
CHAPTER 2

RECITALS IN INTERNATIONAL CONTRACTS

I. INTRODUCTION

A large number of contracts, particularly those dealing with international trade, begin with so-called “recitals.” The parties to such contracts use recitals to set out a series of statements that they regard as useful before approaching the body of the contract. Often, the parties introduce themselves and state their respective qualifications. They describe the purposes of their contract and the circumstances that have brought about their collaboration. The history of their negotiations is sometimes given. Recitals record a wide variety of statements and acknowledgements. A transitional formula then leads to the contract itself.

Here is a first example:

“M. is specialised in international Project Managership and contracting in the Turnkey Engineering field and wishes to further expand its activities by means of association with P. to enable both Companies to benefit from the possible introduction of the . . . Filter to the . . . Mining and Metallurgical Industries.

“With this purpose in mind, M. has approached P.

“The P. Group is active in the international engineering design and contracting industry, particularly those concerning plants of a Metallurgical nature and incorporating applications of the . . . Filter.

“Therefore, it would appear that the above-mentioned Groups have a common interest of forming a joint venture in order to promote the P. Filter application in . . .

“Therefore, the following has been agreed upon: . . .”

Although recitals occur widely, their legal implications appear to have been given little attention until now.¹

¹ Subject to what will be said *infra*, p. 86 regarding English law, another extensive study can be referred to: F.W. Grosheide, *De considerans in internationale commerciële contracten*, in *Molengrafica, Eenvorming en vergelijkend privaatrecht*, Lelystad, Vermande, 1991, pp. 295–324. There are however some references to recitals in certain works for

The classical theory of contracts says nothing whatever about recitals. Should this silence be taken to mean that recitals have no legal implications? This would indeed be surprising if one bears in mind the growth since the 19th century in legal literature on the legal status of contract negotiations and the various legal effects that have come to be attributed to them. In the preceding chapter, a variety of situations giving rise to legal implications was discovered concerning letters of intent.² In the case of recitals, one reaches the threshold of the contract. There has been a meeting of minds and it is in the very document, which records their agreement, that the parties feel the need to describe some of the circumstances surrounding that agreement. It would be paradoxical if recitals were to be without any legal implications when such implications are recognized in certain aspects of the pre-contractual negotiations.

The study of recitals is made difficult by its novelty. We begin with a description of how recitals occur in practice. The analysis is based on some 200 examples of recitals collected by the Working Group (Section II). The second part of the study attempts to put forward some suggestions on the legal implications of recitals; after drawing parallels with similar but better known legal concepts, we point out the different ways in which the contents of recitals appear capable of affecting the legal position of the parties to the contract (Section III). Finally, we offer some advice to negotiators (Section IV).

II. RECITALS IN PRACTICE

A. Frequency of Occurrence

Recitals exist in a considerable number of contracts. An inventory made by a member of the Group of a representative sample of his firm's contracts showed the occurrence of recitals in 85 percent of cases! Recitals are not specific to international contracts,³ but they have undergone considerable development in this area. Recitals introduce contracts of all types: sale and purchase, distribution, franchise, leases, agency, loan, pledge, transfer of technology, industrial construction, joint ventures, settlement

practitioners, e.g., in J.M. Deleuze, *Le contrat international de licence de know-how*, Paris, 4th ed., 1988, No. 60; J.A. Boon & R. Goffin, *Les contrats "clé en main"*, Paris, Masson, 1981, No. 37; D. Ledouble, *L'entreprise et le contrat*, Paris, Litec, 1980, No. 105; D. Blanco, *Négocier et rédiger un contrat international*, Paris, Dunod, 1993, p. 98; J.M. Mousseron, *Technique contractuelle*, 2nd ed., Paris, Francis Lefebvre, 1999, pp. 171–173.

² Cf. *supra*, pp. 5–30.

³ Insertion of recitals is characteristic in legal documents with a certain degree of solemnity, such as notarized documents (P. Watelet, *La rédaction des actes notariés*, Brussels, Larcier, 1975, p. 58) or deeds (Odgers, *Construction of Deeds and Statutes*, 5th ed, 1967, pp. 149–160).

agreements, etc. Recitals are particularly frequent in contracts where the parties feel the need to give some explanation, notably because the pre-contractual negotiations have been long and difficult or because the contract relates to an original and complex transaction, especially if the transaction is to be implemented over a certain length of time.

The frequent occurrence of recitals explains why practical guides to contract drafting refer to them. Thus, the U.N. Economic Commission for Europe's Guide on the Transfer of Know-How states that recitals can serve as an aid to interpreting the parties' obligations in the event of a dispute.⁴ The WIPO Guide describes the practice of including recitals, their significance and content in agreements for the licensing or transfer of technology.⁵ UNCITRAL's Guides on International Contracts for Construction of Industrial Works and on International Countertrade Transactions state that recitals can contain certain statements instrumental to entering into the contract, defining the purpose of the contract and the context of its conclusion.⁶

On the other hand, it is noteworthy that standard contracts published by the International Chamber of Commerce⁷ and the standard contract on International Sales of Perishable Goods prepared by the International Trade Centre⁸ do not include recitals, while the new FIDIC contracts⁹ have

⁴ U.N. Economic Commission for Europe, *Guide for Use in Drawing Up Contracts Relating to the International Transfer of Know-How in the Engineering Industry*, 1970, No. 24; J.M. Deleuze, *op. cit.*, No. 60.

⁵ WIPO, *Licensing Guide for Developing Countries*, 1977, No. 124–127.

⁶ UNCITRAL, *Legal Guide on Drawing Up International Contracts for Construction of Industrial Works*, New York, 1988, p. 49; UNCITRAL, *Legal Guide on International Countertrade Transactions*, 1993, p. 47.

Although entitled "Preamble," Article 1 of the general conditions issued by the U.N. Economic Commission for Europe, appears to be of a different nature. Article 1 forms part of the body of the contract and provides that the conditions are to apply unless both parties expressly agree otherwise in writing. (See notably conditions 188A).

⁷ ICC Model Commercial Agency Contract, ICC Publication No. 496, Paris, ICC Publishing, 1991; ICC Model Distributorship Contract, ICC Publication No. 518, Paris, ICC Publishing, 1993; ICC Model International Sale Contract (Manufactured Goods intended for resale), ICC Publication No. 556, Paris, ICC Publishing, 1997; ICC Model Occasional Intermediary Contract, ICC Publication No. 619, Paris, ICC Publishing, 2000; ICC Model International Franchising Contract, ICC Publication No. 557, Paris, ICC Publishing, 2000.

⁸ Model Contract and Users' Guide, International Commercial Sale of Perishable Goods, International Trade Centre (UNCTAD/WTO) 1999, 78 pp.

⁹ Conditions of Contract for Construction (new Red Book), Lausanne, FIDIC, 1999; Conditions of Contract for Plant and Design-Build (new Orange/Yellow Book), Lausanne, FIDIC, 1999; Conditions of Contract for EPC Turnkey Projects (Silver Book),

only very short ones. This can be explained by the nature of these contracts, which aim at standardization, whereas recitals hardly fit such a purpose. The lack of mention of the possibility of drafting recitals can also be explained by the fact that some standard contracts are meant to be used in specific sectors such as commodities, perishable goods or products manufactured for sale, where contracts are not subject to lengthy negotiations.

B. Form

Recitals occur most often after a commencement introducing the parties to the contract:

“This agreement is made between Consolidated Industries, Inc., hereinafter called Licensor, a corporation organized under the laws of Delaware, United States of America (United States), and having its principal offices in the United States, and Gas N.V., hereinafter called Licensee, a naamloze vennootschap organized and existing under the laws of the Kingdom of the Netherlands (Netherlands) and having its residence and principal offices in the Netherlands.

“Witnesseth:

“Whereas, . . .”

Sometimes, recitals bear a title: (*Preamble, Exposé des Motifs, Preliminary, Recitals, Präambel, Premesse*, etc). In contracts drafted in English, the recitals are often introduced by the word *Witnesseth*, as in the above example.

Generally, each paragraph of recitals begins with the words *Whereas*, or in French *Attendu que* or *Considérant que*.

Often, recitals end with wording that leads into the beginning of the contract. Here are some typical examples:

- “now, therefore in consideration of the premises and of the mutual agreements hereinafter contained, Licensor and Licensee do hereby agree as follows: . . .”
- “now, therefore, it is hereby agreed as follows: . . .”
- “en foi de quoi, il a été convenu de ce qui suit: . . .”

Lausanne, FIDIC, 1999. The standard form, which incorporates FIDIC conditions into the contract, starts with the following recitals: “Whereas the Employer desires that the Works known as . . . should be executed by the Contractor, and has accepted a Tender by the Contractor for the execution and completion of these Works and the remedying of any defects therein.”

C. Length

The length of recitals varies considerably, from a few lines to several pages. Here is an example of a particularly brief recital:

“Whereas, pursuant to arrangements made by X incorporated and Bank of Z Limited (hereincalled the Managers), the Banks, subject to the terms and conditions herein set forth, are willing to make loans available to the Borrower in a maximum aggregate principal amount of U.S. \$. . .

“Now, Therefore, it is agreed: . . .”

Such brevity is fairly exceptional. Most recitals vary in length depending on the complexity of the circumstances surrounding the contract, and also on the verbosity of the contract’s draftsmen and their desire to set out some explanations before entering into the contract.

D. Contents

What do recitals contain? Although their contents vary considerably, it is possible to categorize the types of subject matter most frequently encountered. The following account simply describes those different types; legal issues will merely be identified and will be discussed later in the second part of this study.¹⁰

1. Attributes of the Parties

Although the parties to the contract will perhaps have already been identified in the commencement of the contract, recitals very often contain a more detailed description of their respective skills and attributes:

- “whereas, A, through the operation of its subsidiaries and affiliates located in 22 countries in the world, has accumulated and is accumulating valuable experience and know-how in the business of, among other things, renting various kinds of television, video tape recorders and other similar and related merchandises to individuals, hotels and other customers;”
- “whereas, B and C each possess valuable information regarding the market situation relating to television, videotape recorders and similar and related merchandises and the rental business related thereto: . . .”
- “whereas, A is in the business of selling food products to end consumers in . . . and wishes to establish facilities for the production

¹⁰ See *infra*, pp. 87–100.

and bottling and/or canning of fruit and similar drinks (hereinafter referred to as the Facilities);”

- “B is in the business of manufacturing and selling fruit juices, soft drinks, fruit concentrates and syrups in Europe and in other countries but is not in a position to market its finished products in Arabian countries;”
- “C is in the business in the Middle East and Africa of developing and managing complete industrial projects including the provision of technical and general management assistance to such projects and wishes to cooperate closely with above mentioned partners with respect to the construction of, and the transfer of technology to, the Facilities; . . .”

Often there is distinct emphasis of the particular attributes of one or the other of the parties:

- “whereas, Licensor is now and it and its predecessors for many years have been engaged in the business of designing, manufacturing and selling office plate holding devices, . . .;”
- “Licensee is among the world leaders in the business of licensing know-how and patent rights for the design, construction and operation of . . . plants . . .;”
- “considérant que X possède une expérience très développée dans la fabrication mécanique et dans la commercialisation d’articles de . . .;”
- “A, constructeur de matériel textile, d’une part possède un réseau commercial important dans le monde entier et est donc, de ce fait, bien placé pour recueillir des demandes d’installations de fils ou fibres chimiques, . . .”

