Introduction to the Law of Commercial Contracts of April 2001

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Explanatory notes to the Law of commercial contracts of April 2001

These explanatory notes together with the introduction to the Law relate to the Law of Commercial Contracts. They have been prepared by the Ministry of Commerce in order to assist the reader in understanding the Law. They do not form part of the Law and have not been endorsed by the National Assembly and Senate.

The notes need to be read in conjunction with the Law. Note that where an article or part of an article does not seem to require any explanation or comment, none is given.

Introduction to the Law of Commercial Contracts of April 2001[1]

This law that is solely applicable in the case of contracts concluded between merchants as it is generally assumed that business people have a certain degree of sophistication in the field of commerce and that they are familiar with the ins and outs of the business world in which they are evolving. Stated otherwise, merchants acting in the course of their business do not need the same type of legal protection that non-business people need. Therefore, the rules provided in this Law aim at facilitating the conclusion of the contract between business people.

Although the title of the law, "Law of commercial contracts", may suggest that the contracts contained therein are departing from the general theory of contract law, that is not the case. To the contrary, contracts dealt with in this Law are, as all other contracts, submitted to the general rules of the law of obligation and contract in so far as these general rules have not been modified by the Law of commercial contracts (see article 3 of the Law).

Until the Civil Code of Cambodia is adopted, these general rules are to be found in *Decree No.38D referring to contract and other liabilities* of October 28, 1988 as modified or supplement by the rules found in Chapter 4 of this Law.

In fact, the contracts regulated in this Law are some of the most often encountered types of contracts concluded in a business environment, with the result that in looking at the commercial practice, it became apparent that specific provisions were repetitively found in these contracts. In other words, it became possible to clearly identify and then name certain contracts, such as the commercial contract of sale and carriage contract.

It is in taking into consideration these specific characteristics attaching to a certain type of contracts that the particular rules found in this Law have been enacted.

The rules found in this Law aim at circumscribing the rights and obligations of the parties and the effect of the contract entered into, with the result that the contracting parties will not have to reiterate these rules in their own contract. It is however important to note that the rules contained in this Law are, with some exceptions, of suppletive in nature. That is to say that the parties may modify or depart from them.

As stated above, the parties to the contract may not waive some of the rules provided in the Law. Such rules have been drafted for the purpose of preventing potential abuses by one of

[1] Commentaries relating to the previous draft law of commercial contracts were provided by the following institutions and were taken into consideration for the purpose of drafting the draft law of April 2001:
Faculty of Law and Economics Sciences, Professor Antoine Fontaine,
DFDL , Mr. David Doran
GMAC, Mr. Van Sou Ieng
JICA team on Civil Code and Civil Code of Procedure: Professor Yoshihisa Nomi and Mr. Manabu Imaizumi
Club d'affaires Franco-cambodgien,
World Bank Report, "Projet de rapport final, Réforme juridique, Diagnostic" par Alain Gourdon et Xavier Ghelber, submitted to the Royal Government of Cambodia, Counsel of Minister, Counsel of Jurist, 2000.

the party to the contract. For example see article 30 that deals with the legal obligation of the vendor to warranty the goods sold to farmer and fisherman.

Commercial contract that do not fit the qualification of the Law are said to be "*sui generis*" (of his own kind or class; the only one of its own kind; peculiar). They are "unnamed contracts" and are regulated the general provisions of this Law (Chapter 1) and by the general rules of the law of obligation and the law of contract. Again, until the Civil Code of Cambodia is adopted, these general rules are to be found in *Decree No.38D referring to contract and other liabilities* of October 28, 1988 as modified or supplement by Chapter 4 of this Law.

Furthermore, certain type of commercial contract such as loan, commercial lease, mortgage and other type of securities occurring in the commercial world have not been dealt with in this Law because they will be the subject matter of other laws (for example: the secured transactions law that is actually in drafted form).

Law on Commercial Contracts

Chapter 1. Provisions Relating to all Commercial Contracts

Part A. General Provisions

Article 1. Scope of Law

(1) This law applies to contracts made between merchants in the course of their commercial activities.
(2) This law does not apply to contracts made by a merchant for personal, family or household purposes unless the other party neither knew, nor should have known, before or at the conclusion of the contract, that the contract was for such non-commercial purposes.

Explanatory notes: 1. This law is solely applicable to transactions occurring between persons that are both involved in commercial activities. Both parties to the commercial contract must be business persons. If there are more than two parties to the contract the same principle applies: all parties have to be merchants.

2.This Law provides for general provisions applicable to commercial contracts and regulates specifically some of the most encountered types of contracts concluded in a business environment such as contract of sale (articles: 21 to 32) and transportation (articles: 33 to 61). With respect to these contracts the Law qualifies them, gives them a name and regulates them specifically.

Other commercial contracts may be regulated specifically in other laws. For examples: transfer of securities will be regulated by the Law of commercial enterprises of July 2000 (actually in draft form), loan will be regulated in the law of secured transactions (actually in draft form) and insurance contract are regulated in the Insurance Law of July 25, 2001. On the basis of the legal principle that is to the effect that specific provisions take precedence over general provisions: the particular provisions dealing with a particular commercial contract will have to apply first. In this case, the general provisions of the Law on commercial contracts will only be applicable if they are consistent with the provisions of that other law.

Furthermore, numerous commercial contracts are not qualified by the Law of commercial contract, nor by any other law. We can refer to these contracts as *sui generis* (of his own kind or class; one of its own kind; peculiar). The general provisions found under Chapters 1 and 4 of this Law are applicable to all contracts - taking into account the comment in the preceding paragraph- concluded between merchants, including the *sui generis* ones.

3. Specific rules are provided under article 10 permitting to resolve jurisdictional issues that may arise when a contract involves a merchant and a party that is not a merchant ("private party").

Article 2. Definition of merchant

(1) A merchant is a natural person carrying on business as a sole proprietor; two or more natural or legal persons carrying on business as a general or limited partnership; or a legal person carrying on business as a private limited company or a public limited company.

(2) Carrying on business means regularly engaging in a trade, occupation or profession with a view to profit.

Explanatory notes: 1. The definition of merchant includes "merchant", in the traditional sense of the word, as well as artisans and professionals. The common denominator between the contracting parties who are subject to

this Law is that: they are carrying on business with a view to profit and that such activity is carried on a recurrent basis. It is not an exceptional activity.

Cross-references: 1. Article 1 of the L*aw Bearing Upon Commercial Regulation and the Commercial Registered* as amended by article 298 (a) of the *Law of commercial enterprises* of July 2000.

Article 3. General rules of the law of obligation and law of contract

The general rules of the law of obligation and the law of contract apply to all commercial contracts, regardless of their nature except when special rules are found in this Law that complement or depart from them.

Explanatory notes: 1. The purpose of this article is to ascertain the applicability of the general rules of the law of obligation and the law of contract to commercial contracts.

2. The definition of the concept of "obligation", conditions of formation of a contract, rules permitting the determination of what constitute and offer and an acceptance, nullity of contract theory, remedies for non-performance of a contract, liability of the contracting parties, etc. are not found in this Law. They are actually and partially found in *Decree No.38 referring to contract and other liabilities* of October 28, 1988 and will be later found in the Civil Code of Cambodia (partially drafted).

The Law on commercial contracts does not create a new set of general rules of the law of obligation and law of contract. General rules of the law of contract apply to all commercial contracts as long as they have not been modified by this Law. This Law may add one or more conditions relating to the formation of a specific type of contract or may depart from it. In these cases, the provisions of the Law on commercial contracts will take precedence over the general provisions of the law of contract. Otherwise, the general provisions are applicable to commercial contracts.

