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ARTICLE

Is there a Life After the End of the Contract?

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1. Introduction

Legislators and even literature on contract law tend to ignore the post-contractual phase, perhaps because of the excessive attention devoted to the pre-contractual phase. And yet the issue is particularly relevant for international commercial contracts drafters. This Article will focus on what happens after the end of a contract, ie on so-called post-contractual obligations, one of these issues that many domestic laws definitely do not deal with satisfactorily.

First, this article will indicate its sources, set a few definitions, and draw a few preliminary lessons. It will then list examples of post-contractual obligations to be found in various international contracts and show how contract drafters can tackle this issue. The approach will be based as far as possible on real life commercial contracts and on the UNIDROIT Principles of International Commercial Contracts (UPICC),[1] which offer a useful tool in the course of reforming endeavours, as well as in the interpretation of existing domestic laws on contracts.[2]

2. Sources, definitions, and generalisation

2.1. Sources

This Article draws on various sources. To be mentioned first, the *Groupe de Travail Contrats Internationaux*[3] devoted one of its early empirical studies to 'Post

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[1] International Institute for the Unification of Private Law, *UNIDROIT Principles of Commercial Contracts* (2016) ('UPICC') <www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016> accessed 28 April 2018.

[2] See the purpose of the UPICC in the Preamble: UPICC Preamble and Comment 6-7, 5f.

[3] First chaired by Professor Marcel Fontaine (Louvain-la-Neuve), and then by Professor Filip de Ly (Erasmus University Rotterdam).

contractual obligations in international contracts'.[4] This group of corporate lawyers, members of the Bar, and professors specialising in international trade transactions from different countries (Belgium, France, Netherlands, Switzerland, Brazil, Egypt, England, Germany, Italy, Poland, Spain, USA, etc) has been meeting since 1975 to conduct a systematic analysis of clauses frequently appearing in international contracts.[5] Its particularity lies in the fact that sample clauses taken from the practical experience of its members are collected on a given topic, and carefully analysed in light of the development of international contract practice. The reports were published in French and English in the peer-reviewed *Revue de droit des affaires internationales (RDAI)/International Business Law Journal (IBLJ)*,[6] then gathered in a book first published in 1989,[7] which was later expanded[8] and translated in different languages (English,[9] Italian, and Spanish[10]). The findings of the Group about post-contractual obligations revealed that international commercial contracts devoted quite some attention to the phase after termination or performance of a contract through various types of clauses for which national legislations offered no model. The report recognises that, even when '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'.[11] Based on the collected clauses, the report distinguishes between clauses organising the winding up of the past and clauses extending the contract into the future after performance or termination. In conclusion, the report notes that post-contractual obligations 'constitute too disparate a group to allow a much more detailed survey, but they deserve to be highlighted'.[12]

[4] Marcel Fontaine, 'Les obligations « survivant au contrat » dans les contrats internationaux' (1984) Droit et pratique du commerce international/International Trade Law and Practice 1.
[5] Marcel Fontaine and Filip De Ly, *Drafting International Contracts: An Analysis of Contract Clauses* (Ardsley 2006/Martinus Nijhoff 2009) xvii ff.
[6] Prior to 1996, IBLJ <https://www.iblj.com/?lg=en> accessed 8 February 2019, was known as 'Droit et pratique du commerce international/International Trade Law and Practice' <http://www.periodicals.com/stock_f/d/ttl00143.html> accessed 8 February 2019.
[7] Marcel Fontaine, *Droit des contrats internationaux, Analyse et rédaction de clauses* (FEC 1989).
[8] Marcel Fontaine and Filip De Ly, *Droit des contrats internationaux, Analyse et rédaction de clauses* (2nd edn, Bruylant/Forum européen de la communication 2003).
[9] Fontaine and De Ly (n 5).
[10] Marcel Fontaine and Filip De Ly, *La redazione dei contratti internazionali, A partire dall'analisi delle clausole*, (Renzo Maria Morresi tr, Milan, Giuffré 2008); Marcel Fontaine and Filip De Ly, *La redacción de contratos internacionales. Análisis de cláusulas,* (Madrid, Civitas Thomson Reuters 2013).
[11] Fontaine and De Ly (n 5) 597.
[12] Fontaine and De Ly (n 5) 620.

