakarta, Indonesia); Professor Kassia Watanabe (Fluminense Federal University, Brazil). The Food and Agriculture Organization (FAO) participated as partner organisation and co-author of the Guide. The following intergovernmental organisations were also represented: the International Fund for Agricultural Development (IFAD) and the World Bank / International Finance Corporation. Observers representing professional and trade interests, i.e., the World Farmers' Organization (WFO), and from one agribusiness company likewise attended.[2] The meeting was chaired by Professor Henry Gabriel, member of the UNIDROIT Governing Council.

4. The Working Group used the following documents as a basis for its deliberations: revised draft Introduction, prepared by the UNIDROIT Secretariat and FAO (UNIDROIT 2014 – Study 80 A – Doc. 8); revised draft Chapter I – Parties to the Contract, prepared by the UNIDROIT Secretariat (UNIDROIT 2014 – Study 80 A – Doc. 9); draft Chapter II – Contract Form and Formation, prepared by Professor Bryan Endres (UNIDROIT 2014 – Study 80 A – Doc. 10); revised draft Chapter III – Obligations of the Parties, prepared by Professor Marcel Fontaine and Professor Henry Gabriel (UNIDROIT 2014 – Study 80 A – Doc. 11); draft Chapter IV Part I – Excuses for Nonperformance, prepared by the UNIDROIT Secretariat (UNIDROIT 2014 – Study 80 A – Doc. 13); draft Chapter IV Part II – Remedies for Breach, prepared by Professor Cafaggi and Professor Iamiceli (UNIDROIT 2014 – Study 80 A – Doc. 12); draft Chapter V – Duration, Renewal and Termination, prepared by Professor M. Joachim Bonell (UNIDROIT 2014 – Study 80 A – Doc. 14); draft Chapter VI – Applicable Law and Dispute Resolution, prepared by Professor Paripurna P. Sugarda and the UNIDROIT Secretariat (UNIDROIT 2014 – Study 80 A – Doc. 15).

Broad Comments

5. *Organization and Future Work*: Prior to the 4th meeting of the Working Group in late 2014, significant work will be undertaken to harmonize the various chapter drafts. In particular, the UNIDROIT Secretariat will work with the drafters of Chapters III and IV to ensure that these chapters complement each other effectively and fit within the structure and goals of the Guide. Under the current schedule, up until the end of August 2014, the Secretariat will work with the drafters to undertake a holistic revision of the set of chapters and incorporate feedback from the Working Group.

1 UNIDROIT 2012 – C.D. (91) Misc. 3: Summary of the conclusions.
2 See the list of participants reproduced in Appendix to this report.

In September 2014, the Secretariat will distribute preliminary revised drafts to the Working Group for initial comments. In October 2014, the Secretariat will incorporate initial comments and circulate the draft versions to be considered during the 4th meeting of the Working Group, tentatively planned for November 2014. Also during 2014, there will be several consultation events. In addition to the event in Buenos Aires in late March, events are tentatively planned in Bangkok, Nairobi and Rome. The Secretariat will also incorporate feedback from these events into the Guide.

6. *Terminology:* Throughout the text, the terminology within and across chapters must be harmonized. One example which was highlighted in the Introduction is that the term *farmer* should be uniformly replaced with *producer*. Similarly, the use of *supply chain* and *value chain* throughout the Guide must be checked. The use of pronouns in the text must also be standardized; here the Guide will follow standard UN style which utilizes the generic pronoun, *it*, or else just refers to the contractor or producer as such.

7. *Sui Generis Contract:* It was reminded that references to sales contracts and or services contracts in the chapters of the Guide should not be used to shape the discussion based this distinction. Furthermore, it was noted that there may be policy considerations in describing these contracts as primarily service or sales contracts.

8. *Role of Commodities*: It was suggested that the Guide could further highlight how the type of commodity affects the terms of the contract, the obligations of the contract, and the form of the contract.

Chapter-Specific Comments

Introduction

General Comments

9. *Definition of contract farming*: The Working Group discussed whether the definition of contract farming in this Guide should include language about *control* by the contractor, or *guidance* by the contractor, or another term. The Group reached general agreement that control may be seen as too strong a word for the definition (for policy reasons), and it may be necessary to find a slightly different intermediate term (between *guidance* and *control*). Also, as a general matter for the scope of the Guide, it was agreed that the scope will exclude the possibility that the contractor has rights to the land/production area. It was however noted that there are certain cases and commodities, such as forestry products, where this could actually be common practice. The Group also discussed the issue of to what extent may fishing be included within the Guide's scope for contract farming, but it was noted that here, the guidance element is often missing.

10. *Adding content*: The Group discussed whether to bring various additional elements into the Introduction. The goal of such additions would be to introduce topics that recur frequently in subsequent chapters (for example, a starter section which introduces inputs). However, the general consensus within the Group was that the Introduction should be kept brief and simple for the reader. It was suggested that the Introduction would benefit from the inclusion of a few more illustrative examples.

