
CHAPTER 12

TERMINATION CLAUSES

I. WORK METHOD

True to its objectives, the Working Group looked at termination and synonymous clauses in international commercial contracts from the perspective of international contract draftsmen. On the basis of discussions and analyses of sample clauses provided by its members working in legal or contract departments of companies or working in private practice,¹ general

¹ The following termination clauses contained in international instruments should also be mentioned:

Articles 18 and 20 of the ICC Model Commercial Agency Contract, ICC Publication No. 644, Paris, ICC Publishing, 2002;

Articles 19 and 20 of the ICC Model Distributorship Contract, ICC Publication No. 646, Paris, ICC Publishing, 2002;

Chapter XXV—Termination of Contract of the Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works, UNCITRAL, U.N. Sales No. E.87.V.10, Doc. A/CN.9/SER.B/2, 1988;

Article 2.2.9—Postponement and Termination of the International Model Form of Agreement between Client and Consulting Engineer and International General Rules of Agreement between Client and Consulting Engineer for Pre-Investment Studies (IGRA 1979 P.I.), FIDIC, 3rd ed., 1979; Article 2.2.9—Postponement and Termination of the International Model Form of Agreement between Client and Consulting Engineer and International General Rules of Agreement between Client and Consulting Engineer for Project Management (IGRA 1980 PM), FIDIC, 1980; Article 2.2.9—Postponement and Termination of the International Model Form of Agreement between Client and Consulting Engineer and International General Rules of Agreement between Client and Consulting Engineer for Design and Supervision of Construction of Works (IGRA 1979 D&S), FIDIC, 1979, all replaced by the Client/Consultant Model Services Agreement—The White Book, FIDIC, Lausanne, 2nd ed., 1991;

Conditions of Contract for Electrical and Mechanical Works—The Yellow Book, FIDIC, Lausanne, 1st ed., 1963 (clauses 41–47), 2nd ed., 1980 (clauses 44–48 and 51), 3rd ed., 1988 (clauses 33 and 44–46);

Conditions of Contract for Works of Civil Engineering Construction—The Red Book, FIDIC, Lausanne, 2nd ed., 1969 (clauses 63, 65–66, 69), 3rd ed., 1977 (clauses 63, 65–66 and 69), 4th ed., 1989 (clauses 63, 65 and 69); (In 1999, new FIDIC conditions were published. The old conditions are cited in this chapter by way of example only to the extent that they express original solutions).

Conditions Générales AFB pour les opérations d'échange de devises et/ou de conditions d'intérêts, Association française des Banques, March 1987;

trends and problems regarding these clauses were observed. This chapter attempts to provide a summary of the discussions and analyses. This is therefore an analytical description, which has the advantage of giving extensive attention to the various elements of these clauses. However, to understand termination clauses, an overall perspective is also needed including their various elements, other contract clauses² and the factual background of the circumstances under which these clauses have been or are to be used.

Attempts to classify termination clauses (see Sections IV.E. through IV.M) may create the false impression that all termination clauses fall within one of these categories, but classification only facilitates a better understanding of the various options available to contracting parties and is not intended to be comprehensive.

Finally, one should note that termination clauses in international commercial contracts tend to be standardized to a certain extent, with similar contents and wording. However, one cannot characterize termination clauses as boilerplate clauses that are copied from one contract to another not only within the same company or law firm but also across the legal profession. Indeed, the degree of standardization of termination clauses is less pervasive than for some other clauses (e.g., interpretation and assignment clauses³). The reason for the more tailor-made nature of termination clauses is that they are related to the core of the contract. Often, these termination clauses sanction breaches regarding fundamental contractual obligations or express circumstances under which the parties no longer wish to continue their contractual relationships. Because of their importance, termination clauses are the subject of negotiations between parties to one-off contracts. Bargaining power and strategies also determine the contents of the termination clause and an imbalance to which a party is forced to agree regarding one part of the termination clause is sometimes set off by modification to another part of the termination clause. This explains the great variety of termination clauses one finds in international commercial contracts.

Code of Standard Wording, Assumptions and Provisions for Swaps, 1986 ed., International Swap Dealers Association, 1986 and International Swap Dealers Association Master Agreement;

International Foreign Exchange Master Agreement.

² See, for instance, the relationship between termination and certain assignment clauses mentioned by Mousseron (*Technique contractuelle*, Paris, Lefebvre, 2nd ed., 1999, pp. 229–230). In those particular examples, the transfer of the contract by the assignor entitled the obligor to terminate the contract in order to avoid contractual relationships with the assignee.

³ See *supra* Chapters 3 and 11.

II. INTRODUCTION AND DEFINITIONS

Termination of contracts is a well-known problem in international business life. As to the law on termination, many civil law countries have statutory rules on the subject.⁴ These rules generally deal more with termination of the obligations stemming from the contract than with the termination of the contract itself. Legal scholarly writings therefore had to fill this gap and provide a conceptual background for contract termination. In codifications and legal literature, one can generally find rules on the grounds for termination as well as the requirements and the effects of termination on the obligations and the contract itself. In common law jurisdictions there are few statutory rules on termination, while established precedents offer solutions to demanding problems. In addition to national rules, there are also uniform texts that contain provisions relevant to contract termination. In this respect, one may note the many uniform texts in the field of transport law and the Convention on the International Sales of Goods 1980 (CISG), the latter now in force in over 60 countries. Finally, in international commercial arbitration, some persuasive authority for resolving disputes about termination has been established in the Unidroit Principles for International Commercial Contracts⁵ and in the Principles of European Contract Law.⁶ However, these Principles and other sources of *lex mercatoria* will, as such, not be able to settle termination disputes completely, and, in general, termination disputes between companies will also have to be solved by reference to national law.⁷

Before discussing the scope of this chapter, here are some terminological indications. Since grounds for termination of obligations and contracts may differ among jurisdictions and no universal terminology is available, this chapter will use the generic terms of *termination clauses* and *termination of obligations and contracts*. Where useful or necessary, further distinctions as to the grounds for termination will be made.

III. SCOPE OF THE CHAPTER

Because of the vast range of issues regarding termination, some restrictions were made in order to limit the scope of the project. First, the analy-

⁴ Differences in terminology among the various jurisdictions regarding termination is a factor that complicates work in this area.

⁵ *Principles of International Commercial Contracts*, Rome, Unidroit, 2004, 385 pp. For the most extensive commentary, see M.J. Bonell, *An International Restatement of Contract Law, The Unidroit Principles of International Commercial Contracts*, 2nd ed., Irvington N.Y., Transnational, 1997.

⁶ Commission On European Contract Law, *The Principles of European Contract Law*, O. Lando, & H. Beale, (eds.), The Hague, Kluwer Law International, 2000, 561 pp.

⁷ This may be different in State contract-litigation where States and public enterprises are involved.

sis dealt only with general problems of the law of contract and obligations regarding termination. Special contracts that, under the applicable law, may be affected by special considerations or governed by specific provisions (e.g., mandatory rules on termination of commercial agents,⁸ mandatory rules on protection of employees against dismissal, protection of consumers against termination of contracts,⁹ provisions in insurance law relating to termination of insurance contracts, termination of contracts regarding intellectual and industrial property rights, termination clauses related to legislation or regulations regarding public procurement projects) were not included in the analysis.

Furthermore, termination clauses in international commercial contracts are often influenced by the nature of these contracts. This has been covered in this chapter to the extent that contract practice reflects the features of these specific contracts and to the extent that clauses expressing these features have been encountered in the process of the analyses and discussions of the Working Group. For instance, distribution agreements, license agreements¹⁰ and financial agreements contain specific termination provisions that may be more detailed or more specific than termination clauses in other international commercial contracts. These have also been included in this chapter under the two qualifications mentioned above.

