Section 3

Termination of the Contract

Article 9:301: Right to Terminate the Contract

(1) *A party may terminate the contract if the other party's non-performance is fundamental.*

(2) *In the case of delay the aggrieved party may also terminate the contract under Article 8:106(3).*

COMMENT

A. The underlying considerations

Whether the aggrieved party should have the right to terminate the contract in the case of a non-performance by the other party depends upon a weighing of conflicting considerations.

On the one hand, the aggrieved party may desire wide rights of termination. It will have good reasons for terminating the contract if the performance is so different from that for which it bargained that it cannot use it for its intended purpose, or if it is performed so late that its interest in it is lost. In some situations termination will be the only remedy which will properly safeguard its interests, for instance when the defaulting party is insolvent and cannot perform its obligations or pay damages. The aggrieved party may also wish to be able to terminate in less serious cases. A party which fears that the other party may not perform its obligations may wish to able to take advantage of the fact that the threat of termination is a powerful incentive to the other to perform to ensure that the other performs every obligation in complete compliance with the contract.

For the defaulting party, on the other hand, termination usually involves a serious detriment. In attempting to perform it may have incurred expenses which are now wasted. Thus it may lose all or most of its performance when there is no market for it elsewhere. When other remedies such as damages or price reduction are available these remedies will often safeguard the interests of the aggrieved party sufficiently so that termination should be avoided.

For these reasons it is a prerequisite for termination that the non-performance is fundamental in the sense defined in Article 8:103.

Illustrations have been supplied in the comments to in Article 8:103.

B. Action in court not required; No period of grace

As a rule termination is effective only if notice thereof is given by the aggrieved party to the defaulting party, see Article 9:303 and Article 8:106. For exceptions to this rule, see Article 8:106(3) and Article 9:303(4). Termination may be effected by the act of the aggrieved party alone; it does not have to bring an action in court in order to have the contract terminated.

If the requirements of Article 9:301 are satisfied the Principles do not provide for any period of grace to be granted to the defaulting party by a court or an arbitral tribunal.

C. The "notice" procedure.

Under Article 8:106(3), when a delay in performance does not amount to a fundamental non-performance the aggrieved party may fix an additional period of time of reasonable length for performance. If by the time the period expires the defaulting party has still not performed, the aggrieved party may treat the contract as terminated. The same applies if the defaulting party has declared that it will not perform within the period so fixed.

D. Non-performance partly due to aggrieved party's own act.

One factor which should be taken into account is the extent to which the detriment to the aggrieved party is the result of its own conduct. If the detriment was substantially due to its own conduct it might be inappropriate to say that the non-performance was fundamental.

> *Illustration 1*: A manufacturer undertakes to install a machine for supplying molten material in a factory. After it is installed, the machine is left on to warm up ready for testing; the factory owner undertakes to provide a watchman. A slight defect causes a fire which, because the owner failed to provide a watchman, spreads and causes substantial damage to the factory. The manufacturer's non-performance was not fundamental and the factory owner cannot terminate the contract.

In other cases it may be appropriate to permit termination but to hold that the aggrieved party's conduct amounted to a non-performance itself for which the other party may claim damages.

> *Illustration 2*: An exclusive dealership contract between a manufacturer and a dealer is terminated because the dealer has contravened the exclusive purchase clause. However the dealer can show that it was led to purchase elsewhere by the financial demands of the manufacturer which, contrary to the terms of the agreement, had demanded payment in cash. The court should investigate the effect of each party's behaviour and, if it concludes that the manufacturer's actions led to the dealer's default, may award damages to the dealer.

NOTES

1. Termination when non-performance is fundamental
The Principles determine the circumstances in which an aggrieved party may terminate the contract by reference to whether the non-performance is "fundamental". Not all systems allow the aggrieved party to terminate by giving notice. FRENCH, BELGIAN and LUXEMBOURG CCs art. 1184 requires that *résolution* be by judicial pronouncement, and the court must decide whether the non-performance is sufficiently important to justify ending the contract; but clauses allowing automatic termination (*clauses résolutoire de plein droit*) are permitted (*Malaurie & Aynès*, Obligations, nos. 735-759). However, as seen earlier (see the notes to Article 8:103) similar results are reached in most systems, even those which rely on judicial discretion to decide when a contract should be terminated.

2. Excused and non-excused non-performance treated alike
The Principles use the same rules for termination whether or not the non-performance was excused; the aggrieved party may give notice of termination. DUTCH BW arts. 6:74 and 6:265, NORDIC law (see *Taxell,* Avtal och rättsskydd 225), ULIS (for excused non-performance see art.74), CISG (see art.79) and *Unidroit* see art. 7.3.1. take a similar approach. This is a contrast to many systems in which the case of termination of a contract which has become impossible is treated separately from the case of termination because of a breach of contract. Thus in FRENCH and BELGIAN law in the case of impossibility the contract will be determined according to the theory of risks, CC arts. 1302 and 1624 (c.f. *Treitel,* Remedies § 254); in SPANISH law see CC arts. 1182 ff. and 1124. In GERMAN law a separate paragraph of the BGB, § 323, applies to impossibility due to circumstances for which neither party is responsible (see *Treitel,* Remedies § 255), and a similar approach is taken by AUSTRIAN ABGB § 1147 and by GREEK CC art.380; in ITALIAN law there is a separate regime for impossibility, CC arts.1463-1466; and in COMMON LAW the doctrine of frustration will apply. See the notes to Article 8:108 above.

3. No additional time once right to terminate has arisen
It should be noted that the Principles do not permit the non-performing party to be given extra time once the non-performance is fundamental; compare the FRENCH and BELGIAN *délai de grâce* (CC art.1184; similarly, SPANISH CC art. 1124 (3)) or relief against forfeiture in the COMMON LAW systems (in which, for instance, a tenant may be able to obtain relief against forfeiture of a lease by the landlord for non-payment of rent: see *Treitel,* Remedies § 247).

On Article 9:301(2) see note to Article 8:106 above.

Article 9:302: Contract to be Performed in Parts

If the contract is to be performed in separate parts and in relation to a part to which a counter-performance can be apportioned, there is a fundamental non-performance, the aggrieved party may exercise its right to terminate under this Section in relation to the part concerned. It may terminate the contract as a whole only if the non-performance is fundamental to the contract as a whole.

COMMENT

A. General principle

Where the contract calls for a series of performances by one party, each with a matching counter-performance (typically, a separate price for each performance), the contract may be seen as divisible into a series of units. If one party fails to perform one unit, the other may want to put an end to its obligation to accept performance of that unit: for instance, in a contract for services it may want to arrange for someone else to do the work. However, it may not be appropriate for the aggrieved party to have the right to terminate the whole contract because the failure may not be fundamental in relation to the whole. The unit not performed may not affect the rest of the contract significantly, and the non-performance may not be likely to be repeated. In these circumstances, it is appropriate to allow the aggrieved party to terminate in relation to the part not performed, leaving the rest of the contract untouched. Only if the non-performance is fundamental to the whole contract should the aggrieved party be entitled to terminate the whole.