Paragraph-Specific Comments

11. *Preface* and *Section I - General Introduction to contract farming*: It was suggested to add the qualifier *legal* to the second sentence of **para. 1** for clarity, saying instead *advice on legal issues*. Instead of *addressed to the parties*, perhaps say instead *focus* on the parties. The first clause of the first sentence of **para. 2** could possibly be deleted as unnecessary. The last sentence of **para. 2** could be expanded to include contractors and extension agents. In **para. 3**, first sentence, the proper

term should be *supply* chain. In **para. 4**, revise the first sentence to either use the chosen terminology or use the concepts, potentially also including cooperatives etc. In **para. 8**, first sentence, remove the reference to the *recent past*. The first sentence of **para. 16** could be revised to make it less general (to focus on agriculture). In **para. 26**, there could be a greater emphasis on the contractor's potential benefits in gaining from the specialized knowledge of the producer. In **para. 36**, it may be appropriate here to highlight the role of traditional law. Much of **paras. 31-37** may be condensed and each of these paragraphs may be better organized around an easily identifiable topic sentence. It was also noted that the last sentence of **para. 33** is a different topic from the rest of the paragraph, so this sentence could be reoriented or moved.

12. *Section II – Scope of the Guide:* It was noted that **paras. 41** and **42** may be redundant with earlier paragraphs in this chapter. **Para. 46** and following paragraphs could be condensed, and could be reworded to reflect elements of the relationship rather than elements of control. The clause "chiefly safety and quality," could be removed from the chapeau of **para. 46**. It should be clear in this paragraph that both parties may be subjected to certification. It was suggested to delete the last mini-paragraph of **para. 46** because this is not common in practice; there has to be more than mere certification to fall within the scope of contract farming for the purposes of this guide. It was suggested that **paras. 47** and **48** may be removed as unnecessary. In **paras. 50-51** it is necessary to check terminology and perhaps use a broader term than partnership (e.g., unified legal entity). It was highlighted that this section intends to distinguish between joint ventures for a common purpose, situations where there is *de facto* same operation, and partnerships as typified under rural contracts under national legislation. The Group struggled with the complexities in the section starting with **para. 52** and here the approach could be reviewed and perhaps condensed. It was suggested to rephrase the last sentence of **para. 54** so as to not be advising courts on how to interpret contract clauses. In **para. 55**, it was suggested a qualifier to the list to make clear that the list of criteria is not exhaustive.

13. *Section III – Private Law Regime*: It was suggested that in **paras. 60-61** there could be a reference to the chapter on dispute resolution. It was suggested that the last sentence of **para. 61** could be removed. The Group noted that **paras. 67 and 68** may not be strictly necessary. The mention of codification in **para. 71** should not be limited to civil law systems. The accuracy of the third sentence of **para. 80** was questioned and this sentence may have to clarified or deleted. The first sentence of **para. 81** should be broadened to include case law. It was stated that some of the concepts in **para. 84** and following paragraphs could be kept separate to avoid confusion. Perhaps some could be moved to the chapter on formation. It was suggested that **para. 88** could be deleted as unnecessary. It also was suggested that the content in **para. 89** and following paragraphs could be moved closer to para. 60 and 61 to show the intended distinctions.

14. *Section IV – Regulatory Environment*: The UNIDROIT Secretariat first noted that this section will be substantially revised in future versions, including new topics such as investment, competition, and agricultural credit. It was suggested that the last sentence of **para. 95** could be deleted as unnecessary. It was suggested to reorganize and reorient **para. 98**, bringing the last sentence to the front and refining the paragraph to make clear that the goal of poverty reduction may have different implications from the goal of protecting the right to food. It was noted that it may be appropriate to add a focus on water in the section beginning with **para. 99**. It was noted that **para. 104** is clear and may be used to reform para. 52-56. On a related note, it was recommended to stick with the term *employment* law rather than labour law, when appropriate. In this section, it was highlighted that private voluntary standards could be covered and coordinated within the discussion on regulatory environment. It was suggested that **para. 107** could include a reference to geographical indications. In **para. 117**, the correct treaty acronym is ITPGRFA.

Chapter I: Parties to the Contract

General Comments

15. *Extension Services*: It was suggested that the chapter could benefit from combining the mini sections on extension service providers with that of service providers, and it was also suggested that perhaps the meaning of *extension services* could be clarified.

16. *Language*: The language in this chapter needs further polishing, and it was also suggested to tweak references to *most* countries, and to instead soften the language to *many* countries.

17. In this chapter and others, it was suggested to refer to *utilization* of natural resources rather than *exploitation* of natural resources, for policy reasons.

18. It was suggested to include the role of IGOs like IFAD and WFP somewhere because of the important role that such organizations may play, particularly in the development context. IFAD is involved in contract farming operations as a project finance provider. On the other hand, WFP is actively involved in contract farming as a market participant/buyer.