Furthermore, competition law (including merger control law) aspects of termination clauses have also been left out of this Chapter, notwithstanding their importance and the frequency of competition-law-sensitive provisions in termination clauses.

Finally, the analysis was restricted to clauses in international contracts regulating termination, thus excluding *termination contracts* that parties may conclude after termination of their business relationship (for instance, in the course of a settlement) and in which the effects of the termination are dealt with.

⁸ For the European Union, see the harmonization achieved by Directive 86/653 of December 18, 1986 on the coordination of the legislation of the member States regarding commercial agents, OJ L. 382 of December 31, 1986, 17–21. Other civil law countries have often similar rules providing some protection for commercial agents in case of termination of commercial agency contracts.

⁹ E.g., statutory provisions regarding consumer credit contracts or general conditions which restrict possibilities to terminate consumer contracts. For the harmonization of the law on general conditions within the European Union, see Council Directive 93/13 of April 5, 1993 regarding unfair contract terms in consumer contracts, OJ L. 95, April 24, 1993, 29–34.

¹⁰ For a discussion regarding these contracts, see J.M. Mousseron, *op. cit.*, pp. 615–676 with further references.

Because of the many differences both in terminology and in substance of national laws regarding termination, it was unanimously decided that the project could not go forward without national reports describing termination rules in some major jurisdictions.¹¹ Some members of the Group were asked and accepted to provide such reports. In relation to termination law, reference is made to these reports on Belgian, Dutch, English, French, German, Italian, Spanish and Swiss law.¹²

IV. ANALYSIS OF TERMINATION CLAUSES IN INTERNATIONAL CONTRACTS¹³

A. General Observations

Termination clauses cover a wide range of different situations including the possible termination of contracts as a result of:

1. nullity and voidability;
2. the effect of a condition subsequent;
3. an agreement by the contracting parties to terminate the contract (*mutuus dissensus*);¹⁴
4. the performance of the contractual obligations;

¹¹ National rules are particularly relevant in international commercial contracts. This raises the conflict of laws issue as to the law applicable to termination questions. Generally, the law governing contractual termination issues will be the law that applies to the contract (*lex causae*). For the European Union, the basis for this solution is set forth in Article 10 of the Rome 1980 Convention on the Law Applicable to Contractual Obligations (OJ L. 266, October 9, 1980, 1–19).

¹² These reports have been published in *I.B.L.J.* 1997, 837–937 as annexes to the original publication of the report on termination clauses. Adde: B. Mercadal, *Contrats et droits de l'entreprise*, 10th ed., Paris, Lefebvre, 2002, pp. 357–411; I. Cherpillod, *La fin des contrats de durée*, Lausanne, CEDIDAC, 1988, 275 pp.; *La cessation des relations contractuelles d'affaires*, Institut de Droit des Affaires, Aix-en-Provence, Presses Universitaires D'Aix-Marseille, 1997, 232 pp.; J. Gruber, *Die Befugnis des Darlehensgebers zur Vertragsbeendigung bei internationalen Kreditverträgen*, Bielefeld, Giesecking, 1997, 354 pp.; A. Brabant, *Les marchés publics et privés dans la C.E.E. et outre-mer*, Vol. I, Brussels, Bruylant, 1992, pp. 518–540.

For a comparative overview, see G.H. Treitel, Remedies for breach of contract, in *International Encyclopedia of Comparative Law*, The Hague, Mouton, 1976, 185 pp.

¹³ See on this subject: J.M. Mousseron, *op. cit.*, 615–676; B. Mercadal, *op. cit.*, pp. 396–397 and 405–410; A.G.J. Berg, *Drafting Commercial Agreements*, London, Butterworths, 1991, 134–137; R. Christou, *Boilerplate Practical Clauses*, London, Financial Times Law & Tax, 2nd ed., 1995, pp. 35–48; D. Blanco, *Négocier et rédiger un contrat international*, Paris, Dunod, 1993, pp. 170–176; *La fin du contrat*, Association belge des Juristes d'Entreprise, Brussels, 1993, 296 pp.

¹⁴ The termination agreement may not only follow from a new agreement between the contracting parties but also from a contractual termination mechanism. For an example of the latter, see the termination mechanisms in joint venture contracts related to deadlock (see the report on deadlock clauses in F. De Ly, *Divorce Clauses in International Joint Venture Contracts*, *I.B.L.J.*, 1995, pp. 294–295 and 311–313).

5. definite impossibility to perform resulting from *force majeure*,¹⁵ frustration or hardship;¹⁶
6. default of a contracting party constituting a breach of contract and entitling the other party to have the contract terminated;
7. the passing of the period for which the contract has been concluded in case of fixed term contracts;
8. notice given by one party to the other party in case of contracts concluded for an indefinite period;
9. some objective circumstances such as death of a contracting party¹⁷ or a party's involvement in insolvency, bankruptcy or similar proceedings.

This list of events or circumstances amounting to a termination of contracts is not exhaustive¹⁸ but reflects termination grounds that may be found in many jurisdictions of both a civil and a common law background. To a large extent, these national laws on termination do not impose mandatory rules regarding contract termination, which means that the contracting parties may themselves clarify or modify termination aspects of their contractual relationship. The following will show to what extent contracting parties in international commercial contracts actually adapt national laws regarding termination aspects of their contracts in order to meet their respective needs. To the extent that some termination grounds have already been discussed in previous reports of the Working Group (particularly in relation to *force majeure* and hardship), readers are referred to those chapters. One should also note that the existence of extensive legal rules on termination in statutory instruments or in case law already provide a framework for contract regulation. Consequently, contract draftsmen tend to adapt or depart from these rules in view of the specific requirements of individual contracts rather than to re-write them in terms of contractual provisions.

Since termination clauses are related to a variety of termination causes, all with their own features, the discussion hereafter will have to distinguish between these various grounds for termination (Sections IV.F through

¹⁵ See *supra* Chapter 8.

¹⁶ See *supra* Chapter 9.

¹⁷ This is related to physical persons as counter-parties to contracts. In international commercial contracts, counterparties are, however, mostly legal persons. Therefore, this termination basis will not be discussed in this chapter. No contractual provisions to that effect have been found in the clauses that were the subject of the analysis.

¹⁸ In the national reports published with the original report, some other causes were established (see *I.B.L.J.*, 1997, 837–937). In this respect, one may cite grounds such as repudiation of contracts, cancellation of contracts, voidance of contracts and termination based on anticipatory breach (for the latter, see M. Vanwijck-Alexandre, *La résolution du contrat sur base de l'inexécution anticipée*, *I.B.L.J.* 2002, pp. 407–422).

IV.M). This analytical method has the advantage that the various termination mechanisms are better identified and described with emphasis on these particular features. This approach, however, isolates the various aspects of termination clauses therefore sketching only an incomplete picture, since many termination clauses bring together several termination grounds. The following example taken from the FIDIC Red Book¹⁹ illustrates this mixture of various termination grounds: breach of contract, hardship and objective terminating events:

“In the event of the Employer:

(a) failing to pay to the Contractor the amount due under any certificate of the Engineer within 28 days after the expiry of the time stated in Sub-Clause 60.10 within which payment is to be made, subject to any deduction that the Employer is entitled to make under the Contract, or

(b) interfering with or obstructing or refusing any required approval to the issue of any such certificate, or

(c) becoming bankrupt or, being a company, going into liquidation, other than for the purpose of a scheme of reconstruction or amalgamation, or

(d) giving notice to the Contractor that for unforeseen reasons, due to economic dislocation, it is impossible for him to continue to meet his contractual obligations

the Contractor shall be entitled to terminate his employment under the Contract by giving notice to the Employer, with a copy to the Engineer. Such termination shall take effect 14 days after the giving of the notice.”