> *Illustration 1*: An office cleaning company agrees to clean a law firm's office on Saturday of each week for fifty weeks at a price of £500 per week. One Saturday the cleaning company's employees hold a one day strike. The law firm may terminate in relation to that part of the contract and bring in another cleaning firm to clean the office for that week. They may not terminate the contract as a whole unless it is clear that that the strike will be repeated and that therefore there will be a fundamental non-performance, so that there is an anticipatory non-performance within Article 9:304.
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> *Illustration 2*: The contract is as in Illustration 1. The cleaning work done in the first week is completely inadequate. It is clear that the cleaning company is trying to do the work using too few employees to cover an office of that size. The cleaning company refuses to use more employees. The law firm may terminate the whole contract.

See also the comment to Article 9:306, Illustrations 1 and 2.

B. Terminology

"Termination in relation to a part" of the contract is a slightly awkward phrase, as the contract is not terminated, but it has the advantage that the general rules on termination (such as the need to give notice under Article 9:303) applies. CISG Article 73 takes the same approach.

Termination "of the contract as a whole" normally means only termination of all the future obligations on each side. See Article 9:305.

C. Performances which are divisible though not to be paid for separately

Sometimes one party's obligation to perform consists of distinct parts, and the non-performance affects only one of those parts, but the payment to be made for them is not split up into equivalent sums. If nonetheless the first party's performance is really divisible and the payment can be properly apportioned, Article.9:302 applies and termination is allowed in respect of the part affected.

> *Illustration 3*: as Illustration 1 but the price is £25,000 for the fifty week period. This price was initially calculated by the cleaning company simply by multiplying the weekly charge by 50. The aggrieved party may again terminate in respect of the week missed.

NOTE

Where a contract is to be performed in instalments or separate parts, most systems recognise that the aggrieved party should have the right to refuse to accept, and to refuse to render its promised counter-performance for the defective instalment or part, without necessarily having the right to refuse to accept further performance of the remaining performance under the contract; but it may be entitled to refuse to accept any further performance when the non-performance affects the whole contract. This is provided, for instance by DANISH Sale of Goods Act §§ 22, 29 and 46; FINNISH and SWEDISH Sale of Goods Act, § 43, 44 (see *Ramberg*, Köplagen 462); IRISH Sale of Goods Act 1893, s.31(2); UK Sale of Goods Act 1979, s.31(2) (and in the case law similar results are reached for other contracts; see *Treitel*, Remedies § 278); GREEK CC art.386 (under which the aggrieved party may choose between damages and termination even with respect to parts already performed: *Michaelides-Nouaros* Erm. AK vol.II/1 art.386 nos.7-14). GERMAN law does not recognise a single principle but reaches similar results. Thus in the case of a contract for delivery in instalments (*Sukzessivlieferungsvertrag* or *Ratenlieferungsvertrag*) the aggrieved party can terminate the contract with respect to the improper instalment or with respect to all future instalments. In the latter case it is often required that the aggrieved party's interest in the performance has fallen away (cf *Palandt(-Heinrichs)* Intro. to § 305, nos.31-33, distinguishing the different kinds of non-performance). Virtually the same rule applies in AUSTRIAN law, see ABGB §§ 918(2) and § 920 second sent. Similar results are reached in BELGIUM, see *Lefebve* Rev. de Notariat Belge (1988) 266ff; *Fontaine* R.C.J.B. 1990, 382ff.; *M.E.Storme* T.B.B.R/R.G.D.C 1991, 112, no.12ff; Cass. 29 May 1980, Arr.Cass. no.310, R.W. 1980-81, 1196; and in FRANCE, where

according to its *pouvoir souverain*, the court may partially terminate the contract for a partial non-performance (*Malaurie et Aynès* nos.742-744); it will take into account the divisibility of the performance. In SPANISH law termination is not necessarily retrospective (*Diez-Picazo*, II 724; contra; *Albaladejo*, II, 1 § 20.4.5. ITALIAN CC art.1564 provides that in contracts for the periodical supply of goods the whole contract may be terminated if the non-performance is of major importance and leads to loss of confidence in future performance, but according to CC art.1458(1) termination does not extend to performances already executed; on the question of partial termination see *Corrado* 363ff. PORTUGUESE CC art.434(2) provides for termination of the whole of a contract for performance by instalments or over a period of time when the ground for termination relates to the unperformed instalments. DUTCH BW art 6:265 allows the creditor in all cases to choose between termination in part or of the whole, but subject to the general principle that the failure must justify the type of termination chosen.

ULIS arts. 45 and 75 and CISG art. 73 are similar to Article 9:302.

Article 9:303: Notice of Termination

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

(2) The aggrieved party loses its right to terminate the contract unless it gives notice within a reasonable time after it has or ought to have become aware of the non-performance.

(3) (a) When performance has not been tendered by the time it was due, the aggrieved party need not give notice of termination before a tender has been made. If a tender is later made it loses its right to terminate if it does not give such notice within a reasonable time after it has or ought to have become aware of the tender.

(b) If, however, the aggrieved party knows or has reason to know that the other party still intends to tender within a reasonable time, and the aggrieved party unreasonably fails to notify the other party that it will not accept performance, it loses its right to terminate if the other party in fact tenders within a reasonable time.

(4) If a party is excused under Article 8:108 through an impediment which is total and permanent, the contract is terminated automatically and without notice at the time the impediment arises.

COMMENT

A. The requirement of notice.

Fair dealing requires that an aggrieved party which wishes to terminate a contract normally give notice to the defaulting party. The defaulting party must be able to make the necessary arrangements regarding goods, services and money at its disposal. Uncertainty as to whether the aggrieved party will accept performance or not may often cause a loss to the defaulting party which is disproportionate to the inconvenience which the aggrieved party will suffer by giving a notice. When performance has been made, passiveness on the side of the party which was to receive performance may cause the performing party to believe that the former has accepted the performance even if it was too late or defective. If, therefore, the aggrieved party wishes to terminate the contract it must notify the other party within reasonable time. The need to notify the other party within a reasonable time does not apply to cases of anticipatory repudiation (see Article 9:304).

Notice may be given either by expressly declaring the contract terminated or by rejecting the tender of performance.

B. When performance has already been tendered but it was late or is defective

Article 9:303 (2) states the general rule that will apply both when the aggrieved party has received a late tender of performance and when it has received a tender which was defective. In either case, once it knows or should know of the tender, it should have a reasonable time to check it for defects and to decide what to do; but if it waits for more than a reasonable time without notifying the other party that it is terminating the contract it loses the right to terminate. If it is prepared to accept the tender, it need not give any notice.

What is a reasonable time will depend upon the circumstances. For instance the aggrieved party must be allowed long enough for it to know whether or not the performance will still be useable by it. If delay in making a decision is likely to prejudice the defaulting party, for instance because it may lose the chance to prevent a total waste of its efforts by entering another contract, the reasonable time will be shorter than if this is not the case. If the defaulting party has tried to conceal the defects, a longer time may be allowed to the aggrieved party.

C. When performance is overdue

When a tender of performance is due but has not been made, the courses of action open to the aggrieved party will depend on the circumstances.

