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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

(Good faith and fair dealing)

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

(Definitions)

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 5 (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 6 (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(2) An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.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 7 (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 8 (Rejection of offer)

Any offer is terminated when a rejection reaches the offeror.

Article 9

(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 10

(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 11

(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 12

(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 13

(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 14

(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 15

(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 16

(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 17

(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 18

(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 19
(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 20
(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 21
(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 22 - 24.

(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 22
(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 23
(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 24
(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 25

(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 26

(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 27

(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 28

(Interpretation of commercial terms)

Subject to the provisions of Articles 25, 26 and 27, the expressions, provisions or terms of the contract shall be interpreted according to the meaning usually given to them in the trade concerned.

Article 29

(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 30

(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

SUBSTANTIVE VALIDITY

Article 31

(Validity of mere agreement)

A contract is concluded, modified or terminated by the mere agreement of the parties, without any further requirement such as bargain, exchange, delivery [or the existence of a cause].

Article 32

(Definition of mistake)

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

Article 33

(Mistake)

A party may only avoid a contract for mistake if when the contract was concluded the mistake was 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

(a) the other party made the same mistake, or 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, or

(b) the other party has not at the time of avoidance acted in reliance on the contract.

Article 34

(Error in expression or transmission)

An error occurring in the expression or transmission of a declaration is considered to be a mistake of the person from whom the declaration emanated.

Article 35

(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 36

(Fraud)

A party may avoid the contract when he has been led to conclude it by the other party's fraudulent representation, including language or practice, or fraudulent non-disclosure of circumstances which according to reasonable commercial standards of fair dealing he should have disclosed.

Article 37

(Threat)

A party may avoid the contract when he has been led to conclude it by the other party's unjustified threat 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 wrongful in itself, or it is wrongful to use it as a means to obtain the promise.

Article 38

(Gross disparity)

(1) A party may avoid a contract or an individual term if at the time of the making of the contract the contract or term unjustifiably gives the other party an excessive advantage. Regard is to be had 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, and

(b) the commercial setting and purpose of the contract.

(2) Upon the request of the party entitled to avoidance, a court may adapt the contract or term, in order to bring it in accordance with reasonable commercial standards of fair dealing.

(3) A court may do so also upon the request of the party receiving a notice of avoidance, provided that party informs the party who sent the notice promptly after receiving it and before that party has acted in reliance on it. The rules stated in Article 11, paragraph 2 apply accordingly.

Article 39

(Initial impossibility)

(1) The mere 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 mere 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 40

(Third persons)

(1) Where a fraud, a threat, 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, a threat 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, the threat or the disparity, or has not at the time of avoidance acted in reliance on the contract.

Article 41

(Confirmation)

If the party who is entitled to avoid the contract expressly or impliedly confirms the contract after the period for giving notice of avoidance has commenced to run avoidance of a contract is excluded.

Article 42
(Rectified contract)

(1) If a party is entitled to avoid the contract for mistake but the other party declares himself willing to perform or performs the contract as it was understood by the party entitled to avoid, the contract shall be considered to have been concluded as the latter understood it. The other party must make such a declaration or such performance promptly after having been informed of the manner in which the party entitled to avoid had understood the contract and before that party has acted in reliance on the [right to avoid] [notice of avoidance].

(2) After such a declaration or performance the right to avoid is lost and any earlier notice of avoidance is ineffective.

Article 43
(Notice of avoidance)

Avoidance must be by notice which must reach the other party.

Article 44
(Time limits)

Notice of avoidance must be given within a reasonable time, with due regard to the circumstances after the avoiding party knew or could not have been unaware of the relevant facts and became capable of acting freely.

Article 45
(Partial avoidance)

If a ground of avoidance affects only individual terms of a contract, the effect of an avoidance is limited to those terms if, giving due consideration to all circumstances of the case, it is reasonable to uphold the remaining contract.

Article 46

(Retroactive effect of avoidance)

(1) Avoidance shall take effect retroactively.

(2) On avoidance either party may claim restitution of whatever he has supplied under the contract or the individual terms avoided, provided that he concurrently makes restitution of whatever he has received under the contract or part or if he cannot make restitution in kind he must make an allowance for what he has received.

Article 47

(Damages)

Where a contract has been fully or partly avoided a party may be awarded damages according to the rules on damages in general.

Article 48

(Mandatory character of the provisions)

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

Article 49

(Questions not covered)

These Principles do not deal with an invalidity arising from

- (a) lack of capacity,
- (b) lack of authority, or
- (c) immorality or illegality.

Article 50

(Unilateral declarations)

Unless otherwise provided in these Principles, the provisions of this chapter apply accordingly to declarations which are addressed by one party to the other.

CHAPTER V

PERFORMANCE

SECTION 1: Performance in General

Article 51

(Express and implied obligations)

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

Article 52

(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 53

(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 54

(Determination of kind of duty involved)

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 55

(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 56

(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 57

(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 58

(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 59
(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 60
(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 61
(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) 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 62

(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 63

(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 64

(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 65

(Taxes and duties)

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

Article 66

(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 67

(Imputation of non-monetary obligations)

Article 66 applies with appropriate adaptations to the imputation of performance of non-monetary obligations.

