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U n i d r o i t

PRINCIPLES FOR INTERNATIONAL COMMERCIAL CONTRACTS

CHAPTER I : GENERAL PROVISIONS

CHAPTER II : FORMATION

CHAPTER III : INTERPRETATION

CHAPTER IV : MISTAKE, FRAUD, THREAT AND GROSS DISPARITY

CHAPTER V : PERFORMANCE

Section 1 : Performance in General

Section 2 : Public Permission Requirements

Section 3 : Hardship

CHAPTER VI : NON-PERFORMANCE

Section 1 : General Provisions

Section 2 : Performance in Natura

Section 3 : Termination

Section 4 : Damages and Exemption Clauses

Section 5 : Restitution

(First consolidated text of the Principles prepared by the Secretariat
on the basis of the drafts so far discussed by the Working Group)

Rome, January 1987

The Working Group for the Preparation of Principles for International Commercial Contracts, set up by the President of Unidroit with the task of carrying out the preparatory studies and elaborating the preliminary drafts on the topics to be dealt with in the context of this project, has so far examined draft rules on the following subjects:

- Formation (cf. UNIDROIT Study L - Documents 9, 11, 15 and 25)
- Interpretation (cf. UNIDROIT Study L - Documents 12, 13, 14, 15 and 25)
- Substantive Validity (cf. UNIDROIT Study L - Document 17)
 - Mistake, Fraud, Threat and Gross Disparity (cf. UNIDROIT Study L - Documents 20 and 26)
 - Public Policy Legislation (cf. UNIDROIT Study L - Document 32)
- Performance
 - Performance in General (cf. UNIDROIT Study L - Documents 28, 29, 33 and 34)
 - Public Prohibitions and Permission Requirements (cf. UNIDROIT Study L - Documents 18, 21, 27, 30 and 32)
 - Hardship (cf. UNIDROIT Study L - Documents 24 and 37)
- Non-Performance
 - Performance in Natura (cf. UNIDROIT Study L - Document 35)
 - Termination (cf. UNIDROIT Study L - Document 35)
 - Damages and Exemption Clauses (cf. UNIDROIT Study L - Documents 31 and 36).

The present document contains a consolidated text of the above-mentioned draft rules. It does not contain the draft rules on Public Policy Legislation as the Governing Council at its 64th session decided their deletion. As to the other subjects the document reproduces the latest versions of the respective draft rules, except for the subjects of formation and interpretation where some changes have been introduced in accordance with the amendments decided by the Group.

Index

	<u>Page</u>
CHAPTER I : GENERAL PROVISIONS (Arts. 1 - 4).....	3
CHAPTER II : FORMATION (Arts. 1 - 18).....	4
CHAPTER III : INTERPRETATION (Arts. 1 - 6).....	9
CHAPTER IV : MISTAKE, FRAUD, THREAT AND GROSS DISPARITY (Arts 1-18)	11
CHAPTER V : PERFORMANCE	
Section 1 : Performance in General (Arts. 1-18)	16
Section 2 : Public Permission Requirements (Arts. 19-23)	21
Section 3 : Hardship.....	23
CHAPTER VI : NON-PERFORMANCE	
Section 1 : General Provisions (Arts. 1-4).....	25
Section 2 : Performance in Natura (Arts. 5-8)....	26
Section 3 : Termination (Arts 10-14).....	28
Section 4 : Damages and Exemption Clauses (Arts. 15-32)	30
Section 5 : Restitution (Arts. 33-35).....	35

CHAPTER I

GENERAL PROVISIONS

Article 1

(Purposes and scope of the principles)

(....)

Article 2

(Autonomy of the parties)

(....)

Article 3

The formation, interpretation, performance and enforcement of a contract shall be in accordance with the principles of good faith and fair dealing in international trade.

Article 4

For the purposes of these Principles:

- "writing" includes telegram and telex;
- an offer, declaration of acceptance or any other indication of intention "reaches" the addressee when it is made orally to him, delivered by any other means to him at his place of business or mailing address or, if he does not have a place of business or mailing address, at his habitual residence;
- "usage" means any practice or method of dealing of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

CHAPTER II

FORMATION

Article 1

If information is given as confidential by one party in the course of negotiations, such information shall not be disclosed by the other party who is otherwise liable in damages whether or not a contract is subsequently concluded.

Article 2

(1) Unless the applicable law or these rules otherwise provide, a contract need not be concluded in or evidenced by writing and is not subject to any other requirement as to form.