Paragraph-Specific Comments

19. *Central Parties – Producer*: It was suggested that the first subheading above **para. 2** could be reworded to say *Main* Parties rather than Central Parties. In **para. 10**, it was noted that the last clause of the first sentence may need to be further nuanced because it does not accurately reflect the situation in some countries. In **para. 11**, it was suggested to simplify the first sentence to remove the reference to Roman Germanic tradition. In the first sentence of **para. 16**, it was suggested to remove the term *unlimited* as a qualifier from liability. In **para. 19**, the term *partner* could be changed to *owner* in the fourth sentence because here the focus is on corporate structures. It was noted in **para. 19** and following paragraphs that a non-profit association may be a facilitator, and it was commented that perhaps this section could be renamed to reflect the inclusion of non-profit associations. In **para. 20**, it was noted that the distinction in the second half of the paragraph may also apply to common law systems. The first sentence of that paragraph requires a better definition of what is meant by *forms* – how broad or narrow this is intended to be. It was suggested that not all cooperatives combine non-profit features and this could be further nuanced, as in **para. 31**. The second sentence of **para. 32** could be further clarified.

20. *Central Parties – Contractor*: In **para. 43**, it was highlighted that institutional buying is not the typical case in contract farming, but rather the typical case is that governments are involved in development authorities and service providers.

21. *Other Parties*: In **para. 54**, it was suggested to add the word *independently* to the second to last sentence's last clause. The last sentence of this paragraph could possibly be deleted as nonessential. In **para. 55**, further explanation could be added to the example in this paragraph. In **para. 59**, there could be a quick reference to micro-insurance schemes because of their possible importance in contract farming. In **para. 60**, the Group suggested rephrasing the last sentence for clarity. In **para. 61**, the Group noted that frequently the costs of certification fall on the producer. It was suggested to possibly add a discussion of secured and unsecured creditors to **para. 65**. In this paragraph, a balance term to the first sentence could be added to include producers and contractors. The language of the opening statement of **para. 66** might need to be softened. It was suggested to reinforce the second clause of the first sentence in **para. 67**. In **para. 71**, the terminology could be broadened to reflect aquaculture, etc. (not just land).

Chapter II: Contract Form and Formation

General Comments

22. *Tailoring the Focus*: There was general agreement within the Group that this chapter would benefit from an effort to tailor the language of this chapter to focus more specifically on contract farming/agricultural production contracts rather than contract law (more broadly). In particular, the Group noted that the part on Formation deserves particular attention. On a related note, the Group agreed that the text in this chapter should be carefully reviewed to ensure that the language reflects the variety in international practice (beyond US terminology in particular).

23. *Establishing the Structure for the Rest of the Guide*: Currently, the section on Contract Form contains a list of components present in most written agreements. The Group agreed that this section is very useful because it is the only place where the Guide lays out broadly what is the content of the contract. It was suggested that it may be helpful to slightly restructure these paragraphs to follow the categories of the titles of the chapters, and reorganize content on this basis. It may also be helpful to add one or several components to the list as necessary.

Paragraph-Specific Comments

24. *Section I – Contract Form*: It was noted that in **para. 3**, there is a discussion of general principles, and perhaps it could be beneficial to bring the principles currently discussed in subsequent chapters up into this chapter. In **para. 3**, the term *verbal* agreements refers to oral agreements. In **para. 4**, second sentence, it was pointed out that often the administrative costs of contracting fall on the producer, and this is one factor which may weigh against a producer entering into a contract farming arrangement. Perhaps here, adding one sentence is necessary. **Para. 8** may need to be developed in a more nuanced manner to reflect all commodities. In **para. 9**, Group members highlighted the needs for coordination with confidentiality obligations in Chapter III. Here, the Group highlighted that in many contexts confidentiality agreements may be positive because it implies a closer relationship between producer and contractor. In **para. 11**, the terminology needs to be clarified, using instead *producer* and *commodity*. In **para. 12**, much of what is described here is often in the preamble clauses. The resulting issue is what is the legal significance of this preamble; this could be briefly discussed somewhere as it may even have implications on liabilities. The Group requested more detail in **para. 15**. **Para. 15** could be re-labelled *Price and Terms of Payment*. In **para. 17**, it was suggested to add in other remedies beyond termination. In **para. 18**, it may be necessary to remove the reference to *ideal* situations. In the last clause of **para. 19**, it was noted that this clause actually encompasses two distinct concepts and these could be teased out.

25. *Section II – Contract Formation*: The first sentence of **para. 21** may have to be deleted because of its limited international relevance. The Group gave several examples of how verbal contracts are prevalent in Latin America, both on an individual basis and on a community basis. It was pointed out that the section could treat the issue of full informed consent at some point. As a general matter, it was suggested that it may be helpful to mention when the parties may be bound, even during negotiation, reliance, etc. possibly in **para. 25**. In **para. 27 et seq**. it may be important to highlight that there are a number of ways that terms may be imposed on parties by law, trade practices, etc. The Group also highlighted cases where the government is involved in the offer process or as a facilitator of negotiations. It was noted that **para. 30 et seq.** have too strong a reliance on CISG, the provisions of which are not universal or necessary applicable in this context. Similarly, some of the language in this section must be softened to take into account variability across legal systems. It was pointed out that **para. 32** may not be sufficiently clear and the group expressed concern that this paragraph generally raises a number of complicated issues. In **para. 33 et seq**., it was highlighted that the section does not address issues with respect to cooperative agencies or groups of producers.