Such flattering appreciation is not always without ulterior motive. In many instances, it is initiated by the other party and doubtless the party that is the object of the flattery is unable to refuse the compliment. Below we shall deal with the repercussions that flattering words in the recitals can have on the parties’ level of liability under the contract.¹¹

In some cases, the opposite occurs and it is the party that is the object of the eulogy who requires its inclusion so as to justify any harsh provisions that it has forced the other party to accept. Such is the case in a Franchise Agreement containing the following:

“Considérant que X possède une position prépondérante en matière de création de chaussures de femmes et dispose d’importants moyens de production, . . .

¹¹ See *infra*, pp. 93–94.

“Considérant que X a créé, en France et à l’étranger, des magasins de qualité indiscutable, installés dans des quartiers prestigieux et dont l’existence favorise le renom de ses propres marques, ainsi que de celles commercialisées dans ces points de vente,

“Considérant que le franchisé est conscient des avantages que peut lui procurer une plus étroite collaboration avec X, . . .”

Conversely, a party to a contract may wish to emphasize its own limitations so as to highlight the other party’s responsibilities.

“Considérant que la société X n’est pas initiée à la technique informatique,”

2. The Parties’ Objectives in Entering Into the Contract

Another topic frequently dealt with in recitals is the objectives sought by the parties at the time of entering into the contract. Here are several examples:

- “whereas, the Parties are desirous of participating in the execution of the Project, and, accordingly, wish to jointly prepare and submit to the Customer a Tender for the Project, and thereafter, if the Tender is accepted by the Customer, to execute the Project in collaboration jointly and severally towards the Customer, . . .”
- “whereas A and B desire to rationalize the production and operation of their respective mills so as to permit each mill to concentrate its production on grades of paper best suited to its equipment, to obviate short runs, and to effectuate other economies in the operations of both companies; . . .”
- “Attendu que les objectifs essentiels visés par cette collaboration sont: la mise au point et l’adaptation en commun de matériel textile mettant en œuvre la technologie la plus récente et la plus performante;
la coordination des moyens de recherches de chaque Partie, afin d’abaisser le coût de ces recherches et d’en augmenter l’efficacité; de faire bénéficier B de l’expérience industrielle d’un producteur mondial de fils et/ou fibres chimiques;
de développer une industrie française de la construction de matériel pour la fabrication et la transformation de fils et/ou fibres chimiques;”
- “Considérant que X désire participer au développement de cette nouvelle industrie pour mieux mettre en valeur sa main-d’œuvre, ses propres investissements et son know-how en matière de . . . ; qu’elle désire également renforcer sa participation dans cette

industrie au cas où il s'avèrerait, à la suite de l'expérimentation, qu'une telle extension de sa participation serait souhaitable; que cette participation permettrait à X d'utiliser pleinement les actifs dont elle dispose actuellement, étendrait ses activités dans un secteur nouveau de l'industrie du . . . et contribuerait ainsi à préserver sa position dans cette industrie en s'adaptant à son évolution; . . .”

The technique of setting the contract in its context can be used to satisfy a desire to provide an aid to interpretation for use in the event of any future disagreement between the parties.

In the following extract from the recitals to a joint venture agreement, the parties describe the fundamental reasons for their alliance:

“l'organisation de cette entité reposerait sur l'idée fondamentale qu'elle constitue un moyen au service des parties destiné à faciliter la coordination de leurs efforts et de la mise en oeuvre de leurs moyens respectifs et à améliorer les résultats de leur coopération en vue de réaliser les objectifs susvisés.”

Descriptions of the parties' objectives are sometimes given a journalistic ring, as in the recitals to this franchise agreement:

“Les difficultés dont souffre le commerce indépendant en général, y compris celui de la quincaillerie, proviennent d'un certain nombre de causes dont les principales sont les suivantes:

“les consommateurs ont de plus en plus tendance à estimer trop élevé le prix des marchandises qui leur sont offertes;

“l'accroissement continu des charges d'exploitation rend de plus en plus difficile l'équilibre des entreprises;

“une concurrence croissante disposant d'un pouvoir d'achat important et de puissant moyens d'action, utilisant les techniques les plus modernes de distribution, attire à elle une part croissante du marché au détriment du commerce isolé.

“Afin de reprendre leur place et de retrouver une pleine activité, les commerçants indépendants n'ont d'autre moyen que d'unir leurs efforts en se groupant pour mettre en commun leur capacité d'achat et d'accéder ainsi aux méthodes commerciales modernes qui font le succès de leurs concurrents.”

No doubt this is inspired by the desire to *sell* the franchise agreement to the franchisee and perhaps also to provide future justification for the contract under competition law by stressing the aim of rationalization.

In some contracts with developing countries, the recitals serve to set the contract within the regulation of foreign investment¹² and the economic policy objectives pursued by the government of the country in question:

“que X est chargée, sous sa responsabilité, de promouvoir l’industrialisation (du pays Z) dans le domaine de la construction mécanique;

“que X a plus particulièrement pour mission la création d’une industrie autonome et indépendante susceptible de répondre aux besoins actuels et futurs (du pays Z) en matière de constructions mécaniques et, notamment, dans le domaine de la fabrication et de la distribution de cycles, de cyclomoteurs et de moteurs . . .

“que le Constructeur accepte la mission qui lui est confiée dans le cadre des principes définis par (le pays Z) dans le but de développer son économie nationale.”

Some recitals refer to the New International Economic Order¹³

“attendu que X et Y, conscients de contribuer ainsi à l’édification d’un nouvel ordre économique international, ont décidé de conclure la présente Convention Générale de Coopération, pour établir entre elles une coopération institutionalisée et pour fixer les principes et le cadre de cette coopération.”

Below we shall describe the possible consequences that such a reference may have on the parties’ obligations under the contract.¹⁴

3. *The Spirit in Which the Parties Have Entered Into the Contract*

When an agreement raises sensitive issues for its signatories, for example, with regard to their relations with their principals, recitals can serve as an opportunity to state the spirit in which each party is entering into the agreement. Take as an example this extract from an agreement entered into in 1964 in Belgium between the public administration, trade unions

¹² See, for instance, the recitals of the contract leading to the Pyramids arbitrations (ICSID decision, November 27, 1985, XVI *Yearb. Com. Arb.* 1991, 16).

¹³ About the New International Economic Order, see *infra*, p. 93.

¹⁴ See *infra*, p. 93.

and parties from the private sector. The agreement relates to the organization of the production and distribution of gas and electricity:

“Les organisations signataires, tout en ne se considérant pas comme engagées de façon générale sur le plan des principes applicables en matière économique et sociale, indiquent ci-après dans quel esprit elles signent la Convention:

“Les organisations syndicales des travailleurs et la FIB, considérant, d’une part, les résultats obtenus par la formule de contrôle de l’électricité dérivant de la Convention de 1955 mais, d’autre part, la limitation du champ d’activité de celle-ci aux producteurs-distributeurs privés, se réjouissent de voir aboutir les efforts tendant à incorporer dans la Convention de contrôle l’ensemble du secteur de l’électricité. Par ailleurs, étant donné les activités mixtes (électricité et gaz) exercées par certaines sociétés, et l’aspect d’utilité publique de l’approvisionnement en gaz, elles se réjouissent également de l’adhésion à la Convention de la partie privée de ce secteur et espèrent pouvoir étendre cette adhésion à l’ensemble de celui-ci.

“Ces organisations ont entendu également orienter vers une action de prévision et de programme la mission du Comité de Contrôle et donner à son secrétariat les moyens voulus pour la remplir.

“Les entreprises privées d’électricité, fortes de l’expérience acquise, se rallient à une consolidation de la formule de contrôle. Les entreprises publiques d’électricité et les unions de centrales industrielles, considérant qu’elles ne peuvent rester en dehors d’un mouvement de coordination de la politique de l’électricité, décident d’adhérer à la Convention dans les limites indiquées respectivement dans les statuts de la SGSPE et dans la convention avec le Comité de gestion des entreprises d’électricité.

“Les entreprises privées gazières, enfin, se montrent disposées à s’engager dans un système de contrôle qui a fait ses preuves en électricité.

“De son côté, le Gouvernement, conscient de sa responsabilité en matière de politique énergétique et considérant que la nouvelle convention de l’électricité et du gaz a le mérite d’étendre un système qui, jusqu’à présent, a donné d’heureux résultats, approuve cette convention et y apporte sa collaboration. Il a entendu y définir son rôle et ses prérogatives.

“Toutes les parties constituant et le Gouvernement se rallient aux objectifs de la Convention, soit, dans l'intérêt général, poursuivre la rationalisation des secteurs et la réalisation d'une gestion plus coordonnée et plus unifiée pour arriver à un abaissement des prix de l'électricité et du gaz, en tenant compte de la situation économique et du caractère de service d'utilité publique des secteurs.”

4. *Circumstances Preceding and Surrounding the Contract*

Recitals are often the place where parties recount the circumstances which have preceded and which surround the entering into the contract.

Here are two examples of this:

- “The Giotto project is undertaken to achieve an exploratory mission to the Comet Halley, Giotto is to be launched by an Ariane launcher in a tight single launch window in July 1985. The encounter with Halley is to take place in March 1986. The principal objectives of the Giotto experiments include imaging the nucleus of the Comet Halley and chemical analysis of the coma during a fast fly-by. The Giotto project principally consist of three parts:
“the Giotto Spacecraft (hereinafter referred to as Giotto) and
“the Giotto Experiment Payload (hereinafter referred to as the Experiments) and
“the Giotto ground segment. . . .”
- “Il a été préalablement exposé:
“1. Qu'après la découverte, au . . . , d'un gisement de calcaire, X a fait procéder à une étude sur la rentabilité de l'investissement nécessaire à la construction et à l'exploitation d'une cimenterie installée à proximité dudit gisement;
“2. Qu'après examen de cette étude de rentabilité, X a décidé de construire à proximité du gisement découvert une cimenterie de deux lignes de production capable de produire annuellement un million deux cent mille tonnes de clinker, ladite cimenterie devant s'approvisionner aux carrières d'exploitation dudit gisement, la production de clinker devant être en partie utilisée au . . . et en partie exportée, notamment en”

The description of the contractual context can include commercial, political, technical and other elements affecting the contract, as well as the allocation of risks decided by the parties. In the financial sector, the recitals may refer to the transactions that are the subject matter of the operation, such as buyers' credits, which identify and describe in detail the commercial contract that is being financed.¹⁵

¹⁵ G. Bourdeaux, *Le crédit acheteur international*, Paris, Economica, 1995, pp. 149–150.

Such descriptions of the environment in which the contract has been entered into appear capable of affecting the future interpretation of the contract.¹⁶ Could they not also facilitate the adaptation or the termination of the contract if the circumstances described in the recitals proved different from reality or if they changed drastically?¹⁷

Describing the circumstances that led to the making of the contract seems particularly important in the case of settlement agreements given that the recitals will outline the dispute that the settlement is intended to bring to an end:

“en date du 12.12.1977, X a passé commande à Y d’un remorqueur baptisé ultérieurement . . . Dans le cadre de cette commande, Y a passé différents contrats . . . pour la fourniture de deux moteurs de propulsion entraînant chacun une pompe à incendie, sans qu’il soit utile ici d’entrer dans le détail de ces contrats ou des responsabilités en découlant. Postérieurement à la livraison du navire, les groupes propulseurs pompes à incendie furent l’objet de graves détériorations qui nécessitèrent des travaux et dépenses importantes dont le montant s’est élevé à près de 650.000 francs.