(2) A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.

Article 3

(1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance.

(2) A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.

Article 4

(1) An offer becomes effective when it reaches the offeree.

(2) An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.

Article 5

(1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.

(2) However, an offer cannot be revoked:

- (a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or
- (b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

Article 6

Any offer is terminated when a rejection reaches the offeror.

Article 7

(1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.

(2) An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.

(3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down in the preceding paragraph.

Article 8

(1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.

(2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

(3) Additional or different terms relating, among other things, to the price, payment, place and time of performance, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.

Article 9

(1) A period of time for acceptance fixed by the offeror in a telegram or a letter begins to run from the moment the telegram is handed in for dispatch or from the date shown on the letter or, if no such date is shown, from the date shown on the envelope. A period of time for acceptance fixed by the offeror by telephone, telex or other means of instantaneous communication, begins to run from the moment that the offer reaches the offeree.

(2) Official holidays or non-business days occurring during the period for acceptance are included in calculating the period. However, if a notice of acceptance cannot be delivered at the address of the offeror on the last day of the period because that day falls on an official holiday or a non-business day at the place of business of the offeror, the period is extended until the first business day which follows.

Article 10

(1) A late acceptance is nevertheless effective as an acceptance if without delay the offeror orally so informs the offeree or dispatches a notice to that effect.

(2) If a letter or other writing containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached

the offeror in due time, the late acceptance is effective as an acceptance unless, without delay, the offeror orally informs the offeree that he considers his offer as having lapsed or dispatches a notice to that effect.

Article 11

An acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective.

Article 12

(1) Where within a reasonable time after the conclusion of a contract, one party sends the other a document which is intended to be a written confirmation of their agreement but which contains terms that add to or vary those of that agreement, these terms will become part of the contract, unless they materially alter the terms of the contract and the recipient without undue delay objects as provided in Article 8(2).

(2) Paragraph 1 of this article applies also where the additional or varying terms are contained in an invoice.

Article 13

Where according to the intention expressed by one of the parties in the course of negotiations the conclusion of the contract is dependent on the agreement on specific terms, the contract shall be deemed to be concluded only where the parties have reached such an agreement.

Article 14

(1) When the parties have left a term of the contract to be agreed upon in further negotiations or to be determined by a third person, they should provide in what manner such term shall be rendered definite in the event of their failure to reach an agreement or of the third party not having made the determination.

(2) The fact that no agreement is reached or the manner in which, failing such an agreement, the term shall be rendered definite has not been provided or the third person has not

determined the term, does not in itself prevent a contract from having come into existence.

Article 15

(1) Notwithstanding the provisions of these Rules governing offer and acceptance, general conditions shall only be incorporated in a contract where one party has expressly referred to them and the other party has accepted them.

(2) In all other cases general conditions shall only be incorporated in a contract where they have been expressly agreed to in similar transactions between the parties or where their incorporation amounts to a usage.

Article 16

Notwithstanding the provisions of these Rules governing offer and acceptance, if both parties refer to different general conditions with conflicting terms, the contract shall be considered to have been concluded without the conflicting terms unless one party without undue delay informs the other that he does not intend to be bound by the contract.

Article 17

No clause contained in general conditions which by reason of its content, language or presentation is of such a character that the other party could not reasonably have expected it, shall be effective, unless it has been expressly accepted by that party.

Article 18

A special provision agreed by the parties shall prevail over conflicting provisions of general conditions.

CHAPTER III

INTERPRETATION

Article 1

- (1) A contract shall be interpreted according to the intention common to the parties.
- (2) Statement made by and other conduct of a party shall be interpreted according to his intention where the other party knew or could not have been unaware what that intention was.

Article 2

- (1) If the common intention of the parties cannot be established, the contract shall be interpreted according to the meaning which reasonable persons of the same kind as the parties would give to it in the same circumstances.
- (2) If the preceding paragraph is not applicable, statements made by and other conduct of a party shall be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.

Article 3

In interpreting a contract or statements made by and other conduct of a party due consideration shall be given to all relevant circumstances, including any preliminary negotiations between the parties, any practices which they have established between themselves, usages and any conduct of the parties subsequent to the conclusion of the contract.

Article 4

Subject to the provisions of Articles 1, 2 and 3, the expressions, provisions or terms of the contract shall be interpreted according to the meaning usually given to them in the trade concerned.

