Unidroit Principles of International Commercial Contracts: The Black Letter Text and a Review

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Unidroit Principles of International Commercial Contracts: The Black Letter Text and a Review

Cover Page Footnote

Alpin J. Cameron Professor of Law, Fordham University School of Law. I am indebted to Steve Thel and Joel Reidenberg for their helpful comments on an earlier draft of this essay.

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INTRODUCTION

Cross-border trading is as natural to humanity as eating, laughing and crying. Patterns of trade and the laws regulating them have, as one would expect, significant similarities. However, when disputes arise, the conceptual framework and the rationales for the rules of decision have been far from uniform even where there is uniformity or similarity of result.

Western States are broadly divided into common law and civil law systems. Within the common law system, most legal professionals of England staunchly cling to the supreme value of certainty of result, while the legal professionals of the United States generally have been open to flexible and changing rules, including changes stemming from civil law influences. Similarly, the civil law spans the landscape from the French family of the formerly radical, but now antiquated, Code Napoleon, to the relatively modern Italian Codice Civile, and the truly

* Alpin J. Cameron Professor of Law, Fordham University School of Law. I am indebted to Steve Thel and Joel Reidenberg for their helpful comments on an earlier draft of this essay.


3. This openness to civil law influences was described as early as 1834, when Justice Joseph Story wrote an article for a German publication entitled “American Law.” It was published in a German translation. For the original in English, see Joseph Story, American Law, 3 Am. J. Comp. L. 9 (1954). As to contracts, Story wrote:

The law with regard to personal or movable property, and contracts, (often called in the language of common law, choses in action) is in substance that of England. The same principles and distinctions exist as to the formation, obligation, interpretation, and execution of contracts. The Law of Bailments, of Agency, of Partnership, of Insurance, of Bottomry, of Promissory Notes, of Bills of Exchange, of Shipping and Navigation, and of other maritime and commercial contracts, is generally, (not universally) the same as that of England, except that the American law on these subjects is more expansive and comprehensive, and liberal, borrowing freely from the law of Continental Europe, and more disposed to avail itself of the best principles of commerce, which can be gathered from all foreign sources not excluding even the civil law.

Id. at 22.
up-to-date Civil Code of the Netherlands, with a panoply of Codes in between them, not to mention non-codified successors to Roman Law. Despite the variety of ways in which the conclusions are reached and articulated, concrete commercial issues tend to have similar resolutions in all of these Western systems. As to the rest of the world, non-western legal systems have generally adopted a conceptual framework based on one or another Western prototype, even if decolonization may have produced major changes in the content of the rules of law.4

Under the auspices of the United Nations Commission on International Trade Law ("UNCITRAL"), an international group of lawyers and scholars produced the United Nations Convention on the International Sale of Goods ("CISG" or "Convention"),5 which has been ratified by the United States and thirty-eight other States. It is striking that this Convention was acceptable to nations from different families of legal systems, such as the United States and France, and such diverse economic backgrounds as China and Germany. In producing this Convention, UNCITRAL drew heavily on earlier work by the International Institute for the Unification of Private Law ("UNIDROIT"), under whose auspices precursors to CISG had been drafted.6 Many of the same individuals who labored for a considerable number of years to produce the CISG continued under UNIDROIT auspices to produce the UNIDROIT Principles of International Commercial Contracts,7 the black letter text of which is appended to this review. Produced under the chairmanship of Italy's Michael Joachim Bonnell, with the participation of such stalwarts as America's E. Allan Farnsworth and worthies of similar stature from a considerable number of countries, the product is a significant step forward in the globalization of legal thinking.

To an extent, Principles is modelled on CISG. But in three significant ways it departs from CISG. First, it is far broader in scope. CISG is limited to contracts for the sale of goods and furthermore eschews many issues relevant to sales contracts. For example, CISG avoids the question of contractual validity.8 On the other hand, Prin-

8. Article 4 provides in part: "This Convention ... is not concerned with: (a) the validity of the contract or of any of its provisions or of any usage." See generally,
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ditions deals not only with the broad range of commercial contracts, but also with some questions of validity. A second departure from CISG is that, to the extent that the two documents cover the same ground, Principles is a better, more mature product. For example, it deals with the "Battle of the Forms" in an innovative way, which presents a considerable improvement over the wretched draftsman-

ship of Uniform Commercial Code section 2-207 and the timorous Article 19 of CISG. The third departure is that Principles is not intended for adoption as a treaty or as a uniform law; rather, the document is in the nature of a restatement of the commercial contract law of the world.

I. THE FUNCTION OF PRINCIPLES

One could ask what might be the function of such a restatement. The Preamble lists a number of practical uses the statement of principles might have for the judge, arbitrator or practicing lawyer. If the

parties negotiating a contract have difficulty in agreeing on a choice of law clause, the choice of Principles could avoid deadlock. If the principles had been in existence at the relevant time, it would have been an ideal choice of legal principles for contracts dealing with the construction of the "Chunnel" connecting England and France. Feelings of national dignity precluded each side from acceding to the choice of the other's law. Similarly, if the contract declares that it is governed by "general principles of law" or the like, Principles can be a primary source for the adjudication of any dispute that may arise from the contract. In addition, Principles could be employed as a supplement for decisions under other international agreements, such as CISG. Moreover, if the rules of conflict of laws point to a State whose law is obscure, undeveloped or merely difficult to ascertain, the judges or arbitrators have a neutral resource to apply. This last function of

Helen Elizabeth Hartnell, Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods, 18 Yale J. Int'l L. 1 (1993) (discussing the range of interpretations available to adjudicators and proposing a "middle of the road" approach).


10. Id. at 7-13. For an example of such a clause, see Noto v. Cia Secula di Arma-

nento, 310 F. Supp. 639, 646 n.17 (S.D.N.Y. 1970). The clause stated: In view of the diverse nationalities of the parties to this Agreement, it shall be governed by and interpreted and applied in accordance with principles of law common to Iran and the several nations in which the other parties to this Agreement are incorporated, and in the absence of such common principles, then by and in accordance with principles of law recognized by civilized nations in general, including such of those principles as may have been applied by international tribunals.

Id.
Principles should not be underestimated, as this is one of the primary functions of a restatement in the United States.

There is, I believe, another dimension to Principles that the Preamble does not state. Comparative law is a humanistic discipline. A comparison of legal systems expands the mind.11 Provisions within Principles regarding issues on which the common law and civil law systems have different conceptual frameworks (e.g., specific performance and penalty clauses) show that the drafters were able to break out of their respective conceptual straitjackets to reach common ground. This only could have happened by a process of mutual education and the expansion of understanding.

II. FORMATION OF CONTRACTS

To the extent that the rules of formation of contracts contained in Principles are at variance with the rules laid down by CISG, they improve them. For example, the newer document specifically adopts a rule that a contract may be formed without a process of offer and acceptance.12 Its definition of "offer" is simpler; language in the CISG definition that was erroneous, or at best confusing, has been eliminated.13 Furthermore, the apparently invariable requirement that an express or implicit price term is essential to an offer has been eliminated.14

To understand Principles' offer and acceptance mechanism, it is important to know that by the law of Germany, Italy, Switzerland and some other civil law countries, the law with respect to revocability is different from the common law rules on the subject. In these civil law

11. See, e.g., Jerome Hall, Comparative Law and Social Theory 5 (1963) ("Presumably, comparative legal research implies that there is important knowledge to be acquired which cannot be had in any other way.").
12. Principles, supra note 7, art. 2.1. For a discussion of the formation of contracts without a process of offer and acceptance, see 1 Arthur L. Corbin, Corbin on Contracts § 1.12 (Joseph M. Perillo ed., rev. ed. 1993).
14. The word "apparently" is used because there is a dispute among CISG experts as to whether the requirement of a price term in Article 14 of CISG is satisfied by Article 55, which imposes a term based on "the price generally charged" in the event "a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price." CISG, supra note 5, art. 55. There are those who think that this provision bootstraps Article 14. G. Eorsi, in C.M. Bianca & M.J. Bonnell, Commentary on the International Sales Law 132, 141-44 (1987). There are those who think that Articles 14 and 55 contradict each other. Fritz Enderlein & Dietrich Maskow, International Sales Law 85 (1992). The opinion has also been expressed that the price question is a question of validity governed by domestic law. Honnold, supra note 6, §§ 137.4-8. It has, however, been contended that Article 14(1) contains its own validity term to the effect that a price term is indispensable. The drafting history of Article 14 supports this last view. See Hartnell, supra note 8, at 66-69.
countries, an offeror is held to the promise to keep the offer open; the power of acceptance created by an offer cannot be revoked during the period that the offeror has said it will remain open.\(^1\) Even if no time at all has been stated, under these legal systems the offer when made is not revocable for a reasonable time. CISG provides in Article 16 that an offeror cannot revoke "if [the offer] indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable." The stating of a fixed time may raise an inference of irrevocability during that period.\(^6\) The language of the Article is intentionally ambiguous, being based on compromise between advocates of different systems.\(^7\) Principles continues this ambiguity.\(^8\) The offeror, however, is always free to avoid such an ambiguity by employing clear language of revocability.

Traditionally, the common law has required that all offers be revocable unless a promise to the contrary is supported by consideration, or formerly (and still in some jurisdictions) a seal. Today, however, for the sale of goods, the U.C.C. section 2-205 provides:

An offer by a merchant to buy or sell goods in a signed writing which gives assurance that it will be held open needs no consideration to be irrevocable for a reasonable time or during a stated time but in no event for a time exceeding three months; but such term on a form supplied by the offeree must be separately signed by the offeror.\(^9\)

New York has a similar statute, dating before the adoption of the U.C.C., that is not limited to "merchants." Similarly, the UNIDROIT provision applies to commercial transactions generally and not merely to goods. There is thus convergence between a common law statute and a United Nations Convention to which the United States is a party and also with Principles. Yet, the provisions differ primarily as to their formal requirements and as to the nature of the language that will create irrevocability.

On the question of the effective moment of an acceptance when the parties' communications are not contemporaneous, CISG and Principles, supra note 7, art. 2.4(2)(a).

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\(^1\) Formation of Contracts, supra note 9, at 109; see also W.J. Wagner, Some Problems of Revocation and Termination of Offers, 38 Notre Dame Law. 138, 138 (1962) ("In civil law systems, as a rule, offers are firm as a matter of law, or, if not, they may be made irrevocable easily by a mere declaration by the offeror. In the common law, the requirement of consideration renders such an approach impossible.").

\(^6\) Enderlein and Maskow, both civil law scholars, agree. "In interpreting the intention of a party ... the origin of the parties is also to be taken into consideration. If both come from the Anglo-American legal order then, in the case of the mere statement of a time limit for acceptance, a court ... would come to the conclusion that the offer is not irrevocable." Enderlein & Maskow, supra note 14, at 90.

\(^7\) See Honnold, supra note 6, ¶¶ 143-2; Eorsi, in Bianca & Bonell, supra note 14, at 157-58.

\(^8\) Principles, supra note 7, art. 2.4(2)(a).

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_pleds_ take a position contrary to the traditional common law mailbox rule. The interrelationship among the three rules needs to be examined. Under CISG and _Principles_, an offer becomes irrevocable when an acceptance is dispatched, but the acceptance is effective only when and if it reaches the offeror. Article 22 of the Convention and Article 2.10 of _Principles_ both provide that: "An acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective." These provisions represent a series of compromises between common law and civil law notions.

As stated above, in many civil law countries, offers are generally irrevocable for a stated or reasonable time. This rule favoring the offeree contrasts with the common law's general pro-offeror rule permitting revocation of offers. To balance the common law's bias toward offerors on the issue of revocation, the common law developed the mailbox rule, which shortens the period in which an offer may be revoked. To balance the civil law's bias toward offerees on the issue of revocability, the civil law developed a rule favoring the offeror on the question of when an acceptance takes effect. The Convention approximates the common law view on the question of revocability and the civil law view on the question of the time of acceptance.

Professor Murray has constructed a worst-case scenario pursuant to which these CISG (and now also _Principles_) rules can be manipulated for speculation. Under this scenario the offeree may dispatch an acceptance by mail, thus making the offer irrevocable—if it was not irrevocable to start with. The offeree can later overtake the letter of acceptance with a withdrawal. During this period the offeree can speculate without risk. This is doubtless true; but in today's world, with its deteriorating postal systems, and its increasingly sophisticated means of electronic communication, it is seldom that offers are made in speculative matters by mail. Furthermore, among the factors that go into determining whether an offer has been duly accepted within a reasonable time is the rapidity of the means of communication used by the offeror. It may also be noted that under the rules of the Re-statement (Second) of Contracts there is a similar ability to speculate with irrevocable offers. It is true, however, that under CISG and _Principles_ there is an expansion of the grounds for irrevocability and therefore an expansion of situations in which the offeree can speculate without risk.