Chapter III: Obligations of the Parties

General Comments

26. *Reorganization*: This chapter has undergone significant changes after two separately drafted parts were combined for this reading. Significant work remains in harmonizing the two original draft contributions, as well as harmonizing this chapter with the chapter on remedies.

27. *Exclusivity*: The Group suggested including a greater, separate focus on the topic of exclusivity.

28. *Inputs*: There was discussion within the Group regarding the extensive treatment of inputs in the current draft. Some members noted that the current description was too detailed, but others argued that this level of detail is consistent with the importance of the topic. Regarding inputs in general, the Group discussed the issue of contracts where the contractor provides the land on which production takes place. Forestry, rubber products, etc. are fields where it may be more common for contract farming to occur in situations where land is provided by the contract. It was suggested to include a quick acknowledgement of this as a sector specific exception, but it was also argued that this situation may be regulated differently under national legislation, and therefore should be distinguished.

29. *Assignment and Delegation*: It was suggested that this section may have to be revised, and perhaps could be moved to the beginning of the core obligations section.

Paragraph-Specific Comments

30. *Approach and Risk Allocation*: In **para. 9**, it was mentioned that the reference here should be to broader notions of rights to land, not just title to land. **Paras. 7** and **8** were identified as possibly duplicative, and therefore may be deleted. In **paras. 5-6**, it may be necessary to further explain the issue of whether holding title tracks with risk allocation. It was pointed out that it is necessary to review the statements in Chapter III for consistency with the Introduction as far as relates to guidance by the contractor over the product (throughout the chapter but particularly in **para. 6** and **para. 13**). The Group expressed that the concepts from **para. 17** could benefit from clarification or further development. With respect to **paras. 12-18, 25-27** on exclusivity, this content may be consolidated under a separate heading and treatment of the topic, given its overall importance. The middle sentence of **para. 19** could benefit from rewording.

31. *Core Obligations – Production and Delivery*: In **para. 28**, it was mentioned that in the third sentence the word *normally* is too strong, and perhaps it could instead say "may." In **para. 38**, it may be possible to delete the sentence after FN 27. **Para. 29** may need to be reworked for clarity. Similarly, the last sentence of **para. 37** may need to be reworked. It was suggested that the default rule in **para. 39** is overbroad, and that this issue is actually commodity specific. However, the Group confirmed that it is true that many contracts provide that production must come from the producer's land. But, there may be default rules in the national legislation that for example allow for remedies whereby the producer can replace its shortfall by buying on the market.

32. *Core Obligations – Price*: In **para. 55**, the Group expressed its uncertainty regarding change of price as a result of unforeseeable weather events, and noted that this paragraph should be reconciled with the Remedies chapter. Also in **para. 55**, the first sentence may have to be reviewed. The Secretary-General expressed that much detail has been lost in the merging, particularly with respect to **para. 58-62**, and perhaps this will need to be reintroduced. In **para. 61**, the reference to sales and service contracts will have to be addressed. In **para. 57 and 62**, it was noted that these paragraphs may have to be moved or reoriented to focus on the topic of this chapter.

33. *Production Process – Inputs*: In **para. 67**, it was suggested to include a reference to machinery. It was suggested to delete the last clause of **para. 64**. **Para. 69** needs to be checked

against the definition included in the Introduction. In **para. 70**, the information on remedies could be transferred to the following chapter. In **para. 73**, half way, the sentences need to be checked for consistency with the chapter on remedies; also, a term other than *abilities of the producer* may be needed. In **para. 77**, further clarification was requested on the arrangement of granting a lease to contractors. Regarding **para. 82**, the concepts of implied remedies may need to be removed to include something more generic across legal systems. Also in **para. 82**, the Group asked for clarification in the sentence after FN 66. **Para. 82** may be duplicative of para. 73. The last sentence of **para. 91** could be weakened so as not to create the impression of a strong overarching obligation. It was suggested that the **para. 97** may be better suited to a place in the introductory matter for this section. The footnote citations for **paras. 103** and **104** need to be reviewed. **Paras. 106-108** need to be reviewed and checked with the potentially controversial para. 73.

34. *Production Process – Methods, Compliance and Control*: The Group highlighted the need for careful coordination between **para. 109 et seq.** and the Remedies chapter, as well as the Introduction. In **para. 112**, it was suggested remove the word *private* from the first sentence and clarify the meaning of the word *registration* in this paragraph. In **para. 113**, it was noted that the last few sentences potentially go too far in laying out a default rule which may not be there. In **para. 120**, it was suggested that the third sentence should be reviewed, but the Group defended this sentence as based on contractual practice. In **para. 133**, *reasonable access* could substitute *free access*. The last sentence of **para. 129**, may require further explanation.

35. *Delivery*: The heading above **para. 139** could be simplified to just, "Delivery." In **para. 139**, the phrasing, particularly in the second sentence, was noted to be awkward. In **paras. 145-146**, there is some repetition in discussion of packaging. It was suggested that **paras. 141** and **149** are not necessary because they are too broadly descriptive. It was noted that **paras. 154 and 155** deal with remedies and could therefore be reallocated. Here, there was some discussion within the group regarding the usage of the word *rejection*, and it was agreed that rejection is meant in the literal common sense.

