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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

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WORKING GROUP FOR THE PREPARATION OF PRINCIPLES  
FOR INTERNATIONAL COMMERCIAL CONTRACTS

PRINCIPLES FOR INTERNATIONAL COMMERCIAL CONTRACTS

CHAPTER 1 : GENERAL PROVISIONS

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CHAPTER 3 : SUBSTANTIVE VALIDITY

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## CHAPTER 1

### GENERAL PROVISIONS

#### Article 1.1

##### *(Purpose of the Principles)*

These Principles set forth general rules for international commercial contracts.

#### Article 1.2

##### *(Application of the Principles)*

(1) The Principles shall be applied when the parties have agreed that their contract be governed by them.

(2) The Principles may be applied

(a) when the parties have agreed that their contract be governed by "general principles of law", the "lex mercatoria" or the like; or

(b) when the parties have not chosen any law to govern their contract.

(3) The Principles may provide a solution to the issue raised when it proves impossible to establish the relevant rule of the applicable law.

(4) The Principles may be used to interpret or supplement instruments of international uniform law.

#### Article 1.3

##### *(Freedom of contract)*

The parties are free to enter into a contract and to determine its content.

Article 1.4

*(Binding character of the agreement)*

A contract validly entered into is binding upon the parties. It can only be modified or terminated in accordance with its terms or by agreement or as otherwise provided under these Principles.

Article 1.5

*(Mandatory rules)*

Nothing in these Principles shall restrict the application of mandatory rules, whether of national, international or supranational origin, which are applicable in accordance with the relevant rules of private international law.

Article 1.6

*(Exclusion or modification by the parties)*

The parties may exclude the application of these Principles or derogate from or vary the effect of any of its provisions, except as otherwise provided in the Principles.

Article 1.7

*(Interpretation and supplementation of the Principles)*

(1) In the interpretation of these Principles, regard is to be had to their international character and to the need to promote uniformity in their application.

(2) Issues within the scope of these Principles but not expressly settled by them are so far as possible to be settled in accordance with the ideas underlying the Principles.

Article 1.8

*(Good faith and fair dealing)*

(1) Each party must act in accordance with good faith and fair dealing in international trade.

(2) The parties may not exclude or limit this duty.

Article 1.9*(Courses of dealing and usages)*

(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

(2) The parties are bound by a usage that is widely known to and regularly observed in international trade by parties in the particular trade concerned except where the application of such a usage would be unreasonable.

Article 1.10*(Notice)*

(1) Where notice is required it may be given by any means appropriate to the circumstances.

(2) A notice is effective when it reaches the person to whom it is given.

(3) For the purpose of paragraph (2) a notice "reaches" a person when given to the person orally or delivered to that person's principal place of business or mailing address.

(4) For the purpose of this article "notice" includes a declaration, demand, request or any other form of communication.

Article 1.11*(Definitions)*

In these Principles

- "court" includes arbitration tribunal;
- if a party has more than one place of business the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract.

## CHAPTER 2

### FORMATION

#### Article 2.1

##### *(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 2.2

##### *(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 2.3

##### *(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 2.4  
(*Rejection of offer*)

An offer is terminated when a rejection reaches the offeror.

Article 2.5  
(*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 2.6  
(*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 2.7  
(*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 2.8

##### *(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 gives 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 gives a notice to that effect.

#### Article 2.9

##### *(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 2.10

##### *(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 gives 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 2.11  
*(Writings in confirmation)*

If a writing which is sent within a reasonable time after the conclusion of the 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 2.12  
*(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 is agreement on specific matters or in a specific form, the contract is not concluded before there is agreement on these matters or in that form.

Article 2.13  
*(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 means of rendering the term definite that is reasonable in all of the circumstances, including any intention of the parties.

Article 2.14*(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 intending not to make an agreement with the other party.

Article 2.15*(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 2.16*(Form of the contract)*

(1) Nothing in these Principles requires a contract to be concluded in or evidenced by writing. It 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 2.17*(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 2.18 - 2.20.

(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 2.18*(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 such a contract.

Article 2.19*(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 2.20*(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 other term prevails.

## CHAPTER 3

### SUBSTANTIVE VALIDITY

#### Article 3.1

##### *(Validity of mere agreement)*

A contract is concluded, modified or terminated by the mere agreement of the parties, without any further requirement.

#### Article 3.2

##### *(Definition of mistake)*

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

#### Article 3.3

##### *(Relevant Mistake)*

(1) 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.

(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 3.4

*(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 3.5

*(Remedies for non-performance)*

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 non-performance.