For that reason, the examples cited hereafter may not be seen as sample termination clauses but are used only to illustrate the various elements that have been found in the termination clauses analyzed. It is sometimes difficult to characterize termination grounds in order to determine in which category terminating events are to be placed. Moreover, this characterization process is often complicated by terminological imprecision on the part of contract draftsmen. Before discussing the different termination grounds any further, some common characteristics of termination clauses will be analyzed (Sections IV.B through IV.E).

¹⁹ Clause 69.1 (Default of Employer) of the Conditions of Contract for Works of Civil Engineering Construction—The Red Book, FIDIC, Lausanne, 4th ed., 1989.

Finally, another general observation should be made. A growing tendency has been noted with contract negotiators and draftsmen, particularly in contracts with parties of similar bargaining power, to look—much less than used to be the case—to termination not from the perspective of the causes of termination and who is to blame for termination, but rather when and how termination is to be achieved. This more objective approach had already been noted in the report on deadlock and divorce clauses in international joint venture contracts²⁰ and has been found here also, albeit to a much lesser degree. This difference might be explained by the fact that joint venture contracts are typically longer term cooperation contracts generally involving huge interests on both sides where it is important to find out ways that are acceptable to both parties. In such a configuration, one is more inclined to draft the contract in terms of problem solution rather than in terms of blame and responsibilities. This same approach sometimes exists in termination clauses of other international commercial contracts:

“Si les licences d’exportation n’étaient pas obtenues . . . l’Acheteur serait en droit de résilier le Contrat en totalité ou en partie.”

or

“Si les deux parties reconnaissent que les défauts, visés au point 14.14, dans certains types de l’équipement ne peuvent être éliminés, ou si, pour les éliminer, il faut plus de 6 mois, l’Acheteur aura le droit de renoncer aux parties correspondantes du Contrat. Dans ce cas, le Vendeur est obligé de rembourser à l’Acheteur la valeur de l’équipement livré et de payer une pénalité de x% du montant de la partie résiliée du Contrat.”

B. Headings

Various headings are used for termination clauses. In the clauses, which were analyzed, these were found:

Termination, Postponement and Termination, Termination and Cancellation, Default, Default and Liquidation, Résiliation, Interruption of the Loan—Events of Default, Exigibilité anticipée, Acceleration of Maturity, Résiliation en Cas de Défaut, Discontinuation due to Contractor

These headings indicate that (1) the various grounds for termination are not always clearly distinguished; or (2) in some cases, all termination grounds are brought together in one single termination clause.

²⁰ F. De Ly, *Divorce clauses in international joint venture contracts*, *I.B.L.J.*, 1995, pp. 291–294.

C. The Location of Termination Clauses in the Contract

Termination clauses do not have a fixed place in the contract but are generally placed towards the end of the contract before the boilerplate clauses. Mostly, termination clauses are clearly identifiable contract clauses that deal only with termination.

One might add that termination is sometimes, particularly in finance agreements, also mentioned in the *Representation and Warranties* part of the contract. In that respect, at least one of the contracting parties states that events of default or termination events enumerated in the termination clause do not exist at the time of the formation of the contract. This aspect will not be covered in this chapter.

D. Relationship of Termination Clauses to Other Contracts

Often, international commercial contracting does not merely involve one single contract but several inter-related contracts may be concluded. Sometimes, this is referred to as *contract groups* (*groupe de contrats*). In that case, termination clauses may refer to previous contracts, contracts that are to be concluded at a later point in time or other contracts concluded with other parties such as group companies or sub-contractors. With regard to public procurement, a pre-bid agreement contained the following termination clause:

“The Pre-Bid Agreement shall terminate on any of the following occurrences:

...

b) Failure of the Parties to agree upon the wording of the Joint Venture Agreement, or

...

d) The Contract being awarded to a third party, or

...

f) The conclusion of the Joint Venture Agreement as per Clause 4 hereof. . . .”

In sub-contracting agreements, provisions may be inserted in order to specify the effects of the termination of the main contract upon the sub-contract:

“Le présent contrat est résilié de plein droit et sans aucune formalité:

- lorsque le marché principal est lui-même résilié sans qu'il y ait faute de l'entrepreneur principal.

Dans ce cas, aucune indemnité n'est due de part ni d'autre. Toutefois, dans le cas où une indemnité est versée par le maître de l'ouvrage à l'entrepreneur principal, celui-ci est tenu de répartir entre les sous-traitants concernés, en proportion du préjudice qu'ils ont subi, la part d'indemnité correspondant au préjudice retenu par le maître d'ouvrage pour les travaux sous-traités."

E. Unilateral and Bilateral Termination Clauses

Termination clauses may be unilateral or bilateral. Unilateral termination clauses entitle only one of the contracting parties to terminate if the termination event occurs. This may be related to the nature of the contract, as for instance, termination of contracts upon failure to proceed with the fee payment mechanism:

"The Contractor shall also be entitled to terminate the Contract by giving 28 days notice to the Engineer and the Employer in any case where the Engineer has failed to issue a certificate of payment upon proper application by the Contractor."²¹

Unilateral termination clauses may also give indications as to the parties' bargaining position in negotiating the contract. Public procurement contracts in some countries do frequently provide for termination by reason of causes related to the performance of the contract by foreign companies, but do not state anything regarding termination related to the performance of the contract by the procuring public authority.

Bilateral termination clauses entitle either party to terminate the contract upon the occurrence of a certain termination event. Bilateral termination clauses may be symmetrical or asymmetrical. They are symmetrical if the termination clause treats both parties alike. In asymmetrical clauses, a distinction is made between the position of the parties. The different treatment of a party is often based on their respective bargaining power.

F. Nullity and Voidability

Contract clauses seldom provide for the termination of the contract as a result of its nullity or voidability. This can probably be explained by the fact that rules on contract formation were traditionally considered mandatory, and contracting parties could not, by agreement, vary these rules or

²¹ Clause 33.7, last paragraph of the FIDIC Yellow Book (Conditions of Contract for Electrical and Mechanical Works, 3rd ed., 1988).

their effects. This traditional view is open to challenge but little research has been done regarding this issue.²² Contractual clauses regarding nullity or voidability of the contract were present in a limited number of cases. In a first clause, the termination provision dealt with the termination effects regarding bribery and corruption in a turn-key contract between commercial companies:

“Any commission, advantage, gift, gratuity, reward or bribe given, promised or offered by or on behalf of the Contractor or his agent or servants or any other person on this or their behalf to any officer, servant, representative, or agent of the Owner, the Architect, or the Project Manager or their Representative, or to any person on their behalf or any of them in relation to the obtaining or to the execution of this or any other Contract with the Owner may in addition to any criminal liability which may be thereby incurred subject the Contractor to the cancellation of this and all other Contracts which he may have entered into with the Owner and also to the payment of any loss or damage resulting from such cancellation. The Owner shall be entitled upon a certificate in writing from the Project Manager to deduct the amounts so certified from any monies otherwise due to the Contractor under this or any other Contract Agreement or to recover the said amounts as a debt due or partly the one, and partly the other as the Owner shall deem advisable.”

In another case, a finance agreement provided that no early withdrawals could be made from the credit facility

“. . . if any statement made in this Loan Agreement or at the time of its performance misleads the LENDERS in their application of any substantial element of the BORROWER'S situation; . . .”

In yet another finance agreement, the *acceleration clause* of a loan (i.e., the provision according to which the loan or credit becomes due and payable prematurely—*clause d'exigibilité anticipée*) is set in operation

“Si l'un des événements suivants venait à se produire, à savoir:

. . .

²² For one of the rare extensive discussions, see R. Moser, *Vertragsabschluß, Vertragsgültigkeit und Parteiville im internationalen Obligationenrecht*, St. Gallen, Verlag der Fehr'schen Buchhandlung, 1948, 253 pp. On this question, see also Chapter 1, pp. 34–54; Chapter 3, pp. 146–168; and Chapter 7, pp. 353–356 and 387–388.

c) que l'une des déclarations faites par l'EMPRUNTEUR ou toute attestation, engagement ou document signé par un représentant de l'EMPRUNTEUR se révèle inexact sur un point important; . . .”

