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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

PROGRESSIVE CODIFICATION OF INTERNATIONAL TRADE LAW

PART I

THE LAW OF INTERNATIONAL CONTRACTS IN GENERAL

Chapter 3 : THE SUBSTANTIVE VALIDITY OF INTERNATIONAL CONTRACTS

(Section 1 : Mistake, Fraud, Threat, Unequal Bargaining Power and Gross Unfairness)

(Text and Explanatory Report prepared by Professor U. Drobnig, Hamburg, and Professor O. Lando, Copenhagen, as amended following the discussions at the meeting of the UNIDROIT - Informal Working Group, held in Hamburg, 23-25 February, 1981)

Rome, February 1982

CHAPTER 3

THE SUBSTANTIVE VALIDITY OF INTERNATIONAL CONTRACTS

Section 1 : MISTAKE, FRAUD, THREAT, UNEQUAL BARGAINING POWER AND GROSS UNFAIRNESS

Article 1 : Definition of mistake

Mistake is an erroneous assumption relating to facts or to law existing when the contract was concluded.

Article 2 : Mistake

A party may only avoid a contract for mistake if the following conditions are fulfilled at the time of the conclusion of the contract:

(a) the mistake is, in accordance with the principles of interpretation, of such importance that the contract would not have been concluded on the same terms if the true state of affairs had been known; and

(b) the mistake does not relate to a matter in regard to which the risk of mistake was expressly or, in all the relevant circumstances, impliedly assumed by the party claiming avoidance; and

(c) the other party has made the same mistake, or has caused the mistake, or knew or ought to have known of the mistake and it was contrary to reasonable commercial standards of fair dealing to leave the mistaken party in error.

Article 3 : Mistake in expression or transmission

A mistake in the expression or transmission of a statement made in the course of formation of a contract shall be considered as the mistake of him from whom the statement emanated.

/ Article 4 : Breach remedies preferred

A party shall not be entitled to avoid the contract on the ground of mistake if the circumstances on which he relies afford, or could have afforded, him a remedy for breach of contract./

Article 5 : Fraud

A party who was induced to conclude a contract by a mistake which was caused by the other party's fraudulent misrepresentation may avoid the contract. The same applies if the mistake was caused by the other party's fraudulent

nondisclosure of circumstances which according to reasonable standards of fair dealing he should have disclosed.

Article 6 : Threat

A party may avoid the contract when he has been led to conclude it by an unjustifiable threat, from whatever person it emanates, which, having due regard to the circumstances, is so imminent and serious as to leave him no reasonable alternative. In particular, a threat is unjustified if the act or omission which the promisor has been threatened is unlawful /improper/ in itself, or it is unlawful /improper/ to use it as a means to obtain the promise.

Article 7 : Unequal bargaining power

A party may avoid a contract when the other party has taken advantage of his dependence, economic distress or urgent needs, or of his improvidence, ignorance, inexperience, or lack of bargaining skill, to obtain terms which make the contract as a whole unreasonably advantageous for the other party and unreasonably disadvantageous for him.

Article 8 : Gross unfairness

1. A party may avoid a contract if at the time of the making of the contract there is a grossly unfair disparity between the obligations of the parties or there are unfair contract clauses which grossly upset the contractual equilibrium.

2. In determining whether a contract or any clause thereof is grossly unfair, regard should be paid to the commercial setting and the purpose of the contract.

Article 9 : Initial impossibility

/1. The fact that the performance of the assumed obligation was impossible at the time of the conclusion of the contract shall not affect the validity of the contract, nor shall it permit its avoidance for mistake./

2. The fact that at the time of the conclusion of the contract a party was not entitled to dispose of the assets to which the contract relates, shall not affect the validity of the contract, nor shall it permit its avoidance for mistake.

Article 10 : Third persons

1. Where a fraud, an abuse of unequal bargaining power or a party's mistake is imputable to, or is known or ought to be known by, a person acting for the other party, the contract may be avoided under the same conditions as if it had been concluded by the other party himself.

2. Where a fraud or an abuse of unequal bargaining power is imputable to a third party for whose acts the other party is not responsible, the contract may be avoided if the other contracting party knew or ought to have known of the fraud or the abuse.