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20. CISG, _supra_ note 5, art. 16(1); _Principles_, _supra_ note 7, art. 2.4(1).
21. CISG, _supra_ note 5, art. 18(2); _Principles_, _supra_ note 7, art. 2.6(2). This provision, of course, does not affect acceptances that are properly made by performance rather than by promise. CISG, _supra_ note 5, art. 18(3); _Principles_, _supra_ note 7, art. 2.6(3).
22. See Honnold, _supra_ note 6, ¶¶ 157-63.
23. _Principles_, _supra_ note 7, art. 2.7.
24. Restatement (Second) of Contracts § 63(2) & cmt. f (1979).
III. Good Faith

Speculation with offers is, as Professor Murray notes, frowned on by the Restatement (Second) because it is a manifestation of bad faith.25 One of the improvements in Principles over CISG rules is Article 1.7, which imposes on the contracting parties a non-derogable duty to "act in accordance with good faith and fair dealing in international trade."26 Attempts to mandate such an obligation in CISG were unsuccessful, although a vague formulation was adopted. CISG provides that "[i]n the interpretation of this Convention, regard has to be had to . . . the observance of good faith in international trade."27 This provision carefully avoids saying that an obligation of good faith and fair dealing exists in every contract. Rather, the Convention must be interpreted in the light of a standard of good faith. Principles requires the contracting parties to act in good faith. Whether the two formulations are substantively different is a matter about which scholars can reasonably disagree.28

The civil law concept of culpa in contrahendo finds its way into the Convention.29 Thus, the parties must act in good faith in the course of their negotiations.30 Although the concept is not part of the common law, American courts frequently replicate results similar to those available under the civil law through the utilization of concepts such as fraudulent non-disclosure, equitable estoppel and promissory estoppel. The time is ripe for a thorough reexamination of the common law of the United States in the light of this doctrine and its acceptance as a principle of international commercial contracts.

Related to the obligation to negotiate in good faith is the obligation to respect the confidentiality of information given during the course of negotiations. Not all information is deemed confidential; it is confidential if the party revealing the information requests confidentiality

25. Murray, supra note 13, at 882 (citing Restatement (Second) of Contracts § 41 (1979) ("particularly ill. 8")). The obligation of good faith and fair dealing is more broadly stated in § 205 of the Restatement (Second).
26. Illustration 1 to Principles Article 1.7 applies the obligation of good faith in an offer and acceptance context. The illustration could also have been resolved in the same way by application of Article 2.8, which extends deadlines falling on a non-business day to the next business day.
27. CISG, supra note 5, art. 7(1).
28. One commentary expresses the opinion that there is no distinction between utilizing a standard of good faith in interpreting the Convention and in administering the contract. "Observance of the principle of good faith means to display such conduct as is normal among businessmen." Enderlein & Maskow, supra note 14, at 56.
29. The classic English language article on the subject is Friedrich Kessler & Edith Fine, Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study, 77 Harv. L. Rev. 401 (1964). The concept has been invoked in American scholarly writing with some frequency. Fifteen documents in Westlaw's JLR database make reference to it in the 1990s. The most thorough of these discussions is Nicola W. Palmieri, Good Faith Disclosures Required During Precontractual Negotiations, 24 Seton Hall L. Rev. 70, 201-13 (1993).
30. Principles, supra note 7, art. 2.15.
or where circumstances indicate that confidentiality is required by principles of good faith and fair dealing. Disclosure of such information (or its appropriation) is forbidden and can result in an action for damages or restitution. American case law in purely domestic cases is sparse on this question, but one of Justice Traynor's superb opinions supports the UNIDROIT Principle.

IV. BATTLE OF THE FORMS

The "battle of the forms" receives innovative and generally sound treatment in Principles. What the U.C.C. deals with in one section, the newer document addresses in three sections. The first deals with additional or different terms in a "custom-made" acceptance, and the second governs the use of a pre-printed standard form as an acceptance of the other party's standard form. The third deals with written confirmations. The custom-made acceptance receives basically the same treatment as in CISG. The battle of the forms, however, is solved by a "knock-out" principle. A term on a printed form will be part of the contract only to the extent that both party's forms agree to the substance of the term. Either party can, in advance, or, without undue delay, after the exchange of forms, declare to the other party that it does not intend to be bound by a contract formed under the knock-out rule. The commentary indicates that the inclusion of such a declaration in a standard-form offer or acceptance would not ordinarily be a sufficient declaration of intent not to be bound. If a written confirmation of a contract previously made is sent by one party to the other, an additional or different term becomes part of the

31. Id. art. 2.16.
32. Ward v. Taggart, 336 P.2d 534, 538 (Cal. 1959) (In Bank) (allowing quasi-contractual recovery for appropriation of an opportunity). But see Cronin v. National Shawmut Bank, 27 N.E.2d 717, 721-22 (Mass. 1940) (allowing no recovery for the value of work product in formulating an offer, the ideas for which the offeree gave to another for appropriation; however, the offer was probably not made in confidence).
33. Principles, supra note 7, art. 2.11. There is precedent for treating tailor-made contractual terms differently from standardized terms propounded by one party. For example, Article 3(1) of the European Community Directive on Unfair Contract Terms provides: "A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract, to the detriment of the consumer." EEC Directive 93/13, art. 3(1), 1993 O.J. 29; Meryll Dean, Legislation: Unfair Contract Terms: The European Approach, 56 Mod. L. Rev. 581, 583-84 (1993); see also infra text accompanying notes 39-47.
34. Principles, supra note 7, art. 2.22.
35. Id. art. 2.12.
36. Unlike CISG, the Restatement (Second), and the U.C.C., Principles is gender neutral. Also, where the customary spelling of words differs in the United Kingdom and the United States, Principles uses the spelling of the Queen's English. The only official text is in English.
37. Principles, supra note 7, art. 2.22 cmt. 3 & illus. 2.
contract unless it materially alters the contract or the recipient of the confirmation objects to the term.\textsuperscript{38}

A task force in the United States is working on a revision of Article 2 of the U.C.C. Drafts of a revised Section 2-207 have been circulated in the legal community.\textsuperscript{39} The CISG solution has found no support and should not be supported.\textsuperscript{40}

The \textit{Principles} solution, however, deserves serious consideration. It has its weaknesses, but the bold stroke of differentiating a negotiated text from a standard text should be replicated in the U.C.C. The bulk of the case law dealing with the present text of Section 2-207 deals with standard forms. The exceptional cases where a tailored acceptance implicates U.C.C. section 2-207 ought to have separate treatment because they involve traditional problems of the manifestation of assent by negotiation, that is, by expressions of intention.\textsuperscript{41}

There is a second and more profound rationale, however, for separate treatment. The "battle of the forms" does not deal with negotiation but with strategic bombardment. The swapping of conflicting forms cannot be regarded as expressions of intention in the traditional sense. Their analysis should be separated from the framework of offer and acceptance because the concepts within that framework have proved utterly incapable of providing acceptable solutions to the problems created by the battle of the forms. The result under the U.C.C. has been chaos.\textsuperscript{42} Professor Gilmore aptly described the provision as "abominable," a "complete disaster," and a "miserable, bungled patched-up-job."\textsuperscript{43} The circulated draft that has been preferred by the Drafting Committee to revise Article 2 of the U.C.C. is a vast

\begin{itemize}
\item \textsuperscript{38} \textit{Id.} art. 2.13.
\item \textsuperscript{39} See Symposium, \textit{Ending the "Battle of the Forms": A Symposium on the Revision of Section 2-207 of the Uniform Commercial Code}, 49 Bus. Law. 1019-80 (1994).
\item \textsuperscript{40} Under CISG, a purported acceptance that contains non-material variations from the offer is an acceptance unless the offeror objects. If the offeror objects, no contract is formed. CISG, supra note 5, art. 19(2). As defined in Article 19(3) of CISG, almost all conceivable variations are material.
\end{itemize}

The CISG provision was rightly criticized as inadequate by Professor Murray. Murray, supra note 13, § 152. His criticism, however, was based on the inadequacy of the provision as applied to the battle of the forms. For more extended criticism, see Christine Moccia, Note, \textit{The United Nations Convention on Contracts for the International Sale of Goods and the "Battle of the Forms"}, 13 Fordham Int'l L.J. 649 (1989-90).

Although the rule in \textit{Principles} is basically the same as Article 19 of CISG, there is a slight language change in subdivision 2, and subdivision 3 has been reduced to commentary and somewhat modified. Principles, supra note 7, art. 2.11.

\begin{itemize}
\item \textsuperscript{42} See John E. Murray, Jr., \textit{The Chaos of the "Battle of the Forms": Solutions}, 39 Vand. L. Rev. 1307, 1309 (1986).
\item \textsuperscript{43} Letter from Professor Grant Gilmore to Professor Robert S. Summers (September 10, 1980), \textit{in} Richard E. Speidel et al., \textit{Sales: Teaching Materials} 93-94 (1987).
\end{itemize}
improvement, but needs more work. A major flaw in the current draft is that it fails to deal separately with a negotiated series of specially crafted written communications. Another is that it does not give sufficient protection to an offeror who does not want to contract except on its own terms. *Principles* takes these two issues into account.

UNIDROIT took precisely the bold step that was necessary by separating its provision on the battle of the forms from its rules governing offer and acceptance and inserted its solution as the last of four Articles dealing with standard forms. The first of these is a provision defining what is meant by the words “standard terms” and providing that, in general, “standard terms,” whether on a printed form or incorporated by reference, binding on the parties. The second of these provides that a “surprising” standard term is ineffective unless it is expressly accepted by the party adhering to the term. This in essence replicates one aspect of the U.C.C.’s approach to unconscionability that is designed for “the prevention of oppression and unfair surprise.” The other provision with respect to standard terms is the obvious rule that if there is a conflict between a standard term and an individually agreed term the latter prevails.

V. Writing Requirements and Parol Evidence

As is the case under CISG, there is no statute of frauds or parol evidence rule in *Principles*. The parties, however, are free to adopt a merger clause and to stipulate that oral modifications or rescissions are prohibited; the latter stipulation is the equivalent of a privately

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In *Dorton v. Collins & Aikman Corp.*, 453 F.2d 1161, 1165 (6th Cir. 1972), the court said:

> In reviewing this determination by the District Court, we are aware of the problems which courts have had in interpreting Section 2-207. This section of the UCC has been described as a “murky bit of prose,” *Southwest Engineering Co. v. Martin Tractor Co.*, 205 Kan. 684, 694, 473 P.2d 18, 25 (1970), as “not too happily drafted,” *Roto-Lith Ltd. v. F.P. Bartlett & Co.*, 297 F.2d 497, 500 (1st Cir. 1962), and as “one of the most important, subtle, and difficult in the entire Code, and well it may be said that the product as it finally reads is not altogether satisfactory.” *Duesenberg & King, Sales and Bulk Transfers under the Uniform Commercial Code*, (Vol 3, *Bender’s Uniform Commercial Code Service*) § 3.03, at 3-12 (1969).

44. *See Symposium, supra* note 39, at 1019-80.
45. *Principles, supra* note 7, art. 2.19-22.
46. *Id. art. 2.19.*
47. *Id. art. 2.20.*
49. *Principles, supra* note 7, art. 2.21. *Accord Restatement (Second) of Contracts* § 203(d) & cmt. f (1979) (stating the principle that negotiated terms trump standardized terms).
50. *Principles, supra* note 7, art. 1.2.
51. *Id. art. 2.17.*
52. *Id. art. 3.18.*
enacted statute of frauds. In the course of negotiations either party may make it clear to the other that it does not intend to be bound until a final writing is prepared and signed. The party's expression to that effect will be honored. As an apparent exception to the general rule of contractual freedom adopted by *Principles*, a merger clause cannot effectively bar parol evidence for the purpose of interpreting a writing.

**VI. Validity**

While CISG states that it is not concerned with the validity of contracts, chapter 3 of *Principles* is entitled "Validity." It, however, disclaims any coverage of capacity of parties, authority of agents, or public policy. These are left to domestic law. It expressly provides, however, that neither consideration nor *causa* are required for the valid formation of a contract.

**A. Existing Impossibility**

It has been the rule in some civil law systems and a sometime dictum in common law cases and literature that if an agreement is impossible to perform at the outset, and this fact is unknown to both parties, the agreement is void. These statements are usually made in a context where goods have perished or never existed. This rule is discarded along with another obsolete rule that one cannot contract to

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53. Id. arts. 1.1, 1.5.
54. See the last sentence of *Principles* Article 2.17 and comment 3 to Article 4.3.
55. CISG, supra note 5, art. 4(a). This statement can be accepted only if the term "validity" is given a narrow construction. In some sense of the word, topics such as the timely acceptance of an offer and definiteness of terms are concerned with validity. See also supra note 14.
56. Principles, supra note 7, art. 3.1 & cmt.
57. Id. art. 3.3. Article 3.3 uses the French term *cause* rather than the Latin term *causa*.
58. It is enshrined in Restatement (Second) of Contracts § 266 (1979). The citations in the reporter's notes thereto mostly involve cases decided on other grounds, such as mutual mistake or supervening impossibility.
59. See Jan Z. Krasnowiecki, *Sale of Non-Existent Goods: A Problem in the Theory of Contracts*, 34 Notre Dame Law. 358, 358 (1959); Barry Nicholas, *Rules and Terms—Civil Law and Common Law*, 48 Tul. L. Rev. 946, 966-72 (1974). The common law cases usually find that one party or the other, usually the seller, has impliedly warranted the existence of the goods or other subject matter that is impossible to deliver or that there has been negligence by the promisor. See, e.g., *In re Zellmer's Estate*, 82 N.W.2d 891 (Wis. 1957) (promise to maintain a life insurance policy that had already lapsed); McRae v. Commonwealth Disposals Comm'n, 84 C.L.R. 377, 386 (Austl. 1951) (sale of nonexistent ship).
60. If, however, the general criteria for avoidance for mistake are present, the contract may be avoided on the basis of a mistaken belief that the goods are available. Principles, *supra* note 7, art. 3.5. cmt. 2, illus. 1.
sell that which one does not own— a rule that had made short-selling impossible.  