“Les parties au présent protocole n’ayant pu se mettre d’accord sur les causes et responsabilités des désordres constatés, une expertise amiable fut confiée à M. W par un accord en date du 25 avril 1983.

“M. W ayant déposé son rapport le 13 janvier 1984, les parties se sont alors rapprochées pour trouver une solution amiable à leur différend.

“C’est dans ces conditions qu’il a été convenu ce qui suit . . .”

The need to describe the circumstances in which the contract has been concluded also appears when the purpose of the contract is to amend a pre-existing contract. Here, the parties feel the need to explain the amendments and to set them in context:

“whereas, Primo and Secundo have entered into a . . . ‘Products Agreement’ as of the first day of January 1980 (hereinafter referred to as ‘The Agreement’);

“whereas, it has now become apparent to Primo and Secundo that Paragraph 4.03 of The Agreement does not adequately protect Secundo’s interest, and

¹⁶ See *infra*, pp. 88–89.

¹⁷ See *infra*, pp. 92–93.

“whereas, in the furtherance of a good business relationship, Primo desires that Secundo’s interests be adequately protected;

“now, therefore, in consideration of the premises and the mutual covenants herein set forth, it is agreed that the first sentence of Paragraph 4.03 of the Agreement shall be amended to read as follows: . . .”

5. *Links With Other Contracts*

Contracts sometimes have links with other contracts. In such cases, recitals frequently make reference to this fact:

- “whereas Buyer has previously purchased from Seller one Proof-of-Concept Widget under a Purchase Order, dated as amended;
“whereas Buyer and Seller have previously entered into a Widget Sales agreement (hereinafter ‘Sales Agreement’), dated . . . ;
“whereas Buyer and Seller have previously entered into a License and Technical Assistance Agreement (hereinafter ‘LTAA’), dated . . . , concerning the Widget;
“whereas Buyer and Seller desire to continue their cooperative efforts to develop, manufacture, market, and sell the Widget; . . .”
- “Il a préalablement été exposé que:
“1) Le ‘Ministry of Works’ de la République de . . . (ci-après dénommé le ‘Client’) a conclu avec l’E.G., le . . . mil neuf cent quatre vingt deux, un contrat relatif aux études, génie civil, fournitures, montage et toutes opérations de mise en service d’un complexe . . . à ériger sur le site de . . . que le Sous-Traitant a visité antérieurement aux présentes. Travaux ci-après désignés comme: le ‘Main Contract’ (ou le ‘Contrat Principal’) ou ‘l’Entreprise.’
“2) De son côté, à l’issue des négociations de . . . auxquelles . . . a participé activement et après avoir pris connaissance du ‘Main Contract,’ le Sous-Traitant déclare . . .

The following example is the recitals to a contract entered into by the supplier of an industrial plant who was required to accept part payment in the form of crude oil, with a third party agreeing to repurchase the crude oil against payment of a commission:¹⁸

“Engineering C négocie avec la State Chemical Company (S.C.C.) un contrat industriel pour la fourniture d’unités de traitement faisant partie du projet d’aromatiques d’ . . .

¹⁸ For a more detailed account of such a scenario see M. Fontaine, *Aspects juridiques des contrats de compensation*, *D.P.C.I.*, 1981, pp. 203–213.

“Dans le cadre de ce projet, Engineering C ou l’acheteur qu’il aura désigné sera amené à garantir à la State Petroleum Company (SPC) le débouché aux prix et conditions officielles de la SPC de 4 000 000 Tonnes de Brut dont 70% sous forme de grade lourd 31–31.09 API et 30% sous forme de grade 1 Léger 34–34.09 API.”

References to linked contracts undoubtedly shed light on the significance of the contract in which they are contained. Sometimes it may be arguable that such references bring about some degree of legal linkage between the various contracts.¹⁹

Linkage of this sort is undeniable in the following extract, also taken from a sub-contract:

“In view of this, A shall design, manufacture, deliver CIF, guarantee and generally assure the obligations described in the Main Contract Documents on his equipment in the same manner as a direct Contractor towards Electric Company, as well as assure the erection, supervision and commissioning test on site, if required. A will be bound by all and any decision taken by E.C. and in particular: modifications, suspension or termination of the Main Contract. . . .”

The following example relates to a transfer of shares and makes the performance of a concurrent contract a condition precedent to the entry into force of the contract which contains these recitals:

“Considérant qu’un Accord d’Achat (ci-après dénommé ‘Accord d’Achat’) daté du 30 juillet 1970 est souscrit simultanément avec le présent par et entre A, C et B pour formuler les modalités suivant lesquelles A devra acheter, ou avoir acheté à la Date de Clôture (ci-après dénommée “Clôture”) tels qu’ils sont définis dans ledit Accord d’Achat, les actions, prêts et avances ci-dessus mentionnés,

“Considérant que les parties signataires souhaitent exposer dans le présent accord général leur accord en ce qui concerne les intérêts respectifs qu’elles vont avoir dans le capital de X et dans les prêts et avances à elles consentis, ainsi que les prix à payer par chacune d’elles pour ce faire, en ce qui concerne la manière dont X sera organisée, contrôlée, dirigée et gérée, d’un commun accord entre elles, aussi bien qu’en ce qui concerne les autres sujets dont question ci-dessous, dans le cas où les transactions prévues dans l’Accord d’Achat sont effectivement réalisées à la Clôture . . .”

¹⁹ See *infra*, pp. 95–96.

6. *Stages of the Negotiations Leading Up to the Contract*

Often, recitals serve as an opportunity to set out a chronological account of the different stages of negotiations which have led to the making of the contract. Here is an example of this:

1. “Attendu que l’Agence a envoyé le 05 Octobre 1982 au Contractant une demande de révision de son offre de Novembre 1979 pour la réalisation d’une série de satellites Meteosat pour un système météorologique opérationnel (Réf.: Demande d’offre n° RFQ/3-3425/82/F, sous couvert de la lettre n° ON/2703-82/CG/fd datée du 5 Octobre 1982).”
2. “Attendu que le Contractant a répondu à cette demande d’offre révisée, par sa proposition de Novembre 1982 et par les amendements qui y ont été apportés jusqu’en 1983.”
3. “Attendu que l’Agence a établi et signé le 24 juin 1983 une lettre (Réf.: ON/2794-83/CG:fd) de notification de son intention de conclure un contrat pour les travaux précités (3 satellites plus un jeu pré-assemblé d’éléments de rechange) et d’autorisation formelle d’entreprendre immédiatement les travaux.”
4. “Attendu que le Contractant a formellement accepté tous les termes de cette lettre, en apposant sa contresignature le 18 juillet 1983.”
5. “Attendu qu’une seconde lettre (Réf.: ON/2844-83/CG/fd datée du 27 Décembre 1983) a été signée par les deux Parties, les 5 et 11 Janvier 1984, pour prolonger jusqu’au 1er Avril 1984 l’autorisation formelle d’entreprendre les travaux et pour établir ou amender certains termes du contrat en préparation.”
6. “Attendu que ces lettres ont prévu la conclusion d’un contrat dans un délai spécifié, l’entrée en vigueur de ce contrat avec effet rétroactif au 21 Juin 1983, et l’annulation consécutive du caractère contractuel des dites lettres.”
7. “Attendu que les deux Parties ont achevé la négociation des termes et conditions nécessaires à l’établissement d’un contrat complet.”
8. “Le lien contractuel entre l’Agence et le Contractant est à présent établi et défini par le présent contrat que les Parties substituent aux lettres précitées.”

A factual account such as the above can obviously have a different ending, such as in the following example:

“en ce qui concerne toute matière qui ne serait pas spécifiquement traitée dans le présent contrat, les deux Parties conviennent de se référer en priorité aux autorisations préliminaires d’entreprendre les travaux (en cas de conflit, la plus récente devant prévaloir), et aux lettres de l’Organisation confirmant au Contractant les accords conclus sur les prix négociés et définitivement approuvés; en cas de lacune, les deux Parties conviennent de se référer sub-

sidiairement aux termes de l'Appel d'Offres n° . . . révisé en juillet 1973, émanant de l'Organisation, ainsi que de la proposition soumise par le Contractant le 16 août 1973 et révisée par celui-ci le 1er octobre 1973 ainsi qu'à l'occasion de la revue critique de conception tenue du 27 au 31 mai 1974 (les termes de l'Appel d'Offres devant prévaloir sur ceux des documents émanant du Contractant, et en cas de conflit entre les documents précités émanant du Contractant, le document le plus récent faisant foi)."

Such an account of the different stages of contract negotiations can, at the very least, have an effect on how pre-contractual documents can be used to interpret the contract.²⁰

7. *Acknowledgements and Statements by the Parties*

Immediately prior to the making of a contract, it is not infrequent for one of the parties to require the other party to acknowledge certain facts that may have some bearing on how the contract is to be performed. This is done to ensure that such facts were fully acknowledged at the time the contract was entered into and thus to avoid any subsequent dispute in relation to them.

- "Whereas previously to the execution of the . . . , Contractor has satisfied himself as to the nature of the site of the Works, and the physical conditions there prevailing, in so far as they affect the Works or the execution thereof and has also satisfied himself as to where and in what manner the labour, materials, and equipment required for the Works can be obtained and has made every allowance he considers desirable in his own judgement in view of his own information, for all and such matters in the Scheduled Rates and Prices."
- "Afin de permettre à B de contracter en connaissance de cause, A a communiqué à cette dernière la totalité des documents en sa possession relatifs aux Brevets Licenciés et en particulier le résultat des recherches d'antériorité."

Particularly noteworthy is the reference in the following example to the existence of pending litigation:

"Whereas, Primo has agreed to grant to Tertio and Tertio has agreed to accept from Primo, although aware of the pendency of litigation concerning the validity and enforceability of the aforesaid patent, a non-exclusive license under United States patent No. . . . , all on the terms and conditions hereinafter set forth."

²⁰ See *infra*, pp. 88–90.

In other instances, one or both of the parties acknowledge circumstances which will affect the performance of the contract:

- “X has represented that he is presently qualified to act in the abovementioned capacities in the Kingdom of Saudi Arabia and that he will forthwith satisfy all requirements (including as to nationality) to remain so qualified for indefinite future.”
- “Whereas, A has the financial ability, technical competence and professional skills necessary to carry out the Petroleum Operations Hereinafter described, . . .”
- “Considérant que ni A ni le franchisé n’ont, à ce jour, signé un quelconque accord qui serait incompatible avec le présent contrat, . . .”

Often, recitals contain statements with reference to intellectual property rights:

- “Whereas, R is the owner of patents and patent applications, and may be the owner of further patents and patent applications, in the United States and Canada relating to the manufacture and use of Products (as hereinafter defined) and other spunbonded fabrics; and . . .”
- “1. K has acquired a license under the French Patent Application PV No. . . . registered on . . . in the joint names of Centre National de la Recherche Scientifique and Centre National de Transfusion Sanguine (hereinafter referred to as C.N.R.S. and C.N.T.S.), entitled . . . and its additional Application PV No. . . . registered on . . . , in the joint names of C.N.R.S. and C.N.T.S.
- “2. Said license is an exclusive manufacturing license for the whole world, an exclusive sales license for the whole world and a license permitting sub-licensing for the manufacture and sale in the whole world, of equipment conceived under the patent and the additional Application mentioned hereinabove in the first Whereas.
- “3. Applications corresponding to the above have also been filed in the United States of America, on . . . and in Canada, on . . . under Ser. No. . . . and . . . respectively.”