Article 11: Confirmation

Avoidance of a contract is excluded if the party who is entitled to avoid the contract after the term for giving notice of avoidance has commenced to run (art. 15 (1)) expressly or impliedly confirms the contract.

Article 12 : Counter offer

1. If the co-contractant of the mistaken party declares himself willing to perform or performs the contract as it was understood by the mistaken party, the contract shall be considered to have been concluded as the latter understood it. He must make such a declaration or such a performance promptly after having been informed of the manner in which the mistaken party had understood the contract.

2. If such a declaration of performance is made, the mistaken party shall thereupon lose his right to avoid the contract. Any declaration already made by him with a view to avoiding the contract on the ground of mistake shall be ineffective.

Article 13 : Adaptation of the contract

If in cases covered by articles /2, 3,/ 7 and 8 avoidance of the contract would lead to an undue hardship to one of the parties, the court or arbitrator may, at the request of that party, adapt the contract in order to bring it in accordance with reasonable commercial standards of fair dealing.

Article 14 : Notice of avoidance

Avoidance of a contract must be by express notice to the other party.

Article 15 : Time limits

1. Notice of avoidance must be given within a reasonable time, with due regard to the circumstances

(a) in the case of mistake, fraud or gross unfairness, after the avoiding party knew of it;

(b) in the case of threat or abuse of unequal bargaining power, after the avoiding party has become capable of acting freely.

2. In any event, the notice shall only be effective if it reaches the other party within two years after the conclusion of the contract in the case of mistake or within five years after the conclusion of the contract in other cases.

Article 16 : Partial avoidance

If the ground of avoidance affects only part of a severable contract, avoidance is limited to this part of the contract if, giving due consideration to all circumstances of the case, it is reasonable to uphold the remaining contract.

Article 17 : Retroactive effect of avoidance

Avoidance shall take effect retroactively, subject to any rights of third parties.

Article 18 : Restitution

Where a contract has been fully or partly avoided, the parties shall restore to each other what they have received under the contract insofar as it has been avoided. The provisions on restitution upon rescission of a contract shall apply accordingly.

Article 19 : Damages

1. The party who is entitled to avoid the contract may, in addition to, or in lieu of, avoidance or adaptation demand damages if the other party by his fault has caused the mistake, has committed a fraud, made a threat, abused an unequal bargaining power or was responsible for a grossly unfair disparity as provided by article 8.

2. If a mistake was at least in part the fault of the mistaken party, the other party may obtain damages from the mistaken party. In determining damages, the court shall give due consideration to all relevant circumstances, including the conduct of each party leading to the mistake.

3. Damages are governed by chapter x of the Rules.

Article 20 : Mandatory character of the provisions

1. The provisions of this chapter are mandatory, except insofar as they relate or apply to mistake and to initial impossibility.

/2. A contractual term by which a mistaken party assumes the risk of mistake does not apply to a mistake which has been caused by the other party's negligence./

EXPLANATORY REPORT

Introductory Remarks

1. The provisions of art. 1 - 20 of this chapter dealing with substantive validity of international contracts are essentially based upon the UNIDROIT Draft of a Law for the Unification of certain rules relating to validity of contracts of international sale of goods of 1972. (Text and explanatory report in Revue de droit uniforme/Uniform Law Review 1973 I 60 ss.).

2. Neither the Uniform Law on the International Sale of Goods of 1964 (ULIS) nor the U.N. Convention on Contracts for the International Sale of Goods of 1980 (CISG) deal explicitly with the validity of international sales contracts. Rather, both uniform instruments, in identical terms, expressly declare that their provisions are not concerned with the validity of the contract or of any of its provisions or of any usage. (ULIS art. 8 sent. 2; CISG art. 4 sent 2 lett. (a).).

3. The revision of the UNIDROIT text of 1972 was prepared by the authors of this report with the following purposes in mind:

a) to emancipate the earlier text from its sales context and to adapt it to a general instrument on international contracts;

b) to take into account new legislative texts which have been enacted within the last 20 years, especially the Algerian Civil Code of 1975; Czechoslovakian International Trade Code of 1963; German Democratic Republic Law on International Economic Contracts of 1976; Israel Contracts (General Part) Law of 1973; Netherlands New Civil Code Books 3 and 6 of 1980; New Zealand Contractual Mistakes Act of 1977; Portuguese Civil Code of 1966; United States Restatement of Contracts 2d; (1979).