3. Note on the conditions of formation of a contract. The general rules of the law of contract state that: for a contract to be formed there are four conditions that need to be met: i) capacity: the parties to the contract have to be legally capable; ii) Consent: is the expression of the volition of the parties to enter into the contract; consent has to be free and given by a person who has the ability to discern iii) Object: the contract must have an object, that is to say a legal transaction foreseen by the parties and to which they will consent; the object has to be legal and respectful of the public order iv) Cause*: that is the source of the consent or of the obligations flowing from the contract.

These rules are applicable to commercial contracts.

*Cause: For purpose of clarity, the term "consideration " has not been used here. "Consideration" does not carry the same significance as "cause". "Consideration" carries a particular technical meaning in common law where it forms a constituent element in the legal formation of a contract. As Cambodia will have a Civil Code based on the civil law tradition, the concept of consideration as understood in common law is not applicable in states of the civil law tradition.

Cross-references: 1. Articles 1 to 120 of the *Decree No.38 referring to contract and other liabilities* 2. Chapter 4 of the Law on commercial contracts .

Article 4. Rules of Interpretation

(1) In determining any issue between the parties to a commercial contract, the tribunal shall apply the contract.

(2) Where the contract is unclear or ambiguous, the tribunal shall construe the contract and determine the common intention of the parties. In making its determination, the tribunal may rely on:

(a) the law;
(b) customs and usages and any practices which the parties have established between themselves;

(c) commercial customs and usages of the type of contract involved in the particular commercial activity in issue;
(d) commercial customs and usages; and
(e) the commercial character of the contract and the need to promote the observance of good faith in commercial activities.

Explanatory notes: 1. Rules of construction of contract are, by nature, supplementary. That is to say, when a contract, verbal or written, is clear and not ambiguous, the judge does not have to construct it, he only has to apply it. However, when the contract is ambiguous, it cannot be ascertained which type of contract the parties entered into. In these circumstances, the judge needs to determine what was the common intention of the parties at the time of entering into the contract. To help him in this task, the legislator may provide for rules of construction. This is the sole purpose of this article.

2. The expression "is ambiguous", expresses a condition precedent to the applicability of this article. Without having found that the common intention of the parties is ambiguous, the judge should not intervene or substitute his decision to the decision of the parties.

3. The expression "common intention of the parties". Contract law embodies the principle that the conclusion of a contract necessitates a common intention of both parties. If it is not the case there is no contract. Therefore in constructing an ambiguous contract the judge cannot solely look at the intention of the parties in their individuality.

4. "Custom and usage" means "a usage or practice of the people, which, by common adoption and acquiescence, and by long and unvarying habit, has become compulsory, and has acquired the force of a law with respect to the place or subject-matter to which it relates. It results from a long series of actions, constantly repeated, which have, by such repetition and by uninterrupted acquiescence, acquired the force of a tacit and common consent. An habitual or customary practice, more or less widespread, which prevails within a geographical or sociological area; usage is a course of conduct based on a series of actual occurrences." (Reference: Black's Law Dictionary)

5. Paragraph (b) that refers to the "customs and usages and any practices which the parties have established between themselves" is there to permit the tribunal to look at the history of the commercial relationship between the parties. The practice between two parties may not be a commercial custom or usage. This can permit the judge to determine the intention and the nature of the obligations of the parties based on prior conduct that can be ascertained.

6.Proof of existence of customs and usages. In all case, usages, customs, practices have to be proven. In principle, the onus of proof is on the party who is claiming the existence of such usages, custom or practice.

Cross-references: 1.Articles 7 et 9 of the *United Nations Convention on Contracts for the International Sale of Goods 1980.)* 2. Québec and French law use this principles in the interpretation of commercial contracts.

Article 5. Form of commercial contract

(1) A commercial contract need not be concluded in or evidenced by writing and is not subject to any other requirement as to form except as otherwise provided by law. A contract may be proved by any means, including witnesses.

(2) For the purposes of this law "writing" includes telegram and telex.

Explanatory notes: 1. This article deals with the question of form of the commercial contract; the form may be verbal or in writing.

2. The general theory of contract in both, civil and common law traditions, is to the effect that contracts can be verbal or in writing. The obligation that a contract be in writing is the exception. The requirement that a certain type of contract shall be in writing will be specified by law. .

3. It is generally assumed that business people have a certain degree of sophistication in the field of commerce and they have knowledge of the "business world" in which they are evolving. Considering the above, transactions between business people do not need the same type of safeguards as transactions where non-business people are involved. The intent behind this rule is to facilitate and make less stringent the exchange of goods and services in the country commercial environment.

Cross-references: 1. Articles 11 and 13 of the *United Nations Convention on Contracts for the International Sale of Goods 1980.)* 2. Principles to the same effect are found in the Québec and French law applicable to different type of commercial contracts.

Article 6. Applicable law

(1) The parties to a commercial contract may elect the law applicable to the contract.

(2) In a contract that does not involve any foreign element, and where the parties have not elected the law applicable to the contract, the laws of the Kingdom of Cambodia shall apply.

(3) In a contract that does not involve any foreign element, and where the parties have elected the law of a different country, the rules of law relating to public order of the Kingdom of Cambodia shall apply to that contract.

Explanatory notes: 1. This article permits the parties to a commercial contact to choose the legal system that will be applicable to the contract. That is to say that parties to a commercial contract may agree that the laws of Cambodia will not apply and that the laws of another country will apply instead.

2. In practice, this type of clause is commonly used in Cambodia in the conclusion of significant contract and international ones. This rule solely recognized the actual practice follow in the business community.

3. "Laws relating to public order" include, among other things, laws and regulations that tend to prevent the commission of fraud and crime, and secure generally the comfort, safety, morals, health, and prosperity of the citizens of a state. In some civil law jurisdictions the expression "lois de police" ("laws of police") is used to refer to these laws and regulations. However, in English, the expression "public order" embodies this principle.

Article 7. Several liability of debtors

Where there is more than one debtor of an obligation resulting from the conclusion of a commercial contract, the debtors are presumed to be severally liable to the creditor.

Explanatory notes: 1. This rule is deviating from the rules applicable to contract in general where the several liability of the debtors is not presumed. In the case of a commercial contract where there is more than one debtor, the creditor of the contractual obligation will have to bring a *prima facie* evidence that there is more than one debtor and the court will have to presume that they are severally liable. Then the debtors will have to onus of proof of showing the tribunal that the debtors are not severally liable.

Article 8. Clause limiting liability of a party to a commercial contract

Parties to a commercial contract may include a clause in their contract that limits their liability. A clause limiting liability of the parties has no effect against a third party to the contract.

The parties to the contract may not waive this provision.

Explanatory notes: 1. This provision permits the parties to a commercial contract to restrict in whole or in part their respective liability with respect to the contract. Such a provision is prohibited in the case of civil contract and contract involving a merchant and non-merchant.

Furthermore, such a clause in a commercial contract limiting the liability will not have effect against a third party whose claim may involve the different parties to a commercial contract.

2. Example:

i) a manufacturer and a distributor conclude a commercial contract of sale of goods where they provide that the manufacture 's liability will be limited to a certain sum of money in case of defect of the product.
ii) the distributor is selling the goods to a store
iii) a consumer is purchasing the good from the store
iv) the good purchased by the consumer is defective and the consumer is suing the store, the distributor and the manufacturer

Based on article 8 the manufacturer will not be able to rely on the provision of the contract that restrict his liability. This clause is only valid vis-à-vis the distributor and cannot be used against the consumer.

Article 9. Limitation Period

(1) Obligations resulting from a commercial contract shall expire 5 years from the date defined in the contract, or where the date is not defined in the contract, 5 years from the date the contract was concluded.