(1) It does not know whether the other party intends to perform or not but it wants performance. In that case it should seek specific performance, and under Article 9:102 (3) it must seek it within a reasonable time after it has or ought to have become aware of the non-performance.

(2) It does not know whether the other party intends to perform and either it does not want the performance or is undecided. In this case it may wait to see whether performance will ultimately be tendered and under Article 9:303 it may make up its mind if and when this happens. If the defaulting party wishes it may ask the aggrieved party whether it still wishes to receive performance, in which case the latter must answer without delay, see Article 1:201.

(3) It has reason to know that the defaulting party is still intending to perform within a reasonable time, but it no longer wishes to receive the performance. In this case it would be contrary to good faith for it to allow the defaulter to incur further effort in preparing to perform and then to terminate when performance is tendered. Therefore Article 9:303 (3)(b) requires it in this situation to notify the other party that it will not accept the performance, on pain of losing its right to terminate if the other party does in fact perform within a reasonable time.

D. Exceptions to requirement of notice

There are two exceptions to the rule that notice of termination must be given. The first is under Article 8:106 (3), according to which a notice setting a reasonable period during which the defaulting party must perform may provide that at the end of the period the contract shall terminate automatically if performance has still not been made.

The second is under Article 9:304 (4), which provides that where a party's non-performance is excused because it was due to a total and permanent impediment, the contract terminates automatically. Some legal systems regard the contract as destroyed by such an event.

> *Illustration*: A famous tenor is engaged to sing at the opening ceremony of the World Cup. The tenor falls seriously ill and has not recovered by the date of the opening ceremony. Notice of termination need not be given.

In cases of only partial or temporary impediment, the defaulting party may still tender performance, and a notice of termination by the aggrieved party will be needed. Note that in cases of excused non-performance, the non-performing party has a duty under Article 8:103(3) to give notice of the impediment.

NOTES

Legal systems differ in their approach to the question of how termination is to be effected and how quickly the aggrieved party must act if he is not to lose the right. See *Treitel,* Remedies §§ 243-252.

1. Termination by notice to non-performing party
The Principles merely require notice to the non-performing party in order to terminate the contract. This accords with the COMMON LAW; DANISH Sale of Goods Act §§ 27, 32, and 52; FINNISH and SWEDISH Sale of Goods Acts, §§ 29, 39, 59. PORTUGUESE CC art. 436(1); and the DUTCH BW 6:267 allows rescission by notice. In SCOTTISH law, even notice is not always required: *McBryde* 324-325.

Article 9.303 of the Principles is markedly different to systems such as the FRENCH, BELGIAN, ITALIAN or SPANISH which at least in general principle require court proceedings to effect termination: see FRENCH , BELGIAN and LUXEMBOURG CC art. 1184(2), ITALIAN CC art. 1453 and SPANISH CC art. 1124 (though in SPAIN a notice of termination may be effective if it is accepted by the defaulting party: *Diez-Picazo,* II, 722; *Lacruz-Delgado* II, 1, § 26, 204; and *Ministerio de Justicia,* art. 1124). The time limit on the court's power to order termination is the general period of limitation (see French CC art.2262 and CCom. art. 189 bis; Italian CC art. 1453(1) and (2); Spanish CC art.1124); but in the case of defective goods the buyer, if he elects for *résolution,* must do so *dans un bref délai,* French and BELGIAN CC art. 1648. ITALIAN CC arts. 1454, 1456 and 1457, and Belgian caselaw, recognise exceptions to the rule that the creditor needs a court order to terminate: see *Dirix and van Oevelen,* R.W.1992-93, 1236; *van Ommeslaghe* R.C.J.B. 1986, nos.98-100; *M.E.Storme* T.B.B.R./R.G.D.C. 1991, 110-11, no.12. Article 9:303 also differs from rules such as the GERMAN and AUSTRIAN *Nachfrist* procedure noted earlier (see note to Article 8:106) which may require that

the debtor be given reasonable notice before the contract is terminated even in cases other than simple delay.

CISG arts. 49 and 64 and *Unidroit* art. 7.3.2 adopt an approach similar to that of the Principles.

2. Notice of termination must be given within reasonable time
The notice must generally be within a reasonable time of the non-performance. This corresponds broadly to many systems: eg DANISH Sale of Goods Act §§ 27, 32 ("promptly" or "within a short time"); FINNISH and SWEDISH Sale of Goods Acts, §§ 29, 32, 39, 59 (“reasonable time”); DUTCH BW art. 6:89 ("promptly"); FRENCH, BELGIAN and LUXEMBOURG CC art.1648 for *garantie des vices cachés* ("*dans un bref délai*") and, in Belgium, in some other cases on the basis of good faith, see Cass. 18 May 1987, Arr. Cass. 546 and Cass. 8 Apr. 1988, Arr.Cass., no.482; IRELAND "promptly and decisively", *Clark* 420; UK Sale of Goods Act 1979, ss.34 and 35 (and see *Treitel*, Contract 711); PORTUGUESE CC art.436(2); or the same result may be reached by application of the doctrine of good faith, eg in SPAIN and in GERMANY, see *Staudinger (-Otto*) § 325 no.96. AUSTRIAN and GERMAN law have special time limits for claims to terminate in cases of defects, e.g. ABGB §§ 932, 933, HGB § 377.

Some systems offer protection to the debtor by requiring that he be given reasonable notice before the contract is terminated: for example the German *Nachfrist* procedure noted earlier (see note to Article 8:106), under which the aggrieved party cannot demand performance after the notice period has expired, so that the non-performing party will know that after that date he no longer has to perform his obligations. Where a commercial contract containing a *Fixgeschäft* is not performed on time no *Nachfrist* is required, but the aggrieved party must notify the non-performing party promptly if he does not want to terminate, HGB §376 (1) sentence 2. In other cases where no *Nachfrist* is required the aggrieved party may lose his right to terminate if he does not exercise it promptly (eg in the case of a non-commercial *Fixgeschäft*: *Palandt (-Heinrichs)* § 361 No. 3). DUTCH law also requires notice of default, unless the contract provides for a fixed time for performance, or the creditor must conclude from a communication by the debtor that the latter will fail to perform (BW 6:82 and 6:83).

German law is not alone in allowing the non-performing party to set a reasonable time within which the aggrieved party must decide whether or not he wants to terminate (§§ 327, 355 BGB); see GREEK CC arts. 546, 395, 387(2): see *Michaelides-Nouaros* ErmAK II/1 art.382 no.15, art.383 no.22 (1949); PORTUGUESE CC art.436(2)).

3. The aggrieved party which knows the other still intends to perform
There is no direct equivalent in any of the legal systems studied to Article 9:303(3)(b) but the same results might be reached by application of the doctrine of good faith or, in COMMON LAW, by promissory estoppel, at least where the aggrieved party had given some positive indication that he was still willing to accept performance; mere silence or inactivity would not create an estoppel, however, see *The Leonidas D* [1985] 1 W.L.R. 925, 937, C.A.