Also the comparative study and proposals of Rodière, Les Vices du consentement dans le contrat (1977) has been taken into account;

c) to supplement the earlier text by one or more rules dealing with unconscionable contracts, in accordance with a mandate given by the Full Committee at its last meeting in September 1979.

4. The subject-matter of the following provisions requires brief comment.

Rules on formal validity are lacking so far and will probably have to be added.

Questions of capacity have been omitted. Lack of capacity of natural persons will very rarely affect an international contract. The problem of a legal entity concluding a contract ultra vires occasionally arises in international transactions; but it seems appropriate that this question be dealt with by rules on legal entities rather than by rules on contract law.

Article by article commentary

Article 1

a) This provision offers a definition of 'mistake' which contains two essential elements.

b) The first is that a mistake of law shall be treated in the same way as the traditional mistake of fact. This equation of the two types of mistake follows the view increasingly accepted in the legal systems of the Civil Law as well as in the Common Law.

c) The second and more important aspect of the definition is its time element. The erroneous assumption giving rise to a mistake must relate to facts, or to the law, as they existed at the time of the conclusion of the contract. The purpose of fixing this time element is to delimit the areas in which the applicable remedies are to be based on the law of mistake on the one hand, and on the rules relating to non-performance on the other hand. This delimitation is necessary because these two sets of rules differ everywhere and the same factual situation may be regarded either as a mistake or as an obstacle preventing performance of the contract, or making it more difficult. The former view will prevail where attention is focused on the (mistaken) assumption on which the party acted when entering into the contract; the latter view will be taken if one looks at the situation as it exists at the time when the contract is to be performed and if one then asks whether there is a sufficient reason to exempt the party from liability for non-performance.

d) The borderline between the rules on mistake and those on non-performance was drawn by using a criterion which seems to be reasonably clear as well as conforming to most legal systems. Specifically, the Netherlands (art. 6.5.2.11 par. 2) and the United States (Restatement, Comment a on par. 151) have recently adopted the same criterion.

e) Sometimes it may be difficult to decide whether or not the fact to which the mistake relates arose before the contract was concluded; yet these difficulties do not seem to be insuperable. If a party is mistaken as to the factual situation existing at the time of entering into the contract and, on the basis of this mistake, misjudges certain future developments which are relevant for its assent to the contract, then the rules on mistake will be applicable. On the other hand, if the party correctly understands the facts as they exist when he enters into the contract but draws wrong conclusions from those facts and, after being disappointed by the actual course of events, refuses to perform the contract, this is a case of non-performance, and not of mistake.

Article 2

a) This provision states the conditions under which one party may avoid a contract on the ground of mistake. The mistake must be essential (a) and the risk of mistake must not have been assumed by the party claiming avoidance (b). Further, the co-contractant of the party claiming avoidance either must have made the same mistake or he must have caused the mistake or he must have or ought to have known of the mistake, having left the mistaken party in error (c).

b) According to letter (a) a mistake must be "of such importance that the contract would not have been concluded on the same terms if the true state of affairs had been known". The drafters have chosen an open-ended formula rather than defining, as some Codes do, certain items (e.g. the subject-matter, or the quality of performance) as "essential" because such statutory enumerations have always to be restricted or supplemented by the intention of the parties. In applying the text, the principles of interpretation, as laid down in chapter 2 have to be applied. Usually an actual common intent of both parties or an actual intent of one party that was known or ought to have been known by the other party as to the importance of the mistake will not exist. Then the intent of the parties has to be established by ascertaining the intent that reasonable parties would have had under the same circumstances. In this connection applicable usages and the meaning given in the trade concerned to expressions, provisions and contractual forms that were used by the parties will be of particular relevance. In commercial transactions avoidance of a contract will, therefore, as a rule be denied if the mistake relates, for instance, to the value or the marketability of the goods or to mere motivations or expectations of the parties or to minor contractual points not normally considered as essential in the trade concerned. Also, a mistake as to the person of a contracting party or as to his personal qualities may be an important factor, although in most commercial transactions this will very rarely occur. Each case will have to be determined on its particular facts. It is impossible to offer more than a general formula.