B. Mutual Mistake

The rule governing mutual mistake is, in substance, not unlike the rule generally stated in the United States. In addition, a unilateral mistake of a serious kind is grounds for avoidance if the other party "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." A serious unilateral mistake is also grounds for avoidance if the other party, however innocent, had not yet acted in reliance on the contract. This is in accord with recent rulings in the United States. Because the ability to avoid a contract for mistake can be the basis for grave attacks on the stability of contracts, Principles provides safeguards against the abuse of the doctrine. Mistaken parties are responsible for their own negligence and are responsible for risks generally assumed to be taken by contracting parties. An interesting provision states that avoidance for mistake will not be allowed where the party under the mistake has another remedy (e.g., breach of warranty). There is no rule concerning the reformation of a writing for mutual mistake. There is no need for such a rule in view of the free admissibility of parol evidence to establish the intended meaning of a writing.  

C. Fraud and Duress

Principles paints with a broad brush. Fraud is dealt with in one page. Duress, under the heading of "Threat," is given a few more lines than fraud. Aside from their brevity, the themes and solutions are familiar to common law lawyers. There is one startling devia-

61. Id. art. 3.3.
63. Principles, supra note 7, art. 3.5(1).
64. Id. art. 3.5(1)(a).
65. Id.
66. Cf. John D. Calamari & Joseph M. Perillo, The Law of Contracts § 9-27 (3d ed. 1987) ("Today avoidance is generally allowed if two conditions concur: 1) enforcement of the contract against the mistaken party would be oppressive, or, at least, result in an unconscionably unequal exchange of values and 2) rescission would impose no substantial hardship on the other.").
68. Id. art. 3.7.
69. See supra text accompanying note 48.
70. Principles, supra note 7, art. 3.8.
71. Id. art. 3.9. However, there are a number of other provisions (Articles 3.14-20) dealing with all grounds of avoidance for initial invalidity and providing for such matters as notice, ratification ("confirmation") and damages.
72. Compare id. art. 3.9 illus. 1 (stating that a contract may be avoided if an unjustified threat is utilized to obtain assent) with Capps v. Georgia Pac. Corp., 453 P.2d
tion. A threat by the members of a professional basketball team to strike at a very vulnerable point in the season is given as an illustration of duress.\textsuperscript{73} When reading this document, one needs constantly to remind oneself that \textit{Principles} is subject to the mandatory laws of the country whose law governs the transaction; consequently, the validity of the illustration in any given country is dependent on whether the strike threat is protected under the applicable labor law.

D. "Gross Disparity," Unconscionability and Lesion

One of the more interesting \textit{Principles} provisions is entitled "Gross Disparity." Here civil law concepts of \textit{lesion} merge with the common law notion of unconscionability. A somewhat oversimplified overview of the civil law concept is that an excessive or inadequate price is deemed a \textit{lesion} if the disparity between price and value is fifty percent or more. This disparity is grounds for avoiding the contract whether or not the other party's conduct can be regarded as predatory.\textsuperscript{74} Civil codes vary, and the French and Louisiana Codes restrict the doctrine to contracts dealing with immoveables.\textsuperscript{75} Unconscionability is a more variegated concept, but one of its core applications is the nonenforcement of a contract that is the product of some degree of exploitation by one party resulting in overall imbalance of the exchange.

Under \textit{Principles}, a party may obtain avoidance or reformation ("adaptation") of any contract or term giving the other party an excessive advantage. The court must take into account whether the other party took "unfair advantage" of the moving party's vulnerability.\textsuperscript{76}

Exemption clauses are not dealt with under the heading of validity, but are dealt with under "performance." We are used to thinking about exemption clauses in terms of their \textit{per se} invalidity in some circumstances. Under \textit{Principles}, exemptions are not invalid and

\textsuperscript{73} Principles, \textit{supra} note 7, art. 3.9 cmt. 3, illus. 2.

\textsuperscript{74} This is not true of all civil law states. For example, Article 17 of the Mexican Civil Code provides:

When any person taking advantage of the supreme ignorance, notorious inexperience or extreme poverty of another, obtains an excessive profit which is evidently disproportionate to the obligations assumed by him, the person damaged has the right to demand the rescission of the contract, and if this be impossible, an equitable reduction in his obligation.

Civil Code [C.C.D.F.] art. 17 (Mex.).


\textsuperscript{76} Principles, \textit{supra} note 7, art. 3.10(1)(b).
there is no general principle about the conscionability of terms of the agreement, except for the provisions on hardship and good faith. Article 7.1.6 of Principles is unlike U.C.C. section 2-302 in that the question of whether the exemption clause will be sustained is one of unconscionability of application rather than a question of invalidity. Two different kinds of clauses are encompassed in the concept: a clause that limits liability and a clause that "permits one party to render performance substantially different from what the other party reasonably expected." Official comments to the provision indicate that contract clauses that stipulate fixed sums, ceilings, percentage of performance, retention of deposits and buy-out clauses are means of limiting liability and therefore governed by the provision. A clause that permits a party to substitute a substantially different performance is illustrated by a case where a tour operator promises luxury hotels but reserves the right to substitute accommodations if the circumstances require. Such clauses are not made invalid, but "may not be invoked" if it would be grossly unfair to do so. This provision, in American perspective, provides a rule against the unconscionable application of a clause as is found in Section 2-309 of the U.C.C. on the question of the termination of sales contracts, as opposed to a clause that is unconscionable at the outset of a contract as contemplated by U.C.C. section 2-302.

E. Non-Derogability of Invalidity Principles

Although most of the provisions of Principles are derogable, those concerning fraud, threat and gross disparity are not. It would be a violation of the doctrine of good faith to attempt to disclaim them by contract.

VII. Interpretation of Contracts

CISG provisions concerning the interpretation of contracts are lean. Principles contains a more expansive chapter called "Interpretation," which in a general way is in accord with CISG. The most notable departure is the rule that the primary rule of interpretation is that a contract "shall be interpreted according to the common intention of the parties." In contrast, CISG has no provision with respect to interpretation of "a contract." Its provisions govern statements made by "a party." The common intention of the parties is also adopted by

77. Id. art. 7.1.6.
78. Id. art. 7.1.6 cmts. 2, 3.
79. Id. art. 7.1.6 cmt. 2, illus. 1.
80. Id. art. 7.1.6.
82. Id. § 2-302.
83. Principles, supra note 7, art. 3.19 cmt.
84. Id. art. 4.1.
the Restatement (Second) of Contracts as its first rule of interpretation.\textsuperscript{85} The Restatement rule, however, is imbedded in a tradition that severely restricts testimony by the parties of their subjective intentions. Principles, however, disclaims any limitation on evidence of the parties' intentions.\textsuperscript{86} Although in many civil law States parties are not competent to testify as witnesses, their unsworn statements may be elicited and evaluated as evidence.\textsuperscript{87} Consequently, in the actual decision of a dispute, significantly different results could be obtained under Principles from those obtainable by utilization of the Restatement rules.

If the common intention cannot be determined, Principles slips into the reasonableness mode familiar to us.\textsuperscript{88} As is the case with CISG and the U.C.C., course of dealing, course of performance and usages are relevant circumstances to be taken into account in the interpretation of contracts and statements of the parties.\textsuperscript{89} In addition, a provision on interpretation makes explicit once again that the interpretation process must take into account "the preliminary negotiations between the parties."\textsuperscript{90} As indicated above, the parties cannot derogate from this rule by agreeing in a merger clause to bar such evidence.\textsuperscript{91}

VIII. Construction of Contracts

Legal theorists have long distinguished between the interpretation of language (meaning) and its legal effect (construction).\textsuperscript{92} While the existence of such a dichotomy is intellectually coherent and convincing, its consistent application to real-world contracts appears to be impossible. A similar distinction is made in Principles. Chapter 4 deals with "Interpretation" and chapter 5 deals with "Content." It is difficult, and maybe impossible, to discern how the division was crafted. Omitted terms are regulated in chapter 4\textsuperscript{93} and implied terms in chapter 5.\textsuperscript{94} Yet, all of the fact patterns used to illustrate implied terms involve, in my analysis, omitted terms.\textsuperscript{95} Other provisions in chapter 5 clearly deal with imposed terms such as a duty to cooperate reason-

\begin{footnotesize}
\textsuperscript{85}. Restatement (Second) of Contracts § 201(1) & illus. 1, 3 (1979).
\textsuperscript{86}. See supra text accompanying note 48.
\textsuperscript{87}. Schlesinger, supra note 4, at 428-31.
\textsuperscript{88}. Principles, supra note 7, arts. 4.1(2), 4.2(2); see also id. arts. 4.4-.8 (providing other rules of interpretation and gap-filling).
\textsuperscript{89}. Id. art. 4.3. (distinguishing between usages and trade terms. The former are applicable by virtue of Article 1.8, while trade terms have, according to the official comment, broader relevance.).
\textsuperscript{90}. Id. art. 4.3(a).
\textsuperscript{91}. See supra text accompanying note 52.
\textsuperscript{92}. See e.g., 3 Arthur L. Corbin, Corbin on Contracts § 534 (1960) (discussing the subject extensively).
\textsuperscript{93}. Principles, supra note 7, art. 4.8.
\textsuperscript{94}. Id. arts. 5.1., 5.2.
\textsuperscript{95}. Id. art. 5.2 illus. 1-3.
\end{footnotesize}
ably with the other contracting party, the imposition of a warranty of reasonable quality of every performance (akin to the common law notion of workmanlike performance), the method of filling an open price term (much as in U.C.C. section 2-305), and the giving of reasonable notice of termination of a contract of indefinite duration (much as required by U.C.C. section 2-309).

Two provisions of chapter 5 deal with the distinction made by the French between obligation de résultat and obligation de moyens—that is, between an obligation to achieve a given result and an obligation use reasonable (or best) efforts to achieve a given result. This is a distinction to which the common law, perhaps, has paid insufficient attention; but this lack of attention is understandable. The common law regards the question as a matter of interpretation of the contract. French law regards the two types of contract as distinct in nature. Because the French law of contract looks to fault as an essential element of breach, in the first kind of obligation, the promisor has the burden of proving the non-existence of fault; in the second type the burden of proof of breach is on the promisee. Under Principles, however, all liability (subject only to force majeure) is no-fault liability. Therefore the distinction has lost its juridical significance, and devotion of approximately six pages in a slim volume of 215 substantive pages seems to pay disproportionate attention to the topic of whether a contract obligation is to attain a specific result or to attempt to attain that result.

96. Id. art. 5.3.
97. Id. art. 5.6.
98. Id. art. 5.7. As indicated above, a price term is not an essential term under Principles. See supra note 14 and accompanying text.
99. Principles, supra note 7, art. 5.8.
102. See, e.g., Tamarac Dev. Co. v. Delamater, Freund & Assoc., 675 P.2d 361, 365 (Kan. 1984) ("The work performed by architects and engineers is an exact science; that performed by doctors and lawyers is not. A person who contracts with an architect or engineer for a building of a certain size and elevation has a right to expect an exact result.").
103. The common law regards the distinction as important for different reasons than the French. Where the obligation is not to achieve a specific result, but to exercise a standard of due care, the question often raised is whether a breach is a contractual breach or a tort. See Davis, supra note 97, at 1021-25 (focusing on construction cases). Physician cases are discussed in Thomas M. Woodbury, Note, Physicians and Surgeons—Sullivan v. O’Connor: A Liberal View of the Contractual Liability of Physicians and Surgeons, 54 N.C. L. Rev. 885, 887 (1976).
104. Nicholas, supra note 96, at 53-54.
105. Principles, supra note 7, art. 7.1.1 & cmt. Besides force majeure, the comment lists two other kinds of justified nonperformance: interference by the other party and justified withholding of performance (because of the nonoccurrence of a constructive condition).
IX. Performance and Breach

One of the more interesting chapters of Principles is entitled "Performance." For one thing, its content is far more wide-ranging than comparable chapters in common law writings, where many of the same topics are considered in other chapters under headings such as "Indefiniteness" and "Conditions." From another perspective, it contains detailed provisions with respect to payment in an international context that are not commonly found in works on domestic law. This kind of provision should usefully fill lacunae in our law of contracts. It also contains a subchapter on "Hardship" that appears to introduce radical deviations from the common law.