Article 3.6

*(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 practices, or fraudulent non-disclosure of circumstances which according to reasonable commercial standards of fair dealing he should have disclosed.

Article 3.7

*(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 3.8

*(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 a party receiving a notice of avoidance providing 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 3.12(2), apply accordingly.

Article 3.9

*(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 3.10

*(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 person 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 person 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 3.11

*(Confirmation)*

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

Article 3.12

*(Adaptation of 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 render 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 a 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 3.13

*(Notice of avoidance)*

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

Article 3.14*(Time limits)*

(1) 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.

(2) Where an individual term of a contract may be avoided by a party under Article 3.8, the time-period runs from the moment that the term is asserted by the other party.

Article 3.15*(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 3.16*(Retroactive effect of avoidance)*

(1) Avoidance shall take effect retroactively.

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

Article 3.17*(Damages)*

Irrespective of whether or not the contract has been avoided, the party who knew or ought to have known of the ground for avoidance is liable for damages so as to put the other party into the same position it would have been in if it had not concluded the contract.

Article 3.18

*(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 3.19

*(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 3.20

*(Unilateral declarations)*

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

## CHAPTER 4

### INTERPRETATION

#### Article 4.1

##### *(Intention of Parties)*

(1) A contract shall be interpreted according to the parties' common intention if such an intention can be established.

(2) If such an intention 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.

#### Article 4.2

##### *(Interpretation of statements and other conduct)*

(1) A party's statements and other conduct shall be interpreted according to that party's intention, if the other party knew or could not have been unaware of that intention.

(2) If the preceding paragraph is not applicable, such statements and other 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 4.3

##### *(Relevant circumstances)*

(1) In applying Articles 4.1 and 4.2, due consideration shall be given to all relevant circumstances, including:

- (a) any preliminary negotiations between the parties;
- (b) any practices which the parties have established between themselves;
- (c) any conduct of the parties subsequent to the conclusion of the contract;
- (d) the commercial setting and purpose of the contract;

- (e) any meaning commonly given to terms and expressions in a trade concerned; and
- (f) any usages.

Article 4.4

*(Interpretation of unclear contract terms)*

If the terms of a contract are otherwise unclear, they shall be interpreted so as to give effect to all the terms rather than to deprive some of them of effect.

Article 4.5

*(Contra proferentem rule)*

If contract terms supplied by one party are otherwise unclear, there is a preference for their interpretation against that party.

Article 4.6

*(Reference to the contract as a whole)*

Terms and expressions shall be interpreted in the light of the whole contract or statement in which they appear.

Article 4.7

*(Supplying an omitted term)*

(1) Where the parties to a contract have not agreed with respect to a term which is important for a determination of their rights and duties, a term which is appropriate in the circumstances is supplied.

(2) In determining what is an appropriate term regard is to be had, inter alia, to

- (a) the intention of the parties as expressed in the contract language;
- (b) the purpose of the contract; and
- (c) good faith and reasonableness.

Article 4.8*(Linguistic discrepancies)*

If a contract is drawn up in two or more linguistic versions being equally authoritative, in case of discrepancy between the versions there is a preference for the interpretation according to the version in which it was originally drawn up.

## CHAPTER 5

### PERFORMANCE

#### SECTION 1: Performance in General

##### Article 5.1.1

*(Express and implied obligations)*

The contractual obligations of the parties may be express or implied.

##### Article 5.1.2

*(Implied obligations)*

Implied obligations stem from

- (a) the nature and purpose of the contract;
- (b) usages and standard trade practices;
- (c) good faith and reasonableness.

##### Article 5.1.3

*(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 5.1.4

*(Duty to achieve a specific result  
Duty of best efforts)*

(1) To the extent that an obligation of a party involves a duty to achieve a specific result, that party is bound to achieve that result.

(2) To the extent that an obligation of a party involves a duty of best efforts in the performance of an activity, that party is bound to make those efforts that would be made by

a reasonable person of the same kind under similar circumstances.

Article 5.1.5

*(Determination of kind of duty involved)*

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

- (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 risk normally involved in achieving the expected result;
- (d) the other party's ability to influence the performance of the obligation.

Article 5.1.6

*(Determination of quality of performance)*

If the quality of performance is not fixed by nor determinable from the contract, a party is bound to render a performance of a quality that is reasonable and not less than average in the circumstances.

Article 5.1.7

*(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 5.1.8

*(Contract for an indefinite period)*

A contract for an indefinite period may be ended by either party by giving notice of reasonable length.

Article 5.1.9

*(Performance at one time or in instalments)*

In cases under Article 5.1.7(b) or (c), a party must perform its obligations at one time, if that performance can be rendered at one time and the circumstances do not indicate otherwise.