c) Letter (b) establishes a negative requirement in the person of the mistaken party. The mistake must not relate to a matter in regard to which the risk was expressly or impliedly assumed by him. It may be argued that this case is already covered by letter (a), since a mistake for which the mistaken party assumed the risk will not be essential in the sense described in (a). However, a special provision appeared preferable in order to avoid any doubt and to emphasize the importance of this point. An example of an assumption of the risk of mistake is an error as to the quality of goods that were bought "as is". Quite generally the risk of mistake will have been assumed by the mistaken party if the contract bears for him a speculative element, because at the time of concluding the contract he does not fully know all the relevant facts.

d) Letter (c) establishes several additional but alternative reasons in the person of the co-contractant of the mistaken party, one of which must be fulfilled in order to allow avoidance of the contract. The underlying basic idea is that the interests of the mistaken party alone do not justify avoidance to the detriment of the other party, unless the latter's reliance upon the concluded contract for some reason or other does not deserve protection. Letter (c) enumerates three specific situations in which it appears justified to impose avoidance of the contract on the co-contractant because the latter was intimately connected with the mistake of the mistaken party.

e) One situation arises where both the party claiming avoidance and his co-contractant laboured under the same mistake when they entered into the contract. If both parties, in concluding the contract, acted on the basis of the same mistake, both parties should also bear the risk of losing the contract. It should be kept in mind, though, that no right to avoid the contract exists where the mistake relates to a fact arising after the contract has been concluded (cf. art. 1). It seems that most "common mistakes" fall

into that category. Further, if the parties erroneously believe the object sold to be in existence at the time of contracting, while in reality it had already perished, the special rule of art. 9 applies.

f) In "unilateral mistakes" (i.e. those that have not been shared by the co-contractant of the mistaken party) the co-contractant of the mistaken party will ordinarily be protected in his reliance on the contract, except in two situations described in (c).

g) The first arises if the co-contractant of the mistaken party caused the mistake. As in the Anglo-American doctrine of innocent misrepresentation, a party's mistake is to be considered as "caused" by the other party if it can be traced to specific implied or express representations of the other party or to conduct which, according to the circumstances, is equivalent to such representations. Also, silence of the co-contractant may cause the mistake. Mere puff used in advertising or in negotiations in itself is nowhere considered to be a representation. If the mistake was caused intentionally art. 5 will apply. In the context of letter (c), however, it is immaterial whether or not the conduct of the party causing the mistake was reprehensible. Even though that party may have been totally free from blame, he caused the mistake if the course of events leading to the mistake undeniably originated in his sphere. Under these circumstances it seems fair to impose upon the co-contractant the loss of the concluded contract, by allowing avoidance to the mistaken party.

h) The co-contractant of the mistaken party also does not deserve protection of his reliance on the contract where he knows or ought to have known of his co-contractant's mistake and did not clear up the matter, even though reasonable commercial standards of fair dealing would have required him to do so. In accordance with art. 13 ULIS, the expression "knew or ought to have known" refers to what should have been known to a reasonable person in the same situation. Knowledge of the mistake by the co-contractant only justifies avoidance if the co-contractant, under reasonable commercial standards of fair dealing, was obliged to inform the mistaken party of his error. If there was no such obligation, the mistaken party cannot avoid.

Article 3

a) This provision equates an error in the expression or transmission of a statement of intention to an ordinary mistake. The conditions for, and the effect of avoidance are, therefore, also governed by arts. 1 and 10 to 19. In addition, it is expressly provided that such an error is considered as a mistake of the person who made the statement (and not of the receiver). Thus it is only the declarant or sender of the statement who is entitled to avoid the contract under the conditions of art. 2, for mistake under art. 3. In some cases the risk of an essential mistake occurring in the transmission of a telegram will impliedly have been assumed by the sender so that he may not avoid the contract (see art. 2, lett. b). If the sender has not assumed the risk, avoidance of the contract is only possible if the conditions of art. 2 letters a) and c) are met. Thus, if the receiver has desired a reply by wire, he may be considered as having caused a mistake that occurs in the transmission of the telegram (see art. 2, letter c).

b) If the receiver misunderstands the true meaning of a telegram that has been correctly transmitted, this is not a mistake in transmission. Therefore, the general rule of art. 2 applies and not the special rule of art. 3.

c) The provision only applies to declarations made in the course of formation of a contract; this covers, of course, also agreed amendments of the contract or its agreed termination. Whether the provision applies to other communications or notices, depends upon the purposes of the rules prescribing them (see, e.g., for a differing rule CISG art. 27).