Another source is the 1980 UN Convention on Contracts for the International Sale of Goods (CISG).[13] The CISG contains a provision envisaging the period after avoidance of the contract by the buyer or the seller, in case of a fundamental breach of contract or non-performance within an additional reasonable period of time.[14] According to Article 81 CISG, avoidance releases both parties from their obligations, but 'does not affect any provision of the contract for the settlement of disputes or *any other provision of the contract governing the rights and obligations of the parties consequent upon the avoidance of the contract*'.[15] These provisions are considered as surviving or continuing provisions, for example, provisions on the settlement of disputes, which are specifically mentioned by paragraph 2, or provisions on the applicable law, on damages (liquidated damages, penalty clauses), on confidentiality, duty of cooperation, on restitution of documents, etc.[16] A breach of these provisions, even after avoidance, will lead to damages pursuant to Article 74 CISG.[17]

A third useful source lies in the Principles of European Law on Commercial Agency, Franchise and Distribution Contracts (PEL CAFDC).[18] An international private body, the Study Group on a European Civil Code, has devised these Principles, which, unlike the CISG, are soft law. They are devoted to agency, franchise, and distribution contracts. These long-term contracts call for provisions on post-contractual obligations because the relationship between the parties involves a particularly intense cooperation.[19] Three different duties result from the general

[13] The United Nations Convention on Contracts for the International Sale of Goods 1980 (hereafter 'CISG'), entered into force on 1 January 1988, and is applicable in 89 states, covering most of the world: see map at <www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status_map.html> accessed 28 April 2018.
[14] CISG Art 49 and 64.
[15] ibid Art 81 [2] (stress added).
[16] CISG Advisory Council Opinion No 9, Consequences of Avoidance of the Contract, Rapporteur: Professor Michael Bridge, London School of Economics, London, United Kingdom. Adopted by the CISG-AC following its 12th meeting in Tokyo, Japan on 15 November 2008, [3.3] <www.cisgac.com/opinions/#op> accessed 28 April 2018; John Honnold and Harry Flechtner, *Uniform Law for International Sales under the 1980 United Nations Convention* (4th edn, Wolters Kluwer 2009), CISG Art 81 [441-443], use the wording 'Unaffected by Avoidance'.
[17] Peter Schlechtriem and Ingeborg Schwenzer (eds), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (4th edn, OUP 2016), Art 81 [12-14] (Fountoulakis); Heinrich Honsell (ed), *Kommentar zum UN-Kaufrecht, Übereinkommen der Vereinten Nationen über Verträge über den Internationalen Warenkauf (CISG)* (2nd edn Springer, Salzburg/Zürich 2009), Art 81 [8-12] (Weber).
[18] Study Group on a European Civil Code (MW Hesselink, JW Rutgers, O Bueno Diaz, M Scotton, M Veldman), *Principles of European Law, Commercial Agency, Franchise and Distribution Contracts* (Sellier, Bruylant, Stämpfli 2006).
[19] PEL CAFDC Art 1:202 Co-Operation: (1) In commercial agency, franchise and distribution contracts and in other long-term commercial contracts the obligation to co-operate (…) is fundamental

provisions applicable to all contracts subject to the PEL CAFDC: the duty of confidentiality, the duty to repurchase stock and other materials, and the duty to pay an indemnity for goodwill. First of all, Article 1:204 PEL CAFDC paragraph 1 sets an obligation not to disclose confidential information received from the other party to third parties 'either during or *after the end* of the contract period'.[20] Confidentiality remains a duty even after the end of the contract period. It is the most obvious duty to survive the end of contracts involving an intense relation between the parties. Another duty surviving the end, termination, or avoidance of these contracts is the duty of the principal, franchisor, or supplier to repurchase the remaining stock, spare parts, and materials at a reasonable price, except where the commercial agent, franchisee, or distributor can reasonably resell them.[21] Finally, the PEL CAFDC provide for a duty which comes into existence only once the contract has ended (for whatever reason, including termination for non-performance), namely the duty to indemnify the other party for the goodwill from which the debtor continues to benefit substantially, provided the payment of such indemnity is reasonable having regard to all the circumstances.[22]