4. Automatic termination in cases of impossibility

Several systems recognise that a contract comes to an end automatically if performance becomes impossible: e.g. ITALIAN CC art.1463. See further notes to Article 8:108 above.

Article 9:304: Anticipatory Non-Performance

Where prior to the time for performance by a party it is clear that there will be a fundamental non-performance by it, the other party may terminate the contract.

COMMENT

A. Anticipatory non-performance equated with actual non-performance

This Article entitles the aggrieved party to terminate the contract for "anticipatory non-performance", by which is meant an obvious unwillingness or inability to perform where the failure in performance would be fundamental within Article 8:103. The right to terminate for anticipatory non-performance rests on the notion that a party to a contract cannot reasonably be expected to continue to be bound by it once it has become clear that the other party cannot or will not perform at the due date. The effect of this Article is that for the purpose of the remedy of termination an anticipatory fundamental non-performance is equated with a fundamental non-performance after performance has become due.

> *Illustration 1*: In January B agrees to build a house for O and to start work on 1st May. In April B tells O that owing to labour troubles he will not be able to carry out the contract. O may immediately terminate the contract.

B. Threatened non-performance must be fundamental

Termination under this Article is permitted only where the obligation of which non-performance is threatened is of such kind that its breach would entitle the aggrieved party to terminate the contract. This applies also to a threatened delay in performance. If a party indicates that it will perform but that its performance will be late this does not constitute an anticipatory non-performance within this Article except where time of performance is of the essence of the contract or the threatened delay is so serious as to constitute a fundamental non-performance within Article 8:103.

> *Illustration 2*: B has agreed to build a house to O's design. B informs O that the double glazing specified by O is no longer available but that it can install double glazing from a different supplier which is almost identical. The failure to provide the double glazing originally specified would not, in these circumstances, be a fundamental non-performance, and O therefore cannot treat B's statement as indicating an anticipatory non-performance within this Article.

> *Illustration 3*: In January S contracts to sell goods to B for delivery on 1st March. In February S tells B that delivery will be a few days late. B can treat this as an anticipatory non-performance if time of delivery is of the essence, but not otherwise.

C. Inability or unwillingness to perform must be manifest
In order for this Article to apply it must be clear that a party is not willing or able to perform at the due date. If its behaviour merely engenders doubt as to its willingness or ability to perform the other party's remedy is to demand an assurance of performance under Article 8:105. See Illustration 1 of that Article.

D. Remedies consequent on termination
It is implicit in this Article that a party which exercises a right to terminate the contract for anticipatory non-performance has the same rights as on termination for actual non-performance and is therefore entitled to exercise any of the remedies available under this Chapter, including damages, except that damages are not recoverable where the non-performance at the due date would be excused under Article 3.108. See Article 8:101(2).

E. Time for notification of termination
The party faced with an anticipatory non-performance may terminate the contract at any time while it remains clear that there will be a fundamental non-performance by the other party.

NOTES

1. Anticipatory repudiation a recognised doctrine
The root of this provision lies in COMMON LAW (cf. *Hochster v. de La Tour* (1853) E. & B. 678, Q.B.; *Universal Cargo Carriers Corp v. Citati* [1957] 2 Q.B. 401, Q.B.; *Clark* 414) and corresponds to SCOTTISH law. *Unidroit* art 7.3.3, art. 72(1) CISG and Art. 76 ULIS also adopt the notion of anticipatory repudiation. The FINNISH and SWEDISH Sale of Goods Acts, §§ 61 and 62 adopt the CISG rule: see *Ramberg*, Köplagen, 583 ff.

2. Some equivalent rule recognised
The GERMAN BGB does not contain an express provision. However, there is unanimity that an umambiguous and definite refusal to perform is a non-performance, by analogy to BGB §§ 280, 286, 325, 326; cf. *Staudinger(-Otto*), BGB § 326 nos. 135 FF.. Similarly in AUSTRIA, see *Rumell (-Reischauer)* ABGB § 918 no. 14.

Under DANISH Law the right of a party to terminate the contract in case of anticipatory non-performance is, in general, limited to cases where there is certainty, or probability amounting almost to certainty, that there will be a fundamental non-performance by the other party. This rule, however, is qualified: (1) when a buyer goes bankrupt or becomes insolvent and the time for delivery has come, the seller may terminate the contract unless security is provided (cf. § 39 Sale of Goods Act; § 57 Bankruptcy Act); (2) where the buyer of goods has been declared bankrupt and the administrator of the estate does not confirm the take-over of the contract within a reasonable time, the seller may terminate the contract (cf. § 40 Sale of Goods Act); (3) in a sale where the goods are to be delivered in instalments and where the delay or

defect in respect of one instalment or payment for one instalment amounts to a fundamental non-performance (cf. Sale of Goods Act § 29: "unless there is no reason to expect a future delay";see also §§ 22 and 46).

In DUTCH law, BW art. 6:80 provides that the consequences of non-performance operate although the obligation is not yet due (a) if performance is not possible without breach; (b) if from a communication of the debtor the creditor cannot but conclude that there will be a breach of performance; (c) if the creditor has good reasons to fear a breach of performance by the debtor, and has not received adequate assurance of the debtor's willingness to perform.

Under GREEK law, genuine anticipatory breach exists where the debtor before the date for performance expressly declares (AP 339/1982, NoB 30 (1982) 1459 at 1460) or by conduct necessarily implies (Athens 2671/1957, EEN 25 (1958) 538-539), that he will not perform. In such situations, CC art. 385(1) equally relieves the creditor from setting an additional period of performance, and allows him the remedies for damages and termination even prior to the date of performance (*Gasis* Erm. AK II/1 Introd. remarks to arts. 335-348 no. 62 (1949); *Georgiadis* & *Stathopoulos* II Introd. remarks to arts. 335-348 no.6 (1979); also cf. CC art. 686; in any case, the notice of termination, in terms of time and otherwise, may not result in an abuse of right (CC art. 281)).

In ITALIAN law CC art.1219 provides an automatic *mora debitoris* if the debtor declares in writing his unwillingness to perform. The way is then open for termination. On insolvency of the debtor, see CC art.1461.

3. No equivalent doctrine

In contrast, there is no general rule as to termination for anticipatory non-performance in FRENCH law, SPANISH law and PORTUGUESE law. This problem has hardly been subject to academic discussion nor regulated in the Codes. In general, the law is reluctant to support the aggrieved party prior to the time of performance (cf.SPAIN: *Lacruz-Delgado* II, 1, § 26, 200; *Albaladejo* II. 1, § 20.4 K and M; but termination for anticipatory non-performance is possible if the defaulting party’s behaviour makes it clear that performance will not tke place: CC arts. 1129 and 1183). In Portuguese law, some of the results of anticipatory non-performance are reached in other ways: *Soares-Ramos* 195 ff.; STJ 15 March 1983, BMJ 325, 561; STJ 19 March 1985, BMJ 345, 400; STJ 19 February 1990, Act. jur., 1990. 2. 10. The same is true for BELGIUM: Cass. 5 June 1981, R.W. 1981-82, 245, R.C.J.B. 1983, 199; Cass. 15 May 1986, R.C.J.B. 1990, 106, Arr.Cass. no.565; *Vanwijck-Alexandre* Nos.177 and 199ff; *M.E.Storme*, Invloed no.299ff.