Article 4

a) Art. 4 provides that a party shall have no right to avoid a contract for mistake where the circumstances on which he relies afford him a remedy for breach of contract, or could have afforded him such a remedy. The latter clause envisages the situation where general remedies for breach of contract had been available, but do no longer afford a remedy, e.g. because of lapse of a statutory time period.

b) In the context of international sales governed by ULIS, art. 4 supplements arts. 34 and 53 ULIS. These provisions limit the buyer to the rights provided by the ULIS and exclude all other remedies, where there is a lack of conformity of the goods or where the goods are subject to a right or claim of a third person. Art. 4 is meant to cover also those cases in which the buyer might have relied on a remedy under the ULIS if, in the circumstances, those remedies had not been barred (for example, because the lack of conformity is immaterial or the buyer has not given prompt notice, arts. 33 par. 2, 39 par. 1 ULIS).

c) A special provision saves the contract of sale of an object not owned by the seller from nullity per se (see art. 9 par. 2).

d) The preference of breach remedies over avoidance appears quite acceptable as long as it refers to one specific type of contract, namely sales, although the national legal systems remain divided even on this narrow issue. But to the majority of the Group it appears unwise to extend already now that preference to contracts in general, as long as the detailed rules on the conditions of rescission for breach of contract are yet unknown. For this reason, the provision has been placed in square brackets.

Article 5

a) According to art. 5 par. 1, a contract may be avoided for fraud if the mistake of the aggrieved party was caused intentionally by his co-contractant. In contrast to the requirements of a "simple" mistake (art. 2), the fraudulently induced mistake need not have been essential; also, an assumption of the risk of mistake by the aggrieved party is irrelevant. This is in accordance with the view taken in most legal systems. A more specific description of the fraudulent practices that must be applied would be superfluous, because such formulae would not add to the substance of the provision nor would they significantly facilitate the task of the judge. Mere puff in advertising or negotiations in itself does not suffice.

b) Fraud may also be caused by silence. As distinct from a mistake caused by silence in the meaning of art. 2 lett.c), silence only causes fraud if it is designed by the co-contractant to produce an error on the part of the mistaken party. By contrast, the criterion for the duty to disclose is the same as in art. 2 lett. c).

Article 6

a) Art. 6 confers a right of avoidance on a party who has been led to conclude the contract by an unjustifiable, imminent and serious threat. The imminence and the seriousness of the threat are to be evaluated on an objective basis which, however, must take into account the circumstances of each case. Following some recent enactments, the second sentence describes by way of illustration two examples of an 'unjustifiable' threat. The first is, where the act or omission which has been threatened, is improper; the second is, where the act or omission threatened is lawful, but the purpose which is sought to be achieved is improper.

b) Contrary to many legal systems, threats emanating from a third person are equated to threats from the co-contractant. A party's interest in being able to enter into a contract freely deserves absolute and unqualified protection, irrespective of whether or not the threat emanated from the co-contractant himself or from a third person.

Article 7

a) This new provision has been patterned upon the model of a number of recent statutory texts enacted in a variety of countries (e.g. Algeria, Denmark, Israel, United States, West Germany). It permits a party to avoid a contract in cases where the other party has abused an unequal bargaining power to obtain terms which render the contract as such unreasonably disadvantageous for the weaker party and unreasonably advantageous for the stronger party. The rule only applies in cases of abuse of the circumstances mentioned; the provision does not contain a general rule on abuse of circumstances. It should, e.g. still be possible to avail oneself of an - even unreasonably - advantageous market situation. Also, the dependence mentioned in the rule must be one which exists outside of the market situation. The rule does not apply to the case where a seller because of his dominant market position is able to fix the price of the goods he sells thus making the buyer economically dependent upon him.