A. Payment

Unless otherwise agreed, payment is due at the obligor's place of business. Payment may be made in any manner customary at the place payment is due; payment made by check or other instrument is conditioned on its being honored. In international trade, payment is frequently made by transfer of funds from the obligor's financial institution to the obligee's account. Subject to contrary instructions from the obligee, payment may be made to any account of the obligee which the latter has made known to the obligor. When the transfer to such an account becomes effective, the obligor is discharged. The official commentary details the confusion that has surrounded the issue of whether and when the obligor is discharged in the event the obligor's account is debited but the funds do not reach the obligee. Here the obligee's bank is treated as the obligee's agent.

B. Currency

The fluctuation of currencies and the non-convertibility of certain currencies create numerous problems in international trade. It is not uncommon for parties in two foreign States to stipulate a price in United States dollars or Swiss francs or other internationally respected currency. The dollar or franc may be intended as the currency of account rather than as the currency in which actual payment is intended to be made. Unless the contract provides otherwise, even if the price is stated in another currency, it may be made in the currency of the State where payment is made, provided that the currency

106. See, e.g., id. art. 6.1.1 (time of performance); id. art. 6.1.2 (performance at one time or in installments); id. art. 6.1.6 (place of performance); id. art. 6.1.11 (costs of performance). These provisions are consistent with the common law in the United States.
107. Id. art. 6.1.4 (order of performance).
108. Id. art. 6.1.6.
109. Id. art. 6.1.7.
110. Id. art. 6.1.8.
111. Id. art. 6.1.8 cmt.2.
is convertible and the parties have not otherwise agreed.\textsuperscript{112} If it is not convertible, payment must be made in the currency stated in the contract.\textsuperscript{113} If this should prove impossible because of exchange regulations or other \textit{force majeure}, payment must be made in the currency of the State where payment is made.\textsuperscript{114} If payment is not timely, the obligee has the choice between the rate of exchange at the time payment was due and the rate at the time of payment.\textsuperscript{115}

C. \textit{Costs of Performance}

Unless otherwise agreed, an agreed price is inclusive of all the creditor's costs.\textsuperscript{116} If a price for services is agreed upon, the travel expenses of the party rendering the services are included.\textsuperscript{117} Of course, contrary agreement is possible.

D. \textit{Imputation of Payment}

The Performance chapter has a provision on the imputation of payment. Within limits, the obligee, when making payment, may dictate to which of several obligations the payment must be allocated.\textsuperscript{118} The limits are that the obligor may in disregard of these instructions, apply the payment first to expenses, presumably the costs of collection such as attorneys' fees, and secondly to interest rather than principal. In the absence of instructions from the obligee, payment is imputed in accordance with a hierarchy of four criteria; if none of these is applicable, the allocation is made proportionally to all outstanding debts that the obligee has with the obligor. In general, the imputed allocations strike this observer as sound.

X. \textit{Force Majeure and Hardship}

The modern common law has developed the concepts of impossibility and impracticability. The dichotomy in \textit{Principles} between \textit{force majeure} and hardship does not replicate the common law division; rather, it is based on civil law notions. The obtaining or denial of licenses and permits is singled out for separate treatment.

A. \textit{Licenses and Permits}

Four Articles of \textit{Principles} and extensive commentary is devoted to the obtaining of governmental permissions—certainly an important

\begin{enumerate}
\item 112. \textit{Id.} art. 6.1.9(1).
\item 113. \textit{Id.}
\item 114. \textit{Id.} art. 6.1.9(2).
\item 115. \textit{Id.} art. 6.1.9(4).
\item 116. \textit{Id.} art. 6.1.11.
\item 117. \textit{Id.} art. 6.1.11 illus.
\item 118. \textit{Id.} art. 6.1.12. A comparable provision exists for non-monetary obligations. \textit{Id.} art. 6.1.13.
\end{enumerate}
topic in domestic trade and a more complex one in international trade. Permits may be needed from more than one State; there may be licensing requirements of which one or both parties may be unaware. The burden of applying for any necessary governmental approval is cast on the party who has its place of business in the State whose approval is required—only, however, if the other party has no place of business in the State.\textsuperscript{119} In any other case (i.e., when neither party has, or both parties have, a place of business in the State), the party whose performance requires permission must take the necessary measures.\textsuperscript{120} Where both parties' performances are subject to the same approval requirement,\textsuperscript{121} and neither or both parties have a place of business in the State, the provisions are silent on the question of who must apply for the necessary permission.

The party who has the duty to apply for the approval must exercise best efforts by applying without undue delay and, if reasonable, exercise available processes for appeal if the approval is not obtained.\textsuperscript{122} As elsewhere in Principles, there is an emphasis on communication. Unless the knowledge of the need for approval is generally accessible, the existence of the need for permission must be disclosed by the party whose duty it is to obtain it.\textsuperscript{123} Failure to disclose is a breach of the obligation of good faith inherent in all negotiations.\textsuperscript{124} Similarly, if the approval is granted or denied, the applicant must, without undue delay, notify the other party.\textsuperscript{125} Failure to notify constitutes a breach of contract.\textsuperscript{126}

What are the consequences of refusal of an approval that has been diligently sought? The text is not totally clear. One reading is that if the contract is subject to governmental approval, and approval is not granted, it is as though no contract ever came into being.\textsuperscript{127} This makes governmental approval similar to the often criticized common law concept of a condition precedent to the existence of a contract.\textsuperscript{128} If, however, the lack of approval makes the contract impossible to perform (e.g., denial of a building permit), the rights of the party are governed by the rules governing contractual breaches, including the defense of force majeure.\textsuperscript{129} If only one term of the contract fails to

\begin{itemize}
\item \textsuperscript{119} Id. art. 6.1.14(a).
\item \textsuperscript{120} Id. art. 6.1.14(b).
\item \textsuperscript{121} See, e.g., Oak Bee Corp. v. N.E. Blankman & Co., 551 N.Y.S.2d 559 (App. Div. 1990) (concluding that a preliminary subdivision approval is for the benefit of both parties).
\item \textsuperscript{122} Principles, supra note 7, art. 6.1.14 cmt. 4; see also id. art. 6.1.16 cmt. 1.
\item \textsuperscript{123} Id. art. 6.1.14 cmt. 2.
\item \textsuperscript{124} See supra notes 24-30 and accompanying text.
\item \textsuperscript{125} Principles, supra note 7, art. 6.1.15(2).
\item \textsuperscript{126} Id. art. 6.1.15 cmt. 5.
\item \textsuperscript{127} Id. art. 6.1.17(1).
\item \textsuperscript{128} See, e.g., 3 Arthur L. Corbin, Corbin on Contracts § 589 (1960) (discussing the subject at length).
\item \textsuperscript{129} Principles, supra note 7, art. 6.1.17 cmt. 2(b).
\end{itemize}
receive approval, the contract as a whole survives if it is reasonable to excise the offending term and regard the balance of the contract as a transaction the parties would have agreed to if they knew of the impediment.\textsuperscript{130}

B. Hardship and Impossibility

The provisions on "Hardship" contained in the chapter called "Performance"\textsuperscript{131} should be compared with the provision on "Force Majeure," contained in the chapter on "Non-Performance."\textsuperscript{132} The rule of force majeure is draconian and unforgiving. Under the rule, nothing short of total impossibility will excuse non-performance or partial non-performance. Impracticability will not suffice as an excuse. Rather, impracticability as well as hardship far short of impracticability must be tested under the "Hardship" articles.

Hardship alone never forgives non-performance. It instead compels renegotiation and authorizes courts to "adapt" (reform) the contract to take the hardship into account. "[A]n alteration amounting to 50\% or more of the cost or the value of the performance is likely to amount to a 'fundamental' alteration" justifying invocation of the doctrine.\textsuperscript{133} One illustration involves a ten-year contract for the sale of uranium at fixed prices in United States dollars payable in New York. The currency in the buyer's country declines to one percent of its value against the value that it had at the time of contracting. The buyer cannot invoke force majeure.\textsuperscript{134} Similarly, if the price is increased tenfold because some Texans have almost cornered the market, force majeure is not present.\textsuperscript{135} Nonetheless, the buyer may have redress under the hardship provisions. Renegotiation is compelled if "the equilibrium of the contract" is "fundamentally altered" by events that occur or become known after contracting, the events could not reasonably be taken into account, the events are not within the party's control and the risk was not assumed.\textsuperscript{136} Consequently, in the two illustrations just described a \textit{prima facie} claim of hardship is made out.\textsuperscript{137}

\begin{footnotes}
\item 130. \textit{Id.} art. 6.1.17 cmt. 2(a).
\item 131. \textit{Id.} arts. 6.2.1-.2.3.
\item 132. \textit{Id.} art. 7.1.7.
\item 133. \textit{Id.} art. 6.2.2 cmt. 2.
\item 134. \textit{Id.} art. 7.1.7 cmt. 1, illus. 1(1). This is not a draconian result if the buyer can pass the inflationary costs onto the ultimate consumer.
\item 135. \textit{Id.} illus. 1(3).
\item 136. \textit{Id.} art. 6.2.2.
\item 137. My conclusion regarding the currency collapse case is supported by illustration 3 to Article 6.2.2, where on similar facts hardship is said to exist. However, the currency collapse case in illustration 1(1) to Article 7.1.7 dealing with force majeure concludes that the parties have allocated the risk by the payment terms. The two illustrations seem to contradict each other on the question of what constitutes an assumed risk.
\end{footnotes}
Compelled renegotiation and judicial reformation of the bargain are not in the mainstream of the common law. One case of reforma-
138 tion and one case of compelled renegotiation have been the raw materials for serious scholarly urging of more of the same. In a well-argued article, Professor Speidel has concluded that when a long-
139 term supply contract is disrupted by changed conditions, "[a]t a mini-
140 mum, the advantaged party should have a legal duty to negotiate in good faith. At a maximum, he should have a legal duty to accept an ‘equitable’ adjustment proposed in good faith by the disadvantaged party." His conclusion approximates the law in countries such as Argentina, Germany and Italy, and the provisions of Principles.

Professor Spiedel’s solution does not receive a great deal of support from American case law or scholarly literature. One reason for the difference between the common law and the modern civil law approach is that the leading common law countries have not suffered from the unmanageable inflation that has ravaged much of the civil law world. However, American law should realize that international trade is different from domestic trade and the modern civil law solution formulated in Principles deserves support in international trade disputes. One reason is that sophisticated international trade agreements of long duration typically contain a renegotiation or other adaptation clause that provides flexibility to the relationship—so typical as to perhaps rise to the strength of a usage. The absence of such a clause may reflect that such a clause has been rejected by one

140. See Richard M. Buxbaum, Modification and Adaptation of Contracts: Ameri-
141 can Legal Developments, in Adaptation and Renegotiation of Contracts in Interna-
142 tional Trade and Finance 31 (Norbert Horn ed., 1985) [hereinafter Adaptation and Renegotiation]; Richard E. Speidel, Court-Imposed Price Adjustments Under Long-
144. Speidel, supra note 136, at 404-05.
142. See Haracio A. Grigera Naön, Adaptation of Contracts: An Argentine Sub-
143 stantive and Private International Law Outlook, in Adaptation and Renegotiation, supra note 136, at 55, 58. The author described the doctrine of imprévision stating that:

If an unforeseen and extraordinary change of circumstances takes place such that the performance of a party’s obligations becomes excessively burden-
143 some, such party may sue to obtain the contract’s termination. The other party thus sued may try to avoid such a termination by offering, at his ex-
144 pense, an adequate economic improvement of the obligations; however, it shall be up to the judge to finally decide the issue.

Id.
143. See Norbert Horn, Changes in Circumstances and the Revision of Contracts in Some European Laws and in International Law, in Adaptation and Renegotiation, supra note 136, at 15, 22-23.
144. See Ugo Draetta et al., Breach and Adaptation in International Contracts: An Introduction to Lex Mercatoria 170-214 (1992); Norbert Horn, Standard Clauses on Contract Adaptation in International Commerce, in Adaptation and Renegotiation, supra note 136, at 111.
or both parties, but is more likely to have been overlooked by unso-
phisticated parties or deliberately omitted by a sophisticated drafter.
In the last two cases, the court should consider the contracts as having
an omitted term and fill the gap with the help of *Principles*.

**XI. NON-PERFORMANCE**

"Non-performance" is defined as a failure to perform any obliga-
tions of the contract.\(^{145}\) This is consistent with common law thinking
and with the provisions of CISG, and departs in a major way from the
civil law of France which differentiates among various kinds of
breaches. Non-performance encompasses defective performance and
late performance. It is not a judgmental term, as the non-performance
may be excused because of prevention by the other party, failure of
constructive condition, or *force majeure*.