The fourth source is the issue of post-termination duties, one of the topics discussed by the UNIDROIT Working Group for the 2016 edition of the Principles.[23] Better than in the previous editions, the fourth edition aims at taking into account the special needs of long-term contracts. One of these special needs highlighted by the UPICC concerns post-termination obligations.[24] According to UPICC Article 7.3.5(3) relating to fundamental non-performance, 'Termination does not affect any provision in the contract for the settlement of disputes or *any other term of the contract which is to operate even after termination*'.[25] The comment to this provision lists a number of contract provisions beside those for the settlement of disputes and governing law, which are intended to continue to operate after or upon termination, such as provisions on confidentiality, non-competition, or unwinding of the

and particularly intense. It requires the parties in particular to collaborate actively and loyally and to co-ordinate their respective efforts in order to achieve the objectives of the contract. (2) Parties may not derogate from this provision.

[20] PEL CAFDC Art 1:204, [1] (stress added).
[21] PEL CAFDC Art 1:306.
[22] PEL CAFDC Art 1:305.
[23] (n 1).
[24] UPICC Art 7.3.5 and Comment 4, 262.
[25] UPICC Art 7.3.5(3) (stress added).

contractual relationship.[26] The same provision applies to the effects of the termination of a contract for an indefinite period.[27]

Finally, in more recent times, European domestic legislators have taken up the topic. Article 1230 of the new French Civil Code (FCC) envisages the post-termination stage with contract terms surviving it: 'Termination does not affect contract terms relating to dispute-resolution, nor those intended to take effect even in the case of termination, such as confidentiality or non-competition clauses.'[28] The draft Belgian Civil Code (Draft BCC), addresses the issue of 'obligations and post-contractual clauses' in a more general manner. Article 117 Draft BCC,[29] a provision applicable to all causes of extinction of a contract with certain qualifications,[30] distinguishes between obligations surviving the end of the contract (paragraph 1) and obligations triggered by the end of the contract (paragraph 2). It identifies the sources of such post-contractual obligations as being the contract itself through its 'clauses'

[26] UPICC Art 7.3.5 and Comment 3, 261(f).
[27] UPICC Art 5.1.8 Comment 2, 165.
[28] Art 1230 CCF:

> La résolution n'affecte ni les clauses relatives au règlement des différends, ni celles destinées à produire effet même en cas de résolution, telles les clauses de confidentialité et de non-concurrence.

Translated into English by John Cartwright, Bénédicte Fauvarque-Cosson and Simon Whittaker, <www.textes.justice.gouv.fr/art_pix/THE-LAW-OF-CONTRACT-2-5-16.pdf> accessed 28 April 2018. On this new provision, see François Chénedé, *Le nouveau droit des obligations et des contrats, Consolidations – Innovations – Perspectives*, (Paris, Dalloz 2016) N. 28.221-28.224.
[29] Draft approved by the Council of Ministries on 30 March 2018 (*Projet de loi portant création d'un Code civil et y insérant un Livre 5 "Les obligations"*), available at <https://justice.belgium.be/fr/bwcc>

> Art. 5.117. Obligations et clauses post-contractuelles (1) La fin du contrat n'affecte pas les obligations et les clauses qui, eu égard à l'intention des parties et à la cause d'extinction, sont destinées à rester applicables. (2) La loi, la bonne foi ou les usages peuvent également imposer des obligations postérieures à la fin du contrat. (3) Les règles relatives aux obligations contractuelles leur sont applicables, à moins que leur nature ou leur portée ne s'y oppose.

Translation by the author: Post-contractual obligations and clauses (1) The end of a contract has no effect on obligations and clauses which are meant to remain applicable given the intention of the parties and the extinction cause. (2) The law, good faith or usage may also impose obligations after the end of the contract. (3) The rules on contractual obligations apply unless their nature or scope requires otherwise.
The *Exposé des motifs* is also available at <https://justice.belgium.be/fr/bwcc> accessed 28 April 2018.
[30] See Art 5.115 Draft of 30 March 2018 (n 29) *Exposé des Motifs*, 191:

> La disposition en projet invite à cet égard également à tenir compte de la nature de la cause d'extinction du contrat. En effet, il se peut que certaines clauses soient appelées à survivre à certaines causes d'extinction et pas à d'autres. De manière générale, l'annulation du contrat a des effets plus étendus que les autres modes d'extinction du contrat. Ainsi, par exemple, une clause indemnitaire ne pourra pas survivre à l'annulation du contrat, car une telle clause ne peut s'appliquer qu'en cas d'inexécution d'une obligation valablement contractée.