b) It is the contract as such, and not one or more of its terms which is to be judged when the advantage and disadvantage are to be assessed. The contract must be both unreasonably disadvantageous for one and unreasonably advantageous for the other party. The rule does not cover the case when a party abuses the other party's dependence to sell him rare goods for a price which is low but not unreasonable, although it might confer an unreasonably great advantage upon the buyer. And if a person in distress sells goods for an unreasonably low price the provision is not applicable if the purchaser derives no great advantage from the bargain. If, however, the bargain is grossly unfair it may be covered by art. 8.

c) In contrast to the traditional rule followed in most countries but in accordance with recent enactments, an abuse of unequal bargaining power gives rise to avoidance of the contract, and does not imply its nullity. This abuse is not treated differently from threat.

Article 8

a) Also this new provision is modelled upon a number of recently enacted statutory texts or case law of various countries. There is, and has always been, a need to make it possible for the courts to police explicitly against the contracts or the contract clauses which are grossly unfair. In many countries such policing has been accomplished by adverse construction of language, by manipulation of the rules of offer and acceptance, by stating the contract to be lacking its "cause" or the contract clause to be contrary to public policy or to the dominant purpose of the contract. However, a court must be able to pass directly on the unfairness of the contract or a particular clause therein, and to set it aside. Several legal systems show more or less clearly a tendency in this direction.

b) As the term "gross unfairness" denotes, the requirements for the application of the rule are strict. A disparity between value and price or some other element which upsets the equilibrium of performance and counter-performance is, even if considerable, insufficient for refusing the enforcement of the contract. Only if the disequilibrium is of such extent that it shocks the conscience of the court, is there a "gross unfairness". The provision does not aim at introducing the idea of "contractual justice" into each contract. The permissible extent of disequilibrium is larger than under art. 7.

c) The unfairness must exist at the time when the contract is made. A contract or a contractual clause which, though not unconscionable when made, has become so afterwards may be revised or set aside under the rules on frustration contained in chapter x on breach of contract.

Article 9

a) Art. 9 deals with certain consequences that flow from an initial impossibility of performance and from the seller's lack of ownership of the assets sold.

b) Most legal systems declare a contract of sale to be void if the specific asset sold had already perished at the time of the conclusion of the contract. If one of the parties knows about this initial impossibility of performance, the other party is sometimes awarded damages. Following judicial practice, some modern legislation and advanced modern doctrines, par.1 takes the opposite view and declares that in such a case the contract of sale is valid and may not even be avoided on the ground of mistake. An initial impossibility of performance is thus put on the same footing as an impossibility of performance occurring after the conclusion of the contract. There appears to be no reason to make the validity of the contract depend upon the accidental fact that the asset sold has perished before or after the conclusion of the contract. The rights and obligations of the parties that arise from the seller's inability to deliver the perished goods are

determined according to the flexible rules on non-performance. Under these rules it will be possible to attach due weight to, e.g. the seller's knowledge of the destruction of the sold goods at the time of contracting.

c) However, several members of the group (as before a minority of the UNIDROIT Working Group) were of the opinion that the rule of par. 1 could give rise to considerable difficulties in practice, especially in cases of legal impossibility of performance of a contractual obligation. Therefore, the provision is placed between square brackets.

d) Paragraph 2 excludes the rule of certain countries that deem a contract, especially a contract of sale, void if the seller did not own the sold asset. Paragraph 2 is drafted broadly so as to encompass any rule of a comparable bearing that may exist for other types of contract. The rights and duties of the parties are to be determined by the rules relating to a valid contract, especially those on non-performance.

Article 10

a) This new provision regulates in a general manner the consequences that follow for defects of consent if third persons have participated in the contracting process. Paragraphs 1 and 2 distinguish according to whether the third person is acting for a contracting party (as agent or other type of middleman) or not.

b) In the former case, the contracting party whose consent has been affected by the third person acting for the co-contractant may avoid the contract as if it had been concluded by the co-contractant himself (par. 1). Also the state of mind of the third person which is relevant especially for applying art. 2 lett. c), is in this case attributed to the co-contractant. These rules are fairly obvious.

c) If, on the other hand, a third person has acted for whom the co-contractant is not responsible, then the contract may only be avoided in cases of fraud or an abuse of unequal bargaining power, if the co-contractant knew or ought to have known of the fraud or the abuse (par. 2), for only then is it imputable to him. If the co-contractant was innocently ignorant of the fraud or the abuse, the contract cannot be avoided to his detriment.

d) It should be noted that in the case of threats by a third person it is irrelevant whether the co-contractant knew of them or not (see art. 6: "from whatever person").