G. Condition Subsequent

Contract termination may be related to the intervention of uncertain events in the future, which the parties have foreseen and the occurrence of which are contractual grounds for termination (condition subsequent, *condition résolutoire*). In the context of public procurement, these conditions subsequent are often related to decisions by the contracting public authority as to the adjudication of the public works or the approval of sub-contractors. The following is such an example:

“The Agreement will be terminated:

1. at the time the Parties hereto have entered into and signed the final Joint Venture Agreement referred to in Clause 7 of the Agreement.

. . .

3. if the Joint Venture is not successful in being awarded the Contract, at the time when the Employer has issued a statement that the Contract has been awarded to another Tenderer or that the Employer has abandoned the project and, in either event, the tender bond, which is to be supplied by the Joint Venture, has been returned.

And at the latest, twenty four months after the date of signature hereof.”

Conditions subsequent automatically terminate the contract, which forces the contracting parties to conclude a new contract if they should want to do so. This may cause problems if one of the parties should want to break the contract and re-negotiate the contract terms. In order to obtain more flexibility and to continue working within the existing contractual framework, the following adaptation or modification clause had been inserted into a termination clause:

“Dans le cas où la soumission serait annulée et un nouvel appel d'offre lancé dans le délai de 12 mois après la date de la première soumission, les Associés seraient engagés par le présent accord comme s'il n'avait pas pris fin. Ce délai pourra être prolongé d'un commun accord des trois Associés.”

H. Termination by Mutual Consent (*Mutuus Dissensus*)

Under the rules of contract law, the parties may not only freely conclude contracts but may also terminate them by mutual consent. There are few termination clauses that deal with this possibility. This is probably to be explained by the fact that the parties at the time of contracting do not pay attention to this possibility since it is obvious that also, at a later date, during the life of the contract, they may still come to an agreement to terminate it. One of the few examples reads as follows:

“Furthermore, if both parties upon testing of the modified automatic press for X’s own use find that the marketing of such modified automatic press is not a viable project then this agreement may be terminated by mutual consent.”

One may question whether this contract clause has any additive value but for the affirmation of the legal principle that parties by consent may terminate contracts.

I. Performance

Contracts are also terminated if all the contractual obligations have been performed. Termination clauses, however, seldom provide anything about termination by performance. The following clause is an exception:

“12.1. This Agreement shall come into force on the date of signature hereof and shall terminate in the event of any one of the following circumstances occurring:

12.1.1. If the Contract has been entered into and has been fully implemented by the Joint Venture Partnership and the Employer when all rights and obligations as well as guarantees and liabilities of the Joint Venture Partnership have ceased and/or have been finally settled with the employer and any Third Party, and all rights and obligations between the Parties in connection with this Agreement have been finalized, and all differences or disputes between the Parties in connection with this Agreement have been finally settled. . . .”

Sometimes, contract clauses provide procedures to determine if and when the contract has been fully completed and then terminated. For instance, clause 62.1 (Defects Liability Certificate) of the FIDIC Red Book²³ stipulates as follows:

²³ Conditions of Contract for Works of Civil Engineering Construction—The Red Book, FIDIC, Lausanne, 4th ed., 1989.

“The Contract shall not be considered as completed until a Defects Liability Certificate shall have been signed by the Engineer and delivered to the Employer, with a copy to the Contractor, stating the date on which the Contractor shall have completed his obligations to execute and complete the Works and remedy any defects therein to the Engineer’s satisfaction.”

J. Breach of Contract²⁴

Under general contract law in many jurisdictions, a court or arbitral tribunal may terminate the contract if either party defaults in relation to the performance of its contractual obligations when there is no excuse for such non-performance (such as *force majeure*). In many jurisdictions, termination is, however, not automatic and the court has some discretion in assessing whether the contract is to be terminated. Furthermore, the contracting party asking for termination generally has to observe a number of substantive and formal requirements before a court may grant its demand for termination. In one sample, this system has been followed expressly by an asymmetric termination provision under which default on the part of a contractor led to automatic termination of the turn-key contract. The contract provided as follows regarding default of the owner of the premises:

“For reasons described in Subclause 68(1)b, the Contractor shall not be entitled to terminate his Contract, unless the Owner is judged to be in default by arbitration in accordance with the rules of arbitration specified under Clause 66 herein.”

Court intervention in the termination process will slow down that process and has the disadvantage that it is uncertain and unpredictable whether termination will ensue. These drawbacks do not appeal to businessmen, particularly in international commercial transactions. For these reasons, contract practice has developed the technique of express termination terms (*clauses résolutoires expresses*).

The following is an example of such a terminating provision, which is drafted broadly encompassing a breach of any obligation under the contract:

“In the event that either of the Joint Venturers . . .

(b) shall be in breach of its obligations under Clause 6 hereof or any other of its obligations under this Agreement . . . then and in any such event the other Joint Venturer . . . shall have the following rights . . .

²⁴ See *Les sanctions de l'inexécution des obligations contractuelles. Etudes de droit comparé*, M. Fontaine & G. Viney (eds.), Paris/Brussels, L.G.D.J./Bruylant, 2001, 1097 pp.

(i) to terminate the Joint Venture and this Agreement . . .”

or

“Chacune des Parties aura la faculté de résilier tout ou partie du Contrat en cas de violation par l’autre Partie de ses prestations.”

Termination clauses sometimes contain lists of terminating events. Regarding breach of contract, such clauses enumerate the violated obligations that may trigger the application of the termination clause. These clauses may be unilateral, bilateral and symmetric or bilateral and asymmetric. Where the bargaining power of one of the contracting parties is strong, for instance, regarding public procurement with many competitors, the procuring authorities are able to make long lists of causes for breach justifying the termination of the contract. In this regard, one analyzed contract contains a four-page termination clause with 14 terminating events. In the banking business, one also finds extensive termination clauses enabling the bank or other financial institution to terminate the contract immediately or to terminate any facility and accelerate re-payment upon the occurrence of certain enumerated events of default. Such a list is usually very long in international financial agreements and may take many pages. In that context, an event of default will normally trigger the operation of the *acceleration clause*. Any such mechanisms are strictly enforced and certain contracts provide expressly that the borrower does not have any defense against the request for full and immediate repayment:

“. . . whereupon all those amounts shall become immediately due and payable, all without diligence, presentment, demand or payment, protest or notice of any kind, which are expressly waived by the Borrower.”

Sometimes, contract provisions determine that a mere single breach does not suffice to trigger the application of the termination clause:

- “If the Contractor is not executing the Works in accordance with the Contract or is neglecting to perform his obligations thereunder so as seriously to affect the carrying out of the Works, the Engineer may give notice to the Contractor requiring him to make good such failure or neglect.”²⁵
- “. . . if the Engineer certifies to the Employer, with a copy to the Contractor, that, in his opinion, the Contractor:

²⁵ Clause 45.1 (Notice of Default) of the FIDIC Yellow Book (Conditions of Contract for Electrical and Mechanical Works, 3rd ed., 1988).

“(d) . . . despite previous warning from the Engineer, in writing, is otherwise persistently or flagrantly neglecting to comply with any of his obligations under the Contract, . . .

then the Employer may, after giving 14 days’ notice to the Contractor, enter upon the Site and the Works and terminate the employment of the Contractor without thereby releasing the Contractor from any of his obligations or liabilities under the Contract, or affecting the rights and authorities conferred on the Employer or the Engineer by the Contract, . . .”²⁶

- “L’Administration sera en droit de procéder à la résiliation de ce Contrat en cas de carence grave de l’Entrepreneur dans l’exécution des obligations qui lui incombent selon les stipulations de ce Contrat et ce, à l’expiration d’une mise en demeure donnée par lettre recommandée et restée sans effet dans un délai de 30 (Trente) jours . . .”
- “La Banque pourra à tout moment mettre fin unilatéralement aux obligations résultant pour elle de la présente Convention . . . dans les cas suivants:
 “— Pour le cas où l’Emprunteur ne paierait pas à une date d’échéance quelconque toutes sommes dues au titre de la présente Convention, à moins que cette défaillance ne se poursuive pas au-delà d’un délai de 10 jours. . . .”

