CHAPTER 13
POST-CONTRACTUAL OBLIGATIONS IN INTERNATIONAL CONTRACTS

I. INTRODUCTION

The classical theory of obligations places the contract in a clearly defined time period. A contract is made when the offer is accepted. It normally ends with the performance of the parties’ obligations or on expiry of the term provided. It may end prematurely as a result of a specific incident, such as in a case of force majeure, the remission of a debt or termination due to non-performance.

Upon examination, it becomes clear that, in practice, the temporal limits of contracts, especially international contracts, are often much less precise.

From the above chapter on letters of intent, it emerged that “upstream,” the demarcation between the period preceding the contract and the time the contract was made often proved difficult to establish. The negotiation period, far from being a vacuum from a legal point of view, is, in fact, a period full of expressions of will. Commitments are made to organize the negotiation. The contract itself is made progressively, by successive, more and more detailed agreements. Sometimes, the parties even decide to start performing the agreement before it has been entirely concluded.

What is the situation “downstream”? It appears that quite often the contract does not terminate in a clear-cut way either. Although essentially the parties’ obligations have been performed, the contract will not resign itself to die. It survives in a series of undertakings with which one or the other party continues to comply.

These undertakings are of different types. Some arise out of past events. The situation, which the contract created between the parties, must be wound up: documents must be returned, necessary action taken with regard to stock, outstanding orders need to be dealt with, etc. Others, more characteristically, provide for a veritable extension into the future of con-

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1 See supra, Chapter 1.
2 This concept of contract law can be associated with the theory of relational contracts, referred to elsewhere in this volume (see supra, pp. 212–213 and infra, pp. 625–628).
tractual relations, whether this involves maintaining in force certain obligations (for example a confidentiality clause or the obligation not to compete), or the creation of new obligations (for example a loyalty commitment as to the conclusion of future contracts).

We shall attempt to provide a general overview, illustrated by clauses taken from the sample gathered and discussed by the Group (Section II), before setting out a few thoughts on the specific legal problems which may arise from these post-contractual clauses (Section III).

One caveat should, however, be entered first. The expression post-contractual obligations is not, strictly speaking, correct. Rather, it is the contract itself that survives through these obligations. It is quite clear that the obligations in question also arise from the contract, by virtue of express stipulations, or even implicitly, and especially based on the principle that agreements are to be performed in good faith. ³

The expression post-contractual obligations has the merit, however, of emphasizing the fact that, essentially, the contract has been performed. The parties’ principal obligations have been performed (or have ceased to exist for another reason). The goods sold, for example, have been delivered and the purchase price paid. However, the seller is still bound by his guarantee against latent defects. The agency contract is finished after having been properly performed, but the agent is still bound by the obligation not to compete.

Here is an example of the terminology used in practice:

“Termination of this agreement for whatever reason shall not . . . affect or prejudice the rights and obligations of the parties pursuant to articles 5.1, 5.2, 9.8, 10.4, 10.6, 11.9 and 15.6, which are continuing in nature and shall survive termination.”

II. POST-CONTRACTUAL OBLIGATIONS: GENERAL OVERVIEW

The sample of post-contractual clauses gathered by the Working Group is large (several dozens of clauses) as well as diversified. We shall attempt to create an overview and to propose a certain classification, illustrating each case. These examples are clearly not exhaustive, since there is a great variety of post-contractual obligations. However, the obligations described below seemed to us to occur particularly frequently and to be eminently characteristic.

The aim of the present chapter is to attempt to arrive at an overview of the problems common to post-contractual obligations. We will therefore

³ On this point, see infra, pp. 612–614.