36. *Payment* and *Overarching Obligations*: In **para. 159 et seq.**, it was suggested that there could be a cross reference to pay back of advances provided by the contractor. Repetition between **paras. 159 and 163** was noted by the Group. There was broad consensus to delete **paras. 167 and 169** because their content is addressed earlier. It was suggested that the discussion here on insurance obligations may not fit in its present location as an overarching obligation. The Group broadly agreed that the section on Regulatory Obligations, **para. 176 et seq**., could be condensed to a few sentences at the beginning of Chapter 3, along with textual cross references. The Group questioned the accuracy of **para. 180** because there are often obligations on the contractor, not just on the producer under many regulatory regimes. **Para. 182** needs to be reviewed in light of the chapter on formation.

Chapter IV Part I: Excuses for Non-performance

General Comments

37. *Future Directions*: Professor Veneziano, in introducing her draft, drew attention to the fact that the scope of this draft is actually broader than the title indicates, thereby including hardship situations which may not strictly be an excuse. One area which will likely be developed further in future versions is whether failures by third parties may come in and play a role in the relationship similar to force majeure events.

38. *Organization*: As a general matter, there may be room for improvement in the organization of content when dealing with distinctions between force majeure and hardship. It was highlighted that the organization of the chapter must be made consistent with the textual introduction of the structure of the chapter.

39. *Language*: The Secretary-General reminded that all potentially legalistic or narrow terms should be avoided, such as *Acts of God*, *fait du prince*, etc., and reference should be made instead to the underlying concepts or agreed neutral, consistent terms. On a related note, it was suggested that the term *impracticability* may be too evocative of its meaning under US law.

40. It was identified that parties may have often thought about force majeure events, but have deliberately chosen not to include provisions in the contract, either because of awareness of the gap fillers provided by the legal framework, or because of a strong knowledge of possible contingent events.

Paragraph-Specific Comments

41. *Section A - General Remarks*: It was suggested that **paras. 1-3** may be condensed, and that perhaps this would improve readability while still accomplishing the intended purpose. It was suggested that the introductory material could be linked with **para. 6** on defining force majeure. **Para. 5** could be rephrased as "Generally, national laws provide for relief only exceptionally for events that are unpredictable…" In **para. 9**, it was suggested that the two concepts here could be developed a little bit more deeply. On a related note, there may be more work needed at the end of **para. 8** to make the choice of terminology very clear. In **para. 7** it was suggested to simplify the concepts in this paragraph for non-lawyer readers. In **para. 12**, it was asked whether further explanation could be useful to help the reader distinguish cases. It was suggested to reword the title of the heading **above para. 10** to be more specific. It was noted that some of the generic statements, such as at the beginning of **para. 11**, may be replaced by going straight to the key argument. In **para. 14**, it was suggested that this topic be expanded slightly to incorporate some variations in risk passing with possession, not just title. It was highlighted that **para. 15 et seq.** may be condensed and will have to be coordinated with other sections on insurance.

42. *Section B – Qualifying Events*: In **para. 18,** first sentence, it was suggested to remove the parenthetical reference to *fortuitous case* for reasons of sentence clarity. In **para. 20**, it was suggested the last sentence could be expanded to include more nuanced approaches such as whether listed events qualify *per se* or only if they meet the requirements of a chapeau, but it was also noted that **para. 23** satisfies this need. In **para. 26**, the references to US legislation will have to be removed. In **para. 27**, the Group raised the issue of whether there are scenarios covered in which a pest or epidemic only qualifies if it is certified of a certain level of severity by some government body. In **para. 29,** half way through and **para. 30** first sentence, clarification and support were sought in these sentences. General consensus is that **para. 31** could be removed and perhaps be incorporated in the chapter on parties. It was suggested to review the law statements in **para. 33**. It was suggested that **para. 34** could benefit from clarifying the last sentence. Perhaps **para. 34** can be revised to better tie itself into is current location in the chapter.

43. *Section C – Consequences*: In **para. 42**, the Group discussed the interactions between excuse and suspension, and perhaps this paragraph will need to be revised for improved clarity. It was suggested that the last few sentences of **para. 44** are too broadly conclusory, and perhaps may not be essential for the purposes of the Guide and that perhaps more discussion or development is necessary because several concepts or ideas are put together. Also regarding **para. 44**, it was noted that the only case where she has seen such sharing of risks with respect to force majeure is in seed production. In **para. 51**, it was suggested to include an upfront reference to the case where renegotiation has failed.

Chapter IV Part II: Remedies for Breach

General Comments

44. *Future Reorganization*: This current draft was prepared before the reorganization of Chapter III on Obligations of the Parties. As a result, there are significant potential overlaps between the two chapters which need to be worked out in future drafts. Furthermore, the content of this Chapter will need to be significantly condensed in order to meet the audience objectives of the Guide. As a broad remark, there was general agreement within the Group for reorganizing the chapter around the remedies themselves, and then breaking down the remedies by their availability.