The latter example, frequently included in finance agreements, is preferable to the open criteria regarding the seriousness of the breach of the other above-mentioned clauses (*seriously to affect the carrying out of the Works, persistently or flagrantly neglecting to comply, carence grave*). A strict criterion (such as a period of continuing breach) is, however, easier to use and define for payment obligations than for other obligations where the breach itself is more difficult to establish and to assess. Bank documents furthermore often allow a grace period for interest payments but not for capital.

Very often, termination clauses provide some formal requirements for any such termination in case of non-performance due to breach of contract:

- “La Partie qui invoquerait une telle violation notifiera à l’autre Partie par lettre recommandée avec accusé de réception . . .”
- “. . . if the Employer does not pay to the Contractor any amount properly due under clauses 31.1 and 31.2 within 14 days and continues such default for 7 days after receipt by registered post of a notice from the Contractor stating that notice of termination

²⁶ Clause 63.1 (Default of Contractor) of the Conditions of Contract for Works of Civil Engineering Construction—The Red Book, FIDIC, Lausanne, 4th ed., 1989.

under clause 28 will be served if payment is not made within 7 days from receipt thereof; . . .”

Because of the immediate and possibly harsh effects of the operation of these clauses, provisions have been inserted that allow the defaulting party to remedy its breach. These rights to cure, which are also known in some national laws (e.g., the *Nachfrist* in German law or relief against forfeiture in English law), provide the conditions and periods within which the defaulting party is to remedy its breach:

“In the event that either of the Joint Venturers . . . shall be in breach of its obligations . . . and shall not remedy such breach within twenty eight days after having been required by the Management Board in writing to remedy such breach then . . .”

Some clauses deal with the problem of subsequent contract breaches. In practice, this may be important, since a party may, under the applicable national law, be required to react immediately upon the occurrence of any such breach in the absence of which he may be deemed to have waived his right to invoke the breach and the termination of the contract. Two examples of any such clauses can be given:

- “If the Contractor either shall continue such default for 14 days after receipt of such notice or shall at any time thereafter repeat such default (whether previously repeated or not) then the Employer may within 15 days after such continuance or repetition by notice by registered post forthwith terminate the employment of the Contractor under this Contract, provided that such notice shall not be given unreasonably or vexatiously.”
- “In no event may any delay in exercising the LENDERS’ right to require advance repayment be interpreted as a waiver of this right.”

K. Passing of a Fixed Period

Under national law, fixed term contracts terminate automatically by operation of law upon the passing of the period for which they were concluded. Termination clauses in international commercial contracts often apply this rule, sometimes in combination with other termination grounds:

- “. . . this agreement shall (unless extended by mutual agreement) expire or terminate at the earliest of the following events:
 - (a) one (1) year after the date of this agreement or
 - (b) thirty (30) days after written notice of termination provided by either party to the other.”
- “This Agreement shall remain in force from the Effective Date (as defined in Article 13 hereof) until the Completion Date . . .”

- “This Authorization Agreement expires on _____ unless on or before that date Buyer . . .”

Termination clauses sometimes regulate the effects when the contracting parties continue to execute the contract notwithstanding its expiration. These clauses may provide that a new contract for an identical period is deemed to be concluded (*evergreen clauses*) or that the contract will continue to exist for an indefinite period.²⁷

L. Termination at Will²⁸

Under some national laws, certain special category contracts may be terminated at will. For instance, in France and Belgium some construction contracts may be terminated by the owner under Article 1794 of the French and Belgian Civil Codes. Termination clauses sometimes adopt this technique and make it a contractual termination ground even if the governing law is not French or Belgian or if the statutory requirements of these laws are not met. The following is an example of such a termination clause in an engineering contract:

“In addition to COMPANY’s right set forth in article 17 COMPANY has the right at any time, at its absolute discretion, to terminate the CONTRACT without any notice of default or judicial intervention being required for the purpose.”

Similar termination-at-will-clauses have been encountered in other contexts. For instance, in an agreement between consortium partners intending to bid for a public procurement project, either partner had the right not to join in the tender:

“Furthermore, either Party has the right to recede from this Agreement, on receipt and after review of tender documents . . .”

Furthermore, most national legal systems acknowledge termination at will regarding contracts concluded for an indefinite period. Termination at will operates then as a technique to enable contracting parties to free themselves from obligations that otherwise would be perpetual. In most cases, notice is to be given to the other party before termination can take effect. Based on principles of good faith and equity, any such termination may not come as a surprise attack upon the other party, and a minimal notice period is to be observed; generally, this notice period is rather short.

²⁷ See B. Kohl, *Les clauses qui organisent la poursuite des relations contractuelles*, *I.B.L.J.*, 2002, pp. 443–460.

²⁸ See R. Zimmermann & S. Whittaker, *Good Faith in European Contract Law*, Cambridge University Press, 2000, pp. 532–556.

M. Objective Termination Events²⁹

Termination clauses frequently provide for termination upon the occurrence of some objective terminating events. In that respect, *insolvency or bankruptcy clauses* are most commonly used. These clauses provide for automatic termination of the contract when one or either party is involved in insolvency, bankruptcy or related proceedings. In this regard, one may note that most national laws do not have a general rule of contract law under which contracts are, by law, terminated upon a debtor's insolvency. Thus, insolvency is, as such, not a general termination ground, and the mere fact of a party's insolvency does not constitute breach of contract.³⁰ Exceptionally, some specific contracts are under the applicable national law terminated as a result of insolvency.³¹ Contract clauses providing for termination upon insolvency are thus needed in those cases when, under national law, insolvency does not, *ipso facto*, terminate the contract and where the contracting parties do not want to continue working with one another in circumstances of insolvency. Insolvency and bankruptcy clauses do have a second function, since they clarify how insolvency is to be defined and state the conditions and procedures for any such termination. As one will see from the examples cited below, these clauses extend their reach from insolvency to payment or attachment problems and, more generally, to these cases where doubts are raised about the financial capabilities of a contracting party to perform under the contract. Mostly, insolvency and bankruptcy clauses tend to formulate quite precisely under what circumstances the contract may be terminated:

- “Should any party go into liquidation or be wound up because of inability to pay its debts or compound with its creditors or be placed in the hands of the Receiver, then the other party shall be entitled to terminate this Agreement vis-à-vis the defaulting party with effect from the date of default and without prejudice to the obligation of the defaulting party or its representative to bear its proportionate share of the loss, resulting or to result from the Joint Venture and to any right of action.”
- “In the event that either of the Joint Venturers . . .
 “(a) is insolvent or makes a composition or arrangement with its creditors or has a winding up order made or (except for the purposes of amalgamation or reconstruction) a resolution for voluntary winding up is passed or a provisional liquidator receiver or

²⁹ Under French law, see particularly C. Paulin, *La clause résolutoire*, Paris, L.G.D.J., 1996, 329 pp.

³⁰ Also, insolvency and bankruptcy clauses may often not qualify as conditions subsequent since the condition is not extraneous to one of the contracting parties.

³¹ See the national reports in *I.B.L.J.*, 1997, pp. 837–937.

manager of its business or undertaking is duly appointed or where possession is taken by or on behalf of the holders of any debentures secured by a floating charge on any property comprised in or subject to the floating charge; . . .

then and in any event the other Joint Venturer . . . shall have the following rights . . .