(paragraph 1), or the law, good faith, or usage (paragraph 2). Paragraph 3 of this provision declares the principles on obligations applicable.

This brief survey of hard law (international or domestic), soft law (on contracts in general or on specific contracts), and doctrinal writings, shows that contract practice and various legislators have long since recognised that after termination or performance of a contract the relationship between the parties is not dead.

2.2. Definitions

The expression 'post-contractual' clauses or obligations is not, strictly speaking, correct.[31] In French, '*clauses survivant au contrat*', translated as 'surviving clauses', is a better expression because it conveys the fact that the contract remains the source of the obligations, even when it has come to an end. However, the expression 'post-contractual' clauses, obligations, or duties, as well as 'post-termination' clauses, obligations, or duties, have gained international recognition as the use of the expression during the discussions around the fourth edition of the UNIDROIT Principles will show.[32] The idea of a 'post-contractual' phase entailing certain duties has also found its way into doctrinal writings,[33] perhaps because of the convenient shortcuts the use of Latin words allow. Hence, this article will use the term 'post-contractual' clauses, obligations, or duties hereafter.

For the purpose of this Article, the 'end of the contract' remains undetermined. A contract normally ends when both parties have performed it. It can also end as a

[31] Fontaine and De Ly (n 5) 598.
[32] Presentation of the Working Group's draft proposal by Mr Bonell, Report of the 95th session of the Governing Council UNIDROIT 2016, Rome, 18-20 May 2016, CD (95) 15, text available at <www.unidroit.org/meetings/governing-council/1986-95th-session-rome-18-20-may-2016> accessed 28 April 2018: see both expressions used at Nr 35.
[33] (n 4); Andre Naidoo, 'Post-Contractual Good Faith - A Further Change in Judicial Attitude' (2005) 68 MLR 464; Machteld W. De Hoon, 'Effective Unilateral Ending of Complex Long-term Contracts' (2005) 4 European Review of Private Law 469, 486; Hans-W. Micklitz, 'The Concept of Competitive Contract Law' (2005) 23 Penn State International Law Review 549, 574; Shiyuan Han, 'Liabilities in Contract Law of China: Their Mechanism and Points in Dispute' (2006) 1 Frontiers of Law in China 121, 125, 127; C. Stephen Hsu, 'Contract Law of the People's Republic of China' (2007) 16 Minnesota Journal of International Law 115, 123; Rob Merkin, 'Australia: Still a Nation of Chalmers' (2011) 30 University of Queensland Law Journal 189, 207; Larry A. DiMatteo, 'CISG as Basis of Comprehensive International Sales Law' (2013) 58 Villanova Law Review 691, 696.

consequence of the exercise of a remedy like 'avoidance'[34] or 'termination'.[35] These notions proved difficult to translate from French into English, as the translators of the provisions of the new French law of contracts, Professors Cartwright, Fauvarque-Cosson and Whittaker noted.[36] Termination of a contract for an indefinite period is another way of terminating a contract with a prospective effect only.[37] Whether the contract has come to an end through performance, avoidance, or termination, whether with a retroactive or a prospective effect, the question of surviving obligations or clauses may arise. This is particularly obvious as far as clauses for the settlement of disputes or applicable law are concerned. For other clauses or obligations, a differentiation may be required. For example, Article 1:305(1) of PEL CAFDC provides for an indemnity for goodwill irrespective of the reason for which the contract was ended, including termination by either party for non-performance.[38] The parties may of course provide otherwise[39] and 'punish' the agent, franchisee, or distributor whose conduct led to the end of the contract by refusing it the indemnity for goodwill the contract would otherwise grant it.