In all of these different examples, it seems that the underlying objective is either to avoid any subsequent dispute based on alleged ignorance of the circumstances described in the recitals or to provide a basis for litigation or enforcement in the event that one of the acknowledgements proves to be inaccurate or is not adhered to.²¹

²¹ See *infra*, pp. 91–92.

8. *Statement of Parties' Undertakings*

Although the recitals precede the body of the contract, they sometimes contain the apparent statement of genuine obligations.

Such is the case in this agreement to accept joint and several liability:

“Whereas A now wishes to assign the Lease to B, which wishes to take it over, and A agrees that it will be jointly and severally liable for the obligations undertaken by B pursuant to this Assignment.”

In this undertaking to procure performance by third party entities:

“Whereas, the parties hereto propose that, pursuant to the terms and conditions hereinafter set forth, A shall cause W Subsidiary, a corporation to be incorporated under the laws of the State of Delaware, a wholly-owned subsidiary of A, and B shall cause X Subsidiary, a corporation to be incorporated under the laws of the State of New York, a wholly owned subsidiary of B, to establish a partnership (the “Partnership”) under the laws of the State of . . . in which each W and X will have a fifty percent (50%) interest.”

In this agreement to indemnify:

“Whereas, A has agreed, in order to induce the Bank and W to assume the obligations as aforesaid: (i) to indemnify the Bank (for the account of the Bank, and W as their respective interests may appear) against any and all losses arising from the difference between the amount of funds expected to be forthcoming from the Ultimate Borrower and the aggregate amount of funds required to service the Fiduciary Credit, the Swiss Franc Credit and the Supplementary Credit, and to pay the Bank certain other amounts in connection with arranging the financing . . .”

In this provision concerning prices:

“Seller and Buyer desire to enter into a long-term Contract, whereby Seller will sell and Buyer will buy the naptha at prices conditions applicable from time to time to similar term contracts for similar quantities in Northwest Europe.”

In this hardship clause:

“(Les sociétés soussignées) reconnaissent que l’esprit qui régit le présent contrat et qui a conditionné leur adhésion à celui-ci est un esprit de solidarité, suivant lequel chacune d’elles doit tenir

compte des situations propres des autres co-signataires. Notamment si l'application du présent contrat infligeait à l'une d'elles un préjudice anormalement élevé par rapport à celui supposé par l'ensemble d'entre elles, les sociétés soussignées acceptent que les effets en soient équitablement répartis. . . .”

In this warranty as to the quality of work to be carried out:

“A garantit une construction soignée effectuée suivant les règles de l'art, concernant la manipulation d'un gaz corrosif et la pratique des installations frigorifiques au fréon et à l'ammoniac.

“A garantit aussi que l'étui et l'installation s'effectueront selon les normes bien connues d'elle par son expérience pratique.”

And in this definition of territory:

“Whereas, Licensee is desirous of manufacturing the Products within the following manufacturing area (hereinafter called the Manufacturing Area), namely, that part of the United Kingdom of Great Britain and Northern Ireland (United Kingdom) included within England and the metropolitan territories of Belgium, France, Federal Republic of Germany (West Germany), Italy, Luxembourg and Netherlands, the Product to be so manufactured for sale and use within the following sales area (hereinafter called the Sales Area), namely, the British Isles, composed of the territory of the Republic of Ireland and those parts of the United Kingdom included within Wales, Scotland, England and Northern Ireland; the territory of Iran; continental Europe, composed of . . . (etc . . .).”

Sometimes the recitals even describe the parties' primary obligations under the contract:

- “Whereas the Contractor admits that unless the execution of the Works is seriously hindered or delayed by unforeseen difficulties he can by skill and diligence complete and deliver up and accordingly in his Tender has undertaken to complete and deliver up the whole of the said Works on or before the . . . day of . . . One Thousand Nine Hundred and . . .”
- “In consideration of the mutual covenant herein contained, the Builder agrees to build, launch and complete One(1) Oil Tanker, more fully described in Article 1 hereof, to be registered under the flag of Liberia at the Shipyard in Japan, owned by the Builder or designated by the Builder at its sole discretion (hereinafter called Shipyard) and to deliver and sell to the Buyer, and the Buyer

agrees to purchase from the Builder and to accept delivery from the Builder the said Vessel, all upon the terms and conditions hereinafter set forth.”

- “La convention dont le descriptif suit, a pour objet sur le plan local:
 - “1) La concession par le concédant au concessionnaire d’une manière indissociable:
 - de l’exclusivité d’exploitation de sa marque et de l’utilisation de son enseigne,
 - de l’exclusivité de la fourniture en gros pour la revente au détail des marchandises portant l’étiquette . . . et éventuellement la marque, fournies en exécution du présent contrat, sous réserve de ce qui est ci-après en ce qui concerne les ventes directes.
 - “En conséquence, le concédant s’interdit, dans le territoire concédé, d’exploiter directement ou indirectement une chaîne de distribution spécialisée dans la vente d’articles concurrents, à l’exception de la chaîne . . .
 - “2) L’engagement du concessionnaire envers le concédant:
 - d’exploiter au mieux la marque et de maintenir le bon renom de l’enseigne concédée, par le meilleur service au consommateur,
 - “de s’approvisionner exclusivement, sous réserve de ce qui est dit à l’art.7 § 4 b pour les articles sus-indiqués, auprès du concédant et des fournisseurs agréés par celui-ci, et de toute façon d’acheter par campagne de vente (6 mois) un montant minimum garanti de marchandises au concédant.”

The different examples set out above raise some perplexing questions. If the recitals are to contain provisions that create true substantive obligations, where is the dividing line between the recitals and the body of the contract? Should statements contained in the recitals be endowed with the same legal significance as those contained in the body of the contract?²²

9. *Definition of Terms*

A widely adopted practice is to define certain terms used in the contract. Sometimes, these definitions are put in the recitals. One example of this was already mentioned above in the case of the recitals which define certain territories. Here is another example:

“For purpose of this Agreement, the following terms shall have the meaning designated in this Section, unless the context otherwise requires:

²² See *infra*, pp. 96–98.

“Affiliate is any other person, who is directly or indirectly controlling it, controlled by it or under common control with that Affiliate.

“RC Know-how means . . . (etc . . .)”

Agreement on defined terms certainly appears to constitute agreement on a substantive matter in the same way as the examples set out in Section II.D.8 above amount to agreements on substantive matters.

III. RATIONALE FOR RECITALS

What is the rationale for including recitals at the beginning of a contract?

It is difficult to provide a response to this question. Sometimes, it seems that inclusion of recitals results not from any particular reason but simply from the desire to conform to established practice, without there being any ulterior motive.

More often, recitals are, however, drafted with the greatest of care and their contents reflect pre-occupations of one or both of the parties to the contract. There are even instances in which the contents and the drafting of recitals are the subject of heated negotiations that are almost more difficult than those which relate to the body of the contract. This can be the case when some of the statements contained in the recitals result from one or more of the factors described above.

In the second part of this chapter we shall deal with the extent to which the specific objectives resulting from these factors are likely to be achieved.

Occasionally it appears that inclusion of recitals is driven by entirely different objectives, having nothing to do with the way in which the contract is to be performed. Some contract draftsmen include recitals in order to provide information to the management of their companies; reference to properly worded recitals allows readers who may have little time to read the contract in detail and who may not be lawyers to set the contract in its context and to understand its essential features (some sort of an executive summary). This may be a practical approach but it is not always without the danger of adulterating the contract with an over-simplified summary that may contain imprecisions or even statements that contradict those made in the body of the contract.

In other instances, certain passages contained in the recitals are intended to be read by third parties, for example the tax authorities, authorities that have to authorize the making of the contract, competition law enforcement authorities, even trade unions, the hope being that such

passages will produce a favorable reaction. We already gave an example of recitals in which the objective of certain parts seems to be to support arguments in favor of compliance with the rules of competition.²³

Here is another example which has the clear aim of arousing the sympathy of the authorities of a developing country which would have to authorize the contract.

“Considérant l’urgence de créer une infrastructure agro-industrielle, nécessaire à la réalisation des plans successifs de développement élaborés par le Gouvernement du . . . , la Société . . . a élaboré un projet prévoyant la création d’une Société de droit . . . ayant pour objet la construction, l’installation et l’exploitation d’une ferme d’embouche, sise dans la région de . . . ;

“Le montant de l’investissement prévu s’élève à . . . L’exploitation de la ferme entraînera la création d’environ 15 emplois (quinze) d’expatriés et d’environ 680 emplois de (nationaux);

“Compte tenu de l’importance des capitaux investis;

“Eu égard à l’ampleur des effets directs et indirects de l’investissement prévu sur l’activité économique;

“Compte tenu de la concordance du projet avec les objectifs du Gouvernement de la République du . . .”

Recitals are used in pursuit of a variety of objectives. Such diversity is bound to affect the legal implications.

IV. LEGAL IMPLICATIONS

A. Recitals and Similar Phenomena

Contracts are not the only type of legal documents that contain recitals. Often, the author(s) of written texts spontaneously feel the need to give some explanation or justification. In the case of legal documents, setting out reasons is often mandatory in order to safeguard the rights of the person to whom the decision applies.

1. *International Treaties*

International treaties often begin with recitals.²⁴ Here is an extract from the recitals to the Treaty dated January 27, 1967 on the Exploration of Outer Space:

²³ See *supra*, pp. 65–67.

²⁴ P. You, *Le préambule des traités internationaux*, Fribourg, Librairie de l’Université, 1941, 146 pp.; J. Corriente Cordoba, *Valoracion juridica de los preambulos de los tratados inter-*

“The States Parties to this Treaty,

“Inspired by the great prospects opening up before mankind as a result of man’s entry into outer space,

“Recognizing the common interest of all mankind in the progress of the exploration and use of outer space for a peaceful purposes,

“Believing that the exploration and use of outer space should be carried on for the benefit of all peoples irrespective of the degree of their economic or scientific development,

“Desiring to contribute to broad international co-operation in the scientific as well as the legal aspects of exploration and use of outer space for peaceful purposes,

“Believing that such co-operation will contribute to the development of mutual understanding and to the strengthening of friendly relations between States and Peoples,

“Recalling resolution 1962 (XVIII), entitled ‘Declaration of Legal Principles Governing the Activities of States in the Exploration and use of Outer Space,’ which was adopted unanimously by the United Nations General Assembly on 13 December 1963, . . .

“ . . . Have agreed on the following: . . . ”

Article 31(2) of the Vienna Convention dated May 23, May 1969 on the Law of Treaties expressly recognizes the value of recitals as an aid to treaty interpretation.

2. *European Union Acts*

Article 253 of the EU Treaty provides that regulations, directives and decisions of the Parliament and the Council, of the Council or of the Commission are motivated and must refer to the proposals or to the opinions that had to be obtained pursuant to the Treaty.

An application of this can be seen in the Directive dated March 5, 1979 on life insurance:

“The Council of the European Communities,

nacionales, Pamplona, Ediciones Universidad de Navarra, 1973, 68 pp.; A. Salomon, *Le préambule de la Charte, base idéologique de l'ONU*, Geneva, Editions des trois collines, 1946, 229 pp.

“Having regard to the Treaty establishing the European Economic Community, and in particular Articles 49 and 57 thereof,

“Having regard to the proposal from the Commission (OJ No. 6 35, 28.3.1974, p. 9).