45. *Broadly-applicable Liabilities*: It was noted that the Group must tackle the issue of distinguishing those liabilities deriving from legislation that is broadly applicable, as opposed to liabilities that are specific to contract farming. For example, environmental legislation is applicable to all farming, not just contract farming, so there remains an issue as to whether it is important to consider these liabilities in this context.

46. *Short-term vs. Long-term Contracts*: A preference was stated that quick distinctions between short term and long term contracts be made in the text, rather than dividing chapters into separate subheadings along this line.

47. *Multiparty and Linked Contracts*: The Group agreed that some references in the text will be helpful to raise implications where important, but confirmed a focus on the bilateral relation in the main text. The broad consensus is that these proposed sections on multiparty and linked should not be developed in full detail.

48. *Balance*: It was reminded that there should be an overall balance in the publication between the length of discussion of producers and contractors, as a policy matter. Similarly, equal attention should be paid to issues related to non-performance in the provision of technical services, in addition to physical inputs.

49. *Brevity and Simplicity*: It was reminded that earlier decisions of the Group had attempted to simplify the approach of the study to make the Guide more widely accessible and readable. Thus, the Group warned of the dangers of getting mired in the details of trying to cover every possible situation and every possible detail. Members of the Group expressed fears that the content of this Chapter is too complicated for most readers.

50. *Focusing on the Remedies which are Most Common*: Members of the Group suggested that in remote rural areas limited remedies are available to producers, and they may not even be able to engage in cover transactions. Certainly, litigation is rare in the development context (along with associated remedies). The Group confirmed that many of the possible remedies are currently not used, but countered that including these remedies in the Guide may still be helpful in informing future activities by producer organizations and legislative drafters of available options. It was noted that the Guide had never seen an anecdote or case where a contract farmer has pursued damages for lost profits.

51. *Concrete Examples*: Throughout the session, the Secretary-General highlighted instances supporting a general proposal that more concrete examples, such as those provided in footnotes, should be worked into the text in future draft versions.

52. *Process versus Product-Related Standards*: There was extensive discussion within the Group on this topic and its value was clearly appreciated. Professor Cafaggi identifies the growing role of process standards vis-à-vis product standards, and therefore in his section, he tried to incorporate the breakdown between these two categories. One key distinction that comes into play is the availability for corrective measures during performance, as a result of breaches of process-related obligations. Second, remedies are intended to be primarily cooperative elements, meant to make the relationship work, not to end the relationship. Therefore, it is important to look at the practical sequencing of remedies, starting first with cooperative actions, and then progressing to more radical

action as needed. As a general objective, Professor Cafaggi is trying to extend the logic of cooperation beyond the realm of long term contracts to the full consideration of remedies.

53. Professor Cafaggi asked for the Group to consider several broad issues. The first issue is the allocation of liability between one party and the other, or shared between them, with a view to promoting cooperation in line with the theme of the Guide. The second issue is the extent to which the Group shall extend the concept of nonconformity beyond the concept's traditional source in sales contracts. Third, an important issue is awareness of the kinds of standards being considered because even when the contract is domestic, the goods may be destined for international markets.

Paragraph-Specific Comments

54. For **paras. 149, and 155-156**, it was suggested that these paragraphs do not reflect current law, even if they reflect aspirational norms or policy goals. In **para. 175**, it was noted that it should not be taken for granted that some laws may provide for different requirements of anticipatory breach, as well as other principles. It was mentioned that the Brazilian system does not contain the distinction of fundamental breach and other concepts. In response, it was highlighted that many countries will have functional equivalents which require that some kind of conduct from the non-breaching party should take place (functionally equivalent to the duty to mitigate). It was noted that the principle to cooperate and the principle of good faith are similarly not universal, and thus the Guide must be clear on this aspect, even if advocating these as policy advice. It was suggested that the first sentence of **para. 178** is a bit too strong and the wording could be nuanced. In response, it was noted that this statement was based on legislation in various systems and not on specific obligations found in contracts, and therefore the wording could be changed slightly. It was suggested that there may be repetitions between **para. 197** and section 3.4.

55. In **para. 262**, it is possible that the language here needs to be softened to take account of possible variations. The Group requested an expanded definition, with examples pulled up from the footnotes, of the topics in **para. 263**. In **para. 274**, this paragraph's applicability to seeds was questioned. In **para. 275**, it was reminded to ensure consistency among the several places where the term, *termination*, appears in this chapter. In this section, it was suggested to add one introductory sentence which outlines the range of possible options, rather than maintaining separate headings. In **paras. 277-278**, it was noted that these two paragraphs could possibly be condensed.

56. With respect to **para. 279**, it was again encouraged to incorporate footnote material in the text. **Para. 303** may be revised to limit discussions of more academic matters. **FN219** was highlighted as providing useful content to be incorporated in the text. The Group suggested, regarding **para. 309** second and third sentences and other similar parts of the Guide, that general statements in the Guide be replaced with more concrete examples. In **para. 308**, it was suggested that there may be some confusion issues that result from the terminology chosen, particularly the choice of the term *rejection*.