**A. Prevention and Cooperation**

The doctrine of hindrance or prevention is well established in the
common law.\(^{146}\) A party who has prevented the other party from per-
forming cannot then claim a remedy for breach. The non-perform-
ance is excused both at common law and under *Principles*.\(^{147}\) If the
hindrance merely impedes rather than prevents performance, the ex-
cuse is then prorated. No formula is given, but courts can be expected
to apply this principle to a variety of fact patterns. For example, if
part of the delay in completing a construction project is caused by the
owner's interference or non-performance, the builder's liability for
any delay damages is reduced to that extent.\(^{148}\)

Constructive conditions of cooperation are treated in an article enti-
tled "Withholding Performance."\(^{149}\) Where parties are to perform si-
multaneously, each party may withhold performance until tender of
performance by the other party. If one party is to perform first, the
other party may withhold performance until the first party has per-
formed. While the official comment indicates that these rules are
based on a civil law concept, they are familiar rules in American con-
tract law.\(^{150}\)

\(^{145}\) *Principles*, *supra* note 7, art. 7.1.1.

\(^{146}\) *See* Calamari & Perillo, *supra* note 64, § 11-28, at 486.

\(^{147}\) *Principles*, *supra* note 7, art. 7.1.2.

\(^{148}\) *Accord* Seubert Excavators, Inc. v. Eucon Corp., 871 P.2d 826, 831 (Idaho
1994) ("[A] general contractor cannot recover from its subcontractor for delay under
a liquidated damages clause where the general contractor contributed to the delay by
failing to perform a contractual duty, such as failing to provide adequate
equipment.").

\(^{149}\) *Id.* art. 7.1.3.

\(^{150}\) Restatement (Second) of Contracts § 237 (1979).
B. Cure

Like CISG, Principles adopts a policy of keeping the contract intact if at all feasible. It does this by its emphasis on cure, adoption of the Nachfrist procedure, and by placing limitations on the power of an aggrieved party to cancel the contract because of breach by the other. The cure provisions are similar to Articles 37 and 48 of CISG. A breaching party can promptly notify the other party of its intention to cure, specifying how and when the cure will be effective. If the offer to cure is appropriate, and the other party has no "legitimate interest" in refusing an offer to cure, the aggrieved party must accept the offer; failure to accept an appropriate offer of cure is a breach and bars all remedies. The notice to cure, if appropriate, suspends all remedies, including a notice of termination that is received before the notice of cure is sent—certainly a major deviation from the common law even as it has been liberalized in the U.C.C.. The aggrieved party, however, may withhold performance pending cure, and after cure can assert a right to damages to the extent it is not made whole by the cure.

C. Fundamental Breach

As is the case with CISG, an aggrieved party may terminate a contract for breach only if the breach is "fundamental," or if the breaching party fails to comply with a Nachfrist. This German word refers to a notice to the breaching party setting a deadline for performance. The notice will provide an additional period of time to perform upon expiration of which the aggrieved party may proceed with any of the remedial provisions available under Principles, including termination. The common law provides a similar approach; the major difference is the starting point; under Principles time is never of the essence unless the contract makes it so. At common law, the perfect tender rule for the sale of goods and the default rule as to loan agreements makes time of the essence as a matter of law, unless the parties stipulate to the contrary. But if, under the common law, time is not of the essence or timeliness has been waived, the aggrieved party can make time of the essence by sending a notice to the party in breach. During the additional period most remedies are suspended, but the

151. See infra part XII.C.
152. Principles, supra note 7, art. 7.1.4.
153. Id. cmt. 10.
154. Id. art. 7.1.5. If the allotted additional time is not reasonable the text states that "it shall be extended to a reasonable length." Id. The use of the passive voice is confusing. Obviously, the aggrieved party can extend the time for performance. The most obvious consequence is that if the aggrieved party does not extend it, and a trier of fact later determines that the period was not reasonable, the originally aggrieved party has now committed a fundamental breach.
aggrieved party may commence an action for damages. The common law has no name for this kind of notice. It should adopt Nachfrist into its legal language and make it more widely known. As at common law, although time is not of the essence, any delay is, generally, a breach for which damages are assessable.

XII. Remedies

The remedial articles of Principles are among its most important and detailed. Despite the sometimes clashing cultural and conceptual backgrounds of the drafters, the remedial provisions are realistic, rather than conceptual in formulation, and appear workable.

A. Specific Performance

Civil law theory has it that specific performance is the aggrieved party's entitlement. Conceptually, specific performance is not a remedy; rather, the aggrieved party is compelling performance and the court is an aide in the process of party-compulsion. Only if this is unavailable, or the aggrieved party elects not to pursue compelled performance, will the Civilian lawyer think in terms of remedies for non-performance.\(^\text{156}\) Even then, "during the pendency of an action seeking restitution or damages for non-performance, the obligor ordinarily may defeat such action by tendering performance, together with interest (or other damages for the delay) and costs."\(^\text{157}\) As a practical matter, if a substitute performance is available from the market, the rational actor will not pursue specific performance regardless of whether the actor is operating in a civil law or common law country. Principles recognizes this. In most respects it formulates a reasonable compromise between the common law and the civil law approaches to specific performance. If a debt has been created, the creditor is entitled to payment in the currency in which the debt is to be paid.\(^\text{158}\) This is consistent with common law practice, but not common law thinking, which, views specific performance as a remedy apart from judgments at law. The text of Principles goes further than debt collection in payment cases. Suppose a buyer is obligated to pay in advance for goods that are not specially manufactured to the buyer's specifications and the buyer fails to pay. No common law court would render judgment for payment of the price. Only a judgment for damages would be

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\(^{157}\) Schlesinger, supra note 4, at 667.

\(^{158}\) Principles, supra note 7, art. 7.2.1.
given. The commentary indicates that "[e]xceptionally," judgment for the price "may be excluded," and suggests that it may be a usage for the seller to resell to third parties. This is probably so, but in the United States, it is a usage in the shadow of the law as the seller is aware that the court will not grant a judgment for the price. In this provision Principles may have bent too far toward civil law theory.

The rest of the provisions on specific performance strike a good balance between common law and civil law. Specific performance is available unless performance is impossible in law or in fact, where it would be unreasonably burdensome or expensive, where performance is easily available from another source, where personal services of the breaching party would be required, or where performance is not sought within a reasonable time after the breach. Close examination of these exceptions shows that the proclaimed "general rule" of specific performance is so undercut by the exceptions that not much remains. The practical result is that the rules very much resemble the existing situation in the United States and in civil law countries. Unlike the rule in common law systems, however, the remedy is not discretionary. It thus differs from CISG, which allows the court to refrain from ordering specific performance if it would not do so under its own domestic law. While it is doubtful that a common law court would in the near future follow this UNIDROIT principle and loosen the habitual restrictions on the availability of specific performance, it should be noted that arbitrators are not under the same constraints and a good many international trade disputes are arbitrated. American courts have enforced arbitral awards of specific performance on facts that would not have resulted in such a decree in a court of equity and must enforce such awards if they are governed by the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards. Thus if an arbitral tribunal orders a party to cure a defect in a construction project, an American court would enforce that order.

159. Id. art. 7.2.1 cmt.
160. Id. art. 7.2.2.
161. See Nicholas, supra note 96, at 211. The author stated that:

From the point of view of the French lawyer the creditor's primary recourse is in principle to have the contract performed, whereas for the Common lawyer the primary remedy is damages. In practice, it is true . . . [that] the remedy of specific enforcement is less important than principle suggests, but the attitude of mind remains.

162. CISG, supra note 5, art. 28.
165. Principles, supra note 7, art. 7.2.3 (governing the ordering of the repair and replacement of defective performance on the same terms and criteria as govern other non-monetary obligations).
A party who has received a decree for specific performance of a non-monetary obligation is not bound by an election of remedies and may pursue any other remedy if performance does not take place within a reasonable time or within any period set by the decree. This change of remedial choice is possible whether or not the decree could be enforced by further proceedings.\footnote{166. Id. art. 7.2.5.}

The enforcement mechanism for specific performance is the "judicial penalty." It is a concept that appears to draw from the common law notion of civil contempt, the French \textit{astreinte},\footnote{167. For a discussion of the \textit{astreinte}, see Schlesinger, \textit{supra} note 4, at 669-71; Treitel, \textit{supra} note 152, at 59-63.} the German \textit{fine}\footnote{168. The French and German ways of compelling performance are discussed in Schlesinger, \textit{supra} note 4, at 667-71.} and comparable institutions in other countries.\footnote{169. Id.} According to \textit{Principles}, when the court orders performance it can also direct the breaching party to pay a penalty should the order not be obeyed. The penalty is to be paid to the party (French law) unless the mandatory law of the forum (German law) provides that it be paid to the State. The penalty is superimposed onto any damages caused by noncompliance with the decree.\footnote{170. While the remedy of specific performance is not discretionary, the imposition of a penalty is discretionary with the court.\textit{Principles} is silent on the question of whether other forms of coercion or other forms of producing specific performance are also permissible. For example, in the United States an order for the specific performance of the transfer of property can be carried out by appointing a court officer to execute a conveyance if the vendor is recalcitrant,\footnote{172. Silver v. Ladd, 74 U.S. (7 Wall.) 219, 228 (1868); Cooley v. Scarlett, 38 Ill. 317, 320 (Ill. 1865); Hollander v. Central Metal & Supply Co., 71 A. 442, 444 (Md. 1908); Calder v. Third Judicial Dist. Court, 273 P.2d 168, 169 (Utah 1954).} or the decree itself may transfer title to the property.\footnote{173. Goldsworthy v. Dobbins, 243 P.2d 883, 887 (Cal. Ct. App. 1952); 1130 President St. Corp. v. Bolton Realty Corp., 97 N.Y.S.2d 422, 424 (N.Y. Sup. Ct. 1950).} Similarly, "German law has developed a great variety of indirect and less coercive methods of protecting the injured party's right to performance."\footnote{174. Edward Yorio, \textit{Contract Enforcement: Specific Performance and Injunctions} 559 (1989).}

\textbf{B. Termination and Restitution}

In the event of "fundamental non-performance," the aggrieved party may "terminate" the contract. Unlike the civil law as effectu-
ated in France, there is no need to go to court to have the contract dissolved. Use of the word "termination" may place an obstacle to understanding. Roughly, the analog in the common law is the rule that the aggrieved party may cancel for material breach. However, the breach must be more than material; "extremely material" may be a better term. Essentially, unless strict compliance is made of the essence by the express terms of the contract or usage, non-performance is not fundamental unless it is serious indeed. Moreover, its serious effect on the other party must be foreseeable. This is not a criterion normally enunciated in American law. Yet, the idea of foreseeability so permeates our system of contract and tort law that it may be considered an unarticulated premise in our notions of what is a material breach. Even if the breach is not fundamental, termination is also available if the breaching party has not complied with the terms of a reasonable "Nachfrist." Termination also is available in the event of an anticipatory repudiation or a clear case of prospective inability to perform. Termination is never automatic. It takes place by notice. As elsewhere in Principles, the commercially understood responsibility to communicate is recognized and implemented. Also, throughout the rest of Principles, and as is the case with CISG, the

175. See Treitel, supra note 152, at 323-24.
176. Principles, supra note 7, art. 7.3.1.
177. Terminology in this area is prolific and confusing. The U.C.C. attempts to impose some discipline on the use of the terms "rescission," "termination" and "cancellation," still often used interchangeably:

- "Rescission" is utilized as a term of art to refer to a mutual agreement to discharge contractual duties. "Termination" refers to the discharge of duties by the exercise of a power granted by the agreement. "Cancellation" refers to the putting an end to the contract by reason of a breach by the other party.

Calamari & Perillo, supra note 64, § 21-2, at 865 (footnotes omitted). CISG utilizes the term "avoidance" (e.g., Article 49) to describe what Principles calls "termination" and the UCC calls "cancellation." Principles employs the term "avoidance" in the context of contracts that have problems of initial validity. See supra part VII.B.

178. Principles uses the term "non-performance" rather than "breach." Apparently this is because it encompasses breaches that are excused by force majeure. American doctrine is not clear on the question of whether such a non-performance is a breach that is excused or no breach at all.

179. Principles, supra note 7, art. 7.3.1(2)(b) & cmt. 3(b).
180. Id. art. 7.3.1(2)(a).
181. It is not among the criteria to determine the materiality of a breach under Restatement (Second) of Contracts § 241 (1979), nor under its predecessor Restatement of Contracts § 275 (1932).

182. See supra note 150 and accompanying text.

183. Principles, supra note 7, art. 7.3.4. If the prospective inability or unwillingness to perform is less than clear, the party who is insecure may demand adequate assurance of performance. As under U.C.C. § 2-609 (12th ed. 1990), adequate assurance under all the circumstances may consist of words of assurance at one extreme and at another a letter of credit or guarantee of a creditworthy surety. Id. art. 7.3.4 cmt. 2. If adequate assurance is not given, the insecure party may terminate the contract.

184. Id. art. 7.3.2.
policy of keeping the contract alive if at all feasible is evident in the difficult test for termination.