Article 9:305: Effects of Termination in General

(1) Termination of the contract releases both parties from their obligation to effect and to receive future performance, but, subject to Articles 9:306 to 9:308, does not affect the rights and liabilities that have accrued up to the time of termination.

(2) Termination does not affect any provision of the contract for the settlement of disputes or any other provision which is to operate even after termination.

COMMENT

A. Meaning of termination

Articles 9:305 - 9:309 govern the nature and effect of termination under the Principles.

"Termination" may have several distinct consequences (see *Treitel,* Remedies for Breach of Contract, ch. 9):

(1) The aggrieved party may wish to refuse to perform its own obligations. It may do this on a temporary basis without terminating the contract by withholding its performance under Article 9:201, but if it wishes to ensure that it will never be called upon to perform it will have to terminate the contract permanently.

(2) The aggrieved party may wish to refuse future performance (including cure of any defective performance already made) from the other party. This will also necessitate termination of the contract.

Termination may involve nothing more than (1) and (2) where nothing has been done by either party, or where any performance made has already properly been rejected, or where the contract is to be performed in successive parts and the parts already performed are not affected. But either party may be left with property transferred by the other, or with a payment made by the other. If this is the case, then a third situation arises:

(3) Either party may wish to rid itself of a performance already received, to recover money transferred to the other party and/or to recover property, or its value, transferred to the other party; in other words, in some sense to "undo" what has taken place before the date of termination.

B. Termination should not have retroactive effect

Termination of the contract releases both parties from their duty to effect and to receive performance. It would be very inconvenient, however, to treat a contract which has been terminated as cancelled in the sense of never having been made. First, if the contract had never been made the aggrieved party might be precluded from claiming damages for loss of its expectations, which would not seem an appropriate

outcome. Article 8:102 states that a party does not lose its right to damages by exercising another remedy. Secondly, if the contract were cancelled in the sense of never having been made, this might prevent the application of dispute settlement clauses or other clauses which were clearly intended to apply even if the contract were terminated. Therefore this article states that termination is not retroactive and specifically states the position on the clauses just mentioned.

> *Illustration 1*. The holder of a patent licences a firm in another country to make its product but forbids it to sell it under anything but the patent holder's trade mark. The licensee receives confidential information about production methods which it undertakes not to divulge so long as it is not publicly known. The contract contains a clause referring all disputes to arbitration. The licensee, in breach of the licence, markets the patented product under its own brand name, and the patent holder justifiably terminates the contract. Termination does not release the licensee from its obligation to keep the production information confidential, nor does it prevent the patent holder from seeking damages for non-performance of the contract, and the dispute must be referred to arbitration.

It would also be inconvenient to treat a contract which has been terminated as being retrospectively cancelled in the sense that performances received must be returned or restitution made of their value. This is not appropriate where the contract was to be performed over a period of time when there can be termination for the future without undoing what has been achieved already.

> *Illustration 2*: A cleaning company is employed to clean a law firm's office for 50 weeks at £500 per week. In the 25th week the cleaning company ceases trading and the law firm justifiably terminates the contract. The first 24 weeks' work have already been paid for; the payments are not affected by the termination.

C. When performances received can be or should be returned

Even though termination is forward looking in the way just explained, there are situations in which it is appropriate to "undo" what has taken place before termination. Thus the aggrieved party may need the right to reject a performance already received if termination means that it is of no value to it; either party may need to recover money already paid to the other party if nothing has been received in return; and either may need to be able to recover other property which has been transferred. These points are dealt with in Articles 9:306, 9:307 and 9:308 respectively.

NOTE

See Notes following Article 9:309.

Article 9:306: Property Reduced in Value

A party which terminates the contract may reject property previously received from the other party if its value to the first party has been fundamentally reduced as a result of the other party's non-performance.

COMMENT

Under many different types of contract there is a possibility that the aggrieved party may have received from the other some property which is of no value to it because of the other party's non-performance itself or because it has terminated the contract and will therefore not receive the rest of the performance. In such cases it should have the right to reject the useless property and this Article so provides.

> *Illustration 1*: A firm of accountants agrees to lease a computerised accounts system, which requires a particular kind of computer. The lessor supplies the hardware but completely fails to supply the software. The accountants have no use for the hardware alone and may reject it.

This Article may also apply where the contract is to be performed in distinct instalments, if failure to deliver a later instalment makes the earlier instalments useless.

> *Illustration 2*: A complete computer system is to be installed and paid for one component at a time so that it can be fitted into a new office as the building is being built. An essential item is not delivered and the buyer terminates. The buyer may reject the components already received.

In all the cases suggested the aggrieved party could in the alternative claim damages under Article 9:502 or reduction in price under Article 9:401 for the reduced value that the property received now has to it. However it will often be more convenient for it simply to return the unwanted property than to have to dispose of it some other way and, since it is by definition the aggrieved party, it seems appropriate to give it the right to reject. There will be a considerable advantage in rejecting the property if it has not yet paid for it, as it can thus avoid having to pay even a reduced price.

NOTE

See Notes following Article 9:309.

Article 9:307: Recovery of Money Paid

On termination of the contract a party may recover money paid for a performance which it did not receive or which it properly rejected.

COMMENT

A. The general approach to restitution.

Article 9:305 states the general rule that termination of a contract has no retroactive effect. It does not follow from the fact that the contract has been terminated that the party which has performed can get restitution of what it has supplied.

In many contracts a literal restoration is not possible. This applies to work and labour, services, the hiring out of goods, the letting of premises, and the carriage and custody of goods. A party which has received a performance of this kind cannot give it back. In contracts for sale or barter restoration may become impossible when the goods have perished or have been consumed or resold. In all these situations the party which has received a performance which it cannot return might restore the value of it and various legal systems provide for such a restitution.

In contrast the Principles only give a restitutionary remedy after termination, where one party has conferred a benefit on the other party but has not received the promised counter-performance in exchange. The benefit may consist of money paid (Article 9:307), other property which can be returned (Article 9:308) or some benefit which cannot be returned, e.g. services or property which has been used up (Article 9:309).

B. Restitution of money paid

Under Article 9:307 a party may claim back money which it has paid for a performance which it did not receive. This rule has general application where a party which has prepaid money rightfully rejects performance by the other party or where the latter fails to effect any performance, Article 9:301. It applies equally to contracts of sale, contracts for work and labour and contracts of lease.

C. Application to contracts to be performed in parts

Where a contract is to be performed over a period of time, or in instalments, and the performance is divisible, the rule applies to payments made in respect of so much of the performance as was not made or has been rejected.

> *Illustration*: A has given B advance payment for the construction of 12 houses. B only builds 3 houses, and A terminates the contract. A can claim back the advance payment for the 9 houses which were not built.

If the aggrieved party is entitled to terminate under Article 9:302 in respect of a part of a contract, it may recover a payment made in respect of that part.

D. Interest

The party claiming restitution for money paid may also claim interest, Article 9:508.