(2) The following actions shall toll the limitation period
(a) filing an action to enforce the contract
(b) commencing an arbitration
(c) bankruptcy of the obligor

Article 10. Court's jurisdiction

(a) Except where there is an arbitration agreement, the Commercial Court shall have jurisdiction to resolve commercial contract disputes.

(b) Pending the creation of the Commerce Court, the court of general jurisdiction shall resolve commercial contract disputes.

(c) In the case where a contract occurs between a merchant and a non-merchant, the non-merchant may elect to submit the dispute to the Commercial Court or to the court of general jurisdiction, and the merchant has to follow the non-merchant's choice. The parties to a contract may not waive this rule.

Explanatory notes: 1. When a dispute arises from a commercial contract, the Commercial Court will have exclusive jurisdiction. Rights of appeal will be provided in the law creating the Commercial Court. As there is no Commercial Court actually, the general jurisdiction will have jurisdiction.

2. Paragraph (c) does not involve a dispute arising from a commercial contract since there is one party that is not a merchant. However, it is necessary to provide for a specific rule that will be applicable in such a case. The non-merchant will have the choice to proceed before the Commercial Court or the court of general jurisdiction. It is important to give the choice to the non-merchant as we can assume that the Commercial Court will have the power to determine the issues on the basis of commercial practice, customs and usages that may be unknown to the non-merchant. The non-merchant may prefer to go to the common court of general jurisdiction.

Article 11. Suppletive character of these rules

Except as otherwise provided, the provisions of this law are suppletive.

Explanatory notes: 1. This rule is there to specify that the rules contained in this law are complementary, that is to say that the parties to a commercial contract may expressly or impliedly depart from them. If the parties do not depart from these rules in the contract, these rules will apply.

2. When a provision of this Law states that parties to a contract cannot depart from the rule contained herein, it renders that provision mandatory and nobody can ignore this rule.

Part B – Arbitration Agreements

Cross-references: 1. Articles 2638 to 2643 of the *Civil Code of Québec* 2. With respect to the arbitration procedure, see : *Law of commercial arbitration.*

Article 12. Definition of arbitration agreement

An arbitration agreement is a contract by which the parties undertake to submit a present or future dispute to the decision of one or more arbitrators, to the exclusion of the courts.

Explanatory notes: 1. This article permits the parties to a commercial contract to agree to submit a dispute that may arise between them in the future or that has already arisen to one or more arbitrators instead of going to the courts. The parties to a commercial contract may provide for such a clause in the original commercial contract, or in a different contract concluded at the initial stage of their legal relationship. In this case, the object of the arbitration agreement will be that "future dispute" that may arise between them will be submitted to arbitration. The parties may also agree to arbitration once an actual dispute has arisen between them; in this case it will be said that the parties are submitting "a present" dispute.

Article13. Form of arbitration agreement

An arbitration agreement shall be evidenced in writing. An agreement is deemed to be evidenced in writing if it is contained in an exchange of communications that attest to its existence or in an exchange of communications in which its existence is alleged by one party and is not contested by the other party.

Explanatory notes: 1. This article imposes a condition of form (by opposition to a substantive condition): the arbitration agreement has to be evidenced in writing. Written exchange of communications or exchange of proceedings between the parties will constituted evidence of the arbitration agreement if they "attest to its existence". If there are such communications or proceedings the arbitrators and the courts will have to conclude that the parties have agreed to send their disputes to an arbitrators.

In the case where a court would have to determine whether the parties have agreed to arbitration and that the answer to this question is affirmative, the court will have to decide that it doesn't have jurisdiction over this matter.

Article 14. Matters not subject to arbitration

Disputes over the status and capacity of persons or other matters of public order may not be submitted to arbitration.

Explanatory notes:1. This article is to ensure that the rules of public order that are applicable to the contract cannot be counteracted by the parties. In the case where the commercial contract is not an international contract, and that the laws of Cambodia apply in their entirety or partially, the rules of public order of the laws of Cambodia will apply even if the parties to the agreement have provided (expressly or implicitly) for the non applicability of the rules relating to " status and capacity of persons, family matters or other matters of public order ". Where the contract is an international contract, the determination of the applicable rules relating to status, capacity, etc., will be made by the arbitrator in accordance with the contract or the rules of private international laws (see: articles 18 to 20 and 31 and 32 for the rules of private international law applicable to commercial contracts).

2. This article has to be read in conjunction with article 15 of the Law.

Article 15. Invalid provisions

(1) Any provision in an arbitration agreement that has the purpose of avoiding the applicability of the rules of public order is invalid. The remaining provisions of the arbitration agreement shall be applied.

(2) A provision of the arbitration agreement that places one party in a privileged position with respect to the designation of the arbitrators is null.

Explanatory notes: 1. This article is to ensure that the rules of public order that are applicable to the contract can not be counteracted by the parties. In the case where the commercial contract is not an international contract, and that the laws of Cambodia apply in their entirety or partially, the rules of public order of the laws of Cambodia will apply even if the parties to the agreement have provided (expressly or implicitly) for the non applicability of the rules relating to " status and capacity of persons, family matters or other matters of public order ". Where the contract is an international contract, the determination of the applicable rules relating to status, capacity, etc., will be made by the arbitrator in accordance with the contract or the rules of private international laws (see: articles 18 to 20 for the rules of private international law applicable to commercial contracts) .

2. The provision found in paragraph (2) is to ensure that at the time of the conclusion of the arbitration agreement, both parties have equivalent powers to designate the arbitrators. The nullity of a provision violating this article doesn't nullify the entire arbitration agreement. It is the specific provision that is null.

3. This article has to be read in conjunction with article 14 of the Law.

Article 16. Arbitration agreement separate from contract

An arbitration agreement contained in a commercial contract is considered to be an agreement separate from the other clauses of the contract. The determination by the arbitrators that the contract is null does not nullify the arbitration agreement.

Explanatory notes: 1. This provision is there to ensure that in the case where the parties have provided for an arbitration agreement in the commercial contract as such, that the nullity of the commercial contract doesn't entail the nullity of the arbitration agreement contained therein.

2. This article is there to ensure that the following situation doesn't occur: the declaration of the nullity of the contract that causes the nullity of the arbitration agreement with the result that the arbitrator did not have jurisdiction to determine the issue between the parties. The arbitrator's jurisdiction to decide the issues being only based on the arbitration agreement.

Article 17. Arbitration procedures

Subject to the peremptory provisions of law, the procedure of arbitration is governed by the contract or, failing that, by the Law of Commercial Arbitration.

PART C – Conflict of laws

Explanatory notes: 1. The provisions contained in this Part are general conflict of laws rules. Conflict of laws rules are used when there is an international element to the contract and that the parties have not determined which law will be applicable to their contract. Be it that the contract was formed outside of the Cambodian territory, one of the party's establishment or place of business is not on the Cambodian territory, that the property is issue is located outside of Cambodia, etc.

Conflict of laws rules are needed when a dispute between the parties to the contract is brought before the Cambodian court. In this case, the court has to decide and to do so, the court has to look at the rules of law. But what will be the law applicable to the contract if there is an international aspect to it and that the parties have not provided for the applicable law?

In such a case, the first issue for the court to decided will be: what is the law applicable to the contract; is it the laws of Cambodia or the laws of another country. In determining this question the court will apply the rules provided in this Part.

In applying the conflict of laws rule, if the court concludes that the laws of Cambodia apply, then it will apply the laws of Cambodia to determine the issue raised by the parties. Or, if the court concludes that the laws of another country apply, it will have to use these other laws to resolve the dispute between the parties.

Cross-references: 1. Articles 31 and 32 of this Law that provides for a specific conflict of laws rule in the case of a contract of sale.