Article 5.1.10

*(Partial performance)*

(1) The obligee may reject an offer to perform in part at the time performance is due, whether or not coupled with an assurance as to the balance of the 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 without prejudice to any other remedy.

Article 5.1.11

*(Order of performance)*

(1) To the extent that the parties' performances can be rendered simultaneously, the parties are bound to render them simultaneously unless the circumstances indicate otherwise.

(2) To the extent that the performance of only one party requires a period of time, that party is bound to render its performance first, unless the circumstances indicate otherwise.

Article 5.1.12

*(Earlier performance)*

(1) The obligee may reject 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 obligation 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, without prejudice to any other remedy.

#### Article 5.1.13

##### *(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 its own place of business.

(2) A party 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 5.1.14

##### *(Price determination)*

(1) If a contract does not fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have 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 manifestly 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 person, and he cannot or will not do so, the price shall be a reasonable 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 5.1.15

*(Payment by cheque or other instruments)*

(1) Payment can 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 other order to pay or a promise to pay, is presumed to do so only on condition that it will be honoured.

Article 5.1.16

*(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) In case of payment by a transfer the obligation of the debtor is discharged when the transfer to the creditor's financial institution becomes effective.

Article 5.1.17

*(Currency of payment)*

(1) If a monetary obligation is expressed in a currency other than that of the place of payment, it may be paid by the debtor in the currency of the place of payment unless

- (a) that currency is not freely convertible; or
- (b) the parties have agreed that payment should be made only in the currency in which the monetary obligation is expressed.

(2) If it is impossible for the debtor to make payment in the currency in which the monetary obligation is expressed, the creditor may require payment in the currency of the place of payment, even in the case envisaged by paragraph (1)(b).

[Article 5.1.18]  
(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 for such performances under comparable circumstances in the trade concerned.]

Article 5.1.19  
(Costs of performance)

Each party shall bear the costs of performance of its obligations.

Article 5.1.20  
(Imputation of payments)

(1) A debtor owing several monetary obligations to the same creditor may specify at the time of payment the debt to which he intends the payment to be applied. However, the payment discharges first any expenses, then interests due and finally the principal.

(2) If the debtor does not make such a specification, the creditor may, within a reasonable time after payment, declare to the debtor the obligation to which he imputes the payment, provided that obligation is due and undisputed.

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

- (a) an obligation which is due or which is the first to fall due;
  - (b) an 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 to all the obligations proportionally.

Article 5.1.21

*(Imputation of non-monetary obligations)*

Article 5.1.18 applies with appropriate adaptations to the imputation of performance of non-monetary obligations.

Article 5.1.22

*(Application for public permission)*

Where the law of a State requires a public permission affecting the validity of the contract or making its performance impossible and that law or the circumstances do not indicate otherwise

- (a) if only one party has his place of business in that State, that party shall take the measures necessary to obtain the permission; and
- (b) in any other case the party whose performance requires permission shall take the necessary measures.

Article 5.1.23

*(Procedure in applying for permission)*

(1) The party required to take the measures necessary to obtain the permission shall do so without undue delay. He shall bear any expenses incurred.

(2) That party shall whenever appropriate give the other party notice of the grant or refusal of such permission without undue delay.

Article 5.1.24

*(Permission neither granted nor refused)*

(1) If, notwithstanding the fact that the party responsible took all measures required, permission was neither granted nor refused within an agreed period or, where no period has been agreed, within a reasonable time from the conclusion of the contract, either party is entitled to terminate the contract.

(2) Where the permission affects only some terms, paragraph (1) does not apply if, giving due consideration to

all circumstances of the case, it is reasonable to uphold the contract even if the permission is refused.

Article 5.1.25

*(Permission refused)*

(1) The refusal of a permission affecting the validity of the contract renders the contract void. If the refusal affects the validity of only some terms, only such terms are void if, giving due consideration to all circumstances of the case, it is reasonable to uphold the remaining contract.

(2) Where the refusal of a permission makes the performance of the contract impossible in whole or in part, the rules on non-performance apply.

## SECTION 2: Hardship

### Article 5.2.1

*(Contract to be observed)*

If the performance of a contract becomes more onerous for one of the parties, he is nevertheless bound to perform his obligations subject to the following provisions on hardship.

### Article 5.2.2

*(Definition of hardship)*

There is a case of hardship where the occurrence of events fundamentally alters the equilibrium of the contract whether because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and

- (a) the events occur or become known to the parties after the conclusion of the contract;
- (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;
- (c) the events are beyond the control of the disadvantaged party; and
- (d) the risk of the events was not assumed by the disadvantaged party.