Surviving contract provisions are particularly relevant for 'long-term contracts' to which the 2016 edition of the UNIDROIT Principles is devoted. The Working Group,[40] as well as the UNIDROIT Governing Council,[41] struggled with the notion. Though *Dauerverträge* or *contrats de durée* are well known in civil law jurisdictions such as Germany, Switzerland and France, the notion seems less common in other jurisdictions as the UNIDROIT discussions have shown. According to Article 1.11 of UPICC, ''long-term contract' refers to a contract which is to be performed over a period of time and which normally involves, to a varying degree,

[34] CISG Art 81.
[35] CISG Art 7.3.1 and 7.3.5.
[36] Translation of the new French Civil Code into English by John Cartwright, Bénédicte Fauvarque-Cosson and Simon Whittaker (n 28): Footnote 14 ad Art 1164:

> La *résolution* is used in the Code civil as promulgated in 1804 to denote the retroactive termination of a contract, coupled with (in principle) restitution and counter-restitution: this follows from the significance of its definition and use of *la condition résolutoire*: see arts 1183–1184 C.civ. Under the new law, *la résolution* is said to put an end to the contract (art. 1229 al. 1), but the effect of this may be retroactive or may instead be prospective, where it is termed '*la résiliation*' (art. 1229 al. 3). We therefore use the neutral word 'termination' for *la résolution* and 'resiling from a contract' for '*la résiliation*'.

[37] UPICC Art 5.1.8.
[38] PEL CAFDC Art 1:305(1) Comment A, 141.
[39] Default rule: PEL CAFDC Art 1:305(1) Comment L, 144.
[40] UPICC 7.3.5 Comment 4.
[41] UNIDROIT, Governing Council (n 32).

complexity of the transaction and an ongoing relationship between the parties'. Building on the opposition between 'long-term contracts' and ordinary exchange contracts to be performed at one time (such as sales contracts), Comment 3[42] to this provision identifies three typical elements: ie duration of the contract, an ongoing relationship between the parties, and complexity of the transaction. It is important to note that the essential element of this description is the duration of the contract, the other two elements being normally present to varying degrees, but not required. As Professor Bonell noted during the discussions among the Governing Council, the Working Group had envisioned the definition contained in Article 1.11 of UPICC to be a 'descriptive' rather than a 'regulatory' one.[43] In the debate that followed, the President, Professor Alberto Mazzoni, added that 'the description of long-term contracts should be viewed typologically, meaning that contracts which met some elements of the description could qualify as long-term ones even if they did not meet all of the elements',[44] and Judge Jametti noted, 'there was a great variety of long-term contracts, and it was for good reason that the terms 'normally' and 'to a varying degree' were used as they offered the necessary flexibility to cover such variety'.[45] In conclusion, Professor Bonell encouraged the Governing Council 'not to be too scholastic and stated that the description should just give an idea of what a long-term contract was, before getting to the operative rules which would lay out the particular details as they related to long-term contracts.'[46] The Working Group's proposal was accepted by the Governing Council and included in the fourth edition of the UPICC during its session of 18-20 May 2016.[47]

2.3. Generalising post-contractual obligations

After this overview of sources and definitions, we can envisage a certain generalisation of the issues. First, even if surviving duties pertaining to the post-contractual phase are particularly relevant for long-term contracts (eg commercial agency, franchise, or distribution; framework agreements, supply agreements,

[42] UPICC 1:11 Comment 3, 30f.
[43] UNIDROIT, Governing Council (n 32), Nr 27, 7.
[44] ibid Nr 45, 9-10.
[45] ibid Nr 47, 10.
[46] ibid Nr 63, 12.
[47] ibid Nr 122, 18 (with the exception of the draft provisions on termination for compelling reasons).

operation, and maintenance agreements; contractual joint ventures, etc), contracts to be performed at one time like sales contracts also enter into consideration as a possible source of surviving duties (eg settlement of disputes, duty to maintain spare parts for a certain period, etc). Indeed, all types of commercial contracts are potentially concerned with post-contractual obligations, even if the intensity of the post-contractual phase may be very different according to the provisions that are to survive.

Second, potentially any kind of obligation may bind the parties in the post-contractual phase, especially obligations relating to the settlement of disputes and applicable law, or the winding up of the relationship,[48] but also confidentiality or non-competition, restitution of documents, treatment of intellectual property rights, exit costs, etc. On the contrary, provisions relating to the performance of the main duties (eg payment of a price, delivery of goods or works, services to provide, etc) will normally[49] discontinue after the end of the contract and will not enter into the post-contractual phase.

Third, any kind of contract ending may be considered, including termination for non-performance or termination of a contract for an indefinite period, avoidance, or other. The controversial issue of the retroactive effect or not of such a contract ending should not prevent a reflection on what happens after termination or avoidance. Even when there is no retroactive effect, one has to consider what happens with performances exchanged between the parties during the time the contract was in effect. There are always terms of the contract that will survive, even when they concern only the choice of law and settlement of disputes, payment of damages, or confidentiality.