NOTE

See Notes following Article 9:309.

Article 9:308: Recovery of Property

On termination of the contract a party which has supplied property which can be returned and for which it has not received payment or other counter-performance may recover the property.

COMMENT

A. Restitution of property other than money

Article 9:308 provides restitution after termination where a party has supplied a performance other than money without receiving the counterperformance, and the performance can be restored. If the contract is terminated it may claim back what it has supplied under the contract.

> *Illustration 1*: The contract called for A to deliver goods to be paid for by B upon their receipt. B did not pay for the goods when it received them. A may terminate the contract and claim back the goods from B.

B. Third-party rights are not affected

Like other Principles Article 9:308 deals exclusively with the relationship between the parties and not with the effect which the contract may have on the property in goods sold or bartered. Whether a creditor of the buyer, the buyer's receivers in bankruptcy, or a bona fide purchaser may oppose the restitution of goods sold is to be determined by the applicable national law.

C. Claims by defaulting party

The defaulting party may have transferred property to the aggrieved party before termination. If the aggrieved party can restore the property but does not do so, the court may order it to restore it or its value under Article 9:308.

D. Contracts to be performed in parts

The rule applies to contracts which are to be performed in parts. If the aggrieved party is entitled to terminate in respect of a part under Article 9:302, it may recover property transferred under that part of the contract.

E. Negotiable instruments, securities and shares

A contract for the sale or assignment of stocks, shares, investment securities, negotiable instruments and debts is often performed by delivering the warrant certificate or other instrument which gives evidence of the right. If the contract is terminated the seller or assignor should be entitled to recover the paper irrespective of whether this paper is a negotiable instrument or not, subject to third party rights, see Comment B above.

F. Industrial and intellectual property

If a contract for the assignment of a product of the mind is terminated literal restoration of the intangible is sometimes not possible.

However, the assignment of patents, trade marks, and other legally protected intangible rights may be called off by a formal declaration or other act of the assignee and thereby returned to the assignor.

Furthermore, restoration is possible of things which attach to the intangible. Know-how and literary works are written on paper, paintings are made on canvas, sculptures cast in bronze. Tangible things which in this way materialize the product of the mind may be restored when the contract is terminated. These things often have a value.

> *Illustration 2*: A famous artist contracts with B to make illustrations for a new edition of Homer's Odyssey to be published by B; the copyright is to rest in B. When B receives the drawings he does not pay for them. The artist may terminate the contract and claim the illustrations back; the copyright must also be revested in him.

G. Restitution in case of bad bargains

Restitution may be claimed when the aggrieved party has performed all its obligations under the contract and only the other party's obligation to pay the price remains outstanding. It does not matter that the property is worth more than was to be paid for it so that by obtaining restitution the aggrieved party escapes a bad bargain.

> *Illustration 3*: A has sold a Renoir painting to B for US$200,000; the true value of the painting is over US$250,000. When the picture is delivered to B, he does not pay for it. A is entitled to claim back the painting.

H. Restitution is impossible or too onerous

The rules in Chapter 4 Section 1 on right to performance apply *mutatis mutandis* to the claim for restitution. The aggrieved party cannot claim back the goods or other tangibles when it has become impossible or would involve the defaulting party in an unreasonable effort or expense.

> *Illustration 4*: A has painted a fresco which has been mounted on a wall in B's house and for which B has not paid A. Although it would be physically possible to dismantle the fresco the costs would be disproportionately high. A cannot claim back the fresco. Its remedy is under Article 9:309.

NOTES

See Notes following Article 9:309.

Article 9:309: Recovery for Performance that Cannot be Returned

On termination of the contract a party which has rendered a performance which cannot be returned and for which it has not received payment or other counter-performance may recover a reasonable amount for the value of the performance to the other party.

COMMENT

A. General

It frequently happens that after a contract has been terminated one party is left with a benefit which cannot be returned - either because the benefit is the result of work which cannot be returned, or because property which has been transferred has been used up or destroyed - but for which it has not paid. The other party may have a claim for the price, but this will depend upon the agreed payment terms and the price may not yet be payable. It may have a claim for damages, but the party which has received the benefit may be the aggrieved party, or, though it is the one which has failed to perform, it may not be liable for damages because its non-performance was excused under Article 8:108. It would be unjust to allow it to retain this benefit without paying for it, and Article 9:309 requires it to pay.

> *Illustration 1*: A contract to build a garage onto a house provides that the builder is to be paid only upon completion of the work. After doing two-thirds of the work, the builder becomes insolvent and stops work. The employer gets another builder to finish the garage. The amount the employer has to pay the second builder plus compensation for the employer's inconvenience is less than the original contract price and the employer receives a net benefit. Under Article 9:309 it must pay the first builder a reasonable sum for the work done: in this case the reasonable sum would be the net benefit the employer received from the first builder's work.

> *Illustration 2*: A farmer employs a contractor to lay drain pipes in her field for a lump sum of £10,000. The contractor lays some of the pipes which drain part of the field. Then exceptionally bad weather causes the remaining parts of the field to become waterlogged and, because the contractor's machinery will churn up the field and damage it, the farmer tells the contractor to stop work temporarily. After serving a notice under Article 8:106, the contractor terminates. Although the farmer is not liable in damages because her non-performance was excused under Article 8:108, the contractor may recover for the pipes already laid under Article 9:309.

B. Calculating the benefit

The party which has received the benefit should not be required to pay the cost to the other of having provided it, if the net benefit to it is less, since it is only enriched by the latter amount.

> *Illustration 3*: as Illustration 2, but the contractor has not yet installed enough pipe to carry off a significant amount of water and it has used its own special type of pipe so that the drainage system cannot be completed by another contractor. The net benefit to the farmer is nil and she should not have to pay anything under Article 9:309.

Occasionally it may happen that the net benefit to the recipient is greater than the cost of providing it. Then the recipient should not be liable under this article for more than an appropriate part of the contract price.

> *Illustration 4*: The holder of an oil concession in a foreign country employs an exploration company to make a geological survey of the concession for £250,000. After the exploration company has worked for only a short time it is prevented from completing the survey by the government of the foreign country nationalising the concession, but in that time it has found oil and because of this the owner is paid millions in compensation by the government. The exploration company should recover only a proportionate part of the exploration fee, not a proportion of the compensation.

NOTES

Notes to 9:305 - 9:309
These notes covers Articles 9:305 - 9:309, which together govern the effects of termination.

The various legal systems exhibit great differences in concepts and terminology in this area. The differences in the practical results obtained are not so great but are still significant.

The most apparent difference is between systems such as the FRENCH which treats *résolution* as essentially retrospective and those such as the COMMON LAW which sees termination (or "rescission for breach") as essentially prospective (see *Treitel,* Remedies §§ 282-283). However, as the differences are sometimes more apparent than real it may be helpful to consider the effect of "termination" in the various systems in a number of factual situations:

1. Effect on claims by either party which arose before the date of termination.
In "prospective" systems such as the COMMON LAW these claims are largely unproblematic: they are not affected by subsequent termination, except that if money due but as yet unpaid would in any event have to be repaid after termination, it will for obvious reasons cease to be payable (see *Treitel,* Contract 911). It seems likely

that other systems would reach the same result even if in theory termination was retrospective; for instance, in FRENCH law for a contract *à exécution successive* only *résiliation* for the future might be ordered (see note 4 below).