Article 11

This new provision has been inserted following the trend of recent legislation. It is also usually provided that confirmation is only effective after the term for giving notice of avoidance has started to run.

Article 12

a) According to art. 12, the co-contractant of a mistaken party may prevent avoidance of the contract by expressing his willingness to perform the contract on the terms intended by the mistaken party.

b) The possibility of adapting the contract to the intention of the mistaken party enables the co-contractant to bind the mistaken party to the intended terms of the contract. The mistaken party may thus be prevented from ridding himself, upon the pretext of his mistake, of a contract which may have become burdensome to him through intervening economic reasons. Such a regard for the interests of the co-contractant in preserving an adapted contract is only justified in the case of mistake and not in other cases of defective consent.

c) The adaptation is effected by a declaration of the co-contractant, to be made promptly after having been informed of the terms of the contract as understood by the mistaken party, or by a corresponding performance. It is not laid down how the co-contractant is to receive the information about the errans' understanding of the terms of the contract. The principle of good faith in dealing will lead to a solution adapted to the circumstances of the case. The co-contractant's declaration to perform the contract as it was understood by the mistaken party, or a corresponding factual performance, without restrictions or conditions, is binding upon the mistaken party and completes the corrected contract of the parties.

d) The co-contractant's declaration or performance extinguishes the right of the mistaken party to avoid the contract. If the mistaken party had already given notice of avoidance, this declaration loses its effect. On the other hand, the mistaken party may claim compensation if he has suffered damage and is not made whole by the adaptation of the contract (art. 19).

Article 13

a) This new provision also provides for adaptation of the contract but, contrary to art. 12, requires the intervention of a court or an arbitrator. It is primarily a companion of the new rules on abuse of an unequal bargaining power and gross unfairness (arts. 7, 8), but possibly it supplements also the rules on mistake. By contrast, it is not appropriate to uphold a contract which has been made under the impact of fraud or threat because in this case any confidence between the parties will be spoiled.

b) In cases of mistake, abuse of unequal bargaining power and gross unfairness it may often be more reasonable and realistic to revise the contract than to avoid it, especially if it has already been performed wholly or in part. It is expressly spelt out that a court or an arbitrator can effect such adaptation of the terms of the contract only upon the request of a party who by an avoidance of the contract would be exposed to an undue hardship. The criterion for the adaptation is to bring the terms of the contract in accord with "reasonable commercial standards of fair dealing".

c) Since some members of the Group would prefer not to admit "forced" adaptation for cases of mistake, arts. 2 and 3 are placed in square brackets.

Article 14

a) This provision sets forth the formal requirements for a notice of avoidance. No specific form is required for the notice. In particular, it is not necessary to bring a judicial action for this purpose, nor must the notice be evidenced by writing nor is it necessary that the specific term "avoidance" be used in the notice. It is also unnecessary to state the reasons for avoiding the contract. But, in practice, a notice of avoidance will probably always be accompanied by some explanation on what grounds the avoidance was based. However, it is necessary that the notice be "express". Mere non-performance of the contract or related forms of conduct, therefore, do not constitute an effective notice of avoidance.

b) Nevertheless, the provision must be interpreted in the light of the general principle of good faith. This may mean that, whenever it was the co-contractant who had committed a fraud, made a threat or abused an unequal bargaining power, the absence of an express notice by the affected party should not always exclude the latter from exercising his rights.

Article 15

a) According to this provision, notice of avoidance must be given within a "reasonable time". The period of time for giving notice has not been fixed more specifically, because some leeway for judicial discretion seems indispensable in view of the multiplicity of factual situations. A specific period of time would in some cases make it possible for the mistaken party to delay the notice of avoidance, depending on how the market develops, and thus to speculate to the disadvantage of the other party. Fixing too short a time period may jeopardize the chances of reaching an amicable settlement between the parties. The pendency of negotiations between the parties with a view to reaching a settlement must, in any event, be taken into account in determining the reasonableness of the time of giving notice.

b) Paragraph 2 provides a maximum period for avoidance. It is fixed at two years after the conclusion of the contract in the case of mistake and at five years after the conclusion of the contract in the other cases. This latter longer period contains a punitive element. The notice must reach the co-contractant within the fixed periods.