“(i) to terminate the Joint Venture and this Agreement

“(ii) to exclude the Defaulting Party from further participation in the management of the Joint Venture and of the Contract and the profits arising therefrom . . .”

- “If the Contractor is deemed by law unable to pay his debts as they fall due, or enters into voluntary or involuntary bankruptcy, liquidation or dissolution (other than a voluntary liquidation for the purposes of amalgamation or reconstruction), or becomes insolvent, or makes an arrangement with, or assignment in favour of, his creditors, or agrees to carry out the Contract under a committee of inspection of his creditors, or if a receiver, administrator, trustee or liquidator is appointed over any substantial part of his assets, or if, under any law or regulation relating to reorganization, arrangement or readjustment of debts, proceedings are commenced against the Contractor or resolutions passed in connection with dissolution or liquidation or if any steps are taken to enforce any security interest over a substantial part of the assets of the Contractor, or if any act is done or event occurs with respect to the Contractor or his assets which, under any applicable law has a substantially similar effect to any of the foregoing acts or events, or if the Contractor has contravened Sub-Clause 3.1, or has an execution levied on his goods, . . . then the Employer may, after giving 14 days’ notice to the Contractor, enter upon the Site and the Works and terminate the employment of the Contractor . . .”³²

Sometimes, clauses expressly refer the question of interpretation and application to the court or arbitral tribunal having jurisdiction:

“. . . In the event that Contractor has reason to believe that the Owner may default for such reasons he may refer the matter to arbitration to make a determination in accordance with the rules of arbitration specified under Clause 66 herein.”

Apart from the relatively strict definitions used in the above-mentioned insolvency and bankruptcy clauses, one may also find a more open and

³² Clause 63.1 (Default of Contractor) of the Conditions of Contract for Works of Civil Engineering Construction—The Red Book, FIDIC, Lausanne, 4th ed., 1989; compare with the much shorter provision of Clause 45.2 of the FIDIC Yellow Book (Conditions of Contract for Electrical and Mechanical Works, 3rd ed., 1988).

judgmental specification in some of these clauses. Such an approach is, however, rare. For an example of that approach:

“Le contrat passé avec le Sous-traitant pourra être résilié par l’Entrepreneur Principal dans les cas suivants:

...

“7—pour décès, cessation ou dissolution d’entreprise, dépôt de bilan, règlement judiciaire même si le sous-traitant était autorisé à poursuivre son activité, liquidation de biens, suspension provisoire des poursuites et plus généralement dans tous les cas où la situation du Sous-traitant se trouve modifiée dans des conditions telles que les garanties techniques ou financières qu’il présente ne sont plus compatibles avec la nature ou l’importance des travaux qui lui sont confiés.”

The effects of insolvency and bankruptcy clauses may not only be deduced from the clauses themselves but should carefully be read in conjunction with the applicable law. Some bankruptcy and insolvency laws provide or imply that contracts, which are in force at the date of insolvency, may be continued thereafter by operation of law or by an order of the bankruptcy or insolvency officer or receiver. Given the mandatory character of these rules, the practical impact of insolvency and bankruptcy clauses is dependent on the position taken in the insolvency or bankruptcy jurisdiction regarding the continuation of the contract.³³ One clause illustrates this point:

“Constitue un Cas de Défaut pour l’une des Parties, ci-après la Partie Défaillante, l’un des évènements suivants:

...

8.1.1.6.

sous réserve du droit applicable à cette procédure, ouverture d’une procédure de liquidation amiable ou d’une procédure collective de règlement du passif; . . .”³⁴

Although insolvency and bankruptcy are the major examples of objective terminating events, many other events figure in termination clauses.

³³ See in this respect, the national reports in *I.B.L.J.*, 1997, 837–937. With respect to France, B. Mercadal, *op. cit.*, pp. 577–581.

³⁴ Article 8.1. Résiliation en Cas de Défaut, Conditions Générales AFB pour les opérations d’échange de devises et/ou de conditions d’intérêts, Association française des Banques, March 1987.

However, these clauses do not always come into play automatically but often couple the objective event with a termination right. This implies that these events entitle a contracting party to termination but do not oblige him to do so. In that respect, these clauses are much more flexible than insolvency and bankruptcy clauses. These clauses are generally different from other termination clauses, such as those discussed above under Sections IV.G, IV.J and IV.L, since the termination rights are unrelated to conditions subsequent, indefinite term contracts or breach of contract. Unlike many conditions subsequent, they do not work automatically. Also, they do not follow from the indefinite term character of the contract that enables a contracting party to terminate by giving notice. Finally, the terminating events under these clauses (often called Events of Default) are not expressing non-performance due to breach but determine conditions under which the parties no longer want to be bound by their contractual relationship. Characterization of these clauses remains difficult since some of these clauses might be interpreted to express hardship events although in many cases the severe conditions of hardship will not be met. The following example will illustrate:

“Si les licences d’exportation n’étaient pas obtenues ou si, avant l’achèvement de l’exécution du Contrat, elles étaient retirées par les autorités responsables ou si leur validité était expirée, ou si le certificat du Vendeur confirmant que la licence n’est pas nécessaire se trouve non valable (par suite de l’intervention des autorités responsables du pays du Vendeur), l’Acheteur serait en droit de résilier le contrat en totalité ou en partie.”

The practice of extensively enumerating terminating events is particularly frequent in the finance community where they are contained in termination clauses in loans and other credit arrangements.³⁵ For example:

- “If one or more of the following events of default (each an ‘Event of Default’) shall occur and be continuing, the Loan Agent and the Banks shall be entitled to the remedies set forth in Section 12.2:
 . . .
 (h) without the prior written consent of the Majority Banks, the Borrower sells or otherwise disposes of all or a substantial part of its assets or ceases or threatens to cease to conduct all or a substantial part of its business as now conducted, or merges or consolidates with any other company unless the purchaser or transferee or the other party to such merger or consolidation is any of the Borrower’s Affiliates and is capable of complying with and does comply with all

³⁵ See also S. Stijns, *De beëindiging van de kredietovereenkomst: macht en onmacht van de (kort geding)-rechter/La dénonciation du crédit: les pouvoirs du juge du fond et du juge des référés*, *Revue de droit commercial belge*, 1996, pp. 100–167.

the representations, undertakings, covenants and obligations of the Borrower hereunder as if all references in this Agreement to 'the Borrower and any of its Affiliates' were references to 'that Person and any of its Affiliates'; or

(i) without the prior written consent of the Majority Banks, any of the Borrower's Affiliates sells or otherwise disposes of all or a substantial part of its assets or ceases or threatens to cease to conduct all or a substantial part of its business as now conducted, or merges or consolidates with any other company and such sale, disposal, cessation, merger or consolidation might, in the opinion of the Majority Banks, materially and adversely affect the Borrower's ability to perform any of its obligations hereunder unless the purchaser or transferee or the other party to such merger or consolidation is the Borrower or another of its Affiliates; . . .

. . .

(k) A final judgment or order for the payment of money in excess of U.S. \$ _____ (or its equivalent in another currency) shall be rendered against the Borrower or any Agency and either (i) enforcement proceedings shall have commenced by any creditor upon such judgment or order or (ii) a stay of enforcement of such judgment or order, by reason of a pending appeal or otherwise, shall not be in effect for any period of 10 consecutive days; then, . . . , the Bank may . . . declare its obligation to make Advances to be terminated . . ."

