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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

WORKING GROUP FOR THE PREPARATION OF PRINCIPLES
FOR INTERNATIONAL COMMERCIAL CONTRACTS

PRINCIPLES FOR INTERNATIONAL COMMERCIAL CONTRACTS

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NOTE

This consultative document is circulated for comment only. It does not represent the final views of the Institute.

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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

(Definition of offer)

A proposal for concluding a contract constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance.

Article 2

(Withdrawal of offer)

- (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- (2) An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.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 3

(Revocation of offer)

- (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 4

(Rejection of offer)

Any offer is terminated when a rejection reaches the offeror.

Article 5

(Mode of acceptance)

- (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.
- (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.

Article 6

(Time of acceptance)

An offer must be accepted within the time the offeror 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.

Article 7

(Acceptance within a fixed period of time)

- (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 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 8

(Late acceptance. Delay in transmission)

- (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 9

(Withdrawal of acceptance)

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 10

(Modified acceptance)

- (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.

Article 11

(Writings in confirmation)

If a writing which is sent within a reasonable time after the conclusion of a contract and which purports to be a confirmation of the contract contains additional or

different terms, such terms will become part of the contract, unless they materially alter the contract or the recipient, without undue delay, orally objects to the discrepancy or dispatches a notice to that effect.

Article 12

(Conclusion of contract dependent on agreement
on specific matters or in a specific form)

Where one of the parties in the course of negotiations insists that a contract not be concluded until there has been agreement on specific matters or in a specific form, there is no contract until there has been agreement on those matters or in that form.

Article 13

(Contract with terms deliberately left open)

(1) If the parties intended to conclude a contract, the fact that they have intentionally left a term to be agreed upon in further negotiations or to be determined by a third person does not prevent a contract from coming into existence.

(2) The existence of the contract is not affected by the fact that subsequently

(a) the parties reach no agreement on the term, or

(b) the third person does not determine the term,

provided that there is an alternative that is reasonable in all of the circumstances, including any intention of the parties.

Article 14

(Negotiations in bad faith)

(1) A party is free to negotiate and is not liable for failure to reach an agreement.

(2) However, a party who has negotiated or broken off negotiations in bad faith is liable for the losses caused to the other party.

(3) It is bad faith, in particular, for a party to enter into or continue negotiations knowing that he is not able or willing to make an agreement with the other party.

Article 15

(Duty of confidentiality)

If information is given as confidential by one party in the course of negotiations, the other party is under a duty not to disclose that information or use it improperly for his own purposes whether or not a contract is subsequently concluded. If appropriate, the remedy for breach may include compensation based on the benefit received by the other party.

Article 16

(Form of the contract)

(1) Nothing in these Principles requires a contract to be concluded in or evidenced by writing. The contract may be proved by any means, including witnesses.

(2) A contract in writing which contains a provision indicating that the writing completely embodies the terms on which the parties have agreed cannot be contradicted or supplemented by evidence of prior statements or agreements. However, such statements or agreements may be used to interpret the writing.

(3) 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 17

(Contracting under standard terms)

(1) Where one party or both parties use standard terms in concluding a contract, the general rules on formation apply, subject to articles 18 - 20.

(2) Standard terms are provisions which are prepared in advance for general and repeated use by one party and which are actually used without negotiation with the other party.

Article 18
(Battle of forms)

If both parties use standard terms and they reach an agreement except on those terms, a contract is concluded on the basis of the agreed terms and any standard terms which are common in substance, unless one party clearly indicates in advance or later, without undue delay, informs the other that he does not intend to be bound by the contract.

Article 19
(Surprising provisions)

No provision contained in standard terms which by virtue 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 20
(Conflict between standard terms
and individual provisions)

If there is a conflict between a standard term and another term [which is not a standard term] the latter [other term] prevails.

CHAPTER III

INTERPRETATION

Article 1 (Intention of Parties)

- (1) A contract shall be interpreted according to the intention common to the parties.
- (2) Statements 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 (Understanding of reasonable persons)

- (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 intention of the party who made the statements or engaged in the conduct was not known to, nor should have been known to, the other party, such statements or conduct 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 (Relevant circumstances)

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

(Interpretation of commercial terms)

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

(Interpretation of ambiguous terms)

(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

(Reference to the contract as a whole)

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 3], 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 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.]

