



INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW
INSTITUT INTERNATIONAL POUR L'UNIFICATION DU DROIT PRIVE

Principles of International Commercial Contracts
Working Group on Long-Term Contracts

Second session
Hamburg, 26 – 29 October 2015

UNIDROIT 2016
Study L – Doc. 136 rev.
English only
January 2016

Post-contractual obligations (*)

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(*) Cf. Study L – Doc. 127, Issue (i).

ARTICLE 7.3.5
(Effects of termination in general)

(1) Termination of the contract releases both parties from their obligation to effect and to receive future performance.

(2) Termination does not preclude a claim for damages for non-performance.

(3) Termination does not affect any provision in the contract for the settlement of disputes or any other term of the contract which is to operate even after termination.

COMMENT

1. Termination extinguishes future obligations

Paragraph (1) of this Article states the general rule that termination has effects for the future in that it releases both parties from their duty to effect and to receive future performance.

2. Claim for damages not affected

The fact that, by virtue of termination, the contract is brought to an end, does not deprive the aggrieved party of its right to claim damages for non-performance in accordance with the rules laid down in Section 4 of this Chapter.

Illustration

1. A sells B specified production machinery. After B has begun to operate the machinery serious defects in it lead to a shutdown of B's assembly plant. B declares the contract terminated but may still claim damages (see Article 7.3.5(2)).

3. Contract provisions not affected by termination

Notwithstanding the general rule laid down in paragraph (1), there may be provisions ~~in the contract~~ or obligations which survive ~~its~~ termination. This is the case in particular with provisions or obligations relating to dispute settlement and governing law but there may be ~~others~~ other provisions or obligations which by their very nature are intended to continue to operate even after termination, or to operate only upon termination. They may relate to provisions on confidentiality, non-competition, payment of interest, or unwinding of the contractual relationship (e.g., return of inventory, documents or advertising materials; return of media or documents containing confidential information, indemnities, treatment of intellectual property rights or databases, exit costs, etc.).

~~Illustration~~

~~Illustrations~~

2. The facts are the same as in Illustration 1, except that A discloses to B confidential information which is necessary for the production and which B agrees not to ~~divulge~~ disclose for as long as it does not become public knowledge. The contract further contains a clause referring disputes to the courts of A's country. Even after termination of the contract by B, B remains under a duty not to ~~divulge~~ disclose the confidential information, and any dispute relating to the contract and its effects ~~are~~ is to be settled by the courts of A's country (see Article 7.3.5(3)).

3. A, an equipment leasing company established in country X, leases a commercial aircraft to B, an airline operating regional flights in country Z. The aircraft is registered for nationality purposes in country Z in the name of B, as operator. As international aviation regulation prevents the redeployment of the aircraft without it being de-registered from Z, B has contractually agreed to procure that de-registration upon termination. B decides to standardise its fleet and terminates the lease. There is no power of attorney previously issued to A to arrange for the de-registration and export of the aircraft. B has a duty to cooperate with A in obtaining the de-registration and necessary administrative authorisations that will allow A to relocate the aircraft to another country.

4. Post-termination obligations in long-term contracts

The issue of post-termination obligations is particularly relevant for long-term contracts. In relation to surviving provisions, the parties should consider addressing the following issues: which provisions are to survive termination, whether such provisions are binding on one or both parties after termination, how long they survive, who will bear the cost, which remedies are available in case of non-performance, etc. Surviving provisions may be dealt with in various ways: by a general clause stating that all provisions which by their nature are intended to operate even after termination will remain in force; by listing the specific provisions intended to survive; or by stating in the provision concerned that it is to remain in force notwithstanding termination. Contract drafters should pay close attention to the compatibility of the surviving duties with mandatory domestic law (e.g. limitations on prohibitions to compete).

Illustrations

4. The facts are the same as in Illustration 3. The contract between A and B contains an indemnification clause by the latter in favour of the former for losses attributable to the delay in de-registration of the aircraft, which is expressed to survive contractual termination. That indemnification clause operates and is enforceable independent of any damage claim under the terminated contract, though the payment thereof would impact the calculation of damages under such contract.

5. Consultant A undertakes to provide consultancy services for a new product to Client B for an indefinite period. Intellectual property rights arising out of A's services remain at all times with B, with royalties being payable for a period of fifteen years from the date of first sale. Five years after the duty to pay royalties by B to A has arisen, the contract is terminated pursuant to Article 5.1.8. B's obligation to pay royalties will survive termination during the remaining period of ten years.

6. Client A and Provider B are parties to an agreement under which a telecommunication system is to be provided by B to A. According to the agreement, B shall, upon termination, assist A in the migration of the services to an alternative provider and A is to pay the exit costs. The contract is terminated. B is under a duty to assist A in migrating the system with A paying the exit costs.