Article 5

(1) In the event of ambiguity, the terms of the contract shall be interpreted in such a way as to give them effect rather than to deprive them of effect.

(2) In the event of ambiguity, expressions capable of having more than one meaning shall be interpreted in a manner appropriate to the nature of the particular contract.

(3) Contract terms proposed by one of the parties shall, in case of ambiguity, be interpreted in favour of the other party.

Article 6

Each term of a contract shall be interpreted by reference to all the other terms of the contract, and in determining the meaning of the terms of the contract, reference shall be made to the contract as a whole.

CHAPTER IV

MISTAKE, FRAUD, THREAT AND GROSS DISPARITY

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)

(1) 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, in accordance with the principles of interpretation laid down in chapter 2, is of such importance that a reasonable person in the same situation as the party in error would have contracted only on materially different terms or would not have contracted at all if the true state of affairs had been known; and

(b) 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.

(2) However, a party may not avoid the contract, if

(a) it committed the mistake with gross negligence, or

(b) the mistake relates to a matter in regard to which the risk of mistake was assumed or, taking into account all the relevant circumstances, should be borne by the mistaken party.

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 may avoid the contract when he has been led to conclude it by the other party's fraudulent misrepresentation or fraudulent non-disclosure of circumstances which according to reasonable commercial 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 unjustified 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 with which the promisor has been threatened is unlawful in itself, or it is unlawful to use it as a means to obtain the promise.

Article 7
(Gross disparity)

A party may avoid a contract if at the time of its making there is a gross disparity between the obligations of the parties or there are contract clauses grossly upsetting the contractual equilibrium, which is unjustifiable having regard to, among other things,

- (a) the fact that the other party has taken unfair advantage of the avoiding party's dependence, economic distress or urgent needs, or of his improvidence, ignorance, inexperience or lack of bargaining skill, or
- (b) the commercial setting and the purpose of the contract.

Article 8
(Initial impossibility)

(1) The fact that at the time of the conclusion of the contract the performance of the assumed obligation was impossible shall not affect the validity of the contract.

(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.

Article 9
(Third persons)

(1) Where a fraud, a gross disparity or a party's mistake is imputable to, or is known or ought to be known by, a third party for whose acts the other party is responsible, 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 a gross disparity 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 disparity.

Article 10
(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. 14(1)) expressly or impliedly confirms the contract.

Article 11
(Rectified contract)

(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 or 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 12

(Adaptation of the contract)

(1) If in cases covered by Article 7 avoidance of the contract would lead to an undue hardship to one of the parties, the court or arbitrator or conciliator or any other third person may, at the request of that party, adapt the contract in order to bring it in accordance with reasonable commercial standards of fair dealing.

(2) The rules stated in Art. 11 para. 2 apply accordingly.

Article 13

(Notice of avoidance)

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

Article 14

(Time limits)

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 disparity, after the avoiding party knew of it;

(b) in the case of threat, after the avoiding party has become capable of acting freely.

Article 15

(Partial avoidance)

If the parties regard a contract or an individual term of a contract as severable and a ground of avoidance affects only such a severable part or term, avoidance is limited to this part or term of the contract if, giving due consideration to all circumstances of the case, it is reasonable to uphold the remaining contract.

Article 16

(Retroactive effect of avoidance)

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

Article 17

(Restitution and damages)

(1) 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 according to the provisions on restitution.

(2) A party may also be awarded damages according to the rules on damages in general.

Article 18

(Mandatory character of the provision)

(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.

CHAPTER V

PERFORMANCE

SECTION 1: Performance in General

Article 1

(1) The parties shall perform their obligations in accordance with their content and in a manner corresponding to their nature and economic purpose

(2) Each party shall cooperate with the other party, when such cooperation is necessary for the performance of that party's obligation.

Article 2

If an obligation of a party involves a duty of care in the performance of an activity, the party is obliged to observe the reasonable diligence required in activities of the type involved in the particular trade concerned .

Article 3

(1) When a party is obliged to deliver goods, they must be of the quantity, quality and description required by the contract and be contained or packaged in the manner required by the contract.

(2) The goods do not conform with the contract unless they:
(a) are fit for the purposes for which goods of the same description would ordinarily be used;

(b) are fit for any particular purpose expressly or impliedly made known to the obliged party at the time of the conclusion of the contract, except where the circumstances show that the other party did not rely, or that it was unreasonable for it to rely, on the obliged party's skill and judgment;

(c) possess the qualities of goods which the obliged party has held out to the other party as a sample or model;

(d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.