57. It was highlighted that **para. 309** must be coordinated with the content in the Introduction. It was suggested that the reference to out-growers in **para. 309** be removed as unnecessary. It was suggested to provide further explanation and examples in **paras. 311-312** to show the difference between incidental and consequential damages. Regarding **para. 313**, it was noted that there may be problems with content, such as with the word *fines* in a contractual context, and it was noted that prohibition is a business decision not a remedy. It was suggested that a more neutral term than *penalty* be used in future versions for the heading.

58. Members of the Group expressed hesitation regarding **paras. 314-316**. It was noted that many times, recalls would be undertaken by parties further down the supply chain, rather than the producer. As soon as the buyer accepts the product, then legislation would put responsibility for any potential recalls on the buyer. But, it was also noted that cooperation from the producer may be required in such cases in order to better understand the problems surrounding the recall. It was suggested that more consistency in terms is important in **paras. 321 to 323**, particularly with the

choice of *refusal* over *rejection*. It was suggested that perhaps the language at the end of **para. 326** could be revised for improved clarity. Regarding **para. 328**, the issue was raised of whether a price reduction must be asked for or may be applied. **FN 239** was highlighted as a possible mistaken reference. Regarding **para. 331**, it was suggested to highlight the importance of side-selling and that it be given special attention. The last sentence of this paragraph could include the qualifier, *usually*, to make it consistent with previous statements. In **para. 335**, it was generally agreed that the clause on spontaneity or through judicial order could be deleted.

59. It was suggested to clarify notions in the publication related to relational contracts, particularly in **para. 381**. In **para. 397**, it was suggested that the third sentence is an unnecessary description of just one of several possible options. In **para. 400**, Professor Fontaine suggested using the terminology*, if admitted by applicable law*, not just *legislation* because it may come in through case law. In **para. 406**, it was suggested to broaden the sentence to include common law as well. It was noted in **para. 417** that the reference to partial avoidance could be changed to reflect a more common, neutral terminology. Regarding **para. 418** perhaps the language here could be softer, because the producer may seek renegotiation even in some cases when alternative options may be available. In **para. 423**, there were calls to soften the language and add a qualifier such as *normally* to express that this may not be a universal rule. In **para. 425**, the term *avoidance* could be replaced by termination. **Para. 428** is not consistent with policy choices in geographic examples. The text will not refer specifically to examples of legislation from certain regions or countries. **Paras. 427 to 428** may need to be substantially revised. In **para. 432**, the option of withholding delivery after the contractor has already failed to take delivery could be deleted as not necessary. In **para. 435**, it was suggested that the discussion of the first sentence could be expanded beyond the use of the word *may*, so as to capture that some systems allow this and others don't. In **para. 436(a)**, some members of the Group questioned the accuracy of the statement of the last sentence of this mini-paragraph, but it was countered that this is a general principle applicable to cover transactions.

60. It was suggested to revise the orientation of **para. 436 et seq.** to make it more consistent with the audience of the guide. This section currently reads almost as instructions to a judge evaluating damages and may be too complicated for readers. It was highlighted that some of the rules in **para. 437(b)** are too dictatorial, and some of the language needs to be softened to encompass variability. Members of the Group stated that it is very rare that producers are stuck with products that nobody wants to buy, so this discussion could be functionally condensed. In particular, thus, the second category is not very common, but the section is analytically correct. It was suggested to add illustrative examples here. Again in **para. 448**, in the centre of the paragraph, the language could be softened to take into account different systems. Similarly, in **para. 450**, the term legislation could be broadened to include case law. In **para. 458**, the need to briefly mention IP rights in termination was noted. Regarding **para. 465 et seq.**, it was reminded that this section will likely be minimized in light of earlier decisions on scope.

Chapter V: Duration, Renewal and Termination

General Comments

61. *Ensuring Coherence with Other Chapters*: Moving forward, particular care must be taken in reviewing the content of this chapter and the chapter on remedies (termination). The group engaged in significant debate over the choice of terminology for cancellation versus termination. Although there was no clear consensus on terminology, it is clear that more explanation in the text is needed to clarify the meaning of chosen terms. The style of this chapter is currently different from other chapters and this will be address as the Guide is revised as a whole.

62. *Order*: The Group agreed that the order of content in this chapter should be duration, renewal, and then termination.

63. As a broad remark, the Secretary General stated that the Guide must describe the playing field as it exists, including a description of any less-fair aspects.

Paragraph-Specific Comments

64. *Duration*: The Group asked for further explanation and clarification in **para. 4.** Here, a greater focus on differences between short term and long term contracts was requested. Adding a cross reference or quick note in **paras. 6-7** that there are business components at play here in coherence with financing schedules was suggested. It was requested to add a footnote citation for the clause after **FN10** to make sure this clause is adequately supported. It was suggested that the chapter could benefit from combining sections B and C under the same heading.