Article 68

(Application for public permission)

(1) Where the law of a State requires a public 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 69

(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. He shall bear any expenses so entailed.

(2) Where it is relevant for the conduct of the other party to be informed the applicant party shall inform him of the grant or refusal of such permission without undue delay. The applicant party shall not be entitled to rely on the contract if he has not fulfilled his duty to inform the other party of the grant of permission.

Article 70

(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 71

(Pacta sunt servanda)

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 72

(Definition of hardship)

(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 73

(Effects of hardship)

(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 74
(Definition)

(....)

Article 75
(Cumulation of remedies)

(....)

Article 76
(Exemptions)

(....)

Article 77
(Right to withhold performance)

(....)

SECTION 2 : Specific Performance

Article 78

(Performance of monetary obligation)

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

Article 79

(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 80

(Reparation of defective performance)

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

Article 81

(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 82

(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 83

(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 84

(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 83 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 85

(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 86

(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 87

(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 88

(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 89

(Right to damages)

Any non-performance gives the aggrieved party a right to damages [either exclusively or in conjunction with other remedies] except where the non-performance is excused under Article 76.

Article 90

(Formal notice of default)

(1) The right to damages for delay accrues on the day where the aggrieved party has given notice by any reasonable means of his demand for the immediate performance of the contract.

(2) No notice is required where a mandatory date has been fixed for the performance, or 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 84 (1), he does not thereby waive his right to claim damages for such delay pursuant to paragraph 1 of this Article.]

Article 91

(Full compensation)

(1) The aggrieved party is entitled to full compensation for harm sustained as a result of the non-performance. This harm includes both any loss which he suffered and any gain of which he was deprived, with the deduction of any cost or loss avoided by the aggrieved party.

[(2) Such loss may be non-pecuniary and includes, for instance, physical suffering or emotional distress.]

Article 92
(Certainty of damage)

(1) Compensation will be made only for harm [including future loss] that is established with a reasonable degree of probability.

(2) Compensation may be due for the loss of a chance insofar as it will probably occur.

(3) Where the amount cannot be established with a sufficient degree of probability, the assessment of damages will be at the discretion of the court.

Article 93
(Foreseeability of damage)

The defaulting party is liable only for loss which he foresaw or could reasonably have foreseen at the time of the conclusion of the contract would be likely to result from his non-performance, unless this non-performance is deliberate or reckless [grossly negligent].

Article 94
(Proof of loss in case of cover)

When, as a result of the breach, there has been a reasonable cover [transaction], the loss is presumed to be the difference between the price fixed by the contract and that of the cover. A greater or lesser loss has to be proved.

[Article 95]
(Proof of loss by current price)

(1) When there has been no cover and the performance for which the defaulting party is liable has a current price, the loss is presumed to be the difference between the contract price and the current price, as of the time the contract could have been terminated.

(2) Current price under these Principles is the price generally charged for goods or services rendered and delivered in comparable circumstances.

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

(4) A greater or lesser loss has to be proved.]

Article 96

(Non-performance due in part to the aggrieved party)

When the loss is due in part to the aggrieved party's act or omission, his award may be reduced to the extent this act or omission has contributed to the loss, taking into account the respective behaviour of the parties.

Article 97

(Mitigation of damage)

The defaulting party is not responsible for any increased damage if the aggrieved party could have avoided it by reasonable means.

Article 98

(Compensation for non-pecuniary loss)

Non-pecuniary loss may be compensated by an award for damages or by any other means.

Article 99

(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 90].

(2) The rate of interest shall be the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the due place of payment; in the absence of such a rate, the rate fixed by the law of the State in which money the payment has to be made.

(3) The aggrieved party may nevertheless ask for additional damages if he proves that the non-payment caused him a greater loss.

Article 100

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

(1) The judge may order that damages be paid in lump sum or, according to circumstances, in instalments.

(2) When the judge orders that damages be paid in instalments, he may index the payments.

Article 101

(Time at which damages are determined)

[Subject to Articles 94 and 95] the extent and the amount of damages are to be normally determined as of the date of the final judgment.

Article 102

(Loss evaluated in foreign currency)

A party is entitled to ask for damages either in the currency of the contract or in the currency in which the loss accrues [unless the circumstances, including exchange regulations, indicate otherwise].

Article 103

(Interest of damages)

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

Article 104

(Exemption clauses)

The parties may agree in advance to limit or to exclude their liability for the non-performance of their obligations except where that clause relates to deliberate breach of the contract by the defaulting party or by those for whom he is liable or is otherwise unconscionable [unreasonable].

Article 105

(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; notwithstanding all contrary agreements.

(3) If the agreed sum is less than the actual damage, the article relating to clauses limiting liability shall apply.

SECTION 5: Restitution

Article 106

(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 107 and 108, 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 107

(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 108

(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.