In conclusion, although each situation is unique, one can assume that any type of commercial contract, any kind of obligation (eg positive, negative, to do or refrain from doing, etc), and any kind of contract ending potentially enter into consideration as a starting point of post-contractual obligations. Given this great diversity, it would

[48] For example, CISG Art 81(1) *in fine*; UPICC Art 7.3.5(3); see also, Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), Christian von Bar et al. (eds) *Draft Common Frame of Reference* (DCFR) (Sellier 2009) Art III. – 1:108 (2)(b) and (c), Art III. – 1:109(3)(b) and (c).
[49] For exception, see text accompanying (n 55).

not be possible to draft a general rule encompassing all possible duties because they vary too much according to the contract considered.[50]

3. Examples, drafting methods and issues to consider

This section will present examples of clauses addressing post-contractual obligations to show how parties may proceed. The examples are mostly taken from the *Recueil de Contrats Commerciaux, Modèles en français et en anglais commentés pour le droit Suisse*.[51] The editors and authors of this volume include civil law professors and a practicing lawyer, who took inspiration from real-life contracts to propose contract models subject to Swiss law with commentaries. The volume contains a general part on boiler plate clauses with comments, also from a common law perspective, and forty commercial contracts drafted and commented by lawyers, judges, and professors. Importantly, each contract stems from the professional practice of its author. The influence of international commercial contract practice on these models, though they are subject to Swiss law, is striking and has been taken into due consideration by the authors.

3.1. Examples

In a Sales Agency Contract, under the heading 'Unfinished business', we find the following clause:

> 'All orders received *after termination* of this contract shall entitle the Agent to normal commission, provided negotiations with the customer were already in progress before the termination of this contract.'[52]

Under 'Non-competition':

> '(1) At no time during the life or *after the termination* of this contract may the Agent use any confidential information obtained in

[50] See text accompanying (n 12).
[51] Sylvain Marchand, Christine Chappuis, and Laurent Hirsch (eds), *Recueil de Contrats Commerciaux, Modèles en français et en anglais commentés pour le droit Suisse,* (Basel, Helbing 2013) (cited: Marchand/Chappuis/Hirsch).
[52] ibid 899 and comments 8.1-8.4, 917-918 (stress added).

> connection with the performance of the contract for any purpose other than to solicit customers for the Products.
>
> (2) *Upon termination of this contract, and for as long as Principal is paying commission under this contract or for twelve (12) months after termination, whichever is longer,* the Agent shall not act in the Territory for the account of any other person or entity that offers products identical or similar to any one or more of the Products, or directly sell such products to customers in the Territory.'[53]

Under 'Goodwill indemnity':

> '1. *Upon termination* of this contract, the Agent shall be entitled to an indemnity ("goodwill indemnity") if and to the extent that:
>
> The Agent has brought the Principal a significant amount of new customers or has significantly increased the volume of business with existing customers,
>
> The Principal continues to derive substantial benefits from the business with such customers, and
>
> The payment of this indemnity is equitable having regard to all the circumstances.'[54]

All three clauses of this long-term contract envisage the phase following termination, and no other ending of the contract. The first one purports the survival of one of the principal's main duties, the payment of the agent's commission. Though this may seem exceptional,[55] it is less so when one considers that the agent's activity was undertaken while the contract was still in force, ie before the end of the agency contract. The second clause addresses the agent's negative duty not to use confidential information for other purposes than performance of the contract either during or after the contact, a classical surviving duty, and not to act in the territory for the account of competitors of the principal. The third clause is the source of a new remuneration obligation of the principal, which arises because the principal continues to benefit from the agent's activity notwithstanding the end of the contract. This

[53] ibid 901-902 and comments 11.1-11.5, 920-922 (stress added).
[54] ibid 903 and comments 13.1-13.8, 922-925 (stress added).
[55] (n 49).

typical scheme shows that important obligations of both parties may be made to survive the termination of such contracts.