(3) The obliged party is not liable under sub-paragraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the other party knew or could not have been unaware of such lack of conformity.

Article 4

A party may refuse a partial performance, unless it otherwise results from the nature of the obligation.

Article 5

Performance of an obligation to pay a sum of money takes place by the payment of the nominal amount due.

Article 6

(1) A monetary obligation due in a currency other than that of the place of payment may be paid in the currency of the place of payment according to the rate of exchange prevailing there at the date of maturity.

(2) If the debtor has not paid at the time of maturity, the creditor may demand payment in the currency of the place of payment according to the rate of exchange prevailing there at the date of maturity or at the date of actual payment.

Article 7

Where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods delivered or such services performed under comparable circumstances in the trade concerned.

When no such price is available, and in the absence of any

When no such price is available, and in the absence of any indication to the contrary, the price is determined by the party who delivers the goods or performs the service, provided it is reasonable.

Article 8

If the time of performance is neither stipulated by the parties nor determinable from the contract or the nature of the obligation, the obligation must be performed within a reasonable time after the conclusion of the contract.

Article 9

If the time of performance is fixed by or determinable from the contract, the parties are not entitled to make an earlier performance.

Article 10

A party who accepts an earlier performance is not thereby bound to effect a reciprocal earlier performance.

Article 11

If the place of performance is neither stipulated by the parties nor determinable from the contract or the nature of the obligation, the obligation is to be performed at the place where at the moment when the contract was concluded the obliged party has its place of business.

Article 12

If the place of performance of a monetary obligation is neither stipulated by the parties nor determinable from the contract, such obligation is to be performed at the place of business of the creditor at the moment when the contract was concluded.

Article 13

(1) Payment of a monetary obligation can be made by a transfer to any of the financial institutions in which the creditor has an account, unless either the creditor has expressly indicated to which account he wants the sum credited or he has excluded payment by the way of a transfer.

(2) Payment by the way of a transfer becomes effective upon notice of the transfer to the transferee financial institution.

Article 14

(1) Payment of a monetary obligation can be made by a cheque, a bill of exchange or another instrument instructing the debtor's financial institution to pay, if it has been stipulated by the parties or if it is accepted by the creditor at the time of payment.

(2) Payment by the way of such an instrument is presumed to be accepted on condition that the instruction will be honoured by the debtor's financial institution.

Article 15

Each party has to bear the cost of taxes and duties connected with performance of its part of the contract.

Article 16

(1) A debtor owing several monetary obligations which are due to the same creditor may specify, at the time of payment, which debt he intends the payment to be applied to.

(2) However, payment made is to discharge any interest due before the principal.

(3) When the debtor has accepted a receipt whereby the creditor has imputed what he has received to one of the debts, the debtor may no longer require imputation to a different debt.

Article 17

In the absence of imputation by the parties, payment is imputed to that debt which the creditor has the greatest interest in receiving.

When the interest is equally divided, payment is imputed to the debt which became due first.

All things being equal, imputation is effected proportionally.

Article 18

Articles 16 and 17 apply accordingly to the appropriation of payment of non-monetary obligations.

SECTION 2: Public Permission Requirements

Article 19

(Public permission requirements to be considered)

(1) The provisions of the following articles apply where at the time of the conclusion of the contract the permission of an institution exercising public authority is required and its absence would wholly or in part affect the validity of the contract or render its performance impossible.

(2) A party shall not be entitled to rely on a permission requirement where he could reasonably be expected to perform the contract by means of performance not subject to such a permission requirement.

Article 20

(Obligation to apply for permission)

(1) The party who has a place of business in a State the law of which requires such permission shall take the measures necessary to obtain the permission.

(2) Where none of the parties has a place of business in such State, the party whose performance requires permission shall take the necessary measures.

Article 21

(Procedure in applying for permission)

(1) The party required to take the measures necessary to obtain the permission (the applicant party) shall do so without undue delay and with due diligence. He shall bear any expenses so entailed.

(2) The applicant party shall inform the other party of the grant or refusal of such permission without undue delay. He shall not be entitled to rely in relation to the other party on the full effectiveness of the contract, if he has not informed the other party of the grant of permission.

Article 22

(Termination of the contract)

Both parties are entitled to terminate the contract if,

notwithstanding the fact that the applicant party took all measures required, he failed to obtain a grant of permission within an agreed period or, where no period has been agreed, within a reasonable period from the conclusion of the contract.