### Article 5.2.3

*(Effects of hardship)*

(1) In a case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based.

(2) The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance.

(3) Upon failure to reach agreement within a reasonable time either party may resort to the court.

(4) Having found hardship, a court may, if reasonable,

- (a) terminate the contract at a date and on terms to be fixed, or

(b) adapt the contract with a view to restoring its equilibrium.



## CHAPTER 6

## NON-PERFORMANCE

SECTION 1: General ProvisionsArticle 6.1.1*(Definition)*

In these Principles "non-performance" means failure by a party to perform any of its obligations under the contract, including defective performance or late performance.

Article 6.1.2*(Other party's interference)*

A party may not rely on the other party's non-performance to the extent that such non-performance was caused by the first party's act or omission or by another event as to which the first party bears the risk.

Article 6.1.3*(Withholding Performance)*

(1) Where the parties are to perform simultaneously, either party may withhold performance until the other party tenders its performance.

(2) Where the parties are to perform consecutively, the party that is to perform later may withhold its performance until the first party has performed.

Article 6.1.4*(Additional period for performance)*

(1) In any case of non-performance the aggrieved party may by notice to the other party allow an additional period of time for performance.

(2) During the additional period the aggrieved party may withhold performance of his own reciprocal obligations and

may claim damages but he may not resort to any other remedy. If he receives notice from the other party that the latter will not perform within that period, or if upon expiry of that period due performance has not been made, the aggrieved party may resort to any of the remedies that may be available under this chapter.

(3) If in a case of delay in performance which is not fundamental the aggrieved party has given notice allowing an additional period of time of reasonable length, he may terminate the contract at the end of that period. If the additional period allowed is not of reasonable length it shall be extended to a reasonable length. The aggrieved party may in his notice provide that if the other party fails to perform within the period allowed by the notice the contract shall automatically terminate.

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

#### Article 6.1.5

*(Force majeure)*

(1) A party's non-performance is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

(2) When the impediment is only temporary, the excuse shall have effect for such period as is reasonable taking into account the effect of the impediment on performance of the contract.

(3) The party who fails to perform must give notice to the other party of the impediment and its effect on its ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, it is liable for damages resulting from such non-receipt;

(4) Nothing in this article prevents a party from exercising a right to terminate the contract or withhold performance or request interest on money due.

## SECTION 2 : Right to Performance

### Article 6.2.1

#### *(Performance of monetary obligation)*

If a party who is obliged to pay money does not do so, the other party may require payment.

### Article 6.2.2

#### *(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;
- (b) performance or, where relevant, enforcement is unreasonably burdensome or expensive;
- (c) the party entitled to performance may reasonably obtain performance from another source;
- (d) performance is of an exclusively personal character; or
- (e) the party entitled to performance does not require performance within a reasonable time after he has, or ought to have, become aware of the non-performance.

### Article 6.2.3

#### *(Cure of defective performance)*

The right to performance includes in appropriate cases the right to require repair, replacement or other cure of a defective performance. The provisions of Articles 6.2.1 and 6.2.2 apply accordingly.

### Article 6.2.4

#### *(Judicial penalty)*

(1) Where the court orders a defaulting party to perform, it may also direct that this party pay a penalty if he does not comply with the order.

(2) The penalty shall be paid to the aggrieved party unless mandatory provisions of the law of the forum provide otherwise. Payment of the penalty to the aggrieved party does not exclude any claim for damages.

Article 6.2.5

*(Change of remedy)*

[(1) An aggrieved party who has required performance of a non-monetary obligation and who has not received performance within a period fixed or otherwise within a reasonable period of time may invoke any other remedy for non-performance.]

[(1) An aggrieved party who has required performance of a non-monetary obligation is not precluded from invoking any other remedy.]

(2) If the decision of a court for performance of a non-monetary obligation cannot be enforced, the aggrieved party is not precluded from invoking any other remedy for non-performance.

### SECTION 3: Termination

#### Article 6.3.1

##### *(The right to terminate the contract)*

(1) A party may terminate the contract 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 under the contract;

(c) whether the non-performance is intentional or reckless;

(d) whether the non-performance gives the aggrieved party reason to believe that he cannot rely on the other party's future performance;

(e) whether the defaulting party will suffer disproportionate loss as a result of the preparation or performance if the contract is terminated.

(3) In the case of delay the aggrieved party may also terminate the contract if the other party fails to perform before the time allowed him under Article 6.1.4 has expired.

#### Article 6.3.2

##### *(Notice of termination)*

(1) A party's right to terminate the contract is to be exercised by notice to the other party.