> In a Consultancy Agreement, under the heading 'Survival of terms', we read:
>
> 'The provisions of clauses 7 [Confidentiality], 8 [Property of results], 9 [Intellectual Property], 10 [Royalty] and 11 [Damages] of this Agreement shall remain in force in accordance with their terms *notwithstanding expiry or early termination* of this Agreement.'[56]

In this example, we find reference to the end of a contract resulting either from its expiry or its termination. Indeed, survival of clauses and obligations do not necessarily follow only after termination.[57] As to the content of the surviving elements, they are also typical and diverse. We have already touched upon confidentiality.[58] Clauses on property of the results produced by consultant, intellectual property, and royalties are typical of services of a certain kind rendered for the principal where parties intend the result of these services to remain in the power of the client. Since the result of the services continues to benefit the client after the end of the contract, the consultant retains a right to royalties resulting from his activity. Another interesting feature of this clause is the technique of listing the surviving clauses.[59] We will come back to the possible ways of handling surviving clauses in a contract.

In a Contractual Joint Venture**,** a clause of the provision on 'Effects of a termination' says the following:

> 'In the event of a termination, the terms of this Agreement shall automatically terminate except that the provisions of Article 6.8 through 6.10 [Intellectual Property], Article 9 [Confidentiality and Announcements], Article 11 [No Liability for recommendations and advice between the Parties] and Article 14.4 [governing law and jurisdiction] *shall survive termination and remain binding* upon the Parties.'[60]

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[56] Marchand/Chappuis/Hirsch (n 51) 681 ff, 690 and comment 14.1-14.2, 710 (stress added).
[57] ibid N 12.2, 43.
[58] (n 53).
[59] Marchand/Chappuis/Hirsch (n 51) N 12.3, 43.
[60] ibid 1117 and comment N 13.1, 1137 (stress added).

Here again we see the technique of listing the surviving clauses after termination of a contractual joint venture. Four series of provision thus survive termination. First, the understanding of the parties relating to intellectual property rights and their use remains binding on the parties notwithstanding termination of the agreement. Second, the obligation of confidentiality within agreed limits shall also survive, as well as the prohibition of announcements in connection with the alliance between the parties without prior approval and its limits. Third, we find an exclusion of liability covering specifically recommendations and advice given between the parties to the contractual joint venture. Fourth, the provision mentions the clause on governing law and jurisdiction, which classically survives the termination of the agreement. Interestingly, each of the provisions listed in this survival clause also contains a specific paragraph mentioning which part will survive termination of the agreement, as a sort of double-clarification of the post-contractual phase.

3.2. Drafting methods

The above-mentioned developments illustrate three main methods of dealing with surviving clauses and duties. First, the parties might agree on a general clause stating that the provisions which by their nature are intended to operate after the termination of the contract will remain in force. Similar wording is used by Article 7.3.5(3) of the UPICC, Article III. – 1:108 (2)(b) and III. – 1:109(3)(b) of the DCFR, Article 1230 of the new FCC, and Article 117 of the Draft BCC. The disadvantage of this method lies in its uncertainty because it leaves the concretisation of the surviving clauses or duties to the parties after the event putting an end to the contract. If the parties don't agree at that stage, a general clause of this kind will only bring a minimum of clarity and potentially give rise to costly disputes.

Second, the parties may adopt a precise list of the surviving duties. This list is sometimes placed near the end of the contract, as in the Consultancy Agreement cited above.[61] Such a method obviously brings certainty, but the drafter must be careful not to forget any clause intended to survive, such as liability clauses. It is more difficult than one might think to list all the surviving clauses. The above-

[61] (n 56).

mentioned clause of the Consultancy Agreement,[62] for example, omits the mention of a surviving paragraph of the provision on commencement and termination: 'Upon termination and at the Client's request, the Consultant shall return immediately to the Client all confidential information and copies thereof'. The list in the clause is thus incomplete. However, the surviving paragraph in itself is sufficiently clear.

A third drafting method bringing certainty is illustrated in the Sales Agency Contract[63] and the Contractual Joint Venture.[64] Both contracts mention the surviving elements in the appropriate clauses. The second one even contains a summary of the surviving duties under the heading, 'Effects of a termination'. Such a summary is useful for the parties in order to determine completely the consequences of the end of a contract that has lasted over time. But here again, the summary is incomplete. A paragraph of the same provision about liability for a breach committed after termination is omitted from the list. Again, the omission shows how difficult it is to recapitulate all surviving clauses and duties in a list. The omitted paragraph clearly refers to the post-termination phase:

> 'Each Party shall furthermore remain liable to the others, *notwithstanding the end of the Alliance:* […] for any breach, be it before *or after termination,* of the obligations imposed by Articles 6.8, 6.9, 6.10 and 9 of the present Agreement, and/or any other provision of the present Agreement (or any other contract between the Parties entered into pursuant to this Agreement) which is *imposing duties onto the Parties beyond the end of these contracts*.'[65]

This last clarification about damages is welcome because if there is no legal basis for a damages claim in the contract, one has to resort to the domestic applicable law (unless excluded). The coexistence between non-mandatory law and the contract may prove difficult to handle. The clarity thus aimed for may not necessarily be achieved.