In GERMAN law it used to be said that *Rücktritt* had a retrospective effect but this view is no longer accepted. Contractual claims for damages which arose before termination are now treated as surviving termination which is said only to end the primary duty to perform and the right to damages for loss of expectation (see, *Larenz* I 404; *Treitel,* Remedies § 282 and refs. there).

In DUTCH law termination does not have a retroactive effect: BW art. 6:269. In SPANISH law some writers favour prospective termination (*Diez-Picazo,* II, 724), others maintain the traditional, retrospective approach (*Lacruz-Delgado,* II, 1, § 26.206 and *Albadejo* II, 1, § 24.45) The Supreme Court, 28 June 1977, has adopted prospective termination when past performances were unaffected. See also *Unidroit* art 7.3.1

2. Damages for the non-performance itself.
The conceptual difficulties felt in some systems in awarding full damages for breach of a contract which has been terminated are discussed above, see note to Article 8:102. Most systems now allow full damages despite termination.

3. Effect on contract clauses intended to apply even after termination.
All systems now accept that termination will not affect the application of clauses such as arbitration clauses which were intended to apply despite termination. Eg COMMON LAW: *Heyman* v. *Darwins* [1942] A.C. 356, H.L.; FINLAND: *Aurejärvi* 106; FRANCE: *clause compromissoire* (NCPC art. 1466) and penalty clause (*Malaurie & Aynès,* Obligations no.543); GERMANY, see *Stein-Jonas* (*-Schlosser*) § 1025 No. 00; GREEK law, see *Kerameus* 171-173, with further refs, and *Papanicolaou* in *Georgiadis & Stathopoulos* II art.389 no.14 (1979); ITALIAN law: no specific text but see *Satta* 852; Cass. 5 Aug.1968 n.2803, in Foro It., 1969, I c.445 and Cass. 27.May.1981 n.3474, in Foro It., 1982, I c.199; NETHERLANDS BW art.6:271; PORTUGUESE CC art. 434(1); SPANISH Arbitration Act 1988 (see *Bercovitz,* Arbitraje, art. 1, 17 ff and *Unidroit* art. 7.3.5(3)..

4. Effect on previously performed parts of a contract for successive performances.
All systems now accept that where a contract for performance in successive parts or instalments is terminated after some parts of it have been performed, it may be terminated for the future without the need to undo the completed parts (see *Treitel,* Remedies § 283). In FRENCH, BELGIAN and LUXEMBOURG law, *résolution* is only retroactive when the contract is to be performed at one time: for a contract *à exécution successive* the contract is treated as disappearing only from the date at which the debtor ceased performing or was given notice of termination by the aggrieved party. In this context the process is often termed *résiliation* (*Malaurie & Aynès,* Obligations nos. 743 and 744). In ITALIAN law termination is in principle retrospective but for contracts involving continuous or periodic performance see CC

art.1458. In PORTUGUESE law termination does not affect performances already rendered unless they are affected by the non-performance, CC art. 434(2). In SPANISH law termination is not necessarily retroactive and does not affect past performance if this is not rendered useless by the non-performance, see note 1 above.

5. Property already received and reduced in value by the subsequent non-performance.
Most systems also recognise the rule embodied in Article 9:306 that the aggrieved party may reject property which has already been delivered to him, and which was itself in conformity to the contract, if the subsequent non-performance has rendered it of no use or interest to him. For instance, in GERMAN law, if the performances are inter-related either party can demand return of the earlier -delivered part. In ENGLISH and IRISH law, where a part of the goods to be delivered are defective, the buyer may reject the whole (U.K. Sale of Goods Act 1979, s.30; for Ireland, see *Forde* § 1.192), and this will apply even if the goods are to be delivered in instalments provided that the instalments are similarly inter-connected and thus the contract is not severable (see *Gill & Dufus SA* v. *Berger & Co Inc* [1983] 1 Lloyd's Rep. 622, reversed without reference to this point [1984] A.C. 382, H.L.; *Atiyah* 452). The position with severable contracts is less clear but probably there is a right to reject instalments already received if they are rendered useless by the later breach (*Atiyah* 455; *Forde* § 1.198). The DANISH Sale of Goods Act, § 46, and the FINNISH and SWEDISH Sale of Goods Acts §§ 43 and 44 (see *Ramberg*, Köplagen 462), provide that a buyer who has received a defective instalment can reject instalments received earlier if the instalments are so inter-connected that it would be detrimental to the buyer to have to keep the earlier ones. In ITALIAN law there is no general provision but under CC art.1672 when a construction contract is terminated the purchaser has only to pay for work done so far as it is of value to him.

6. Inability to restore property may be a bar to termination.
Under some systems a party who has received property may not be permitted to terminate either the contract as a whole, where it was for a single performance, or, where it was by instalments, in relation to the part already received, if he cannot return what he has received, for instance because he has consumed or resold it. Generally this rule applies where the inability to restore is attributable to the acts of the party who received the goods: DANISH Sale of Goods Act, §§ 57 and 58; FINNISH and SWEDISH Sale of Goods Acts, § 66 (see *Ramberg*, Köplagen 637 f.); BELGIAN case law, e.g. C.A. Gent 22 Oct. 1970, R.W. 1970-71, 893; C.A. Liège 10 Nov. 1982, J.L. 1983, 153; GERMAN law, BGB § 351; GREEK CC arts. 391-394. It does not apply when the defect constitutes a non-performance: FRENCH CC art. 1647(1); GERMAN law, BGB § 351 and *Enneccerus & Lehmann* 169, 445-446; ENGLISH law, *Rowland* v. *Divall* [1923] 2 K.B. 500, C.A.. When the inability is due to accidental destruction, solutions differ: see the discussion in *Treitel*, Remedies § 285.

With services, in contrast, the usual rule seems to be that the fact that there is nothing to be returned does not prevent termination (*ibid.*). Systems differ as to

whether the aggrieved party must make restitution of the value of what he received (see below).

The Principles, like AUSTRIAN and FRENCH law (see Malaurie & Aynès § 762) and the DUTCH BW, do not follow this distinction. In neither case is inability to restore a bar to termination; the aggrieved party will however be expected to pay for benefits received, see below. In this the Principles differ from CISG art.82.

7. Action for price may be the only remedy.
In some systems, eg the COMMON LAW, there is a rule that if the claiming party has completed its performance, or a severable part of it, the only remedy is an action for the agreed price. Thus a seller of goods who has delivered them to the buyer but has not been paid cannot terminate the contract and recover the goods but can only bring an action for the price. The only exception is if the property in the goods has not passed to the buyer, for instance because the contract provided that property would not pass until the goods were paid for (see *Aluminium Industrie* v. *Romalpa Aluminium* [1976] 1 W.L.R. 676, C.A.). DANISH Sale of Goods Act § 28(2), FINNISH and SWEDISH Sale of Goods Acts, § 54(4) and GREEK CC art.531 provide the same rule and so does GERMAN BGB § 454 where the seller has allowed time for payment of the purchase price. The AUSTRIAN Commercial Code is to the same effect, 4.EVHGB Art. 8 No.21.