Article 23

(Absence of a place of business)

For the purpose of this section, if a party does not have a place of business, reference is to be made to his habitual residence.

SECTION 3: Hardship

Article 24

If the performance of a contract is rendered more onerous for one of the parties, he is nevertheless bound to fulfill his obligations.

Article 25

(1) In case of hardship the disadvantaged party is entitled to request renegotiations, insofar as the contract does not provide for any other remedy.

(2) The disadvantaged party has to exercise his right to request renegotiations without undue delay. The request shall indicate the grounds on which it is based.

Article 26

There is a case of hardship where:

(a) Circumstances arise which either make the performance of one party substantially more onerous or have the effect that a presupposition which is implicit in the very nature of the contract ceases to exist, and

(b) these circumstances arise or become known to the parties after the conclusion of the contract and could not reasonably have been taken into account at the time of the conclusion of the contract, and

(c) these circumstances are beyond the control of the parties, and

(d) these circumstances relate to a long-term contract and the performance affected has not yet been rendered.

Variant: add "and

(e) these circumstances are not the result of risks taken over by the disadvantaged party".

Article 27

(1) On failure to open renegotiations, or in default of agreement within a reasonable period, the disadvantaged party is entitled to terminate the contract.

(2) The non-disadvantaged party may avoid termination according to paragraph 1 by making the disadvantaged party a reasonable proposal to adapt the contract without undue delay.

(3) Where the disadvantaged party does not accept the proposal according to paragraph 2, or where the nondisadvantaged party rejects termination according to paragraph 1, which he shall do without undue delay, the disadvantaged party may claim without undue delay to have the validity of the termination stated by the court.

(4) The court may decide, whether the contract shall be maintained in its original terms, or adapted pursuant to the terms as eventually proposed by the non-disadvantaged party, or whether the termination is valid.

(5) Where the termination is valid and upon request of one of the parties the court has to determine to what extent the performances rendered have to be paid and the money has to be repaid, taking into account to what extent the performances rendered can be used by the one or the other party and to which party's advantage the contract is terminated.

CHAPTER VI

NON-PERFORMANCE

SECTION 1: General Provisions

Article 1
(Definition)

(.....)

Article 2
(Cumulation of remedies)

(.....)

Article 3
(Exemptions)

(.....)

Article 4
(Right to withhold performance)

(.....)

SECTION 2 : Performance in Natura

Article 5

(Performance of monetary obligation)

If the debtor of an obligation to pay money does not make payment, the creditor may demand payment.

Article 6

(Performance of non-monetary obligation)

- (1) If the obligor of an obligation other than to pay money does not perform, the obligee may demand performance.
- (2) However, performance cannot be demanded where
 - (a) performance is impossible in law or in fact; or
 - (b) performance would involve the obligor in unreasonable effort or expense; or
 - (c) the obligee may reasonably obtain performance from another source; or
 - (d) the performance consists in the provision of services or work of a personal character or depends upon a personal relationship; or
 - (e) the obligee does not demand performance within a reasonable time after he has, or ought to have, become aware of the non-performance.

Article 7

(Reparation of defective performance)

The obligee may demand from the obligor to repair or replace a defective performance. The provisions of Arts. 1 and 2 apply accordingly.

Article 8

(Judicial penalty)

- (1) Where the court orders the obligor to perform, it may also direct that the obligor pay a penalty if he does not comply with the order.
- (2) The penalty shall be paid to the obligee unless mandatory provisions of the law of the forum provide otherwise. Payment of the penalty to the obligee does not affect any claim for damages.

Article 9

(Unenforceable claim for performance in natura)

If a claim, a judicial decision or an arbitral award for performance in natura cannot be enforced, the obligee is not precluded from invoking any other remedy for non-performance.

SECTION 3: Termination

Article 10

(The right to terminate the contract)

- (1) A party may declare the contract terminated if the failure of the other party to perform an obligation under the contract amounts to a fundamental non-performance.
- (2) A non-performance of an obligation is fundamental if
 - (a) strict compliance with the obligation which has not been performed is of essence to the contract; or
 - (b) the non-performance substantially deprives the aggrieved party of what he was entitled to expect under the contract unless the other party did not foresee and could not reasonably have foreseen such result; or
 - (c) the non-performance is intentional and gives the aggrieved party reason to believe that he cannot rely on the other party's future performance.