Article 18. Scope

This Part applies to a commercial contract involving a foreign element and where the parties have not made an election of the law applicable to the contract.

Article 19. Form of the contract

(1) The form of the contract is governed by the law of the place where it is made.

(2) A contract is nevertheless valid if it is made in the form prescribed by:

(a) the law applicable to the content of the contract;

(b) the law of the place where the property which is the object of the contract is situated at the time of the conclusion of the contract: or

(c) the law of the domicile of one of the parties when the contract is made.

Article 20. Content of the contract

(1) The contract is governed by the law designated in the contract.

(2) If no law is designated by the parties, the court shall apply the law of the country with which the act is most closely connected, in view of its nature and surrounding circumstances.

(3) A contract is presumed to be mostly connected with the law of the country where the party who has to perform the obligation has his establishment or place of business.

Cross-references: 1. Article 6 permitting the parties to designate the law applicable to the contract

Chapter 2. Contract of sale

Article 21. General rules of the law of contract of sale

The general rules of the law of contract of sale apply to all commercial contracts of sale, except when special rules are found in this Chapter complement or depart from them.

Explanatory notes: 1. This article clarifies that the general rules of law defining the contract of sale are applicable to commercial contract of sale, except when the rules found in this Chapter complement or depart from these general rules. It has to be remembered that this Law is solely applicable to transactions occurring between persons that are both involved in commercial activities. Both parties to the commercial contract must be business persons. If there are more than two parties to the contract the same principle applies: all parties have to be merchants.

However, contracts of sale also occur between non business persons or between one business person and a non business person. In this context, the general rules of law defining and circumscribing the contract of sale will be found in the Civil Code. Pending the adoption of the Civil code, the applicable rules are found in *Decree No.38 referring to contract and other liabilities* of October 28, 1988.

2. The logic of the legal thinking applicable here is based on the principle that the specific take precedence over the general. It can be summarized as followed:

- The general rules of the law of obligation and the law of contract (that are actually found in *Decree No.38* – to be found in the Civil code when adopted) are applicable to all commercial contracts, including contract of sale, to the exception of the provisions that have been modified or supplemented by the Law of commercial contract.
- The law of commercial contract applies to all commercial contracts, including the contract of sale. The specific provisions contained in the law of commercial contract take precedence over the general provisions of the law of obligation and the law of contract (that are actually found in *Decree No.38* – to be found in the Civil code when adopted).
- The general rules applicable to contract of sale (that are actually found in *Decree No.38* – to be found in the Civil code when adopted) are applicable to all contract of sale, including commercial contract of sale, to the exception of the provisions that have been modified or supplemented by Chapter 2 of this Law.
- The specific provisions applicable to contract of sale found in Chapter 2 of the present Law take precedence over the general provisions relating to contract of sale contract (that are actually found in *Decree No.38* – to be found in the Civil code when adopted).

3. This Chapter only applies to contract of sale concluded between merchants in the ordinary course of their business.

Cross references: 1. Articles 1 and 2 of this Law.

Article 22. Scope

This Chapter does not apply to sales:
(a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;
(b) by auction;
(c) on execution or otherwise by authority of law;
(d) of stocks, shares, investment securities, negotiable instruments or money;
(e) of ships, vessels, hovercraft or aircraft;
(f) of electricity.

Explanatory notes: 1. The sales listed in this article are excluded from the application of this Chapter, as they will be dealt with in specific legislation. For example, the particular rules applicable to the sale of stocks, shares, etc will be dealt with in the Law of commercial enterprises; particular rules relating to sale of electricity will be found in the Electricity Law; particular rules relating to sale of goods for personal, family or household use are subject, in an important number of countries, to legislation aiming at protecting the consumers; etc.

Cross references: 1. Article 2 of the *United Nations Convention on contracts for the international sale of goods, 1980*

Article 23. Contracts not considered sales contracts

(1) Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

(2) This Chapter does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services.

Explanatory notes: 1. The purpose of this article is to clarify the nature of the contract of sale. Sale is a well known commercial transaction that is defined in the following manner in article 34 of *Decree No.38 referring to contract and other liabilities* of October 28, 1988:

> A sale is a contract in which one person has the obligation to transfer ownership of a subject matter or right to another person who has the obligation to compensate for the value of that subject matter or right.

As expressed above, the nature of the contract of sale corresponds to the classical conception of civil law jurisdictions. It has to be noted that the *United Nations Convention on contracts for the international sale of goods, 1980* is based on this very concept. Furthermore, the draft provisions of the Civil code of Cambodia dealing with contract of sale are based on this conception.

In vernacular language, contract of sale may designate a number of transactions that are not in law contract of sale. For example: enterprise contract, the purpose of which is to supply services, is in law, specifically qualified as such, and will be subject to a particular set of rules. Enterprise contract is not subject to the rules applicable to the contract of sale.

Cross references: 1. Article 3 of the *United Nations Convention on contracts for the international sale of goods, 1980* . Articles 3 reads in the following manner in French:

> (1)Sont réputés ventes les contrats de fourniture de marchandises à fabriquer ou à produire, à moins que la partie qui commande celles-ci n'ait à fournir une part essentielle des éléments matériels nécessaires à cette fabrication ou production.
>
> (2) La présente Convention ne s'applique pas aux contrats dans lesquels la part prépondérante de l'obligation de la partie qui fournit les marchandises consiste en une fourniture de main-d'œuvre ou d'autres services.

24. Warranty

The vendor is bound to warrant the purchaser that the property and its accessories are, at the time of the sale, free of latent defects which render it unfit for the use for which it was intended or which so diminish its usefulness that the purchaser would not have bought it or paid so high a price if he had been aware of them.

However, the vendor is not bound to warrant against any latent defect known to the buyer or any apparent defect; an apparent defect is a defect that can be perceived by a prudent and diligent purchaser without any need of expert assistance.

Explanatory notes: 1. This article expresses the general principle establishing the obligation of the vendor to warrant that the property sold is free from latent defects.

Cross reference: 1. Article 1726 of the Civil code of Québec 2. Article 42 of *Decree No.38 referring to contract and other liabilities* of October 28, 1988.

Article 25. ?????

(1) If the property perishes by reason of a latent defect that existed at the time of the sale, the loss is borne by the vendor, who is bound to restore the price.

(2) However, if the loss results from a force majeure PAT I FORGOT IN ENGLISH WHAT IS FORCE MAJEURE PLEASE CHANGE IN SECOND PARAGRAPH OF EXP NOTE BELOW or is due to the fault of the purchaser, the purchaser shall deduct the value of the property at the time of the loss from the total amount of his claim.

Explanatory notes: 1. Paragraph (1) of this article aims at establishing the liability of the vendor and purchaser when the property that is the subject matter of the contract of sale perishes because of a latent defect.

2. Paragraph (2) provides for the rule applicable when a good has a latent defect and where the good perishes for reasons unrelated to the latent defect. In this situation, the fault of the purchaser, as well as the occurrence of an event that constitutes a force majeure will be taken into consideration when determining the vendor's liability. Effectively, pursuant to the second paragraph article 25, the value of the property at the time of the loss will be deducted from the total amount that is claimed by the purchaser.

Example:

- Vendor sales a computer to a purchaser for an amount of $5,000.
- The computer has a latent defect with the result that the value of this computer at the time of sale is $3,000. The purchaser is not aware of the latent defect and effectively pays the vendor an amount of $5,000.
- The purchaser takes the computer to his office and drops it on a concrete floor, with the result that the computer is completely destroyed (broken in 2 parts).
- In looking at the broken computer, the purchaser discovers that there was a latent defect.
- The purchaser sues the vendor for the price of the computer, claiming that the computer had a latent defect at the time of purchase

In our example, the purchaser can not claim the total price of the computer, since the computer was loss by his fault. He can only claim: $5,000 (that is the amount he paid) minus $3,000 (that is the value of the computer at the time of the loss) = $2,000. The amount of the purchaser's claim based on the vendor's warranty will be in the amount of $2,000. This amount corresponds to the amount of "over payment" made by the purchaser at the time of the sale, since the computer did not worth $5,000 but only $3,000.