Termination opens the door to all remedies except, of course, specific performance because, upon termination, all executory duties (except those dealing with dispute settlement or otherwise understood to survive the contract) are terminated.185 Interestingly, restitution as a remedy is treated in the sub-chapter186 on termination, whereas the remedy of damages is treated in a separate sub-chapter. Presumably this is because damages is a remedy for breaches of contracts that are not terminated as well as those that are terminated. If restitution in kind is sought, the party seeking restitution (who may be the breaching or the aggrieved party) must make concurrent restitution of anything received under the contract.187 For example, upon termination, the party who has purchased a phony Renoir painting can get a refund, but must return the painting.188

C. Damages

May the party who terminates and obtains restitution also get damages for breach? Every non-performance, unless excused as discussed above, constitutes a breach and creates a right of action for damages.189 This is a departure from the long civil law tradition that regarded fault as a necessary element of a breach.190 This right to be compensated in damages is not inconsistent with any other remedy that may be available.191

Except as regards penalty clauses, the general principles governing the measurement of damages are quite similar in the common law and civil law systems. Joseph Pothier’s Traité des obligations was the basis of the damages principles of the modern civil law and of the common law of England and the United States. For breach of contract, medieval lawyers on the continent of Europe had developed a rule of recovery of damnnum emergens and lucrum cessans, which Pothier

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185. Id. art. 7.3.5.
186. What here is called a subchapter is called a “section” in Principles. See id. art. 7.36.
187. Id. art. 7.3.6. Appropriate rules are in place where the goods or other performance cannot be returned. Where the rights of third parties intervene, Principles leaves the matter to domestic law. Id. cmt. 5.
188. Id. illus. 2.
189. Id. art. 7.4.1.
190. A fundamental distinction between the common law and civil law concepts of breach of contract, and consequent entitlement to damages, is the requirement of fault of the party committing a breach in the civil law, and its absence in the common law. The fault distinction is a result of different conceptions of the contractual relationship, since English common law was developed by merchants, and continental civil law was developed by priests.
191. Principles, supra note 7, art. 7.4.1.

refined. This formula was adopted in the Restatement of Contracts as "losses caused and gains prevented." It appears in Principles as "any loss which it suffered and any gain of which it was deprived."

Damages must be "established with a reasonable degree of certainty." If damages are uncertain, the court may place a value on an opportunity that has been lost. This alternative sort of recovery is well-known in England, but has not been argued much in the United States. If the aggrieved party can satisfy neither of these rules, the court has discretion to assess damages. This goes beyond the practice of courts in the United States, but discretionary justice might well describe cases where the court awards the plaintiff reliance damages because the expectancy interest cannot be proved and cases where the loss of profits cannot be proved but the court awards the rental value of property that might have produced profits.

More particularized rules are familiar. If the aggrieved party enters into a substitute contract, that is, covers or resells, the difference in price between the breached contract and the substitute contract provides the basis for determining general damages. If no substitute transaction is made, damages are measured by the difference between the contract price and the "current price." Consequential damages are available if the foreseeability rule of Hadley v. Baxendale, vintage Pothier, is met.

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194. Principles, supra note 7, art. 7.4.2(1).
195. Id. art. 7.4.3(1).
196. See Calamari & Perillo, supra note 64, § 14-10, at 605-06 (urging development of this line of recovery).
197. Principles, supra note 7, art. 7.4.3(3).
198. Calamari & Perillo, supra note 64, § 14-9, at 603-04.
199. Id. § 14-11, at 606.
200. Principles, supra note 7, art. 7.4.6. American formulations normally use the term "market price." The UNIDROIT formulation recognizes that not all countries have markets. Even in countries having a market economy, not all property and services flow through the market.
201. 9 Ex. 341 (1854). The case states that the second rule of damages restricts recovery to those "as may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract, as a probable result of the breach of it." Id. at 354. Pothier wrote that if there is no fraud, the obligor "is only liable for the damages and interest which might have been contemplated at the time of the contract; for to such alone the debtor can be considered as having intended to submit." 1 Robert Joseph Pothier, A Treatise on the Law of Obligations, or Contracts § 160, at 81 (William David Evans trans., 1826).
202. Principles, supra note 7, art. 7.4.4.
D. Mitigation and Comparative Culpability

Principles adopts familiar rules on mitigation but an unfamiliar rule on contributory harm. A party may not recover to the extent its conduct, or conduct of those for whom it has assumed the risk, contributed to the harm. Two illustrations are given. The common law would regard one of them as an action for contribution between concurrent tortfeasors whose negligence resulted in injury to a ship's passenger. Let us put aside for the moment the coverage of personal injuries in this document. The other illustration involves an exclusive franchise where the franchisor wrongfully demands payment from the franchisee before it is due. Because of this demand, the franchisee purchases some of its stock-in-trade from another seller in violation of its promise of exclusive dealing. The franchisor demands damages (a penalty) for the franchisee's breach. It is held that only a part of the damages will be granted because the franchisor contributed to the breach. The result is intriguing. The common law would likely ask whether the franchisor's breach was (1) a repudiation or material breach or (2) an immaterial breach. If it was the former, the franchisor is entitled to no damages; if the latter, it is entitled to full damages diminished by the franchisee's counterclaim. Comparative culpability is a fairly recent development in American tort law and only a suggestion in contract law. There is, however, a provision in the Restatement (Second) that opens the door to such a development. Section 351(3) provides: "A court may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation." Professor Young has suggested that this provision might be applied to a set of facts much like that envisioned by the illustration above, but he concludes that the Restatement provision is overbroad.

203. Id. art. 7.4.8.
204. Id. art. 7.4.7.
205. Id. art. 7.4.7 illus. 2.
207. See Lippes v. Atlantic Bank, 419 N.Y.S.2d 505, 513 (App. Div. 1979) (applying a comparative culpability statute to a commercial transaction in which the court characterizes the breach as negligent). In State v. United Pac. Ins. Co., 612 P.2d 809, 811 (Wash. Ct. App. 1980), the trial court applied comparative negligence to a contract claim, but was reversed on appeal; see also Umpqua River Navig. Co. v. Crescent City Harbor Dist., 618 F.2d 588 (9th Cir. 1980) (finding no negligent acts by plaintiff, thus rejecting defendant's comparative negligence claim).
208. Restatement (Second) of Contracts § 351(3) (1979).
210. Id. at 30.
Principles contains two articles on interest accruing because of non-performance. The first of these, Article 7.4.9, provides that interest accrues on overdue debts. Such interest represents general damages for the injury done to the creditor. Even if late payment is justified by force majeure, interest is imposed to prevent the unearned enrichment of the debtor at the expense of the creditor. Subject to exceptions, the rate of interest imposed is "the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place for payment." In the United States, state law frequently sets a statutory rate of interest. Where no such statute exists, this formula accurately describes the creditor's general damages in many cases, but undercompensates for the creditor's damages where the debtor is not a prime credit risk.

The common law imposes interest as general damages for non-payment. It refuses, however, to award consequential damages for such a breach. The reason for this is that while consequential damages were available under the writ of assumpsit, they were not granted in actions where the writ was debt. Freed from the power of the graveyard of writs, Principles permits recovery of such damages. This gives effect to the principle of full compensation announced in Article 7.4.2.

Interest on the breaches of an obligation other than the non-payment of money is a controversial issue in American law. Many confusing decisions have been made and rules announced that are difficult to apply. Absent a statutory rule to the contrary, it is generally held that interest is not allowed on unliquidated damages but is allowed on ascertainable damages whether liquidated or not. Such a distinction is an invitation for the prolongation of litigation. It is difficult to apply in concrete cases and therefore invites appeals from the trial court. In addition, if the damages are clearly unliquidated, the obligor has a decided incentive to be dilatory. Principles article 7.4.10 addresses this problem and provides for the accrual of interest from the time of the non-performance, taking note of the reality that

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211. Principles, supra note 7, art. 7.4.9 cmt. 1.
212. Id. art. 7.4.9(2).
214. Principles, supra note 7, art. 7.4.9(3) & cmt. 1.
"[t]his solution is that best suited to international trade where it is not the practice for business persons to leave their money idle."216 Once again, the principle of full compensation is effectuated.

F. Tort and Tort-like Damages

*Principles* does not delineate a distinction between tort and contract. Yet, some illustrations show an implicit acceptance into the world of contract cases that we normally associate with the realm of tort. One illustration concerns the relative liability of a party who carelessly inspects an elevator and another who fails to provide sufficient light where the elevator stopped.217 Another illustration involves a crane that crumple and crushes an architect's car.218 These are but two of a number of illustrations that demonstrate that the drafters of *Principles* embraced a broader conception of contract, and therefore a narrower conception of tort, than that to which we are accustomed.

Even where the breach is clearly a breach of contract, the drafters were willing to embrace a broader conception of the scope of contract damages where the injury involves pain and suffering, mental distress, or harm to the aggrieved party's reputation. Thus, in one illustration a young architect (A) receives a prestigious commission, and, without cause, is replaced by a more experienced architect. A may recover "not only for the material loss suffered but also for the harm to A's reputation and the loss of the chance of becoming better known, which the commission would have provided."219 Such recoveries, while not unheard of,220 are rare in the United States. Also rare are contract cases in which damages for mental distress are awarded.221

XIII. THE JUDGMENT

Generally, *Principles* states that a judgment for damages should be in a lump sum. In appropriate cases (e.g., where compensation is payable over a long period of time based on a percentage of the value of production), judgments should be payable in installments.222 Where

216. *Principles*, *supra* note 7, art. 7.4.10 cmt.
217. *Principles*, *supra* note 7, art. 7.4.7 illus. 2.
218. *Id.* art. 7.4.2. illus. 3; see also *id.* illus. 1.
219. *Id.* art. 7.4.2. illus. 6.
221. *See id.* § 14-5(b), at 596. Typical is *Carpel v. Saget Studios, Inc.*, 326 F. Supp. 1331, 1334 (E.D. Pa. 1971). The defendant undertook to photograph the plaintiffs' wedding. He failed to deliver any photographs; apparently the films were ruined or destroyed. It was held that there could be no recovery for sentimental value or mental distress. *See also Sagnia-Blythe v. Gamblin*, 611 N.Y.S.2d 1002, 1004 (N.Y. Civ. Ct. 1994) (holding failure to deliver bridesmaids' dresses before the scheduled time for the wedding insufficient to warrant intentional infliction of emotional distress damages).
222. *Principles*, *supra* note 7, art. 7.4.11(1) & illus. 2.
such an installment judgment is appropriate, the judgment may be indexed.\textsuperscript{223} We may take note of, and applaud, the drafters for their realism.

In international trade, the question of the appropriate currency constantly arises. The currency in which payment should be made is discussed above.\textsuperscript{224} A separate question is, in what currency should damages be assessed? Fluctuating exchange rates explain why this question can be of the highest importance. The ratio between the currency in which the monetary obligation was expressed and that in which the harm was suffered may have changed in an important way between the time of the breach and the time of the assessment of damages. \textit{Principles} states merely that the "more appropriate"\textsuperscript{225} currency is to be used for the assessment. The official commentary, however, states that "[t]he choice is left to the aggrieved party, provided that the principle of full compensation is respected."\textsuperscript{226}

\section*{XIV. Penalty Clauses}

Nowhere in the law of contracts has the clash of common law and civil law notions seemed as irreconcilable as in the treatment of penalty clauses. They have been void in the common law world for two centuries, three, if we count back to the time the enforcement of penal bonds were enjoined.\textsuperscript{227} Whatever merit this rule continues to have in consumer transactions, it is a rule that deserves overturning in commercial transactions between businesses.\textsuperscript{228} Although some economic analysts have supported the rule on the ground that the enforcement of penalty clauses would deter efficient breaches, the contrary has been cogently demonstrated.\textsuperscript{229} It represents paternalistic interference with contractual freedom. The civil law perhaps went too far in the other direction. Under the Code Napoleon, penalty clauses were binding and could not be modified by the court except in cases of part performance of the principal obligation of the contract.\textsuperscript{230} In 1975, however, Article 1152 of the French Civil Code was amended to provide: "Nevertheless, the Judge may reduce or increase the agreed-upon penalty if it is manifestly excessive or ridiculously small. Any

\begin{thebibliography}{99}
\textsuperscript{223} Id. art. 7.4.11(2).
\textsuperscript{224} See supra text accompanying note 154.
\textsuperscript{225} Principles, supra note 7, art. 7.4.12.
\textsuperscript{226} Id. cmt.
\textsuperscript{227} For a brief history, see Charles T. McCormick, Handbook of the Law of Damages § 21 (1935).
\textsuperscript{228} For a good cogent summary of reasons why the rule against penalties should be overturned, see David Brizzee, \textit{Liquidated Damages and the Penalty Rule: A Reassessment}, 1991 B.Y.U. L. Rev. 1613 (1991).
\end{thebibliography}
contrary stipulation will be considered not written." 231 This revision removes any possible rational opposition to the validity of penalty clauses. *Principles* adopts a rule consistent with the modern civil law. So should we. 232 Under *Principles*, penalty clauses are valid, but agreed penalty sums may be reduced if they are "grossly excessive." 233

**XV. Party Autonomy and Default Rules**

*Principles* forcefully supports freedom of contract and the party autonomy such freedom implies. Its opening article proclaims: "The parties are free to enter into a contract and to determine its content." 234 As a corollary, the parties may derogate from *Principles* except to the limited extent delineated earlier in this essay. 235 Consequently, except to this limited extent, *Principles* sets out default rules to be applied where the parties have not displaced them by agreement. Much recent legal scholarship in the United States has focused on what rationale should guide the legislator, judge, or scholar in the choice of default rules. There are those who preach the sometimes discordant gospels of economic efficiency, the implementation of communitarian values, the inference of norms implicit in the parties’ relationship, or implicitly consented to, and the rationale that the parties "are obligated in fairness to do their part to maintain the cooperative venture." 236

It cannot be said that *Principles* espouses any one of these gospels to the exclusion of the others. As is the case with CISG, normative force is put behind an approach whereby every attempt is made to keep either party from walking away from a deal because the other party has erred in some way. Is this because of fairness, or because of efficiency? It has very little to do with communitarian values or con-

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231. This translation is from Schlesinger, supra note 4, at 672-73. The rule as it applies to excessively high penalties is substantially in accord with German Civil Code Section 343, and Swiss Code of Obligations Article 163, but contrary to German Commercial Code Section 348. *Id.* at 676-77.

