CHAPTER 10
“ENGLISH CLAUSES,” MOST-FAVORED CUSTOMER CLAUSES AND FIRST-REFUSAL CLAUSES IN INTERNATIONAL CONTRACTS

I. INTRODUCTION

This chapter bridges the two preceding ones, dealing with two situations (force majeure and hardship) where the occurrence of new circumstances leads to reconsideration, and often to re-adaptation of the contract, and Chapters 12 and 13, which will examine the termination of the contract, and its survival through certain obligations that continue to bind the parties beyond the achievement of the main purpose of the agreement.

So-called “English clauses” and most-favored customer clauses provide for the re-adaptation (and sometimes the termination) of the contract when market conditions have changed: either one party has received a more favorable offer from a third party, or the other party has offered more favorable terms to a third party. As for a party benefiting from a first-refusal clause, it will be offered the preferential opportunity of jointly carrying out a new transaction with the other contracting party.

It is easy to justify analyzing these three types of clause together.

What “English clauses” and most-favored customer clauses have in common is that they make it possible to adapt the contract to meet the more favorable terms offered by or granted to a competitor. English clauses and first-refusal clauses often appear as alternatives: a supply contract, for example, may be entered into on a long-term basis with the possibility of adapting or ending the arrangements provided by an English clause or on a short-term basis with a first-refusal clause allowing new contracts to be concluded for subsequent periods. The three clauses have undeniable technical similarities, as our analysis will show, for example with regard to the problem of the comparability of terms and conditions. All three make relations between the parties depend on the actual or potential intervention of competitors.

The Group collected and analyzed over 50 such clauses.\textsuperscript{2}

The successive examination of English clauses (Section II), most-favored customer clauses (Section III) and first-refusal clauses (Section IV), based on a sample of more than 60 clauses, will enable the nature and economic role of each of those clauses to be better defined, their respective structures to be examined in detail and the main pitfalls to avoid in their drafting to be highlighted. The Chapter will conclude by setting out three specific legal problems that such clauses are apt to raise (Section V).

\section*{II. ENGLISH CLAUSES}

\subsection*{A. Definition, Economic Role}

An English clause (sometimes also called “alignment clause,” “competitive offer clause” or “meet or release clause”) gives a contracting party A (generally the buyer) the right to rely as against the other contracting party B (the seller) on an offer from a third party that is more favorable than the terms and conditions of the current contract. If B agrees to match the competitive offer, the contract continues on the new terms and conditions. If B does not so agree, A may enter into a contract with the third party and the contract between A and B will generally be suspended or terminated.

Here is an initial example of such a clause:

“Si en cours d’exécution du contrat, l’acheteur notifie au vendeur la réception d’une offre concorrente émanant d’un fournisseur connu et sérieux, faite à un prix inférieur au prix contractuel, toutes autres conditions (notamment de quantité, de qualité et de regularité) restant égales, le vendeur devra, dans les 10 jours de la notification par l’acheteur, rencontrer les conditions de l’offre concorrente.

“A défaut d’accord avec l’acheteur, celui-ci sera libéré de l’obligation d’acheter au vendeur et le présent contrat prendra fin à l’expiration du délai de 10 jours accordé au vendeur.”

Typically, an English clause will be incorporated in certain long-term contracts, in particular, supply contracts granting exclusive rights or con-

\textsuperscript{2} Cf. J.P. Desideri, \textit{La préférence dans les relations contractuelles}, Aix-en-Provence, 1997, pp. 49–57; M. Trochu, Les clauses d’offre concorrente, du client le plus favorisé et de premier refus dans les contrats internationaux, \textit{I.B.L.J.}, 2002, pp. 303–320. Very little litigation is known in practice concerning such clauses; no arbitral award will be cited. This may be explained either by the fact that such clauses may be less frequent than they were in the past, or because their implementation is more apt to lead to a negotiated commercial solution than to a judicial procedure. However, the compatibility of such clauses with the rules of competition has lead to a few decisions (cf. \textit{infra}, pp. 532–535).