Cross-reference: 1. Article 1727 of the Civil code of Québec.

Article 26. ???????

If the vendor was aware or could not have been unaware of the latent defect, he is bound not only to restore the price, but also to pay all damages suffered to the purchaser.

Explanatory notes: This article extends the liability of the vendor, when the vendor knew or should have known that the property had a latent defect. In this case, the vendor may have to pay the purchaser damages in addition to the purchase price.

Article 27. Presumption of existence of latent defect at the time of sale

A defect is presumed to have existed at the time of a sale by a merchant if the property malfunctions or deteriorates prematurely in comparison with identical items of property or items of the same type.

However, such a presumption does not exist where the defect is due to improper use of the property by the purchaser.

Explanatory notes: 1. This article establishes a presumption of existence of a latent defect then the property malfunctions or deteriorates prematurely in comparison with identical items or property or items of the same type.

2. The effect of this article is to shift the onus of proof in the case where there is a latent defect. That is to say that purchaser will have to show a *prima facie* case that the good in issue malfunctions or deteriorates prematurely when compared with identical items to attract the liability of the vendor under the warranty. To defend himself the vendor will have to prove that there was not latent defect.

Article 28. Extension of warranty obligation to manufacturers and distributors

The manufacturer, any person who distributes the property under his name or as his own, and any supplier of the property, in particular the wholesaler and the importer, are also bound to warrant the purchaser in the same manner as the vendor.

Explanatory notes: 1. This article extends the legal obligation of the vendor to warranty against latent defect to the manufacturers and other persons described in the article. This article is there to provide a rule regarding the respective liability of the different actors where there is a series of contracts dealing with the same goods. For example: The manufacturer is selling computers to a distributor, who in turn is selling the computers to an independent vendor.

Cross-reference: 1. Article 1730 of the Civil code of Québec

Article 29. Exclusion of warranty PAT REVIEW THE WORDING

Where the contract of sale is concluded between two or more merchants, the parties to the contract may diminish or entirely exclude the application of the warranty as expressed in articles 24 to 28 of this Law.

However, such a diminish warranty or exlusion of the warranty only takes effect between the parties to the contract.

Such provisions (diminishing or excluding the warranty) is of no force and effect against, farmers, fisherman and non – merchants. IT IS PUBLIC ORDER RULE AND NOT SUPPLETIVE

Explanatory notes: 1. This article aims at providing flexibility in contracts concluded between merchants. It is assumed that merchants are able to negotiate the content of their contract and that they do not necessarily need the protection of the State. Therefore, the Law permits them to waive between themselves the legal obligation to warranty the sale of good against latent defects.

Such a waiver of the warranty will however will be of no force of effect against non-party to the contract, nor against non-merchants. In other words, even it the manufacturer, the distributor and the vendor of the good agreed that there would not be any warranty clause between themselves, they will not be able to rely on the waiver of the warranty clause vis-à-vis of the ultimate purchaser, for example, the consumer of the good.

2. The rule to the effect that a waiver of a warranty has not effect against farmers and fisherman is actually necessary in Cambodia. Considering the level of education of the vast majority of the farmers and fisherman, it was felt that these individuals needed the protection of the State and therefore, the sale of goods warranty may not be waived in contracts concluded with them.

Article 30. Farmers and fisherman PAT TO REVIEW THIS WORDING…

(1) Where one of the party to a commercial contract of sale is a farmer or a fisherman and that the subject matter of the contract is the sale of agricultural products in bulk, AGRICULTURAL PRODUCT THAT ARE NOT YET CULTIVATE – I AM TAKING ABOUT WHEN THEY SELL THE RICE FOR EXAMPLE AND THE PURCHASER WILL BE THE ONE WHO IS GONNA CUT THE RICE AND PROCESS IT. , seeds, fertilizers and FISH IN BULK, the fisherman and farmer may claim the nullity of the contract on the basis of lesion.

This can not be waived.by the parties.

Explanatory notes: 1. Similarly to the rule found under article 29, this rule aims at the protection of farmers and fisherman. Considering the level of education of the vast majority of the farmers and fisherman, it was felt

that these individuals needed the protection of the State and therefore, they may be entitled to claim nullity of the contract on the basis of lesion.

Cross-references: On lesion, see articles 11 and 12 of *Decree No.38 referring to contract and other liabilities* of October 28, 1988 (that will be replaced by the Civil code once adopted)

Article 31. Conflict of law in the case of sale of a movable property

If no law is designated by the parties, the sale of a tangible movable property is governed by the law of the country where the vendor had his establishment at the time of formation of the contract.

However, the sale is governed by the law of the country in which the purchaser has his establishment at the time of formation of the contract in any of the following cases:

(1) negotiations have taken place and the contract has been formed in that country;
(2) the contract provides expressly that delivery shall be made in that country;
(3) the contract is formed on terms determined mainly by the purchaser, in response to a call for tenders.

Explanatory notes: 1. See explanatory notes under Part C of Chapter 1 – Conflict of laws

Article 32. Conflict of law in the case of sale of immovable property

If no law is designated by the parties, the sale of immovable property is governed by the law of the country where it is situated.

Explanatory notes: 1. See explanatory notes under Part C of Chapter 1 – Conflict of laws

Chapter 3. Transportation contract

Part A. General provisions

Article 33. Definition

A contract of carriage is a contract by which one merchant, the carrier, undertakes principally to carry persons or property from one place to another, in return for a price which another merchant, the travel organizer or intermediary thereof, or the shipper or receiver of the property, undertakes to pay at the agreed time.

Explanatory notes: 1. This article defines the contract of carriage between merchants. The content of the definition is reiterating the principles of carriage contract found in civil law jurisdiction and that has been used in international conventions.

Cross-references: 1. Articles 2030 2084 of the Civil code of Québec 2. *United Nations Convention on the Carriage of Goods by Sea* (Hamburg, signed March 31, 1978, entry into force on November 1, 1992 – ratified mostly by developing countries – Cambodia has not ratified it) 3.*Convention on the Contract for the International Carriage of Goods by Road* Geneva, signed May 19, 1956, entry into force on July 2, 1961 – has been modified subsequently by Geneva Protocol of July 5, 1978 – Cambodia has not ratified it)

Article 34. Travel organizer or intermediary defined

“ Travel organizer" or “intermediary” means any merchant who undertakes to perform the contract defined in article 33 in his own name to provide for another, for an inclusive price, a combination of services comprising transportation, accommodation separate from the transportation or any other service relating thereto.

Article 35. Successive and combined carriage

Successive carriage is effected by several carriers in succession, using the same means of transportation; combined carriage is effected by several carriers in succession, using different means of transportation.

Article 36. Gratuitous carriage

Where a merchant provides for gratuitous carriage of persons or property, the rules contained in this Chapter apply.

Article 37. Carrier's obligation and ??????PAT

A carrier who provides services to the general public shall carry any person requesting it and any property he is requested to carry, unless he has serious cause for refusal.

The passengers, shipper or receiver is bound to follow the instructions given by the carrier in accordance with the law.

Article 38. Carrier's liability

A carrier may not exclude or limit his liability except to the extent and subject to the conditions established by law.

The carrier is liable for any damage resulting from delay, unless he proves FORCE MAJEURE.

Article 39. ????