N. Partial Termination

Termination clauses generally envisage the complete termination of the contract. In some cases, however, partial termination had been considered and regulated:

- "Si les licences d'exportation n'étaient pas obtenues ou si, avant l'achèvement de l'exécution du Contrat, elles étaient retirées par les autorités responsables ou si leur validité était expirée, ou si le certificat du Vendeur confirmant que la licence n'est pas nécessaire se trouve non valable (par suite de l'intervention des autorités responsables du pays du Vendeur), l'Acheteur serait en droit de résilier le contrat en totalité ou en partie.
Dans ce cas, le Vendeur remboursera les acomptes correspondant à la partie résiliée du Contrat, avec majoration pour intérêts au taux annuel de x%."
- "Si les deux parties reconnaissent que les défauts, visés au point 14.14, dans certains types de l'équipement ne peuvent être éliminés, ou si, pour les éliminer, il faut plus de 6 mois, l'Acheteur aura le droit de renoncer aux parties correspondantes du Contrat. Dans

ce cas, le Vendeur est obligé de rembourser à l'Acheteur la valeur de l'équipement livré et de payer une pénalité de x% du montant de la partie résiliée du Contrat.

Les conditions du présent point ne constitueront pas un précédent pour les affaires ultérieures.”

O. Consequences of the Application of the Termination Clause

Some, but far from all, termination clauses pay attention to the effects of the termination. Basically, two different attitudes have been found regarding the effects of the contract termination on the contracting parties' rights and obligations. In the first approach, all contractual rights and obligations seem to terminate except for those enumerated in the contract. Under the second approach, the contract continues to exist until all differences and disputes have been solved. These are examples of this approach:

- “The Pre-Bid Agreement shall terminate on any of the following occurrences:

...

But in any event . . . not before:

—The Bid Bond has been returned,

—A final settlement of all differences or disputes and all accounts between the Parties has taken place.”

- “12.1. This Agreement shall come into force on the date of signature hereof and shall terminate in the event of any one of the following circumstances occurring:

...

12.1.1. If the Contract has been entered into and has been fully implemented by the Joint Venture Partnership and the Employer when all rights and obligations as well as guarantees and liabilities of the Joint Venture Partnership have ceased and/or have been finally settled with the employer and any Third Party, and all rights and obligations between the Parties in connection with this Agreement have been finalized, and all differences or disputes between the Parties in connection with this Agreement have been finally settled.

12.2. Upon such termination, the rights of the Parties to make any claims against each other shall cease forthwith.”

- “L'Association créée ce jour entrera en vigueur avec la signature de tous les Associés. Elle durera jusqu'à ce que:

...

2) La soumission soit acceptée; alors l'Association prendra fin au plus tard avec l'apurement définitif de tous les comptes qui seraient la conséquence directe ou indirecte de son objet, tant avec le Maître d'Ouvrage qu'avec les tiers ou entre Associés.

Même après cette date, les Associés resteront liés jusqu'à l'extinction de toutes les obligations légales et contractuelles résultant du marché ou des marchés qui auront été conclus, à moins qu'il n'en soit autrement convenu d'un commun accord lors de la dissolution de la Joint Venture."³⁶

Sometimes, the life of the contract may, by operation of these clauses, be prolonged for a considerable period as in the following example:

"... Sub-Contractor shall remain bound by the present Sub-Contract during the period of time covered by the duration of the guarantees imposed upon Sub-Contractor by the present Sub-Contract, and by the clauses of the Main Contract applicable to its deliveries and Works."

Termination clauses also often provide for the remedies that follow upon termination:

- "La Partie lésée pourra en outre demander à la Partie dont le comportement a entraîné la résiliation anticipée du Contrat des dommages et intérêts en réparation du préjudice qu'a pu lui causer la caducité du Contrat."
- "... Dans le cas où après l'expiration de ce délai les défauts ne seraient pas éliminés, l'Acheteur a le droit de renoncer à l'équipement défectueux et de demander de le remplacer par un équipement de bonne qualité ou résilier le Contrat dans sa partie concernant l'équipement défectueux."
- "The terminated party shall bear all the costs arising out of or in connection with termination."

Sometimes, detailed termination procedures have been provided for as in this case:

- "The Engineer shall, as soon as possible after such termination, certify the value of the Works and all sums then due to the Contractor as at the date of termination in accordance with Clause 33. The Employer shall not be liable to make any further payments to the Contractor until the Works have been completed. When the Works are so complete, the Employer shall be entitled to recover from the Contractor the extra costs, if any, of completing the Works after allowing for any sum due to the Contractor under Sub-

³⁶ In this case, the contractual provision treats both the effect of termination on the parties' rights and obligations and the way the contract termination is to be effected (*apurement de tous les comptes*). The termination clause should ideally distinguish more clearly between these two elements.

Clause 45.3. If there is no such extra cost the Employer shall pay any balance due to the Contractor.”³⁷

- “In the event of such termination the Employer shall pay the Contractor an amount calculated in accordance with Sub-Clause 44.8.³⁸ The Employer shall pay in addition the amount of any loss or damage, including loss of profit which the Contractor may have suffered in consequence of termination. The additional amount shall, however, not exceed the limit specified in the Preamble.”³⁹
- “. . . the Contractor shall allow or pay to the Employer in the manner hereinafter appearing the amount of any direct loss and/or

³⁷ Clause 45.3 (Valuation at Date of Termination) and 45.4 (Payment after Termination) of the FIDIC Yellow Book (Conditions of Contract for Electrical and Mechanical Works, 3rd ed., 1987); see also clause 63.2 and 63.3 of the Conditions of Contract for Works of Civil Engineering Construction—The Red Book, FIDIC, Lausanne, 4th ed., 1989.

³⁸ This clause relating to payment on termination due to *force majeure* provides as follows:

“If the Contract is terminated under Sub-Clause 44.7 the contractor shall be paid the value of the work done.

The Contractor shall also be entitled to receive:

(a) the amounts payable in respect of any preliminary items so far as the work or service comprised therein has been carried out and a proper proportion of any such item in which the work or service comprised has only been partially carried out,

(b) the cost of materials or goods ordered for the Works or for use in connection with the Works which have been delivered to the Contractor or of which the Contractor is legally liable to accept delivery. Such materials or goods shall become the property of and be at the risk of the Employer when paid for by the Employer and the Contract shall place the same at the Employer’s disposal,

(c) the amount of any other expenditure which in the circumstances was reasonably incurred by the Contractor in the expectation of completing the whole of the Works,

(d) the reasonable cost of removal of Contractor’s Equipment from the Site and the return thereof to the Contractor’s works in his country or to any other destination at no greater cost, and

(e) the reasonable cost of repatriation of the Contractor’s staff and workmen employed wholly in connection with the Works at the date of such termination.”

³⁹ Clause 46.3 (Payment on Termination for Employer’s Default) of the FIDIC Yellow Book (Conditions of Contract for Electrical and Mechanical Works, 3rd ed., 1987); see also clause 69.3 (Payment of Termination) of the Conditions of Contract for Works of Civil Engineering Construction—The Red Book, FIDIC, Lausanne, 4th ed., 1989.

damage caused to the Employer by the termination. Until after completion of the Works under clause 27.3.2 the Employer shall not be bound by any provision of this Contract to make any further payment to the Contractor but upon such completion and the verification within a reasonable time of the accounts therefor the Employer shall state the amount of expenses properly incurred by the Employer and the amount of any direct loss and/or damage caused to the Employer by the termination and, if such amounts when added to the monies paid to the Contractor before the date of termination exceed the total amount which would have been payable on due completion in accordance with this Contract, the difference shall be a debt payable to the Employer by the Contractor; and if the said amounts when added to the said monies be less than the said total amount, the difference shall be a debt payable by the Employer to the Contractor.”

These clauses set forth the manner in which the termination of the contract is to be implemented and the way compensation for termination is determined. Various methods have been developed. One method is the *lump-sum* method, which determines, in advance, the damages to be paid. This method has been analyzed in another chapter to which reference is made.⁴⁰ In some cases, a ceiling is put on the liability of a contracting party under the termination clause by means of an overall liquidation and penal damages clause:

“Notwithstanding anything to the contrary in the Conditions the total financial liability of the Contractor under clause 27 shall, including any liability for liquidated and ascertained damages, be limited to an amount equivalent to 10% of the original Contract Price and the Owner shall indemnify the Contractor against any expense, liability, loss, claim or proceedings whatsoever in excess of the said limitation of liability.”