Article 11

(Termination after notice fixing additional period for performance)

- (1) In case of delay in performance the aggrieved party may in a notice to the defaulting party fix an additional period of time for performance. When the delay does not amount to a fundamental non-performance under Article 1 the additional period, if not of reasonable length, shall be extended to a reasonable length.
- (2) If a defaulting party fails to perform before the time allowed him under paragraph (1) has expired the aggrieved party may declare the contract terminated if he has not already provided for its termination in his notice to the defaulting party.

Article 12

(Notice of termination)

- (1) A party will lose his right to declare the contract terminated for non-performance unless he gives notice of termination to the other party within a reasonable time after he has or ought to have become aware of the non-performance.

(2) A party to whom performance has been tendered late will lose any right he may have to declare the contract terminated unless he gives notice of termination to the other party within a reasonable time after he has or ought to have become aware of the tender.

(3) Where no performance has been tendered notice in accordance with paragraph (1) is required only when the aggrieved party has reason to believe that the defaulting party intends to tender performance.

Article 13

(Anticipating non-performance)

Where prior to the date for performance by one of the parties it is clear that there will be a fundamental non-performance by him, the other party may declare the contract terminated provided he gives notice of termination within reasonable time after he became aware or ought to have become aware that due performance would not be made.

Article 14

(Termination excluded)

(1) A party who has received tangible property loses the right to terminate the contract for non-performance if he is unable to make restitution of the property substantially in the same condition in which he received it.

(2) Paragraph (1) does not apply

(a) if the impossibility of making restitution of the property or part thereof substantially in the condition in which the party received it is not due to his act or omission; or

(b) if the property or part of it has perished or deteriorated as a result of a normal examination, or

(c) if the property has been consumed or transformed in course of normal use by the party who received it before that party became aware or ought to have become aware that he was entitled to terminate the contract.

SECTION 4: Damages and Exemption Clauses

Article 15

(Right to damages)

- (1) Every breach of an obligation for which the defaulting party is liable gives the aggrieved party a right to damages
- (2) The object of an award of damages is to give the aggrieved party compensation for the loss or injury which resulted directly from the delayed or defective performance, non-performance or part performance of the defaulting party. The damage award may be either exclusive or in conjunction with other remedies.

Article 16

(Formal Notice of Default)

- (1) The right to damages accrues:
 - (a) upon the arrival of the date fixed for the performance of the contract, when that date has been made mandatory, or
 - (b) when, if no such date has been fixed, the contract normally would have been performed (with reference particularly to usage of trade and course of dealing), if at that time the aggrieved party has used all reasonable means to notify the defaulting party of his demand for the immediate performance of the contract.
- (2) No notice is required where it is certain that the contract will not be performed or if its performance will no longer benefit the aggrieved party.
- (3) If the aggrieved party gives the defaulting party a reasonable extension for his performance of the contract in accordance with Article X, he does not thereby waive his right to claim damages for such delay pursuant to subsection 1 of this article.

Article 17

(Nominal damages)

The judge may award nominal damages when the amount of loss cannot be sufficiently proved.

Article 18

(Principles of reparation)

(1) The aggrieved party is entitled to complete compensation for damage suffered. Such damage is equivalent to both the actual loss which he incurred from the breach and the gain of which he was deprived, taking into account all benefit which the aggrieved party did in fact reap on account of the breach.

(2) The actual loss consists either of a decrease in the aggrieved party's assets or of an increase in his liabilities. Such loss may be non-pecuniary, for example, physical or emotional distress.

(3) The lost gain is that which the aggrieved party would have realized with a sufficient degree of probability if the event which caused the damage had not occurred.

Article 19

(Certainty of damage)

Compensation will be made only for damage that is certain. Damage which has not yet accrued is certain if it will necessarily occur in the future. Compensation may also be due for the loss of a chance insofar as it will probably occur.

Article 20

(Foreseeability of damage)

(1) The defaulting party is liable only for that damage which he had reason to foresee when the contract was made, taking into account:

- (a) the ordinary course of events, or
- (b) the special circumstances which he had reason to know.

(2) This provision does not apply where the breach is deliberate or reckless.

Article 21

(Proof of damage: principle)

The aggrieved party bears the burden of proof with respect to the existence and amount of damage; such proof may be made by any means subject to Articles 22, 23 and 26.