Where the carrier entrusts another carrier with the performance of all or part of his obligation, the substitute carrier is deemed to be a party to the contract.

The shipper is discharged by payment to one of the carriers.

Part B. Carriage of persons

Article 40. Definition

Carriage of persons includes, in addition to carriage itself, embarking and disembarking operation.

Article 41. Carrier's liability

(1) The carrier is bound to take his passengers safe and sound to their destination.

(2) The carrier is liable for injury suffered by a passenger unless he proves it was caused by PAT FORCE MAJEURE OR BY THE STATE OF HEALTH OR FAULT OF THE PASSENGER.

(3) The carrier is liable for any loss of the luggage or other effects placed in his care by a passenger, unless he proves PAT FORCE MAJEURE, an inherent defect in the property or the fault of the passenger.

However,

(a) the carrier is not liable for any loss of documents, money or other property of great value, unless he agreed to carry the property after its nature or value was declared to him.

(b) the carrier is not liable for any loss of hand luggage or other effects which remain in the care of the passenger, unless the passenger proves the fault of the carrier.

Article 42. Liability of successive or combined carriers

In the case of successive or combined carriage of persons, the carrier who effects the carriage during which the injury or loss occur is liable thereof, unless one of the carriers has expressly assumed liability of entire journey.

Part C. Carriage of property

Article 43. Definition

Carriage of property extends from the time the carrier receives the property into his charge PAT WHEN THE CARRIER GET THE PROPERTY UNDER HIS CONTROL???UNDER HIS RESPONSIBILITY ANYWAY WHEN HE HAS IT PHYSICALLY for carriage until its delivery.

Article 44. Bill of lading

Parties to a contract for the carriage of property shall evidence such a contract in writing.

A bill of lading is a writing that evidences a contract for the carriage of property.

A bill of lading states the names of the shipper, receiver and carrier and, where applicable, of the person who is to pay the freight and carriage charges.

A bill of lading also states the place and date of receipt of the property by the carrier, the points of origin and destination, the freight as well as the nature, quantity, volume or weight, and apparent condition of the property and any dangerous properties it may have.

Article 45. ???

The bill of lading is issued in several copies; the issuing carrier keeps a copy and gives one to the shipper; another copy accompanies the property to its destination.

In the absence of any evidence to the contrary, the bill of lading is proof of the receipt of the property by the carrier into his charge and of its nature, quantity and apparent condition.

Article 46. Negotiability of bill of lading

A bill of lading is not negotiable unless otherwise provided by law or by the contract.

Negotiation of a negotiable bill of lading is effected by endorsement and delivery, or by mere delivery if the bill is made to bearer.

Explanatory notes: 1. The basic principle behind this article is that a transaction of a negotiable bill of lading is effected by endorsement on the bill of lading and by delivering the bill of lading in the case the bill if nominative. Where the bill of lading is made to bearer, delivery of the bill is sufficient.

2. An endorsement may be defined as: "the act of a …holder of a bill, …in writing his name upon the back of the same, with or without further or qualifying words, whereby the property in the same is assigned and transferred to another. " An endorsement must be written by or on behalf of the holder. An endorsement is effective for negotiation only when it conveys the entire instrument or nay unpaid residue. It it purports to be of less it operates only as a partial assignment. (reference: Black's Law Dictionary).

3. A bearer is a person in possession of a bill of lading that is payable to bearer or endorsed in blank.

Article 47. Delivery of the property

The carrier is bound to deliver the property to the receiver or to the holder of the bill of lading.

The holder of a bill of lading shall hand it over to the carrier when he demands delivery of the property.

Article 48. Receiver's rights and obligations

Subject to the rights of the shipper, the receiver upon accepting the property or the contract , acquires the rights and assumes the obligations arising out of the contract.

Article 49. Carrier's obligation to notify

The carrier is bound to notify the receiver of the arrival of the property and of the time allowed to remove it, unless it is delivered to the receiver's residence or premises.

Article 50. Receiver not found or refusing to act

Where the receiver cannot be found or refuses or neglects to take delivery of the property or where, for any other reason, the carrier cannot deliver the property through no fault of his own, the carrier shall notify the shipper without delay and request instructions as to disposal of the property. However, in case of emergency, the carrier may dispose of perishable property without notice.

If the carrier receives no instructions within fifteen days of notification, he may return the property to the shipper.

Article 51. Carrier entitlement to remuneration for preservation and storage

From the expiration of the time allowed for removal or from notification of the shipper, the obligations of the carrier are those of a gratuitous depositary.

However, the carrier is entitle to reasonable remuneration for the preservation and storage of the property, payable by the receiver or, in the case where the receiver fails to pay, by the shipper.

Explanatory notes: 1. The concept of gratuitous depositary will be regulated in the Civil code. At this time, parties will have to refer to commercial customs and usages to determine the obligation of the carrier during this period. Generally the depositary has the obligation of preserving and maintaining the property as a reasonable person would in similar circumstances.

Article 52. Carrier's obligations

The carrier is bound to carry the property to its destination.

He is liable for any injury resulting from the carriage, unless he proves that the loss was caused by PAT FORCE MAJEURE, and inherent defect in the property or natural shrinkage.

Article 53. Computation of limitation period

Limitation period of any action in damages against a carrier runs from the delivery of the property or from the date on which it should have been delivered.

The action is not admissible unless a prior notice of the claim is given to the carrier in writing within sixty days after the delivery of the property, whether or not the loss is apparent, or if the property is not delivered, within nine months after the date of which it was sent. No notice is required if the action is brought within that time.

Article 54. Right of action against successive or combined carriers

In the case of successive or combined carriage of property, an action in liability may be brought against the carrier with whom the contract was made or the last carrier.

Article 55. Liability of the carrier

The liability of the carrier, in the case of loss, may not exceed the value of the property declared by the shipper.

If no value has been declared, it is established on the basis of the value of the property at the place and time of shipment.

Article 56. ???

No carrier is bound to carry documents, money or property of great value.

If a carrier agrees to carry that type of property, he is not liable for loss unless its nature or value has been declared to him; any declaration that is deliberately mnisleading as to the nature of the property or deliberately inflates its value, exemptys the carrier from all liability.

Article 57. Dangerous property

A shipper who places dangerous property into the charge of a carrier without prior disclosure of its exact nature shall indemnify the carrier for any loss he suffers by reason of the carriage of the property.

And the shipper shall pay any storage charges and assume all risks.

Article 58. ???

The shipper is bound to compensate any loss suffered by the carrier as a result of an inherent defect in the property or any omission, deficiency or inaccuracy in the shipper's declarations as to the property carried.

However, the carrier remains liable towards third persons who suffer loss as a result of any of these acts or omissions, subject to his remedy against the shipper.

Article 59. Timing of payment for freight and carriage

The freight and carriage charges are payable before delivery, unless otherwise stipulated in the bill of lading.

In either case, if the property is not as described in the contract or if its value is greater than the declared amount, the carrier may claim the amount he could have charged for its carriage.

Article 60. Payment of property carried on delivery

Where the price of the property carried is payable on delivery, the carrier shall not deliver the property until he receives payment.

The shipper pays the charges unless he has instructed otherwise in the bill of lading.

Article 61. Carrier's right of retention of the property

The carrier may retain the property carried until the freight, the carriage charges and any reasonable storage chares are paid.

If, according to the shipper's instructions, those amounts are payable by the receiver and the carrier does not demand payment according to instructions, he loses his right to claim payment from the shipper.

Chapter 4. Transition Provisions

Article XX. Scope

This chapter shall apply to commercial contracts concluded after the promulgation of this law and prior to the promulgation of the Civil Code.