The Principles do not adopt this rule, but they do not deal with the rights of creditors and other third parties to oppose restoration of property delivered, see below.

8. Effect of termination on performances already received.
Assuming that the right to terminate exists, what effect will termination have on performances made already? Most systems require that each party returns benefits received from the other or makes restitution of their value. However the situation is complex and the remainder of this note is devoted to it.

The position is simpler under systems which regard termination as retroactive, for then restitution of benefits appears as a natural concomitant of termination: eg FRENCH, BELGIAN and LUXEMBOURG CC arts. 1379 and 1380 read with art.1184; GREEK CC art.389(2); AP 661/1974, NoB 23 (1975) 275, 276 I; AP 696/1982, NoB 31 (1983) 659-660; PORTUGUESE CC arts. 434(1) and 289; SPANISH law, see note 1 above.

Other systems under which termination is not retrospective nonetheless recognise a general duty to make restitution: DUTCH BW art. 6:271. For SCOTTISH law, under which there may be restitution of unreciprocated performances, see *MacQueen* 1996 Acta Juridica 000. In GERMAN law it is now held that *Rücktritt* does not retrospectively do away with the contract but it creates general obligations of restitution, BGB § 346. In AUSTRIA ABGB § 921 provides that as a result of a notice of termination because of late performance or non-performance, any

consideration previously given must be returned or refunded in such a manner that neither party profits from any losses the other may suffer.

In contrast, the COMMON LAW allows only partial restitutionary remedies. It may be helpful to consider each of the three situations covered by Articles 9:307 to 9:309 in turn.

(a) Money paid.
If money has been paid before the date of termination, and assuming that it was not paid as a deposit or on terms that it would be forfeited if the contract was not performed, systems in which termination is seen as retroactive will normally allow the money to be recovered. It does not matter whether the party seeking to recover the money is the aggrieved party or the non-performing party: FRENCH law, *Malaurie & Aynès,* Obligations no.376 and FRENCH and BELGIAN CC arts. 1376 - 1377; ITALIAN CC arts. 1458, 2033 and, for sales, arts. 1479(2) and 1493(1). For GERMAN, GREEK, PORTUGUESE and SPANISH law see above; DANISH law see Sale of Goods Act § 57 and *Ussing*, *Køb* 164-165; FINNISH and SWEDISH law see Sale of Goods Acts, § 64 and *Ramberg,* Köplagen 614ff.

The COMMON LAW is more restrictive. Except in cases of frustration (now governed by Law Reform (Frustrated Contracts) Act 1943, s.1(2)), it allows recovery by the aggrieved party only where there has been "a total failure of consideration" and by the non-performing party only where the party who had received the money can be restored to his original position (see *Treitel,* Remedies § 284; *Treitel,* Contract 822-824, 906-907, and 911.

ULIS art. 78(2) and CISG art.81(2) take the same broad approach to restitution as the Principles.

(b) Property transferred.
If the property remains in the possession of the party to whom it was transferred, and is not claimed by a third party, the "retroactive" systems allow the transferor to recover it: eg FRENCH law, *Malaurie & Aynès,* Obligations no.376 and FRENCH and BELGIAN CC art. 1379; ITALIAN CC arts. 1458(2) and 1493(2) (sales); FINNISH and SWEDISH Sale of Goods Act § 64(2).

Systems differ where a third party such as a creditor of the recipient claims the property. In GERMAN law the right to the return of the property is only a "contractual" one and third parties' interests will not be affected. See also AUSTRIAN ABGB § 921, second sentence; SPANISH law (*Albaladejo,* II, 1,§ 20.4.U: Supreme Court 1 October 1986); GREEK CC art.393. The result is the opposite in FRENCH law, where the effect is in principle (but subject to important restrictions) "proprietary" (see *Malaurie et Aynès,* Obligations, No.143; *Nicholas,* 245-246; *Treitel,* Remedies § 282). The Principles follow ULIS and CISG in leaving the question of whether the right to restitution enables the claiming party actually to recover the

goods in the face of competing claims by third parties to the law applicable to the issue.

(c) Restitution for services.
"Retroactive" systems again have little difficulty in allowing either party upon termination to recover the value of services rendered under the principle of unjust enrichment. On FRENCH law, see *Ghestin, Jamin & Billiau* § 482ff.; BELGIAN law, Cass. 27 March 1972, Arr. Cass. 707; ITALIAN law, where there is no provision as to contracts in general (but see CC art.1672 and Cass. 5 Aug. 1988 no.4849, in Mass. Foro It., 1988; Cass. 23 June 1982 no.3827, in Mass. Foro It., 1982; Cass. 13.1.1972 n.106 in Rassegna Avvocatura Stato, part I, 1972, 161); PORTUGUESE CC arts. 434(1) and, when the performance cannot be returned, 289(1); for SCOTTISH law, see *Graham* v. *United Turkey Red Co.* 1922 S.C. 583.

For this case GERMAN law has a special rule that where the counter-performance has been fixed in money this amount shall be paid: BGB § 346 sent.2 (see further Treitel, *Remedies* § 284). GREEK law reaches the same result: *Gasis* in Erm.AK II/1, art.389 no. 11 (1949). In DANISH law the party who has rendered a performance which cannot be returned is not entitled to its value or the enrichment which the other party has received if he can claim the counter-performance or damages, *Ussing*, Alm.Del. 98. Under DUTCH BW art. 6:272 the party who has rendered performance is entitled to its value.

In SCOTLAND if a contract is frustrated the obligations of the parties under the contract cease but there may be an equitable adjustment of the rights of the parties under the principles of unjust enrichment (*Cantiere San Rocco* v. *Clyde Shipbuilding and Engineering Co* 1923 S.C. (H.L.) 105).

The COMMON LAW provides, as already mentioned, that if the claiming party has completed its performance, or a severable part of it, the only remedy is an action for the agreed price. In the situation of partial performance it distinguishes between cases of frustration (impossibility) and cases of breach. Where the contract has been frustrated, the court has discretion under Law Reform (Frustrated Contracts) Act 1943, s.1(3) to award what are basically restitutionary awards (see the judgment of Robert Goff J in *BP Exploration Co (Libya) Ltd* v. *Hunt* [1979] 1 W.L.R. 783, though see also Lawton LJ in [1981] 1 W.L.R. 232, C.A.). Where the contract is terminated for breach, the aggrieved party may recover a reasonable sum; the defaulting party may recover nothing (see *Treitel*, Contract 696-699, 592).

Again the Principles follow ULIS, CISG and *Unidroit* art. 7.3.6(1) in taking a broad flexible approach.

Thus the Principles are broadly in accordance with those systems which take a liberal approach to restitution after termination and thus enable the court or arbitrator to order full restitution of benefits received. This normally achieves a just settlement on the facts.