65. *Termination*: It was suggested that the title of Section II.A could be changed to "Scope." It was suggested that the last sentence of **para. 13** could be revised and expanded because it hints at broader concerns which deserve further development. In **para. 14**, the word *presumed* may be added because this sentence implies a loss of remedies. As one possible solution, replace the word, presumed, with the word, considered. The Notice section could be moved to the relevant types of termination, perhaps switching the order of sections C and D. It was suggested to choose a term other than *bilateral* in **para. 18**, perhaps using instead, *by either party*. On a similar note, the Secretary General suggested using the term *indefinite* rather than *perpetual*. The Group agreed that the first sentence of **para. 21** may be too limiting and could be removed. It was suggested that the limitations in **para. 22** could be emphasized. The Group noted that it is not common practice to take into account the investments of the producer as a limitation on the right to unilateral termination. In **para. 23,** the criticism of unilateral termination clauses may have to be reworked a bit in to the text in terms of the risks and advantages of such clauses. In **para. 25**, it was noted that a link could be made with termination at will. Here, it was suggested that the term *relational contracts* be removed, but the description remain. In **paras. 27-28**, the Group suggested adding references to claim time limits and competition law aspects.

66. *Renewal*: Clarification in the text of **para. 32** was requested, in particular regarding the role of tacit renewal in written contracts. It was noted that the Guide could include a discussion of what happens when the contract fails to meet statutory requirements, but it was also acknowledged that this a very complicated problem. The heading for **para. 38** could be changed to, "Renewal at the option of one party." It was noted that reformation is not relevant in oral contracts.

Chapter VI: Applicable Law and Dispute Resolution

General Comments

67. It was suggested to include more cross references to corresponding information in the chapters on remedies and excuses.

68. The issue arose of to what extent the Group should separately consider conciliation from mediation. The Secretary General mentioned that perhaps the Group could follow the UNCITRAL example of primarily referring to conciliation, while acknowledging that there are a variety of views on whether mediation and conciliation are different, depending on the system.

69. There was a suggestion from the Group for an expanded discussion of enforcement, looking in slightly greater detail at each type of dispute settlement covered in the chapter.

Paragraph-Specific Comments

70. *Applicable Law*: In **para. 1**, it was noted that perhaps the Guide can include a mention of traditional law upfront and also emphasize the role of government in dispute resolution. In **para. 10**,

second sentence, the first clause may be removed as unnecessary. In **para. 11,** the basic assumption is that these are domestic contracts, but every now and then, there is the possibility that an international regime will apply. The Group discussed the role of the CISG and it was agreed that this paragraph could address the applicability of the CISG, both in terms of the usual parties and the usual components of these contracts. In **paras. 14-15**, it was highlighted that these paragraphs may not fit within this chapter but it was also suggested to leave this small section to flag issues for readers. It was noted that the opening sentence in **para. 14** is an example, and could be reorganized so as to start with the general principle. It was noted that in the middle of **para. 15,** it may not be the producer that is typically alleged to be liable.

Dispute Resolution: In **para. 16-26**, it was suggested that the double introduction structure here could be reorganized or condensed in future versions. In **para. 19**, second sentence, it was suggested that this sentence may not be factually correct in practice, whereby economic disparity may not lead to more disputes. In **para. 19 et seq**., it was stated that perhaps the Guide could benefit from adding a little bit of content to show from the contractor's perspective some of the difficulties in pursuing dispute settlement with small holders. It was confirmed by the Group that there is a slight problem in focus, but after this problematic sentence, the logic is sound, whereby after a dispute arises, then the difference in power is important to take into account. There was a request for clarification on the use of *individual* producers, and whether this includes coops, etc. It was suggested to change the title of the section beginning with **para. 23** to *Considerations in Choosing a Dispute Resolution Method*. It was suggested to remove from the list in **para. 23** investments in natural resources, instead to refer to *some types of* investments in natural resources; it was also highlighted that employment is often excluded from arbitration. In **para. 26**, it was suggested to broaden the consequences of confidentiality to include the fact that parties may not want competitors to learn about the very existence of the dispute. Here, the Secretary General suggested that mention of the *UNCITRAL Rules on Transparency in Dispute Resolution in International Investment*, in cases where it might become relevant. It was suggested to be more explicit in **para. 27** with where this section is going. In the opening sentence of **para. 30**, terms of art should be avoided. It was suggested that **para. 45** be further expanded because poorly drafted arbitration clauses are extremely frequent and worthy of flagging; here is an area where the Guide can give practical advice, perhaps through a reference to the work of UNCITRAL and ICC, etc. In **para. 46**, it was asked whether the opening sentence is accurate internationally, whether there must be a written agreement to arbitrate as it is so in the US. It was also suggested to avoid this issue because it is too complicated. The language in **para. 55** first sentence, could be softened to perhaps say many countries instead of most countries. In the section on judicial dispute settlement in general, **para. 53 et seq.**, it was suggested that this section covers many complex areas which need to be further nuanced or avoided. It was also suggested to remove "with a view to protecting the weaker party", as it more to protect the interests of both parties. In **para. 57**, the first sentence was questioned, stating that the primary reason is to enforce party interests, and then system confidence. In the last sentence of **para. 57**, it was suggested to better tie this sentence into more relevant concerns.

ANNEX

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

***Third Meeting* - Rome, 3 – 6 March 2014**

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