CHAPTER V

PERFORMANCE

SECTION 1: Performance in General

Article 1

(Express and implied obligations)

The parties shall perform their obligations as expressly or impliedly required by the contract.

Article 2

(Duty of care)

To the extent that an obligation of a party involves a duty of care in the performance of an activity, that party is expected to observe the diligence observed by reasonable persons of the same kind under similar circumstances.

Article 3

(Duty to achieve a specific result)

To the extent that an obligation of a party involves a duty to achieve a specific result, that party is expected to achieve a result of the quality usually achieved under obligations of the same type.

Article 4

In determining whether an obligation of a party involves a duty of care in the performance of an activity or an obligation to achieve a specific result, regard shall be had among others to the following circumstances:

- (a) the way in which the obligation is expressed in the contract;
- (b) the contractual price and other terms of the contract;
- (c) the degree of certainty normally involved in achieving the expected result;
- (d) the other party's ability to influence the performance of the obligation.

Article 5
(Cooperation between parties)

Each party shall cooperate with the other party, when such cooperation may reasonably be expected for the performance of that party's obligations.

Article 6
(Performance at one time or in instalments)

If the whole of one party's performance can be rendered at one time, it is due at one time, unless the circumstances indicate otherwise.

Article 7
(Partial performance)

- (1) The obligee may refuse a partial performance unless he has no legitimate interest in doing so.
- (2) Additional expenses caused to the obligee by partial performance are to be borne by the obligor.

Article 8
(Time of performance)

- A party must perform its obligations;
- (a) if a time is fixed by or determinable from the contract, at that time;
 - (b) if a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the other party is to choose a time; or
 - (c) in any other case, within a reasonable time after the conclusion of the contract,

Article 9
(Earlier performance)

- (1) A party may refuse an earlier performance unless he has no legitimate interest in doing so.
- (2) A party's acceptance of an earlier performance does not affect the time for the performance of his own performance if it has been fixed irrespective of the performance of the other party's obligations.

(3) Additional expenses caused to the other party by earlier performance are to be borne by the performing party.

Article 10

(Price determination)

(1) If a contract 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 performances under comparable circumstances in the trade concerned, or if no such price is available, to a reasonable price.

(2) Where the price is to be determined by one party whose determination is grossly unreasonable, then notwithstanding any provision to the contrary, a reasonable price shall be substituted.

(3) Where the price is to be fixed by a third party, and he cannot or will not do so, the parties are deemed to have empowered the court to appoint another person to fix the price.

(4) Where the price is to be fixed by reference to factors which do not exist or have ceased to exist or to be accessible, the nearest equivalent factor shall be treated as a substitute.

Article 11

(Place of performance)

(1) If the place of performance is not fixed by nor determinable from the contract, a party is to perform:

(a) a monetary obligation, at the creditor's place of business;

(b) any other obligation, at his own place of business at the time of conclusion of the contract.

(2) The creditor must bear any increase in the expenses incidental to performance which is caused by a change in his place of business subsequent to the conclusion of the contract.

Article 12

(Payment by funds transfer)

(1) Unless the creditor has indicated a particular account, payment can be made by a transfer to any of the financial institutions in which the creditor has made it known he has an account.

(2) Payment by a transfer is completed when the transfer to the creditor's financial institution becomes effective.

Article 13

(Payment by cheque or other instruments)

(1) Payment of money due may be made in any form used in the ordinary course of business at the place of payment.

(2) However, a creditor who accepts, either by virtue of paragraph (1) or voluntarily, a cheque, an order to pay or another instrument, or in place of the debtor's original obligation to pay, some other obligation to pay, is presumed to do so only on condition that it will be honoured.

Article 14

(Currency not specified)

If the contract does not indicate in which currency a monetary obligation is due, payment is to be made in the currency usually agreed between parties to contracts of the type involved in the trade concerned.