232. International traders routinely circumvent the common law rule against penalties by use of standby letters of credit. This effective end-run around the rule creates expensive transaction costs. See Gerald T. McLaughlin, *Standby Letters of Credit and Penalty Clauses: An Unexpected Synergy*, 43 Ohio St. L.J. 1, 19 (1982).

233. *Principles*, supra note 7, art. 7.4.13. Typically the common law has treated a clause providing for agreed damages as either a provision for valid liquidated damages or as a void penalty. In Jordache Enter., Inc. v. Global Union Bank, 668 F. Supp. 939, 944 (S.D.N.Y. 1988), Judge Leval took the bold and intelligent step of reducing an agreed damages clause to 35% of the agreed amount.

234. *Id.* art. 1.1.

235. *Id.* art. 1.5.

sent. Certainly, much commentary on the related articles of CISG talks in terms of efficiency; for example, the avoidance of waste that would occur where goods are dispatched to a distant country and rejected out of hand because of some defect. Thus, the emphasis is on cure and the erection of difficult barriers to inhibit the termination of the contract. The fairness principle produces the same result, as expressed by Professor Burton:

A contract sets up a cooperative scheme from which both parties expect to benefit. The parties are obligated in fairness to do their parts to maintain the scheme. This is a special obligation between contract parties, akin to but distinct from the obligations arising from the parties' consent.

It would be a mistake, however, to conclude that all of the UNIDROIT default rules are based on efficiency or fairness. Many of the rules of offer and acceptance are based on a political compromise between those who are familiar with two separate bodies of law on the revocability *vel non* of offers. Neither of these bodies of law is more efficient or fair than the other; neither is the compromise more fair or efficient. As Corbin said in the context of the mailbox rule, "One of the parties must carry the risk [of lost or delayed communication]. We need a definite and uniform rule as to this. We can choose either rule, but we must choose one. We can put the risk on either party, but we must not leave it in doubt."

There is no one rationale for the default rules in *Principles*. Rejection of the French rule that only a court can terminate a contract, and adoption of the common law idea that a seriously aggrieved party may terminate the contract as a form of self-help, appears to be squarely based on efficiency. On the other hand, the notion that a party may withhold performance if the other parties' earlier scheduled performance has not taken place has roots in commercial understanding of the contractual relation and the fairness principle. The drafters of *Principles* are not philosophers. They are lawyers who are aware of the practices of the market and who have a respect for party autonomy and a vision of what is efficient, fair and healthy in a commercial relationship. Each of the rules they have promulgated appears to have been examined from each of these perspectives.

In the event the contract contains a gap, and *Principles* provides no default rule, the tribunal is urged to fill the gap with "a term which is

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237. The following commentary on CISG is typical. "The purpose of restricting the buyer's choice of avoidance serves primarily the interests of the seller. Once the contract is avoided, he must take back the goods supplied... [See Article 81] which necessarily involves risks of damage or loss and expenses such as costs for transports and storage." Michael Will, *in* Bianca & Bonell, *supra* note 14, at 363.


239. 1 Corbin, *supra* note 12, § 3.24, at 440-41.
appropriate term should be, the following factors are to be taken into consideration: "(a) the intention of the parties; (b) the nature and purpose of the contract; (c) good faith and fair dealing; and (d) reasonableness." These criteria do not fulfill any one of the philosophical schools of thought on gap-filling. They are the kinds of concepts, however, that lawyers and judges can work with.

CONCLUSION

Ten thousand years ago the inhabitants of Jericho were making tools of obsidian, a volcanic glass, that was procured from an identified source in Anatolia, a distance of some 1,000 miles. Similarly, obsidian from the Tetons has been found in pre-Columbian mounds in the Ohio Valley. From ancient beginnings such as these, cross-border trade has gradually expanded in scope. Since the voyages of Columbus and Vasco da Gama, this expansion has reached the point where some countries have become nearly totally dependent upon international trade, and, in other countries, major segments of the economy are tied to it. Commercial actors are on a fast track to the creation of a global market. If markets are to function they must be policed and regulated. Actors in the market must have reason to trust the integrity of the market and the transactions that are made in the marketplace, often a global marketplace that is no longer an agora. The emerging global market is not a place, it is a network of communications in which telexes, faxes, E-mail and the telephone replace the city piazza.

As the market changes from the gathering of merchants in a limited geographical spot to a global interchange of communications, the myriad local laws of the marketplace are no longer adequate to assure the commercial community that even-handed rules will govern their transactions. Principles is one step toward such assurance. Those of us whose professional formation is rooted in the common law may examine Principles and note that some of the individual principles are foreign to our way of thinking; lawyers trained in the civil law will find even more that Principles is foreign to their habits of thought. Neither group should dismiss the content of this innovative document for these reasons. Each Principles provision should be looked at on the merits, with the understanding it was approved after debate and study by an outstanding group of legal professionals.

240. Principles, supra note 7, art. 4.8(1).
241. Id. art. 4.8.
242. See Perillo, supra note 1, at 31.
On a pragmatic note, Principles will have a limited impact unless its implementation is made available to merchants and their attorneys. The implementation of CISG by court decisions and scholarly discussion of its provisions is reported in an ingenious piece of software known as UNILEX. Unless a comparable aid to research is provided with respect to Principles, uniformity of application is unlikely to occur, diffusion of knowledge of its implementation will be erratic, and its effect limited.

APPENDIX
UNIDROIT PRINCIPLES OF INTERNATIONAL
COMMERCIAL CONTRACTS(*)

PREAMBLE
(Purpose of the Principles)
These Principles set forth general rules for international commercial contracts.
They shall be applied when the parties have agreed that their contract be governed by them.
They may be applied when the parties have agreed that their contract be governed by "general principles of law," the "lex mercatoria" or the like.
They may provide a solution to an issue raised when it proves impossible to establish the relevant rule of the applicable law.
They may be used to interpret or supplement international uniform law instruments.
They may serve as a model for national and international legislators.

CHAPTER 1
General Provisions

Article 1.1
(Freedom of contract)
The parties are free to enter into a contract and to determine its content.

Article 1.2
(No form required)
Nothing in these Principles requires a contract to be concluded in or evidenced by writing. It may be proved by any means, including witnesses.

Article 1.3
(Binding character of contract)
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 in these Principles.

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Article 1.4

(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 1.5

(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 their provisions, except as otherwise provided in the Principles.

Article 1.6

(Interpretation and supplementation of the Principles)

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

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

Article 1.7

(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 1.8

(Usages and practices)

(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 1.9

(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.
For the purpose of paragraph (2) a notice “reaches” a person when given to that person orally or delivered at that person’s place of business or mailing address.

For the purpose of this article “notice” includes a declaration, demand, request or any other communication of intention.

Article 1.10
(Definitions)

In these Principles
— “court” includes an arbitral tribunal;
— where a party has more than one place of business the relevant “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;
— “obligor” refers to the party who is to perform an obligation and “obligee” refers to the party who is entitled to performance of that obligation;
— “writing” means any mode of communication that preserves a record of the information contained therein and is capable of being reproduced in tangible form.

CHAPTER 2

Formation

Article 2.1
(Manner of formation)

A contract may be concluded either by the acceptance of an offer or by conduct of the parties that is sufficient to show agreement.

Article 2.2
(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 2.3
(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 2.4
(Revocation of offer)
(1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before it 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 2.5
(Rejection of offer)
An offer is terminated when a rejection reaches the offeror.

Article 2.6
(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 when 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 when the act is performed.

Article 2.7
(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 having regard to the circumstances, 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 2.8
(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 2.9
 *(Late acceptance. Delay in transmission)*

(1) A late acceptance is nevertheless effective as an acceptance if without undue delay the offeror so informs the offeree or gives 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 undue delay, the offeror informs the offeree that it considers the offer as having lapsed.

Article 2.10
 *(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 2.11
 *(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 to the discrepancy. If the offeror does not object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

Article 2.12
 *(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 become part of the contract, unless they materially alter the contract or the recipient, without undue delay, objects to the discrepancy.
Article 2.13

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

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

Article 2.14

*(Contract with terms deliberately left open)*

(1) If the parties intend to conclude a contract, the fact that they intentionally leave 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 the circumstances, having regard to the intention of the parties.

Article 2.15

*(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 negotiates or breaks 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 when intending not to reach an agreement with the other party.

Article 2.16

*(Duty of confidentiality)*

Where 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 to use it improperly for its own purposes, whether or not a contract is subsequently concluded. Where appropriate, the remedy for breach of that duty may include compensation based on the benefit received by the other party.
Article 2.17  
(Merger clauses)

A contract in writing which contains a clause 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.

Article 2.18  
(Written modification clauses)

A contract in writing which contains a clause requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated. However, a party may be precluded by its conduct from asserting such a clause to the extent that the other party has acted in reliance on that conduct.

Article 2.19  
(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 2.20 - 2.22.

(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 2.20  
(Surprising terms)

(1) No term contained in standard terms which is of such a character that the other party could not reasonably have expected it, is effective unless it has been expressly accepted by that party.

(2) In determining whether a term is of such a character regard is to be had to its content, language and presentation.

Article 2.21  
(Conflict between standard terms and non-standard terms)

In case of conflict between a standard term and a term which is not a standard term the latter prevails.

Article 2.22  
(Battle of forms)

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

CHAPTER 3

Validity

Article 3.1

(Matters not covered)

These Principles do not deal with invalidity arising from
(a) lack of capacity;
(b) lack of authority;
(c) immorality or illegality.

Article 3.2

(Validity of mere agreement)

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

Article 3.3

(Initial impossibility)

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

Article 3.4

(Definition of mistake)

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

Article 3.5

(Relevant mistake)

(1) A party may only avoid the 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
only have concluded the contract on materially different terms or
would not have concluded it 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 had not at the time of avoidance acted in reliance on the contract.

(2) However, a party may not avoid the contract if
(a) it was grossly negligent in committing the mistake; or
(b) the mistake relates to a matter in regard to which the risk of mistake was assumed or, having regard to the circumstances, should be borne by the mistaken party.

**Article 3.6**
*(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 3.7**
*(Remedies for non-performance)*

A party is not entitled to avoid the contract on the ground of mistake if the circumstances on which that party relies afford, or could have afforded, a remedy for non-performance.

**Article 3.8**
*(Fraud)*

A party may avoid the contract when it has been led to conclude the contract 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, the latter party should have disclosed.

**Article 3.9**
*(Threat)*

A party may avoid the contract when it has been led to conclude the contract by the other party’s unjustified threat which, having regard to the circumstances, is so imminent and serious as to leave the first party no reasonable alternative. In particular, a threat is unjustified if the act or omission with which a party has been threatened is wrongful in itself, or it is wrongful to use it as a means to obtain the conclusion of the contract.

**Article 3.10**
*(Gross disparity)*

(1) A party may avoid the contract or an individual term of it if, at the time of the conclusion of the contract, the contract or term unjustifiably gave the other party an excessive advantage. Regard is to be had, among other factors, to
(a) the fact that the other party has taken unfair advantage of the first party's dependence, economic distress or urgent needs, or of its improvidence, ignorance, inexperience or lack of bargaining skill, and

(b) the nature 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 make it accord with reasonable commercial standards of fair dealing.

(3) A court may also adapt the contract or term upon the request of the party receiving notice of avoidance, provided that that party informs the other party of its request promptly after receiving such notice and before the other party has acted in reliance on it. The provisions of Article 3.13(2) apply accordingly.

Article 3.11
(Third persons)

(1) Where fraud, threat, 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 the behaviour or knowledge had been that of the party itself.

(2) Where fraud, threat or gross disparity is imputable to a third person for whose acts the other party is not responsible, the contract may be avoided if that party knew or ought to have known of the fraud, threat or disparity, or has not at the time of avoidance acted in reliance on the contract.