Explanatory Notes. Commercial Contracts – or contracts between merchants in the course of their business – comprise one type of many different types of contracts. All of these contracts, regardless of their type, share common characteristics that will be governed by the Civil Code. Thus, while commercial contracts will be separate from the Civil Code, they will be governed to a large extent by provisions in the Civil Code. In order to avoid undue burdens on contracting parties, as well as the judicial system, it is essential that these two laws are compatible.

At the time this draft Law was prepared, a substantial part of the Civil Code had been drafted; however, it is difficult to predict how long it will be before the Code is enacted. In order to move ahead with enactment of modern contract principles suited to Cambodia's rapidly developing economic sector, the draft Law on Commercial Contracts includes transition provisions. In this way, these important reforms can proceed through the enactment process prior to enactment of the Civil Code.

In preparing the transition provisions, consideration was also given to existing contract law, Decree 38. Decree 38, which applies to all obligations, including commercial contracts, will be repealed by the Civil Code. In the interim, it will apply to commercial contracts to the extent that it does not conflict with provisions of the Law on Commercial Contracts.

The transition provisions are based on the following factors.

1. *Continued applicability of general contract provisions of Decree 38.*
The Law on Commercial Contracts does not include all relevant general contract provisions (that is, general provisions related to all contracts as well as the general provisions related to sales contracts). The draft law assumes the continued applicability of Decree 38, to the extent that it is appropriate. Many of the general provisions of Decree 38 are substantially similar to the general contract provisions of the Civil Code, and these provisions of Decree 38 can be used in the transition period.

2. *Chapter on Transitional general contract provisions.*
Certain provisions of Decree 38 either conflict or are not adequate – for example, there are no provisions on offer and acceptance. The transition provisions address these conflicts and inadequacies. The transition provisions assume the Law on Commercial Contracts will be promulgated before the Civil Code. Of course, if the Civil Code is considered before or contemporaneously with the Law on Commercial Contracts, the chapter on transitional general provisions will deleted from the draft Law on Commercial Contracts. These transitional provisions will apply to commercial contracts made prior to the promulgation of the Civil Code. This way, the contracts made during the transition period are definite, and the rights of the parties are not susceptible to change upon enactment of the Civil Code.

3. *Transitional provisions based on draft Civil Code.*
These transitional contract provisions are the same as the relevant provisions in the draft Civil Code that existed when this draft Law on Commercial Contracts was prepared. Therefore, the provisions may need to be updated if the draft Civil Code is revised before the Law on Commercial Contracts is enacted.

Part A. Computation of Time

Article XX. Designation of period

A time period may be designated in terms of hours, minutes or seconds, or in terms of days, weeks, months or years.

Article XX. Expression of intention

Unless the parties have expressed a contrary intention, time periods shall be computed in accordance with this section.

Article XX. Calculation of period expressed as days, weeks, months or years

(1) If a period has been expressed as days, weeks, months or years, the first day of the period shall not be included in the computation, unless the period begins at 00:00 of the day. The period shall terminate at midnight on the last day of the period.

(2) If the last day of a period falls on an official holiday or other non-business day, the period shall terminate at the end of the immediately following business day.

Article XX. Calculation of period by calendar

(1) If a period has been established in terms of weeks, months or years, it shall be computed in accordance with the calendar.

(2) If a period does not commence at the beginning of a week, month or year, such period shall terminate on the day in the last week, month or year preceding the day corresponding to that on which it commenced. However, if the period has been fixed in terms of months or years and there is no corresponding day in the last month or year, the last day of the month shall be the day of termination.

Part B. Formation of Contract (Offer and Acceptance)

Article XX. Contract by offer and acceptance

A contract is formed when an offer and an acceptance thereof conform to each other.

Article XX. Definition of offer

(1) An offer is an invitation to enter into a contract based on the offeror's intention to be legally bound by the other party's acceptance thereof.

(2) An offer becomes effective when it reaches the offeree.

Article XX. Offer with acceptance period

(1) An offer may be made subject to an acceptance period. An offer that specifies an acceptance period cannot be revoked.

(2) If the offeror does not receive notice of acceptance within the specified acceptance period, the offer shall automatically lapse upon the expiration of the acceptance period.

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

Article XX. Offer with no acceptance period

(1) An oral offer that states no acceptance period shall lapse unless it is accepted forthwith by the offeree.

(2) A non-oral offer that states no acceptance period cannot be revoked by the offeror until after a reasonable period of time.

Article XX. Revocation of offer

A revocation of an offer shall be valid if it reaches the offeree before notice of acceptance is dispatched by the offeree.

Article XX. Formation of contract on receipt of acceptance

(1) A contract shall be formed when the notice of acceptance is received by the offeror.

(2) An acceptance is a statement made by or other conduct of the offeree indicating assent to an offer. Silence or inactivity does not in itself amount to acceptance.

(3) An acceptance of an offer becomes effective when it reaches the offeror.

(4)An acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same as the acceptance would have become effective

Part C. Performance of Contract

Article xx. Obligee's duty to perform

(1) An obligee shall perform its contractual obligations in accordance with the purpose of the contract and the principle of good faith.

(2) The obligation of a party is extinguished by a performance that complies with the standard established in the preceding paragraph.

Article xx. Right to demand performance

(1) An obligee is entitled to file a suit demanding that the obligor perform the obligation.

(2) However, an obligee may not file a suit demanding performance in the following cases:
(a) where the parties to the contract have agreed not to seek judicial enforcement of performance;
(b) where performance is physically impossible; or

(c) where the cost of performance is prohibitive, and demanding performance of the obligor would violate the principle of good faith.

(3) Even where a suit seeking judicial enforcement of performance is barred, if the obligor carries out such performance voluntarily, the obligee may receive and retain the benefits thereof.

Article xx. Defense of simultaneous performance

Each party to a bilateral contract may refuse to perform its own obligation until the other party tenders the performance of its obligation. However, this shall not apply where the time for performance of the other party's obligation has not arrived.

Article xx. Defense of insecurity

A party to a bilateral contract who is required to perform an obligation in advance of the other party may refuse to perform the obligation if there is a significant risk that the other party will not substantially perform its obligation in accordance with its intended purpose. However, this shall not apply where the other party offers a guarantee or security for its performance.

Part D. Remedies for Breach of Contract

Section 1. Non-Performance - General Rules

Article xx. Definition of non-performance

Where an obligor fails to perform a contractual obligation, the obligee may demand as a remedy for such non-performance specific performance, damages, or termination of the contract, in accordance with the provisions set forth in this part.

Article xx. Types of non-performance

Non-performance of an obligation includes cases in which performance cannot be carried out by the established time for performance due to a delay in performance ('delayed performance'), cases in which performance at such time is impossible ('impossibility of performance'), and other cases in which full and complete performance in accordance with the intended purpose of the obligation is not carried out ('incomplete performance').

Article xx. Delayed performance

Delayed performance occurs in the following situations:

(a) where performance is to occur at a time certain, delay beyond such time;
(b) where performance is to occur at a time that is uncertain, delay beyond the time when the obligor knows that such time has arrived; or
(c) where no time for performance is specified, delay beyond the time that the obligor receives a demand for performance.

Article xx. Impossibility of performance

Where an obligor is physically incapable of performing the obligation at the time for performance, the performance is deemed impossible. Performance shall also be deemed impossible where performance is determined to be impossible from a social or economic standpoint.

Article xx. Incomplete performance

An obligation shall be deemed non-performed where it has been performed but the act of performance was not complete, where only partial performance was carried out, or where for any other reason complete performance in accordance with the intended purpose of the obligation was not carried out.

Article xx. Multiple remedies

Where multiple remedies are available to the obligee, the obligee may select any or all of such remedies so long as they are not in mutual conflict.