Article 15

(Taxes and duties)

Each party has to bear the cost of taxes and duties connected with performance of his obligations.

Article 16

(Imputation of payments)

(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; however, payment made is to discharge first the expenses, then the interests due before the principal.

(2) If the debtor does not make such specification, the other party may, immediately or within a reasonable time after payment, declare to the performing party to which obligation he imputes the payment, provided it applies to an undisputed obligation.

(3) In the absence of imputation according to paragraphs (1) or (2), payment is imputed to that obligation which satisfies one of the following criteria and in the sequence indicated:

- (a) the obligation which is due or which is the first to fall due;
- (b) the obligation for which the creditor has least security;
- (c) the obligation which is the most burdensome for the debtor;
- (d) the obligation which has arisen first.

If none of the preceding criteria applies, payment is imputed proportionally to the amount of the obligations.

Article 17

Article 16 applies with appropriate adaptations to the imputation of performance of non-monetary obligations.

Article 18

(Application for public permission)

(1) Where the law of a State requires a permission the absence of which would wholly or in part affect the validity of the contract or render its performance impossible, the party who has its place of business in that State shall take the measures necessary to obtain the permission.

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

Article 19

(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 20

(Failure to obtain permission)

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.

SECTION 2: Hardship

Article 21

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

Article 22

- (1) There is a case of hardship where:
- /(a) the occurrence of events fundamentally alters the equilibrium of the contract, thereby placing an excessive burden on one party, and/
 - (b) this occurrence of events arises or becomes known to the disadvantaged party 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 disadvantaged party and
 - (d) these circumstances are not the result of risks assumed by the disadvantaged party.
- (2) A party is excluded from invoking a case of hardship in as far as this case arises after the relevant performance has been rendered.

Article 23

- (1) In case of hardship the disadvantaged party is entitled to request renegotiations, provided he does so without undue delay. The request shall indicate the grounds on which it is based.
- (2) On failure to open renegotiations according to paragraph 1, or in default of agreement within a reasonable period, either party may resort to the court.
- (3) Upon request of either party the court may, after having ascertained the presuppositions for invoking a hardship case,
- (a) either terminate the contract at a date and on terms to be fixed, or
 - (b) adapt the contract with a view to restoring the equilibrium of the contract before the hardship.

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 : Specific Performance

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)

If a party who owes an obligation other than one to pay money does not perform, the other party may require performance, unless

- (a) performance is impossible in law or in fact; or
- (b) performance involves an unreasonable effort or expense; or
- (c) the obligee may reasonably obtain performance from another source; or
- (d) performance is of a personal character; or
- (e) the obligee does not require performance within a reasonable time after he has, or ought to have, become aware of the non-performance.

Article 7

(Reparation of defective performance)

A right to require performance includes in appropriate cases the right to require repair or replacement.

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 specific performance)

If a claim, a judicial decision or an arbitral award for specific performance 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) In determining whether a failure to perform an obligation amounts to a fundamental non-performance the following circumstances are significant
 - (a) whether 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;
 - (b) whether strict compliance with the obligation which has not been performed is of essence to the contract;
 - (c) whether the non-performance is intentional and gives the aggrieved party reason to believe that he cannot rely on the other party's future performance;
 - (d) the extent to which the defaulting party will suffer forfeiture if the contract is terminated.

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 10 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.
- (3) Paragraph (2) does not apply when the obligation which has not been performed is only a minor part of the defaulting party's contractual obligation.

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 after he has or ought to have become aware of the non-performance.

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

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

(4) A notice by the aggrieved party under the preceding paragraphs must be given within reasonable time after that party has become or ought to have become aware of the non-performance (paragraph (1)) or the offer (paragraph (2)).

Article 13

(Anticipatory 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.

Article 13a

(Adequate assurance of due performance)

A party who reasonably believes that there will be a fundamental non-performance by the other party may demand adequate assurance of due performance. Where this assurance is not provided within reasonable time the party demanding it may declare the contract terminated.

Article 14

(Termination excluded)

(1) A party who has received 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 the 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 term of the contract not inconsistent with 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 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.