(2) If performance has been offered late or otherwise does not conform to the contract the aggrieved party will lose his right to terminate the contract unless he gives notice to the other party within a reasonable time after he has or ought to have become aware of the offer or of the non-conforming performance.

Article 6.3.3*(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 terminate the contract.

Article 6.3.4*(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 and may meanwhile withhold his own performance. Where this assurance is not provided within a reasonable time the party demanding it may terminate the contract.

Article 6.3.5*(Effects of termination in general)*

(1) Termination of the contract releases both parties from their obligation to effect and to receive future performance.

(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 which is to operate even after termination.

Article 6.3.6*(Restitution)*

(1) On termination of the contract either party may claim restitution of whatever he has supplied, provided that he concurrently makes restitution of whatever he has received. If restitution in kind is not possible allowance should be made in money whenever appropriate.

(2) However, if performance of the contract has extended over a period of time and the contract is divisible, such restitution can only be claimed for the period after termination has taken effect.

#### SECTION 4: Damages and exemption clauses

##### Article 6.4.1

*(Right to damages)*

Any non-performance gives the aggrieved party a right to damages either exclusively or in conjunction with any other remedies except where the non-performance is excused under these Principles.

##### Article 6.4.2

*(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, taking into account any gain to the aggrieved party resulting from his avoidance of cost or harm.

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

##### Article 6.4.3

*(Certainty of harm)*

(1) Compensation will be made only for harm, including future harm, that is established with a reasonable degree of certainty.

(2) Compensation may be due for the loss of a chance in proportion to the probability of its occurrence.

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

##### Article 6.4.4

*(Foreseeability of harm)*

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.

Article 6.4.5

*(Proof of harm in case of replacement transaction)*

Where the aggrieved party has terminated the contract and has made a replacement transaction within a reasonable time and in a reasonable manner it may recover the difference between the contract price and the price of the replacement transaction as well as damages for any further harm.

Article 6.4.6

*(Proof of harm by current price)*

(1) Where the aggrieved party has terminated the contract and has not made a replacement transaction but there is a current price for the performance contracted for, it may recover the difference between the contract price and the price current at the time the contract is terminated as well as damages for any further harm.

(2) Current price is the price generally charged for goods or services delivered or rendered in comparable circumstances at the place where the contract should have been performed or, if there is no current price at that place, the current price at such other place that appears reasonable to take as a reference.

Article 6.4.7

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

When the harm is due in part to the aggrieved party's act or omission or to another event as to which that party bears the risk, the amount of damages shall be reduced to the extent these factors have contributed to the harm, taking into account the respective behaviour of the parties.

Article 6.4.8

*(Mitigation of harm)*

(1) The defaulting party is not liable for harm suffered by the aggrieved party to the extent that the harm could have been reduced by its taking reasonable steps.



(2) The aggrieved party is entitled to recover any expenses reasonably incurred in attempting to reduce the harm.

Article 6.4.9

*(Interest on damages)*

Unless otherwise agreed, interest on damages for non-performance of non-monetary obligations accrues as from the time of non-performance.

Article 6.4.10

*(Damages for failure to pay money)*

(1) If a party does not pay a sum of money when it falls due the aggrieved party is entitled to interest upon that sum from the time when payment is due to the time of payment.

(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 place for payment, or where no such rate exists at that place, then the same rate in the State of the currency of payment. In the absence of such a rate at either place the rate of interest shall be the appropriate rate fixed by the law of the State of the currency of payment.

(3) The aggrieved party is entitled to additional damages if the non-payment caused it a greater harm.

Article 6.4.11

*(Manner of monetary redress)*

(1) Damages are to be paid in lump sum. However, they may be payable in instalments when the nature of the harm makes this appropriate.

(2) Damages to be paid in instalments may be indexed.

Article 6.4.12

*(Currency in which to assess damages)*

Damages are to be assessed either in the currency in which the monetary obligation was expressed or in the

currency in which the harm was suffered whichever is more appropriate.

Article 6.4.13

*(Exemption clauses)*

A term which limits or excludes one party's liability for non-performance or which permits one party to render performance substantially different from what the other party reasonably expects may not be invoked if it would be grossly unfair to do so, having regard to the purpose of the contract.

Article 6.4.14

*(Agreed payment for non-performance)*

(1) Where the contract provides that a party who does not perform is to pay a specified sum to the aggrieved party for such non-performance, the aggrieved party is entitled to that sum irrespective of its actual harm.

(2) However, despite any agreement to the contrary the specified sum may be reduced to a reasonable amount where it is grossly excessive in relation to the harm resulting from the non-performance and the other circumstances.