“Having regard to the opinion of the European Parliament (OJ No. C 140, 13.11.1974, p. 44),

“Having regard to the opinion of the Economic and Social Committee (OJ No. C 109, 19.9.1974, p. 1),

“Whereas, in order to facilitate the taking up and pursuit of the business of life assurance, it is essential to eliminate certain divergences which exist between national supervisory legislation; whereas, in order to achieve this objective and at the same time ensure adequate protection for policy-holders and beneficiaries in all Member States, the Provisions relating to the financial guarantees required of life assurance undertakings should be coordinated;

“Whereas . . .”

There then follows a long series of recitals setting out the reasons for each of the operative provisions of the Directive and ending:

“whereas it is important to guarantee the uniform application of the coordinated rules and to provide accordingly for close collaboration between the Commission and the Member States in this field,

“Has Adopted This Directive

“Title I . . .”

Particularly noteworthy is the requirement in Article 253 for reference to proposals and opinions required under the EU Treaty.

The Court of Justice has held that the obligation to set out reasons “is intended to allow parties to defend their rights, to allow the Court of Justice to exercise its supervisory jurisdiction and to allow the Member States and any citizen thereof who has a legitimate interest to understand the way in which the Commission has applied the EC Treaty.”²⁵ Academic writers have asserted that setting out reasons also provides a means of information to the European Parliament, aids interpretation of the decision and

²⁵ Judgment of July 4, 1963, *ECR*, 1963, p. 143.

is conducive to efficient functioning of authorities who have to look into the reasons why the decision was reached.²⁶

Although the Court of Justice requires less detailed reasoning of legislative texts than of decisions,²⁷ one Regulation has nonetheless been annulled for failure to set out sufficient reasons.²⁸

3. Constitutions

The Constitutions of certain countries begin with recitals. The recitals to the Constitution of the United States of America set out as a Preamble are particularly well known:

“We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.”

The contents of recitals to Constitutions vary considerably. Sometimes, as in the above example, the recitals solemnly declare the promulgation of the Constitution that follows them (also the case in the recitals to the Swiss Constitution of 1874²⁹ and the Constitution of the Republic of Ireland of 1937). Sometimes the recitals set out certain *caveats* that would be inappropriate in the operative part of the constitution (for example the recitals to the Constitution of the Federal Republic of Germany of 1949, which contained the *caveat* that the Constitution was to be temporary since it had not been assented to by the entire German nation). In other cases, recitals to Constitutions contain solemn declarations of adherence to certain principles and to citizens' fundamental freedoms (for example the French Constitutions of 1946 and 1958).³⁰

The legal significance of recitals to Constitutions has given rise to debate. That legal significance varies from case to case. It may be that while appearing to endow principles stated in the recitals with added solemnity, the draftsmen of the Constitution avoid the risk of parties relying on such

²⁶ J. Megret et al., *Le droit de la Communauté économique européenne*, Brussels, ULB, vol. X, 1993, p. 524.

²⁷ *Id.*, pp. 505–506.

²⁸ Judgment of July 7, 1981, *ECR*, 1981, pp. 1833–1934.

²⁹ V.L. Waser-Huber, *Die Präambeln in den schweizerischen Verfassungen*, Bern, Peter Lang, 1988, 217 pp.

³⁰ P. Biscaretti di Ruffia & S. Roszmaryn, *La Constitution comme loi fondamentale dans les Etats de l'Europe occidentale et dans les Etats socialistes*, Paris, L.G.D.J., 1966, pp. 42–43.

principles as a basis for judicial review proceedings.³¹ On the other hand, a tendency has been noted towards a stronger normative character to constitutional preambles, e.g., in France and in Germany.³²

4. *Statutes and Regulations*

Legislation and instruments having regulatory character sometimes begin with introductions comparable to recitals. Such introductions do not constitute preparatory documents (which consist of documents issued before the preparation of the draft instrument, the draft instrument itself, the statement of reasons for its enactment, parliamentary reports and accounts of parliamentary discussions, etc.), which are analogous to pre-contractual negotiations and the different documents exchanged in the course thereof (for example letters of intent).³³ Rather, they amount to introductory remarks put into the final version of the legislative or regulatory instrument.

By way of an example, take the commencement of the Belgian Royal Decree of July 17, 1985, which amended the official interest rate:³⁴

“Baudoin, Roi des Belges,

“A tous, présents et à venir, Salut.

“Vu la loi du 5 mai 1865 relative au prêt à intérêt, notamment l’article 2, modifié par l’arrêté royal No. 147 du 18 mars 1935, confirmé par la loi du 4 mai 1936, et modifié par la loi du 30 juin 1970 et par les arrêtés royaux des 14 octobre 1974 et 28 juillet 1981;

“Vu les lois sur le Conseil d’Etat, coordonnées le 12 janvier 1973, notamment l’article 3, §1er, modifié par la loi du 9 août 1980;

“Vu l’urgence;

“Considérant qu’il existe actuellement un écart important entre les taux d’intérêt pratiqués dans les conventions courantes et le taux de l’intérêt légal;

³¹ *Id.*, p. 43.

³² C. Grewe & H. Luiz Fabri, *Droits constitutionnels européens*, Paris, PUF, 1995, pp. 42–43.

³³ Cf. Chapter 1 *supra*. Likewise, no parallel can be drawn either with explanatory documents that are sometimes issued following the adoption of legislative or regulatory instruments, for example administrative circulars.

³⁴ *Moniteur belge*, July 23, 1985.

“Considérant, dès lors, qu’une adaptation du taux d’intérêt légal s’impose au plus tôt afin de réduire l’écart entre ce dernier taux et ceux pratiqués sur le marché des capitaux;

“Sur la proposition de Notre Ministre de la Justice et de Notre Ministre des Finances et de l’avis de Nos Ministres qui en ont délibéré en Conseil,

“Nous avons arrêté et arrêtons: . . .”

Some of these passages are of use in assessing the lawfulness of the decree: the reference to the laws that are being implemented by the decree (under Article 159 of the Belgian Constitution, challenges to the lawfulness of a decree can be made before Belgian courts) and reliance on the urgent need for the decree to justify failure to request the opinion of the Belgian Conseil d’Etat.³⁵ The passages beginning with the word *Considérant* have not been drafted to comply with any legal requirement but simply to accord with established practice. However, they may have considerable importance in interpreting the decree.

5. Judgments and Awards

There is a further similarity between recitals to a contract and the statement of reasons contained in court judgments. The decision contained in the operative part of the judgment is preceded by a statement of the reasons upon which it is based. For example, judgments written in the traditional French judicial style consist of a series of paragraphs beginning with the word *attendu* or *considérant* leading to the words *par ces motifs* preceding the operative part of the judgment.

What is to be found in the statement of reasons? Statements concerning the attributes of the parties, a description of the dispute, the arguments put forward by each of the parties, some discussion relating to and the reasons why the court has come to its decision. All of these are, *mutatis mutandis*, similar to the contents of recitals to contracts.

In many countries, setting out the reasons on which a judgment is based is a legal requirement, stemming from the Constitution of the country in question (for example Article 149 of the Belgian Constitution). Litigants clearly need to know the reasons for a judgment that will be binding upon them. This is a feature of the smooth administration of justice and a protection against judicial arbitrariness. Absence of or defects in the

³⁵ In Belgium, the Conseil d’Etat comprises a legislative section, whose mission is to give prior opinion on legislative and regulatory drafts (laws coordinated on January 12, 1973, Art. 2-6bis).

reasoning leading up to a judgment can provide a basis for appeal. The requirement to state reasons for a judgment obliges judges to specify their views before deciding. By analyzing the reasons upon which judgments are based, lawyers can identify attitudes of the courts to various issues and trends in case law.³⁶

Some parts of the statement of reasons can have an even more specific significance. It may be the case that the judge fails to properly distinguish between those issues that should be dealt with in the statement of reasons and those that should be dealt with in the operative part of the judgment, and thus determines a substantive issue in the statement of reasons rather than in the operative part. In such cases, the form of the judgment is considered to be of little importance, and determinations made in the context of the statement of reasons will nonetheless be regarded as *res judicata*.³⁷

Under many jurisdictions and also as a result of several international conventions or rules of arbitration, arbitral awards must also state the reasons on which they are based.³⁸ The reasons for this requirement are similar to those in relation to court judgments. In addition, a statement of reasons can be informative for the courts if proceedings are instituted challenging the award or its enforcement.³⁹ Including a statement of reasons in arbitral awards is also of particular value to efforts to reconstitute a new *lex mercatoria*.⁴⁰

Irrespective of whether an instrument is a piece of legislation or a judgment, the operative part is often preceded, in the instrument itself, by an explanation (short or long) that is not always devoid of legal significance. The explanation may consist of cross-references to other instruments, allowing the reader to verify the lawfulness of the instrument; it may consist of a series of reasons capable of serving as the basis for proceedings challenging the validity of the instrument if it is legally defective; it may

³⁶ Dalloz, *Nouv. Rép. de Droit*, 2nd ed., 1963, Vol. *jugement*, No. 65.

³⁷ *Id.*, No. 64; J. Van Compernelle, *Considérations sur la nature et l'étendue de l'autorité de la chose jugée en matière civile*, note under Cass. b., Sept. 10, 1981, *Rev. Crit. Jur. B.*, 1984, pp. 260–264.

³⁸ R. David, *L'arbitrage dans le commerce international*, Paris, Economica, 1982, pp. 442–456. The dominant tradition was different in English-speaking countries, but even there the trend has developed towards increasingly stating the reasons for arbitral awards (see P. Sanders, *Quo vadis arbitration?*, The Hague, Kluwer Law International, 1999, pp. 31–33).

³⁹ M. Huys & G. Keutgen, *L'arbitrage en droit belge et international*, Bruxelles, Bruylant, 1981, p. 306; P. Sanders, *op. cit.*, 33.

⁴⁰ R. David, *op. cit.*, pp. 455–456; K.P. Berger, The international arbitrators' application of precedents, *J. Int. Arb.*, 1992, pp. 1–22; R.A. Schütze, The precedential effects of arbitration decisions, *J. Int. Arb.*, 1994, pp. 69–75.

consist of a statement of principles or objectives that can be used to aid the interpretation of the instrument.

Analyzing the different effects of recitals on legislative instruments and court judgments prompts one to carefully consider the possible legal significance of recitals preceding contracts, and perhaps, to extrapolate from certain apparent analogies. It should be remembered, however, that unlike legislative instruments and court judgments, contracts are agreements between parties, and not unilateral decisions taken by public authorities. This suggests the need for caution in placing too much emphasis on the similarities between the two.

B. Legal Effects of Recitals to Contracts

What legal significance should be given to recitals? Do the contents of this part of the contract, distinguishable from the body of the contract because of the form they take,⁴¹ have any legal effect?

In view of the subject matter of most recitals, this may be open to doubt. If the parties feel the need to include recitals, separate from the operative part of the contract, it is because they wish to deal with matters that have no place in the body of the contract. After all, recitals do not generally set out contractual rights or obligations. *Prima facie*, describing the parties' objectives in entering into the contract or the circumstances leading up to and surrounding the contract or even setting out the pre-contractual negotiations, do not seem to create any legal rights or obligations.

However, some recitals contain provisions that may create contractual obligations.⁴² In addition, a more thorough examination of recitals suggests that even those that are more literary in style can produce a variety of different legal effects.

Thus, recitals may or may not create legal effects. In practice, recitals often contain elements of both kinds.⁴³

The account, which follows, sets out the Working Group's conclusions on the legal effects of recitals. Given that their legal effects have been given little attention in most legal systems, the Group's conclusions cannot, for the most part, be based on case law or on the theories of academic writers.