Whatever the chosen method, contract drafters are well advised to pay careful attention to the post-contractual phase, especially because this does not come naturally at a time when the relationship is only at its starting point.

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[62] Marchand/Chappuis/Hirsch (n 51) 1117 and comment N 13.1, 1137.
[63] (n 52) ff.
[64] (n 60).
[65] Marchand/Chappuis/Hirsch (n 51) 1117 and comment N 13.1, 1137 stress added.

3.3. Issues to consider

When devising rules for the post-contractual phase, the parties may wish to consider a number of issues. They first have to identify which clauses or duties should survive and which new duties should arise once the contract has come to an end.[66] Among the first category, we find the clauses on the settlement of disputes, such as applicable law, forum, and arbitration clauses.[67] Clauses on confidentiality and non-competition, or on payment of interest, are also very common considerations. The numerous contracts addressing intellectual property issues should contemplate the fate of intellectual property rights after they come to an end. The second category of clauses or duties are related to the winding up of the contractual relationship, which also entails many possible duties, such as the return of the stock, of documents or advertising materials, of documents containing confidential information, the payment of indemnities, the duty to maintain spare parts available, etc. In a complex relationship, as for example a contractual joint venture, an important part of the contract will be devoted to the winding up phase.

Once the parties have listed the surviving clauses or duties, other questions have to be decided upon:[68] whether the surviving provisions are binding on one party or more (eg certain duties may be imposed only on the defaulting party); how long do the provisions survive (fixing a certain time limit may prove difficult to determine and negotiate); and who bears the cost of restitution or other post-contractual duties. Another issue to consider concerns the remedies in case of breach of a surviving duty. Because termination of the contract—the most drastic of all remedies—is no longer available in the past-contractual phase, other remedies will have to be considered, for example, specific performance of the breached duty (and interim measures) or liquidated damages. All these issues play a role in the determination of the price and of the general equilibrium of performances that are bargained for by the parties, which may or may not be subject to review by a tribunal depending on the applicable law.

[66] UPICC Art 7.3.5, Comment 3.
[67] See Marchand/Chappuis/Hirsch (n 51), 'Droit applicable, for et règlement des différends' 51-67 (Kaufmann-Kohler and Meakin), with examples.
[68] UPICC Art 7.3.5, Comment 4.

If the corresponding obligations remain implicit, uncertainty will surround the contractual relationship, though there may be legal provisions imposing obligations like confidentiality or non-competition, or court decisions imposing certain duties in the post-contractual phase.[69] The parties who adopt clauses dealing with these difficult issues may bring legal certainty to the last phase of their contractual relationship.

A further concern is about mandatory law.[70] There are limits to what parties may do, obviously also in the post-contractual phase. For example, mandatory labour law or competition law, whether European or domestic, would prohibit overly broad non-competition clauses. The latter must be appropriately limited in time, location, scope, and not put a greater restraint on trade than necessary to be valid. This question will not be pursued further as it is not specific to post-contractual clauses or duties, but should nonetheless be kept in mind.

4. Conclusion

This survey of contract practice, international instruments of hard and soft law, and recent domestic law reforms gives the impression that it was contract practice that pushed forward an adaptation of the international instruments first, which in turn trickled down to new domestic contract laws that encompass the issue of post-contractual clauses and duties. Classical contract law has yet to adapt and recognise that the answer to the question in title is positive. Given the numerous possible types of contracts and post-contractual obligations, the effects of contracts after they have ended may be more or less extensive and certainly differentiated. When designing post-contractual clauses, contract drafters must be imaginative and never forget there definitely is a life after the end of the contract. Long live the contract!

[69] See examples given by Fontaine and De Ly (n 5) 612 ff.
[70] Fontaine and De Ly (n 5) 615.