Article 22 A

(Proof of damage in case of cover)

When, as a result of the breach by one party, the aggrieved party receives cover, the damage is presumed to be the difference between the price fixed by the contract and that of the cover. All additional damage must be proved.

Article 22 B

(Proof of damage by market price)

(1) When the aggrieved party has not received cover and the performance for which the defaulting party is liable has a market price, the damage is presumed to be the difference between the contract price and the market price:

- as of the date of voluntary payment or of judgment (1st possibility)

- as of the date of non-performance (2nd possibility)

(2) "Market price" means any price determined by reference either to an official price list or to a price fixed on the Stock Exchange or by any other established commodity market.

(3) The market price is that of the situs where the contract should have been performed or, for lack of a market price there, the market price of another situs that appears reasonable to take as a reference, taking account of the difference in transport charges for the performance.

(4) All additional damage must be proved.

Article 23

(Effect of aggrieved party's non-performance)

When the damage is partially due to the aggrieved party's failure to fulfill his own obligations, his damage award may be reduced, in accordance with the respective behaviour of the parties.

Article 24

(Mitigation of damages)

(1) The aggrieved party must take all reasonable measures under the circumstances to mitigate his damage.

(2) If such measures are not taken, his damage award will be reduced by the amount which should have been avoided.

Article 25

(Compensation for non-pecuniary damage)

- (1) The judge may redress non-pecuniary loss, if certain, by an award for damages or by any other means.
- (2) The judge determines the amount of the damage award or the terms and conditions of other redress according to what is equitable under the circumstances.

Article 26

(Damages for failure to pay off a monetary debt)

- (1) If a party does not pay off a monetary debt when it falls due, the aggrieved party may, without having to justify any loss, ask for interest upon that sum from the date of maturity or notice, by application of Article 2.
- (2) In the absence of a contrary agreement, the rate of interest shall be the legal rate; in the absence of a legal rate, it shall be the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the due place of payment.
- (3) The aggrieved party may nevertheless ask for additional damages if he can prove that the non-payment caused him a loss greater than the amount of interest.

Article 27

(Judicial determination of the terms and conditions of monetary redress)

- (1) The judge freely determines the form of monetary redress (without being bound by the aggrieved party's request). He may order that damages be paid in lump sum or in installments and he may fix the terms and conditions of such payment.
- (2) When the judge orders that damages be paid in installments, he may index the payments.

Article 28

(Date at which damages are determined)

- (1) The extent and the amount of damages are to be determined as of the date of the final judgment.
- (2) A new request for damages may be made for subsequent aggravation of the injury.

Article 29

(Damages evaluated in foreign currency)

When an element of the loss consists of an expenditure made in foreign currency, the judge may award damages valued in such currency; the exchange rate for the payment shall be that of the date of the judgment.

Article 30

(Interest)

Unless otherwise agreed, interest accrues on damages only after the suit is filed.

Article 31

(Exemption clauses)

The parties may agree in advance to limit or to exclude their liability for the non-performance of one or more obligations where the non-performance by the defaulting party or by the persons for whose acts he is liable is deliberate or reckless.

Article 32

(Penalties and liquidated damages)

- (1) The parties may agree in advance to the amount which will be due once the aggrieved party has established his right to recover damages.
- (2) If this amount is manifestly excessive with respect to the actual damage, the judge may reduce it; all contrary agreements are void.
- (3) When the contract has been partially performed, the agreed sum will be reduced in proportion to the benefit that the aggrieved party received from the partial performance, without prejudice to subsection 2.
- (4) If the agreed sum is less than the actual damage, the article relating to clauses limiting liability shall apply.
- (5) These rules also apply where the aggrieved party is authorized to retain as damages the installments already received.

SECTION 5: Restitution

Article 33

(Effects of termination in general)

(1) Termination of the contract releases both parties from their obligation to effect and to receive future performance, but, subject to articles 34 and 35, does not affect the rights and liabilities that have accrued at the time of termination.

(2) Termination does not preclude a claim for damages for non-performance.

(3) The termination does not affect any provision in the contract for the settlement of disputes or any other provision of the contract capable of surviving its termination.

Article 34

(Restitution of money received)

(1) On termination of the contract a party may claim restitution of money paid for a performance which he did not receive or which he properly rejected.

(2) Concurrently with the repayment a party will have to return property which he has received from the other party.

Article 35

(Restitution of property)

On termination of the contract a party who against payment of money has supplied property may claim restitution of whatever he has supplied provided that he makes a concurrent restitution to the other party of the money received.