⁴¹ Cf. *supra*, p. 62. The formal distinction between recitals and the "*operative part*" of the contract, as well as its practical importance, are also stressed by M. Anderson, *Drafting and negotiating commercial contracts*, London, Butterworths, 1997, p. 28.

⁴² Cf. *supra*, pp. 76–78.

⁴³ Cf. F.W. Grosheide, *op. cit.*, p. 317.

For this reason, they are put forward somewhat tentatively. English law is to be distinguished from other legal systems since certain aspects of the legal effects flowing from recitals have been dealt with in English case law going back as far as . . . the 15th century.⁴⁴

What, then, are the legal effects that may flow from recitals?

- Recitals may serve as an aid to the interpretation of a contract.
- Statements contained in recitals can shore up a claim for avoidance due to defective consent (*vice du consentement*) or misrepresentation.
- Sometimes, factual circumstances described in recitals can amount to the “bases upon which the contract has been entered into” (*Geschäftsgrundlage* or *presupposizioni*), changes that can, in various legal systems, create a right to amend the contract.
- Acknowledgements given by a party in the recitals can be used as grounds to estop that party from subsequently adopting a course of conduct that is inconsistent with those acknowledgements.
- Descriptions of the parties’ particular attributes and skills can influence the interpretation of their respective obligations and the extent to which they incur any liability for breach of the contract.
- Recitals, which give an account of the pre-contractual negotiations, can be used to determine the legal status of pre-contractual documents.
- References to other connected contracts or to third parties can create legal linkage between those other contracts or those third parties and the contract that contains the recitals.
- Recitals may already contain substantive contractual provisions.
- It may even be arguable that some statements contained in recitals can serve to demonstrate that the transaction is simulated or provide the basis for claims by third parties.

1. Interpretation of the Contract

A principle common to many legal systems is that a contract should be interpreted in accordance with the intentions of the parties to it. Clear illustrations of this principle can be found in Article 1156 of the French Civil Code and in Article 1362 of the Italian Civil Code.⁴⁵

⁴⁴ *Skinner v. Gray* (1595), note to *Mount v. Hodgkin* (1554), 2 Dyer 116a, quoted by *Halsbury’s Laws of England*, London, Butterworths, 1975, vol. 12, *Deeds and other Instruments*, § 1509, note 11.

⁴⁵ On the interpretation of contracts in comparative law, cf. *infra*, Chapter 3, pp. 106–114.

Recitals can contain many details that clarify such intentions. This is particularly true where the recitals describe the parties' objectives in entering into the contract (the recitals can then be used in connection with a teleological interpretation of the contract) or the circumstances surrounding the making of the contract. In addition, judges and arbitrators may be assisted in interpreting a contract by statements made in the recitals that convey the context of the economic policy pursued by the government concerned or that make reference to the New International Economic Order.⁴⁶

However, other rules of contract interpretation give precedence to the intentions of the parties as they are actually expressed in the contract rather than inquiring as to what the parties' true intentions might have been. Principally for reasons of legal certainty, precedence is given to what a reasonable man would regard as the objective meaning of the words used in the contract. If the meaning of the words is clear, no different meaning, which the draftsman may have had in mind when he drafted the contract, will be sought.⁴⁷

Although theoretical discussions about these two approaches to contract interpretation have aroused less interest in England than in continental Europe, the rules of English law give precedence to the will of the parties as expressed in the contract.⁴⁸ As a result, use of recitals to determine the meaning of provisions contained in the operative part of the contract is not permitted if the provisions in question are clear in meaning (whereas Article 1156 of the Napoleonic Code could allow such use).⁴⁹ But recitals may be referred to if a provision contained in the operative part is ambiguous. English law contains an important body of case law on the role that recitals may or may not have in the interpretation of contracts.⁵⁰

⁴⁶ Cf. *supra*, p. 67.

⁴⁷ Cf. *infra*, Chapter 3, pp. 110–111; C. Del Marmol & L. Matray, L'importance et l'interprétation du contrat (dans ses relations avec l'arbitrage commercial international), *Rev. Dr. Int. Dr. Comp.*, 1980, pp. 158–208.

Both approaches were defended when drafting the German BGB (compare §§ 133 and 157) but precedence is given to the expressed rather than real intention of the parties (K. Zweigert & H. Kötz, *An introduction to comparative law*, 3rd ed., Oxford, Clarendon Press, 1998, pp. 403–406); also see A. Rieg, *Le rôle de la volonté dans l'acte juridique en droit civil français et allemand*, Paris, L.G.D.J., 1961, pp. 358–420.

⁴⁸ Cf. *infra*, Chapter 3, pp. 112–113; C. Del Marmol & L. Matray, *op. cit.*, pp. 177–181.

⁴⁹ In spite of exceptions, this remains the most important point of difference between the English and continental systems (Cf. F.W. Grosheid, *op. cit.*, p. 319).

⁵⁰ Odgers, *op. cit.*, pp. 149–154 and the cases cited; *Halsbury's Law of England*, vol. 12, *op. cit.*, §§ 1509–1511 and the cases cited; K. Lewison, *The interpretation of contracts*, 2nd ed., London, Sweet & Maxwell, 1997, pp. 265–277; A.G.J. Berg, *Drafting commercial agree-*

In view of their fundamental differences of approach to contract interpretation, legal systems do not all attach the same value to the contents of recitals as an interpretative aid. This should be borne in mind. But, it is always a matter of degree and it appears that all legal systems allow recitals to play a greater or lesser role in resolving disputes over how contractual provisions are to be interpreted. This role is recognized in certain practical guides to contract drafting⁵¹ and should be considered together with the interpretative value accorded to the recitals to certain EU legal instruments⁵² and to international treaties.⁵³

On the other hand, published arbitral awards confirm the interpretative value of recitals, but they also reveal a clear tendency towards a contextual interpretation of the contract, in which the operative part and the recitals help to interpret each other. This approach is explained by the fact that arbitral awards tend to pay scarce attention to the law applicable in matters of interpretation.⁵⁴

The role of recitals as an aid to contract interpretation may become more significant given the current tendency to use word processors to draft contracts that are thus becoming increasingly standardized. Recitals lend themselves less to such a development; instead, they are becoming the place of refuge for items that are specific to a particular contract and which therefore individualize and personalize that contract.

ments, London, Butterworths, 1991, pp. 53–55; M. Anderson, *op. cit.*, p. 28; M. Anderson, *A-Z guide to boilerplate and commercial clauses*, London, Butterworths, 1998, p. 154.

In case of a clear contradiction between a provision in the recitals and a provision in the body of the contract, one finds opposition between the two approaches to contract interpretation: the theory of declared intention gives priority to the clearly written contractual provision, whereas the theory of real intentions allows use of recitals to prove the intention. The two theories converge in result when the contractual provision is ambiguous.

⁵¹ See *supra*, p.; the UNCITRAL Guide on construction of industrial works confirms that “the extent to which the recitals are used in the interpretation of a contract may vary under different legal systems” (*op. cit.*, p. 49).

⁵² Cf. *supra*, pp. 81–83.

⁵³ Cf. *supra*, pp. 80–81.

⁵⁴ ICC Award No. 4132 (1983), *Clunet*, 1983, 891, X *Yearb. Comm. Arb.*, 1985, 49; Ad hoc Arbitral Tribunal (B. Gomard), *Elf Aquitaine Iran v. National Iranian Oil Company*, *Rev. Arb.* 1984, 401, XI *Yearb. Comm. Arb.*, 1986, 97; ICC Award No. 7181 (1992), XXI *Yearb. Comm. Arb.*, 1996, 99; ICSID Award., *SPP (Middle East) Ltd. v. Egypt*, 20 mai 1992, *Rev. Arb.* 1994, 189; ICC Award No. 7639 (1994), XXIII *Yearb. Comm. Arb.*, 1998, 66; ICC Award No. 7314 (1995), XXIII *Yearb. Comm. Arb.*, 1998, 49; ICC Award No. 7337 (1996), XXIV *Yearb. Comm. Arb.*, 1999, 149.

2. Vices de Consentement, Misrepresentations

Often, recitals highlight circumstances that have been instrumental in the making of the contract. They may refer to statements of fact (for example the proximity of hydrocarbon or mineral reserves) or representations made by one of the parties (for example, the ownership of a patent).

The various legal systems contain rules that allow a party to challenge contractual obligations that it accepted before it was in full possession of all the relevant facts.

For example, under French Law (Article 1110 of the French Civil Code), a contract can be terminated on the basis of substantive error (*erreur substantielle*) or on the basis of fraud (*dol*) (Article 1116 of the French Civil Code). The applicant has to prove the existence of factors that vitiate its consent (*vices de consentement*), and statements contained in the recitals to the contract can sometimes provide the necessary proof.

Hence, highlighting certain facts in the recitals can contribute greatly to the proof of a mistake (*erreur*), and, particularly, its substantive character.⁵⁵ Under French law, error as to a party's reasons for entering into a contract will, in principle, be considered. However, it can be taken into account if these reasons were determining factors in the plaintiff's decision to enter into the contract and if the parties have agreed to bring such reasons within the ambit of the contract. These two conditions might be satisfied if the reasons in question have been highlighted in the recitals to the contract.

Including in the recitals a statement by one of the parties that proves to be false may, in certain circumstances, facilitate proof of fraud. In addition, the absence of certain statements in situations in which they should normally have been made can help prove fraud by silence (*réticence dolosive*),⁵⁶ given the current emphasis on the obligation to provide information at the time of entering into a contract.

Alternatively, the inclusion of certain statements in the recitals can subsequently be used to prove that the parties entered into the contract in full knowledge of all relevant facts, thus providing an effective defense to any claim for termination on the basis of error or fraud.

⁵⁵ For a case where this condition was not satisfied, cf. ICC Award No. 6363 (1991), XVII *Yearb. Comm. Arb.*, 1992, 186.

⁵⁶ Cf. e.g., J.P. Masson, *Les fourberies silencieuses*, note under Cass. b., June 8 1978, *Rev. Crit. Jur. B.*, 1979, pp. 527–542.

Under English law, the rules on misrepresentation allow for various remedies for a party who has suffered loss as a result of a false statement made by the other party, with the clear intention of making the injured party enter into the contract (Misrepresentation Act 1967).⁵⁷ Recitals often harbor such false statements.

3. Bases on Which the Contract Was Entered Into

Following a change in circumstances, to continue to perform a contract, may become difficult for either of the parties. A change in government may modify commercial trends and make certain markets less favorable for exportation. A technological breakthrough may render obsolete the goods being sold under a long-term supply contract. Is it possible to amend the contract so as to adapt it to the changed circumstances or even to terminate it?

This problem arises in all legal systems, but its resolution takes different forms based on a variety of legal concepts (*imprévision*, *caducité*, *Wegfall der Geschäftsgrundlage*, *presupposizioni*, frustration, etc.) that often involve reference to the bases on which the contract was entered into.⁵⁸

In cases where its governing law allows a contract to be challenged by reason of change in circumstances, recitals can play a important role insofar as statements contained in them describe, in detail, the bases for the making of the contract or the environment in which it was concluded. For example, statements in recitals may indicate that parties have entered into a contract because of the existence of an effective distribution network or because of one party's access to preferential terms of supply from one of its affiliates. Should the contractual relationship have to continue if these circumstances no longer pertain?