Article 3.12
(Confirmation)

If the party 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 3.13
(Loss of right to avoid)

(1) If a party is entitled to avoid the contract for mistake but the other party declares itself willing to perform or performs the contract as it was understood by the party entitled to avoidance, the contract is considered to have been concluded as the latter party 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 avoidance 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 avoidance is lost and any earlier notice of avoidance is ineffective.
Article 3.14
*(Notice of avoidance)*

The right of a party to avoid the contract is exercised by notice to the other party.

Article 3.15
*(Time limits)*

(1) Notice of avoidance shall be given within a reasonable time, having regard to the circumstances, after the avoiding party knew or could not have been unaware of the relevant facts or became capable of acting freely.

(2) Where an individual term of the contract may be avoided by a party under Article 3.10, the period of time for giving notice of avoidance begins to run when that term is asserted by the other party.

Article 3.16
*(Partial avoidance)*

Where a ground of avoidance affects only individual terms of the contract, the effect of avoidance is limited to those terms unless, having regard to the circumstances, it is unreasonable to uphold the remaining contract.

Article 3.17
*(Retroactive effect of avoidance)*

(1) Avoidance takes 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 makes an allowance for what it has received.

Article 3.18
*(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 in the same position in which it would have been if it had not concluded the contract.

Article 3.19
*(Mandatory character of the provisions)*

The provisions of this Chapter are mandatory, except insofar as they relate to the binding force of mere agreement, initial impossibility or mistake.
Article 3.20
(Unilateral declarations)

The provisions of this Chapter apply with appropriate adaptations to any communication of intention addressed by one party to the other.

Chapter 4

Interpretation

Article 4.1
(Intention of the parties)

(1) A contract shall be interpreted according to the common intention of the parties.
(2) If such an intention cannot be established, the contract shall be interpreted according to the meaning that 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) The statements and other conduct of a party 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 meaning that a reasonable person of the same kind as the other party would give to it in the same circumstances.

Article 4.3
(Relevant circumstances)

In applying Articles 4.1 and 4.2, regard shall be had to all the circumstances, including
(a) preliminary negotiations between the parties;
(b) practices which the parties have established between themselves;
(c) the conduct of the parties subsequent to the conclusion of the contract;
(d) the nature and purpose of the contract;
(e) the meaning commonly given to terms and expressions in the trade concerned;
(f) usages.
Article 4.4

*Reference to contract or statement as a whole*

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

Article 4.5

*All terms to be given effect*

Contract terms shall be interpreted so as to give effect to all the terms rather than to deprive some of them of effect.

Article 4.6

*Contra proferentem rule*

If contract terms supplied by one party are unclear, an interpretation against that party is preferred.

Article 4.7

*Linguistic discrepancies*

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

Article 4.8

*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 shall be supplied.
   2. In determining what is an appropriate term regard shall be had, among other factors, to
      a. the intention of the parties;
      b. the nature and purpose of the contract;
      c. good faith and fair dealing;
      d. reasonableness.

Chapter 5

Content

Article 5.1

*Express and implied obligations*

The contractual obligations of the parties may be express or implied.
Article 5.2
(Implied obligations)

Implied obligations stem from
(a) the nature and purpose of the contract;
(b) practices established between the parties and usages;
(c) good faith and fair dealing;
(d) reasonableness.

Article 5.3
(Co-operation between the parties)

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

Article 5.4
(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 such efforts as would be made by a reasonable person of the same kind in the same circumstances.

Article 5.5
(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, among other factors, to
(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 ability of the other party to influence the performance of the obligation.

Article 5.6
(Determination of quality of performance)

Where the quality of performance is neither 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 5.7

(Price determination)

(1) Where 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 performance in 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 and that determination is manifestly unreasonable, a reasonable price shall be substituted notwithstanding any contract term to the contrary.

(3) Where the price is to be fixed by a third person, and that person 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 5.8

(Contract for an indefinite period)

A contract for an indefinite period may be ended by either party by giving notice a reasonable time in advance.

Chapter 6

Performance

Section 1: Performance in General

Article 6.1.1

(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;

(c) in any other case, within a reasonable time after the conclusion of the contract.

Article 6.1.2

(Performance at one time or in instalments)

In cases under Article 6.1.1(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 6.1.3  
*(Partial performance)*

(1) The obligee may reject an offer to perform in part at the time performance is due, whether or not such offer is coupled with an assurance as to the balance of the performance, unless the obligee has no legitimate interest in so doing.

(2) Additional expenses caused to the obligee by partial performance are to be borne by the obligor without prejudice to any other remedy.

Article 6.1.4  
*(Order of performance)*

(1) To the extent that the performances of the parties 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 6.1.5  
*(Earlier performance)*

(1) The obligee may reject an earlier performance unless it has no legitimate interest in so doing.

(2) Acceptance by a party of an earlier performance does not affect the time for the performance of its own obligations if that time has been fixed irrespective of the performance of the other party's obligations.

(3) Additional expenses caused to the obligee by earlier performance are to be borne by the obligor, without prejudice to any other remedy.

Article 6.1.6  
*(Place of performance)*

(1) If the place of performance is neither fixed by, nor determinable from, the contract, a party is to perform:

(a) a monetary obligation, at the obligee’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 its place of business subsequent to the conclusion of the contract.
Article 6.1.7  
(Payment by cheque or other instrument)

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

(2) However, an obligee who accepts, either by virtue of paragraph (1) or voluntarily, a cheque, any other order to pay or a promise to pay, is presumed to do so only on condition that it will be honoured.

Article 6.1.8  
(Payment by funds transfer)

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

(2) In case of payment by a transfer the obligation of the obligor is discharged when the transfer to the obligee's financial institution becomes effective.

Article 6.1.9  
(Currency of payment)

(1) If a monetary obligation is expressed in a currency other than that of the place for payment, it may be paid by the obligor in the currency of the place for 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 obligor to make payment in the currency in which the monetary obligation is expressed, the obligee may require payment in the currency of the place for payment, even in the case referred to in paragraph (1)(b).

(3) Payment in the currency of the place for payment is to be made according to the applicable rate of exchange prevailing there when payment is due.

(4) However, if the obligor has not paid at the time when payment is due, the obligee may require payment according to the applicable rate of exchange prevailing either when payment is due or at the time of actual payment.

Article 6.1.10  
(Currency not expressed)

Where a monetary obligation is not expressed in a particular currency, payment must be made in the currency of the place where payment is to be made.
Article 6.1.11

(Costs of performance)

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

Article 6.1.12

(Imputation of payments)

(1) An obligor owing several monetary obligations to the same obligee may specify at the time of payment the debt to which it intends the payment to be applied. However, the payment discharges first any expenses, then interest due and finally the principal.

(2) If the obligor makes no such specification, the obligee may, within a reasonable time after payment, declare to the obligor the obligation to which it imputes the payment, provided that the 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 and in the order indicated:

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

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

Article 6.1.13

(Imputation of non-monetary obligations)

Article 6.1.12 applies with appropriate adaptations to the imputation of performance of non-monetary obligations.

Article 6.1.14

(Application for public permission)

Where the law of a State requires a public permission affecting the validity of the contract or its performance and neither that law nor the circumstances indicate otherwise

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

Article 6.1.15

(Procedure in applying for permission)

(1) The party required to take the measures necessary to obtain the permission shall do so without undue delay and shall bear any expenses incurred.
(2) That party shall whenever appropriate give the other party no-
tice of the grant or refusal of such permission without undue delay.

Article 6.1.16
(Permission neither granted nor refused)

(1) If, notwithstanding the fact that the party responsible has
taken all measures required, permission is 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 some terms only, paragraph (1)
does not apply if, having regard to the circumstances, it is reasonable
to uphold the remaining contract even if the permission is refused.

Article 6.1.17
(Permission refused)

(1) The refusal of a permission affecting the validity of the con-
tract renders the contract void. If the refusal affects the validity of
some terms only, only such terms are void if, having regard to the
circumstances, it is reasonable to uphold the remaining contract.

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

Section 2: Hardship

Article 6.2.1
(Contract to be observed)

Where the performance of a contract becomes more onerous for
one of the parties, that party is nevertheless bound to perform its obli-
gations subject to the following provisions on hardship.

Article 6.2.2
(Definition of hardship)

There is hardship where the occurrence of events fundamentally alters
the equilibrium of the contract either 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 disadvantaged party
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 6.2.3
(Effects of hardship)

(1) In 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) If the court finds hardship it 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 7
Non-Performance

Section 1: Non-Performance in General

Article 7.1.1
(Non-performance defined)

Non-performance is failure by a party to perform any of its obligations under the contract, including defective performance or late performance.

Article 7.1.2
(Interference by the other party)

A party may not rely on the non-performance of the other party 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 7.1.3
(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 7.1.4
(Cure by non-performing party)

(1) The non-performing party may, at its own expense, cure any non-performance, provided that
(a) without undue delay, it gives notice indicating the proposed manner and timing of the cure;
(b) cure is appropriate in the circumstances;
(c) the aggrieved party has no legitimate interest in refusing cure; and
(d) cure is effected promptly.

(2) The right to cure is not precluded by notice of termination.

(3) Upon effective notice of cure, rights of the aggrieved party that are inconsistent with the non-performing party's performance are suspended until the time for cure has expired.

(4) The aggrieved party may withhold performance pending cure.

(5) Notwithstanding cure, the aggrieved party retains the right to claim damages for delay as well as for any harm caused or not prevented by the cure.

Article 7.1.5
(Additional period for performance)

(1) In a 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 its own reciprocal obligations and may claim damages but may not resort to any other remedy. If it 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) Where in a case of delay in performance which is not fundamental the aggrieved party has given notice allowing an additional period of reasonable length, it 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 its 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 where the obligation which has not been performed is only a minor part of the contractual obligation of the non-performing party.
Article 7.1.6
(Exemption clauses)

A clause 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 expected may not be invoked if it would be grossly unfair to do so, having regard to the purpose of the contract.

Article 7.1.7
(Force majeure)

(1) Non-performance by a party 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 having regard to the effect of the impediment on the 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 to withhold performance or request interest on money due.

Section 2: Right to Performance

Article 7.2.1
(Performance of monetary obligation)

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

Article 7.2.2
(Performance of non-monetary obligation)

Where 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 it has, or ought to have, become aware of the non-performance.

Article 7.2.3
(Repair and replacement of defective performance)

The right to performance includes in appropriate cases the right to require repair, replacement, or other cure of defective performance. The provisions of Articles 7.2.1 and 7.2.2 apply accordingly.

Article 7.2.4
(Judicial penalty)

1) Where the court orders a party to perform, it may also direct that this party pay a penalty if it 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 7.2.5
(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.

2) Where the decision of a court for performance of a non-monetary obligation cannot be enforced, the aggrieved party may invoke any other remedy.

Section 3: Termination

Article 7.3.1
(Right to terminate the contract)

1) A party may terminate the contract where 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 regard shall be had, in particular, to whether

   a) the non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract unless the other party did not foresee and could not reasonably have foreseen such result;

   b) strict compliance with the obligation which has not been performed is of essence under the contract;
(c) the non-performance is intentional or reckless;
(d) the non-performance gives the aggrieved party reason to believe that it cannot rely on the other party's future performance;
(e) the non-performing 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 it under Article 7.1.5 has expired.

Article 7.3.2
(Notice of termination)

(1) The right of a party to terminate the contract is 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 its right to terminate the contract unless it gives notice to the other party within a reasonable time after it has or ought to have become aware of the offer or of the non-conforming performance.

Article 7.3.3
(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 that party, the other party may terminate the contract.

Article 7.3.4
(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 its own performance. Where this assurance is not provided within a reasonable time the party demanding it may terminate the contract.

Article 7.3.5
(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) 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 7.3.6
(Restitution)

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

(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

Article 7.4.1
(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 7.4.2
(Full compensation)

(1) The aggrieved party is entitled to full compensation for harm sustained as a result of the non-performance. Such harm includes both any loss which it suffered and any gain of which it was deprived, taking into account any gain to the aggrieved party resulting from its avoidance of cost or harm.

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

Article 7.4.3
(Certainty of harm)

(1) Compensation is due 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 is at the discretion of the court.

Article 7.4.4
(Foreseeability of harm)

The non-performing party is liable only for harm which it foresaw or could reasonably have foreseen at the time of the conclusion of the contract as being likely to result from its non-performance.
Article 7.4.5  
*(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 7.4.6  
*(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 delivered or services 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 7.4.7  
*(Harm due in part to aggrieved party)*

Where the harm is due in part to an act or omission of the aggrieved party or to another event as to which that party bears the risk, the amount of damages shall be reduced to the extent that these factors have contributed to the harm, having regard to the conduct of each of the parties.

Article 7.4.8  
*(Mitigation of harm)*

(1) The non-performing party is not liable for harm suffered by the aggrieved party to the extent that the harm could have been reduced by the latter party’s taking reasonable steps.

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

Article 7.4.9  
*(Interest 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 whether or not the non-payment is excused.

(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 appropri-
ate 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 7.4.10
(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 7.4.11
(Manner of monetary redress)

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

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

Article 7.4.12
(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 7.4.13
(Agreed payment for non-performance)

(1) Where the contract provides that a party who does not per-
form 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, notwithstanding 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-per-
formance and to the other circumstances.