Article 16

a) Following the example of some recent legislation, this new provision now deals expressly with partial avoidance. This is limited to part of a severable contract, e.g. a contract with several parties or relating to several, independent assets. An avoidance limited to individual clauses of an unseverable contract will usually destroy the balance between the parties' obligations under the contract and is therefore inadmissible.

b) Even so, the party invoking partial avoidance of a severable contract must, if need be, allege and prove that it is unreasonable, in view of the circumstances of the case, to uphold the remaining contract.

Article 17

a) Art. 17 provides that a notice of avoidance (which is effective under the preceding substantive and formal rules) shall have retroactive effect. The contract is regarded as never having existed, but the rights which third parties may have acquired are not affected.

b) In the case of a partial avoidance, this rule applies, of course, only to the avoided part.

Article 18

a) According to art. 18, what has been supplied or paid under the contract, insofar as the latter has been avoided, shall be restored pursuant to the rules on restitution upon rescission of a contract.

b) This provision should apply by analogy to the restoration of contractual performances that may become necessary upon adaptation of the contract (art. 13).

Article 19

a) This provision regulates the problems of compensation that may arise in connection with defects of consent. Paragraph 1 deals with a claim for damages by the party whose consent has been adversely affected, par. 2 with a claim for damages of the co-contractant against a mistaken party. Paragraph 3 merely is a cross-reference to those provisions of the Rules that determine damages.

b) Paragraph 1 establishes a duty of compensation for those acts of the co-contractant which, faultily committed, have caused a defect of consent or a grossly unfair disparity (art. 8). It is necessary to establish a separate basis for this duty of compensation since the envisaged Rules will not cover torts and chapter I on formation of contracts does not contain a corresponding provision. Whether the claim for damages here established has a tortious or a contractual character, need not be decided. In accordance with the prevailing view, a claim for damages is made dependent upon the co-contractant's fault. Damages may be claimed either in addition to avoidance or adaptation of the contract; in this case, some of the damage will already be absorbed by the avoidance or the adaptation of the contract. Or damages may be claimed in lieu of avoidance or adaptation.

c) According to par. 2, in the case of mistake, the co-contractant may claim damages from the mistaken party, if the latter's mistake was at least in part due to his own fault. Contrary to some legal systems, the Rules allow a party to avoid the contract for mistake even though the mistake may have been due to the mistaken party's own fault. In this case some compensation ought

to be paid to the co-contractant, particularly where there was a common mistake to which he did not contribute or where he caused the mistake innocently. The amount of the damages must be determined by considering all the relevant circumstances, including the conduct of each party which led to the mistake.

Article 20

a) This provision gives a mandatory character to most of the provisions of this chapter. Of course, the value of this provision may be limited as long as the Rules have not been enacted into national or international legislation. Even so, it is appropriate and necessary to signify clearly the intention of the drafters of the Rules that most of the provisions of this chapter are meant to be mandatory. It would be intolerable and contrary to most national laws if the parties were entitled to exclude or modify the provisions of this chapter relating to fraud, threat, abuse of unequal bargaining power or gross unfairness.

b) On the other hand, the provisions relating to mistake and initial impossibility do not partake of such public policy character and therefore need not be made mandatory. Article 2 lett. b) expressly covers already an assumption of the risk of mistake. The parties should also be able to make the validity of their contract dependent upon the initial possibility of its performance.

c) Some laws, e.g. English law, do not allow to exclude the risk or the liability for a mistake which was caused by the co-contractant's negligent misrepresentation. Indeed, the contractual assumption of the risk of mistake is not designed to cover cases where the mistake has been negligently caused by the co-contractant of the mistaken party. This rule is embodied in par. 2. For technical reasons the provision is placed in square brackets; this is to note the necessity of reconsidering the rule in the light of the provisions on exemption clauses in general, which will have to be worked out.