Using recitals to describe the circumstances prevailing at the beginning of the contract can also help a party if it wishes to avail itself of a hardship clause in the future.⁵⁹ Hardship clauses can be made more effective if they contain an express reference to the circumstances described in the recitals to the contract.

Is it possible to go even further and take the view that reference in recitals to the factual context indicates the parties' intention to challenge the contract if those facts no longer pertain, even if the contract contains

⁵⁷ For an account of the rules of English law on misrepresentation see, for example, J. Beatson, *Anson's Law of Contract*, 27th ed., Oxford University Press, 1998, pp. 233–269.

⁵⁸ Cf. *infra*, Chapter 9, pp. 453–455.

⁵⁹ On hardship clauses, cf. *infra*, Chapter 9.

no hardship clause? This issue turns on the interpretation of the contract, which will itself depend on how the contract's governing law establishes how the occurrence of unforeseen circumstances can affect the contract.

On the other hand, reference in the recitals to the New International Economic Order, an example was cited earlier,⁶⁰ can, in itself, suggest a right for one of the parties to precipitate a re-negotiation of the contract in the event of a change in circumstances. Such mitigation of the principle of *pacta sunt servanda* will depend on the content of the New International Economic Order.⁶¹

4. Estoppel

Under English law, a party cannot, in certain circumstances, contradict what it has acknowledged in writing, in a recital for example. In all cases, the acknowledgement in question must be clear, precise and without ambiguity. English case law indicates reluctance to find estoppel on the basis of acknowledgements made in recitals.⁶²

5. Effect on the Parties' Obligations and on the Extent of Their Liability for Breach

Our description of the contents of recitals has emphasized the frequent insistence on praising a party's particular qualifications and attributes ("among the world leaders in its field").⁶³ Praise of this kind is not given without ulterior motive. By admitting to be regarded as highly specialized in its particular area, a party agrees, in advance, to the standard by which the performance of its obligations under the contract will be judged. A party that operates at the highest level of its profession should perform its obligations in a manner worthy of its reputation. As such, assessing the

⁶⁰ Cf. *supra*, p. 67.

⁶¹ S.K.B. Asante, Stability of Contractual Relations in the Transnational Investment Process, 28 *Int. Comp. Law Q.* (1979), pp. 401–423; O. Lando, Renegotiation and Revision of International Contracts, *German Yearb. of Int. Law*, 1980, pp. 37–58. It should be remembered that the New International Economic Order is referred to in several instruments adopted by the U.N. on the basis of the Declaration and Action Program of May 1, 1974 (Resol. No. 3201 and 3202). See the comments on the New International Economic Order in L. Matray, Arbitrage et ordre public international, in *The Art of Arbitration* (Liber Amicorum P. Sanders), Deventer, Kluwer 1967, pp. 252–267.

⁶² Odgers, *op. cit.*, pp. 154–158 and the references quoted; K. Lewison, *op. cit.*, pp. 275–276. Concerning *estoppel*, cf. E. Gaillard, L'interdiction de se contredire au détriment d'autrui comme principe général du droit du commerce international, *Rev. Arb.*, 1985, pp. 241–258; B. Fauvarque-Cosson, *L'estoppel* du droit anglais, in *L'interdiction de se contredire au détriment d'autrui*, M. Behar-Touchais (ed.), Paris, Economica, 2000, pp. 3–25. Also see the new Article 1.8 of the Unidroit Principles, 2004 edition. On non-waiver clauses, cf. *infra*, Chapter 3, pp. 163–167.

⁶³ Cf. *supra*, pp. 63–65.

quality of goods that it delivers or services that it provides will be made by reference to the highest standards for such goods or services. Emphasizing a party's qualifications or attributes is therefore consistent with high expectations in relation to that party's obligations and liability.

On the other hand, sometimes (as mentioned earlier⁶⁴), a party uses recitals to emphasize its lack of skill in the area in which its counterparty will perform obligations under the contract. In such circumstances, the aim is to reinforce the high standard expected of the latter party because, frequently, a higher standard of performance (obligation to give proper information for example) is to be expected if a person enters into a contract with an another is not engaged in that business.

Some provisions contained in recitals may, in a different way, affect the extent to which a party incurs liability for breach of contract. When the governing law of a contract limits the damages payable following breach to damages payable for foreseeable loss,⁶⁵ stating certain facts in the recitals can amount to proof of how foreseeable an alleged loss actually was. No doubt, the famous case of *Hadley v. Baxendale* would have been decided differently if the contract of carriage made between the parties had included a recital explaining the particular importance of the piece of equipment being transported and the fact that it was needed in order to allow the plaintiff's mill to recommence operations.⁶⁶

6. *Status of Pre-Contractual Documents*

Listing pre-contractual documents in recitals can, subject to other indications, be taken to bear testimony to what the parties regard as the main stages of the pre-contractual negotiations. In the event of a subsequent dispute as to the meaning of certain provisions in the contract, such a list of pre-contractual documents may, governing law permitting, provide clues as to the parties' true intentions.

In some cases, recitals specify the status to be given to pre-contractual documents, either by stating that such documents are to be referred to in

⁶⁴ Cf. *supra*, pp. 63–65.

⁶⁵ Such is the case in English law, (M. Elland-Goldsmith, *Les principes généraux du droit anglais et les opérations internationales*, *D.P.C.I.*, 1980, pp. 465–466), as well as under Article 1151 of the French Civil Code (Ph. Malaurie & L. Aynes, *Cours de droit civil*, Tome VI, *Les obligations*, Paris, 10th ed., 1999, No. 839–842; see also *infra*, pp. 329–393).

⁶⁶ 9 Ex. 341, 156 Eng. Rep. 145 (1854). In this case, the owner of the mill did not succeed in obtaining damages from the carrier for loss resulting from the cessation of operations at the mill following delay in performance of the contract of carriage, because the carrier was not aware of the particular importance of the item that it had contracted to transport.

order to fill any gaps in the contract, or, conversely, to state that they are devoid of legal effect and that the contract alone contains all the terms of the agreement between its parties. Some examples appeared above.⁶⁷ Provisions of this kind, even if placed in the recitals to a contract, clearly have the effect of operative provisions; they can be and frequently are, set out in the body of the contract.⁶⁸

7. Links With Other Contracts or With Third Parties

Reference in a contract's recitals to other contracts with which the contract is in some way connected can result in the creation of a legal nexus between these contracts.⁶⁹

Sometimes, such a nexus is expressly created, as in the case of a sub-contract which refers to the main contract and links certain obligations arising under the sub-contract with those arising under the main contract. In an example given above,⁷⁰ the recitals contain a true quoted substantive provision that could, and should preferably, be inserted in the body of the contract.

Other recitals simply refer to other contracts without, in any way, stating what (if any) legal consequences are to result from these references. References of this kind can, at the very least, have some role in the interpretation of the contract in which they are contained,⁷¹ or alternatively, to which they refer. In some instances, the connected contracts are, in economic terms, to be seen as the *raison d'être* of the contract in whose recitals they are referred to. Consequently, such contracts can form part of the *Geschäftsgrundlage* of the contract in question. This may result in the latter contract being affected by matters that relate to the connected contracts (such as their non-existence, voidness, termination, *caducité*, etc.).⁷² Issues, such as this, should be clearly dealt with in the body of the contract.

Furthermore, references in a contract's recitals to other contracts can indicate a legal nexus between all of the contracts and justify that different

⁶⁷ Cf. *supra*, pp. 73–74.

⁶⁸ Concerning entire agreement and four corners clauses, cf. *infra*, Chapter 3, pp. 129–150, with an analysis of the problem of conflict between recitals and entire agreement clauses.

⁶⁹ Cf., in general, *Les effets du contrat à l'égard des tiers, Comparaisons franco-belges*, M. Fontaine & J. Ghestin (ed.), Paris, L.G.D.J., 1992, 464 pp.

⁷⁰ Cf. *supra*, p. 72.

⁷¹ For an example, cf. ICC Award No. 6829 (1992), XIX *Yearb. Comm. Arb.*, 1994, 167.

⁷² Compare M. Fontaine, *Aspects juridiques des contrats de compensation*, D.P.C.I., 1981, pp. 211–212 as well as severability clauses, *infra*, Chapter 3, pp. 167–176.

proceedings that, individually, should have been brought before different courts, could be brought together before a single court.

Finally, a more recent development should be pointed out. In two cases, the plaintiff requested arbitration against a third party, which was identified in the recitals of the contract. In the first case, the arbitral tribunal, on the basis of the case file, concluded that the parties had envisaged that the third party was also bound by the contract.⁷³ In the second case, any such extension was refused.⁷⁴ In principle this second approach should be approved. When the operative provisions of the contract are clearly separated from the recitals, a non-signatory is not to be bound by the arbitration clause of the contract. However, these cases establish the risks that are associated with an identification of a third party in the recitals. In practice, this is particularly relevant when dealing with groups of companies and State contracts.

8. *Substantive Provisions*

Finally, recitals may contain provisions that actually give rise to substantive rights and obligations. Examples of this have just been cited with regard to pre-contractual documents and to links with other contracts. Also cited before were examples of recitals containing provisions establishing joint and several liability, obligations to obtain a third party's undertakings, provisions relating to the calculation of prices or the definition of a contractually allotted territory, hardship clauses and even provisions setting out the parties' fundamental obligations.⁷⁵ Attention should also be drawn to the practice of including the parties' identity,⁷⁶ a list of contractual documents⁷⁷ or definitions in a contract's recitals.⁷⁸

In other instances, recitals can indicate the termination of a prior agreement, contain an agreement to undertake future negotiations or set

⁷³ Iran-U.S. Claims Tribunal, *Agrostruct International Inc. V. Iran State Cereals Organization*, Award No. 5, April 15, 1988, XIV *Yearb. Comm. Arb.*, 1989, 354.

⁷⁴ See Paris, July 7, 1994, *Rev. Arb.*, 1995, 107.

⁷⁵ Cf. *supra*, pp. 76–78. For example, cf. Trib. Gr. Inst. Paris, March 26, 1986, *Rev. Arb.*, 1987, 179, note Ph. Fouchard; an arbitration clause contained in the recitals preceding the operative provisions of a group insurance policy was considered to be enforceable.

⁷⁶ Cf. Trib. Première Instance Genève, March 13, 1986, XII *Yearb. Comm. Arb.*, 1987, 514. In this case, the identification of a party and the mention of its location in Switzerland in the recitals were considered to be relevant in respect to a problem of State immunity.

⁷⁷ For an example of recitals enumerating the contractual documents and establishing their hierarchy, see Paris, December 1, 1995, *Rev. Arb.* 1996, 456.

⁷⁸ Cf. *supra*, pp. 78–79, as well as definition clauses, *infra*, Chapter 3, pp. 153–156.

out conditions precedent (such as the receipt of an authorization) subject to which the contract will take effect.

Although provisions of these types would be more appropriately included in the body of the contract, legal systems rarely favor form over substance. As such, sloppiness by contract draftsmen will not lead to such provisions being deprived of their normal legal effects.⁷⁹

This was the conclusion reached by the Rennes Court of Appeal in 1984.⁸⁰ A group of traders entered into an agreement to form a limited company with a view to running a shopping arcade. The recitals to this contract included a passage in which the parties agreed not to modify their initial assortment. This statement was not included in the body of the agreement. The critical issue was to determine whether the statement in the recitals could establish contractual obligations. The Rennes Court of Appeal decided in the affirmative:

“Considérant que le contrat de société forme un tout dont il n’est pas possible de dissocier la partie “préambule” pour lui donner une simple valeur explicative d’une convention allant suivre;

“Qu’il suffit pour s’en persuader de constater que cette partie contient non seulement l’énoncé de principes généraux devant présider au fonctionnement de la galerie marchande mais aussi celui de toute une série d’obligations précises (dont celui de ne pas “modifier l’assortiment initial”) pesant sur des associés présents ou futurs; qu’en signant une telle convention ces associés adhéraient à un contrat dont le préambule était partie intégrée, ayant valeur conventionnelle et dont l’homogénéité implique que toutes ses composantes soient soumises en cas de difficultés à la procédure d’arbitrage stipulée par l’article 57 du contrat.”