Other methods, such as those cited earlier, refer to the contract value to determine the amount of damages or compensation. Various options are open. The termination clause may consider including or excluding compensation for loss of profit, indirect damages, termination charges paid to sub-contractors and the value of residual assets. It is advisable that the various elements of the compensation to be paid be clearly identified in the contract. An example of a clause where some items of the compensation are specified follows:

- “A Defaulting Party shall, on demand, indemnify and hold harmless the Designating Party for and against all reasonable out-of-

⁴⁰ See *supra*, Chapter 7.

pocket expenses, including attorney's fees, incurred by the Designating Party by reason of the enforcement and protection of its rights under this Master Agreement or any Rate Protection Agreement, including, but not limited to, costs of collection."

- "If the cause of termination is the default of either party hereto the other party shall be entitled in addition to be paid its reasonable costs and expenses connected with or arising from the termination not included in the Account submitted under sub-Clause (A) above and any additional damages to which such other party may be entitled at law. The parties hereto shall within 6 (six) months of the date of termination agree the amounts payable under this sub-Clause and shall record their agreement by exchange of letters. Failing agreement within such period the matter in dispute shall be referred to Arbitration in accordance with Clause 24 hereof."

Sometimes, the assessment or calculation of the compensation is left to one of the parties:

"The parties further agree that a statement in reasonable detail by the Designating Party in good faith showing the calculation of the foregoing amounts shall be conclusive in the absence of manifest error."

In complex cases, the procedure to determine compensation will have to involve auditors or other specialists. It is advisable that the appointment of these specialist, their mandate, the payment of their fees and the nature of their opinions is clearly settled in the contract. The specialist may be appointed by one party as in this case:

"The actual costs referred to under a. of article 17.3 shall be examined and certified as sound by external auditors appointed by COMPANY. All costs involved therein shall come to CONTRACTOR's account."

Sometimes, the contract provides for the identity of the nominated expert and his mandate as in the following sample:

"In the event of complete or partial termination of this Agreement for any reason whatsoever, the Corporation shall . . . submit an account in writing . . .

The said Account shall be accompanied by a Report from . . . Chartered Accountants who acting as Experts shall report whether or not in their expert opinion the Account has been properly prepared in accordance with this Clause whereupon such Account

and Report shall be conclusive and binding upon . . . and the Corporation.”⁴¹

In their provisions regarding the effects of termination, much attention is paid to the remedies available to the aggrieved party. However, the obligations of that party under those circumstances is barely addressed. In one clause, mention was made of this party's obligation to mitigate the other party's losses:

“The Non-Defaulting Party shall be entitled to:

. . .

(ii) make or attempt to make arrangements to avoid, mitigate or reduce the losses which would, or which, in the opinion of the Non-Defaulting Party, might, otherwise arise from such termination; . . .”

In some cases, it is expressly and cautiously stated that the remedies enumerated in the contract do not exclude any other remedies that may be available under the applicable law:

“. . . the other Joint Venturer (hereafter called “the Continuing Party”) shall have the following rights (without prejudice to any other rights and remedies of the Continuing Party against the Defaulting Party under common law statute or otherwise) . . .”

At the other side of the spectrum, the termination clause may provide for an exemption clause such as the following:

“Dans aucune des circonstances ci-avant, le Franchisé n’aura aucun droit à réclamer des dommages et intérêts du chef de la résiliation intervenue du Contrat.”⁴²

In practice, there may be important questions as to how to solve disputes between the contracting parties in the period between the moment that it becomes clear that termination will follow and the moment that national courts or arbitral tribunals may rule on the substance of the claims of either party in relation to such termination. Absent contractual provisions, the par-

⁴¹ The interpretation of this termination clause has been the subject of an ICC arbitral procedure where the arbitral tribunal in a partial final award has held that termination accounts that were not prepared by an expert appointed by both parties in accordance with the contractual clause, were not binding (Case 7071, Partial Final Award dated January 28, 1996, unpublished).

⁴² See *supra*, Chapter 7.

ties will have to seek amicable solutions to these interim problems or will have to seek provisional measures before national courts or arbitrators. Some contractual provisions deal to a certain extent with these issues:

- “. . . the Employer may, after having given 7 days notice to the Contractor, terminate the Contract and expel the Contractor from the Site.
 . . .
 The Employer may upon such termination complete the Works himself or by any other contractor.”⁴³
- “The Contractor shall be entitled to remove immediately all Contractor’s Equipment which is on the Site.”⁴⁴
- “. . . Contractor shall immediately or upon such other date as is specified in the notification discontinue its performance of WORK, or the relevant part thereof, and shall assign to COMPANY, or its nominee, all rights and titles referred to in article 4.4 . . .”

The examples just given reflect the fact that the contracting parties, in their contracts, insert provisions containing obligations that survive the contract or that come into play at the termination of their contractual bonds. The former clauses have already been analyzed in a different chapter and relate, *inter alia*, to issues such as inventory and stock available at termination, return of documents, removal of equipment, buildings or advertisement boards or client orders coming in after termination.⁴⁵ It is obvious from those analyses, and from many examples in this section, that the concept of termination itself is, in this regard, often ambiguous and that the termination clause either expressly or impliedly does not exclude that certain provisions (the applicable law clause, the dispute resolution clause, confidentiality clauses and clauses in restraint of trade) continue to be in effect despite the so-called termination of the contract. Further reference is made to the analyses in the following chapter. As to clauses intended to become operational upon termination, the following may be cited:

- “The Employer may employ and pay other persons to carry out and complete the design and construction of the Works and he or they may enter upon the Works and use all temporary buildings,

⁴³ Article 45.2 (Contractor’s Default) of the FIDIC Yellow Book (Conditions of Contract for Electrical and Mechanical Works, 3rd ed., 1987); compare with clause 63.1 of the Conditions of Contract for Works of Civil Engineering Construction—The Red Book, FIDIC, Lausanne, 4th ed., 1989.

⁴⁴ Article 46.2 (Removal of Contractor’s Equipment) of the FIDIC Yellow Book (Conditions of Contract for Electrical and Mechanical Works, 3rd ed., 1987); see also clause 69.2 of the Conditions of Contract for Works of Civil Engineering Construction—The Red Book, FIDIC, Lausanne, 4th ed., 1989.

⁴⁵ See *infra*, Chapter 13.

plant, tolls, equipment, goods and materials intended for, delivered to and placed on or adjacent to the Works, and may purchase all materials and goods necessary for the carrying out and completion of the Works.”

- “. . . the Contractor shall if so required by the Employer within 14 days of the date of termination, assign to the Employer without payment the benefit of any agreement for the supply of materials or goods and/or for the execution of any work for the purposes of this Contract but on the terms that a supplier or sub-contractor shall be entitled to make any reasonable objection to any further assignment thereof by the Employer.”
- “. . . the Employer may pay any supplier or sub-contractor for any materials or goods delivered or works executed for the purposes of this Contract (whether before or after the date of termination) in so far as the price thereof has not already been paid by the Contractor.”

V. CONCLUSIONS

As has become tradition, reports prepared by the Working Group end with some advice and suggestions to contract draftsmen. Naturally, it is recommended to be precise and accurate and to avoid ambiguity and repetition. Also, a well-drafted termination clause (at least as much as any other clause) is defective without an adequate choice of law clause and consideration of procedures to resolve disputes.

In themselves, termination clauses vary so much according to the contractual context that we refrain from making more specific recommendations for general application. Hopefully, readers will benefit from the obvious defects of some of the clauses we have quoted and from their enormous variety.