One should also note that in the first of these two paragraphs, the Court recognized the recitals to have at least an explanatory role, that is to say, a role in interpreting the contract.

In cases where recitals appear to record a true contractual obligation, care should be taken to ascertain whether the relevant provision is repro-

⁷⁹ Compare this with the similar situation in which, *mutatis mutandis*, *res judicata* will apply with respect to statements made in the passages of a court opinion which set out the reasons for the judgement (cf. *supra*, p. 86).

The law applicable to the contract may affect this matter. Concerning English law, cf. A.G.J. Berg, *op. cit.*, pp. 53–54.

⁸⁰ Rennes, Sept. 26, 1984, *Rev. Arb.*, 1986, 441.

duced and elaborated in the body of the contract. Sometimes recitals summarize certain obligations that will be contained in the contract. In such a situation, the provision contained in the body of the contract is, as a matter of principle, the source of the relevant obligations. But the method is dangerous, because of the risk of contradiction. This comes back to the issue of contract interpretation dealt with above.⁸¹

9. Simulated Transactions—Obligations in Favor of Third Parties

We have already referred to instances in which recitals contain statements intended to incur benevolence on the part of third parties such as tax authorities, competition law enforcement authorities or a foreign government.⁸²

If such statements are not consistent with reality, the issue of how the legal system in question deals with simulated transactions becomes relevant. With regard to the relationship between the parties to the contract, their real intentions generally prevail, notwithstanding what their apparent intentions are expressed to be. However, to avoid future dispute, it is advisable that the parties sign a side-letter (*contre lettre*) although there is always the risk, at least under French law (Article 1321 of the French Civil Code), that third parties will have relied upon the false statement in the recitals and may enforce their rights accordingly. One should also bear in mind that such simulation often amounts to fraud and is therefore often unlawful.⁸³

In other instances, passages are included in recitals that are intended to be read by third parties with no aim to mislead. They simply re-state the terms of an agreement resulting from previous negotiations with such third parties. For example, acquiring shares in an insolvent company may be authorized by the relevant public authorities only in return for assurances about maintaining employment for the company's employees.⁸⁴

Could not recitals, which confirm such assurances and which are published (for example when they are used in a press release), amount to undertakings enforceable by third parties, a government or trade union having some interest in the transaction?

⁸¹ Cf. *supra*, pp. 88–90. See, however, Christou's suggestion to include a clause in the operative part confirming the obligations stated in the recitals (R. Christou, *Boilerplate practical clauses*, 2nd ed., Londres, FT Law & Tax, 1995, p. 5).

⁸² Cf. *supra*, p. 67.

⁸³ With regard to simulated transactions under French law see, J. Ghestin, Chr. Jamin & M. Billiau, *Traité de droit civil, Les effets du contrat*, Paris, L.G.D.J., 3rd ed., No. 865–921.

⁸⁴ Cf. *supra*, pp. 79–80.

10. *Contractual Provisions on the Effects of Recitals*

The various legal effects of recitals described above may arise if the contract contains no express provision stating the effects which its recitals are to have.

It is very rare for parties to make express provision as to such effects. Here is an example where this was done, taken from a Japanese Distribution Agreement:

“Article XXII—Entire Agreement.

“This Agreement constitutes the entirety of the covenants between the parties hereto with respect to the matter hereof. It supersedes and cancels any and all previous covenants, agreements, distributorship rights and undertakings either writing or verbal. It may not be amended except by an agreement in writing established between the parties and signed by their respective duly authorized officers.

“The recital of this Agreement shall have same force and effect as the text hereof.”

Here are the recitals to the Agreement:

“Whereas A manufactures and sells the automotive products known as . . . and desires to establish and develop the market for its products in the territory defined, and

“whereas the Distributor is willing to purchase . . . to import them into the above territory for distribution, and

“whereas the parties now wish to fix the terms and conditions of their relationship and agree to bind themselves by this Agreement, which supersedes and cancels any and all previous covenants, agreements and undertaking, either verbally or in writing, which may conflict, amend or abridge the terms and conditions hereinafter set forth.

“now, therefore, in consideration of the premises and the mutual undertakings herein contained, the parties hereto agree as follows: . . .”

What can be the legal effect of wording such as this, which provides for the recitals having the same force and effects as the body of the contract? One may wonder whether such wording adds anything at all to what has been said above. The only parts of recitals, which can have the same effect as provisions contained in the body of the contract, are those that

amount to operative provisions, which would be more appropriately contained in the body of the contract (for example, the third paragraph of the recitals quoted above, which supersedes and cancels all previous agreements between the parties). In any event, provisions that describe the parties (“A manufacturers and sells automotive products”) or their objectives. (“A . . . desires to establish and develop the market for its products . . .”) clearly cannot amount to operative provisions in the same way as those contained in the body of the contract in spite of any provision that purports to give them the same force and effect as provisions contained in the body of the contract.⁸⁵

Conversely, Grosheide wonders what to think about the following hypothetical clause that this author thought up for the purpose of his article.⁸⁶

“The recital of this agreement shall have no force and effect whatsoever and may not be taken into account as an aid to construction.”

Quite rightly, Grosheide refers to the legal effects of entire agreement clauses. The above clause has similar purposes by retraining the interpretation capacity of a judge or an arbitrator. The analysis of substantive and evidential law in the following chapter on interpretation clauses⁸⁷ seems to be relevant to this hypothetical clause.

V. ADVICE TO NEGOTIATORS

The legal effects that may result from recitals should not be underestimated. In a variety of ways, recitals can have important repercussions for a contract and for its parties.

For this reason, particular care should be taken when drafting recitals. In practice, this does not always happen; some contract draftsmen become

⁸⁵ Two Italian authors have suggested the following clause in an attempt to find a compromise between the binding force of the recitals and the priority to be given to the operative part: “Now, therefore, in accordance with the foregoing recitals which are an integral part of this Agreement and which are subject to the detailed terms and conditions hereinafter set forth, ITALIA and ELECTRONIC SERVICES agree as follows: . . .” (M. Bianchi & D. Saluzzo, *I contratti internazionali, Tecniche di redazione e clausole contrattuali*, Volume 1, Milan, Il sole 24 ore, 32). Such a clause seems to have the disadvantage not to oblige drafters to clearly distinguish between, on one hand, what they consider to be the hard core of contractual undertakings and on the other hand statements pursuing different purposes. However, the suggested clause could be useful in a system like the English one, where courts have formulated principles of interpretation liable to reduce the effects of recitals. The clause would then tend to protect drafters, thus giving more flexibility in negotiations.

⁸⁶ F.W. Grosheide, *op. cit.*, p. 321.

⁸⁷ Cf. *infra*, Chapter 3, pp. 105–119.

less rigorous when drafting this introductory part of a contract and make it appear more a work of literature than a legal document. This Chapter concludes with a checklist:

1. Recitals are rarely a necessity. A contract without recitals is, in principle, entirely valid. The inclusion of recitals should not result from a desire to merely follow a certain tradition. Rather, it should be the result of a conscious decision. Are the provisions, which are intended to be put in the recitals, liable to produce desirable legal effects or could they increase the risk of future disputes between the parties?

Each party to a contract will not always give the same response to these questions and it may be that the parties have conflicting interests in relation to certain provisions in the recitals. This justifies the same degree of care in negotiating recitals as that given to the negotiation of the body of the contract. Particular care should be given when determining the appropriate part of the contract in which various provisions are to be inserted. This should be decided according to the nature of the provisions in question.

2. The most widespread effect of recitals is to serve as an authoritative aid to the interpretation of a contract.⁸⁸ This should be borne in mind when describing the circumstances surrounding the entering into the contract and the objectives pursued by the parties. Such descriptions will undoubtedly be in the basis for any future discussions between the parties in relation to issues of interpretation of provisions contained in the contract. In addition, they will be closely scrutinized by judges or arbitrators called upon to adjudicate any dispute concerning interpretation.
3. When it proves necessary to record that a certain fact is true, is acknowledged by a party to be true or is known by a party, either to prevent a future dispute, or on the other hand, to provide the basis for a possible future claim, recitals can be the appropriate place.
4. Using the recitals to describe the circumstances, which have led up to the making of the contract, can be important for a party who wishes to challenge or amend its obligations under the contract if these circumstances change, governing law (or hardship clause) permitting.
5. A party who wishes to obtain performance of superior quality from the other party to the contract is likely to use the recitals to highlight the particular skills and attributes of the party who is to supply such performance.

⁸⁸ Thought should be given to the important differences which exist in this regard between the various legal systems (see *supra*, pp. 88–91).

6. If negotiations leading up to the contract have been long and have led to the exchange of a considerable number of pre-contractual documents, it may be appropriate to record it in the recitals, listing such documents. It would be appropriate to clarify—preferably in the operative part of the contract⁸⁹—the effects parties wish or do not wish the pre-contractual documents to have.
7. If a contract is economically linked to other contracts, it may be useful to state this in the recitals with the possible aim of providing an aid to interpretation. It may, however, be debatable whether such a statement creates any legal linkage between the different contracts; in any case, it is certainly preferable to state in the body of the contract whether such linkage exists or not.
8. The appropriate place for operative provisions is the body of the contract and it is suggested that such provisions should not be contained in recitals (cf. above, recommendations 6 and 7).⁹⁰

Using recitals to summarize obligations, which are more fully dealt with in the body of the contract, should be avoided because of the possibility for dispute over interpretation in the event of inconsistency between the recitals and the relevant operative provisions. At the very least, the recitals should specify that the obligations, which they summarize, will be undertaken and performed in accordance with the provisions contained in the body of the contract.

By the same token, to avoid problems of interpretation, provisions giving the recitals the same force and effects as those contained in the body of the contract should be avoided.⁹¹

9. Some provisions contained in recitals may be intended to supply information to governmental or administrative bodies. Even though such provisions do not alter the basic philosophy of the contract, there is nonetheless a danger that they may one day justify unexpected consequences, for example when a judge or arbitrator is called upon to interpret the contract. Sending a side-letter may be a precaution worth taking.

Recitals to contracts should receive more attention in legal literature than has been the case. In most countries, until recently, they were given almost no attention at all. Recitals are extremely widespread and can have a multitude of legal effects.

⁸⁹ For an identical view, cf. E.A. Farnsworth, *The Interpretation of International Contracts and the Use of Preambles*, *I.B.L.J.*, 2002, pp. 271–279.

⁹⁰ Cf. P. Siviglia, *Commercial Agreements*, West, 1997, § 1.2. Compare, however, the contrary opinion of some Canadian and American authors, who, in the context of contracts governed by the Vienna Convention on International Sales of Goods, argue that any such provisions may as an alternative negotiation strategy be incorporated in the recitals (J.M. Klotz & J.A. Barrett, *International Sales Agreements*, La Haye, Kluwer Law International, 1998, pp. 46–49).

⁹¹ Compare R. Christou, *op. cit.*, p. 5.