Section 2. Specific performance

Article xx. Court order for specific performance

(1) Where an obligor does not voluntarily perform an obligation, the obligee may seek an order of specific performance from the court. However, this shall not apply where the nature of the obligation is not suitable for specific performance.

(2) Where the nature of the obligation is suitable for specific performance, the court may, after consideration of the nature of the obligation, the need for the obligee's protection and other circumstances, order direct enforcement, substitute execution, or indirect enforcement.

(3) Direct enforcement is a method by which an obligation is compulsorily enforced regardless of the desires of the obligor, and is permitted where the nature of the obligation involves the payment of money or the delivery of property (including eviction from land or buildings).

(4) Substitute execution is a method of specific performance in which, where the nature of the obligation is not suitable for direct enforcement, if the obligation involves the performance of a specific action, a third party is charged with the performance of such action and the obligor is assessed the cost of such action. Where the obligation involves the obligor's manifestation of a specific intent, the court may manifest such intent on behalf of the obligor by means of a [decision]. Where the obligation involves the non-performance of an action, the court may negate the results of the obligor's action at the obligor's expense, or where it is anticipated that the obligor may attempt to perform an action in violation of such duty, the court may adopt appropriate prospective measures.

(5) Indirect enforcement is a court order that, where an obligor fails to voluntarily perform an obligation, orders that the obligor pay a fixed sum of money until the obligation is performed. The obligee may seek a court order of indirect enforcement even in cases in which direct enforcement or substitute execution are available.

Article xx. Relationship to demand for performance and other remedies

Where the obligor fails to perform an obligation, the obligee may demand damages either instead of performance or together with performance so long as there is no conflict between these two demands.

Section 3. Damages

Article xx. Requirements for damages

(1) Where an obligation is not performed, the obligee may demand damages from the obligor for any resulting harm. However, if the obligor proves that the non-performance was not the fault of the obligor, the obligor is not liable for damages.

(2) Where an obligor uses another person as an assistant to assist in carrying out performance of the obligation, the obligor may not avoid liability unless the obligor proves that the obligor was not negligent in the selection or appointment of the assistant and that the assistant was not at fault.

Article xx. Special rules for monetary obligations

(1) Where the subject matter of the obligation is the payment of money, the obligor is not exempted from payment of interest for delay even where the obligor proves that the delay in payment was the result of force majeure. However, the obligor is not responsible for damages beyond interest for delay if the obligor proves that the obligor was not at fault for the non-performance.

(2) The damages for delay described in the preceding paragraph shall be determined in accordance with the legal rate of interest. Where an agreed-upon interest rate exceeds the legal interest rate, the agreed-upon interest rate shall be applied.

Article xx. Concept of damages

The obligee may demand as damages (a) compensation for the benefit that would have been received under the contract (benefit of performance), as well as (b) expenditures that were wasted due to the non-performance to the extent that such expenditures do not duplicate amounts received as benefit of performance damages, and (c) additional expenditures or burdens resulting from non-performance.

Article xx. Scope of damages

The obligor shall provide compensation for the following types of damages suffered by the obligee due to non-performance:

> (a) Normally occurring damages suffered by the obligee due to non-performance;
> (b) Regarding special damages suffered by the obligee due to special circumstances, such damages shall be compensated where the occurrence of such special damages could have been anticipated by the parties when the contract was executed. However, this shall not apply where the parties did not take the possible occurrence of special damages into consideration when the contract was executed; and

(c) Where the non-performance is the result of bad faith, the judge may, based on the obligee's demand for damages, regardless of subparagraphs (a) and (b), order that the obligor pay to the obligee as damages either all of the damages suffered by the obligee or the profit or benefit obtained by the obligor from the conduct comprising the non-performance.

Article xx. Grounds for reduction of damages

(1) Where the obligee's negligence or fault contributed to the occurrence of non-performance or damages, the court may reduce the amount of damages to be paid by the obligor to the extent that the obligee's conduct contributed thereto.

(2) Where the obligee neglects to mitigate damages, the court may reduce the amount of damages to the extent such damages could have been mitigated by the obligee.

Article xx. Liquidated damages

(1) The obligor and obligee may separately establish conditions for the payment of damages and an amount to be paid.

(2) The obligor may not be exempted [by an agreement described in the preceding paragraph] from liability for non-performance that is intentional or the result of gross negligence.

(3) Where the parties agree on the amount of damages, the court may not increase or reduce the agreed-upon amount. However, where the amount fixed by the parties as liquidated damages is either grossly higher or grossly lower than actual damages, and giving effect to such amount would violate public order and good morals, the court may increase or decrease the liquidated damages amount fixed by the parties.

(4) The liquidation of damages does not obstruct a claim for performance or for termination of the contract. An amount fixed and agreed to by the parties as damages for delay shall not be binding on the parties where the obligee seeks termination of the contract and compensation for damages as a substitute for performance.

(5) A penalty for breach of contract shall be presumed to constitute liquidated damages.

Article xx. Compensation in money

Compensation for damages for non-performance shall be made by the obligor in money. However, this shall not apply where the parties separately agree otherwise.

Article xx. Subrogation by compensation

Where an obligee has received as damages compensation for the value of the property or right comprising the subject matter of the obligation, the obligor shall be automatically subrogated to the position of the obligee in regard to that property or right.

Article xx. Extinctive prescription

The right to demand compensation for damages based on non-performance shall be subject to extinctive prescription of a five-year period from the time when the damages occurred.

Section 4. Termination of Contract

Article xx. Termination for non-performance

Where one of the parties to a bilateral contract commits a material breach of the contract, the other party may terminate the contract immediately.

Article xx. Material breach of contract

(1) A material breach of contract occurs where the purpose of the contract cannot be achieved as a result of the other party's breach, and shall be deemed to occur in any of the following situations:

(a) where after a failure to perform at the specified time, the [obligor] fails to perform within a reasonable warning period established by the obligee;
(b) where the obligor fails to perform at the specified time, and the purpose of the contract cannot be fulfilled if performance is not made by the specified time;
(c) where it is impossible to carry out the essential act of performance; and
(d) where the magnitude of the breach is so substantial that trust between the parties is destroyed and further performance cannot be expected.

(2) The obligor may not prevent termination of the contract based on the reasons set forth in the preceding paragraph on the ground that the non-performance occurred without the fault of the obligor.

Article xx. Method of exercise of right of termination

(1) A party having the right to terminate a contract may terminate the contract by expressing an intention to terminate to the other party. Such an intention may be expressed by means other than a lawsuit.

(2) An expression of an intention to terminate may not be revoked or withdrawn.

(3) An expression of an intention to terminate may be subject to a condition precedent.

Article xx. Termination in cases of multiple parties

(1) Where one of the parties comprises multiple persons, termination of the contract must be effected by all of such persons to the other party or by the other party to all of such persons.

(2) In the case described in the preceding paragraph, where the right of termination is extinguished as to one person, it is extinguished as to all persons.

Article xx. Effect of termination

(1) Termination of a contract relieves both parties of their duties under the contract except for the duty to pay damages.

(2) Upon termination, a party that has received all or part of a performance under the contract shall return the property or benefits received to the other party and return the other party to the other party's state prior to execution of the contract. Where both parties are required to return the other party to the party's state prior to execution of the contract, these duties shall be carried out simultaneously.

(3) A party required to return money as a result of termination shall return the money with interest computed from the date on which the money was received. A party required to return property or other benefit due to termination shall return any benefit received thereby.

(4) The legitimate interests of third parties may not be prejudiced by a termination.

Article xx. Loss of right of termination

Where due to the intentional act or gross negligence of a person having a right of termination [the subject matter] of a contract is damaged or rendered incapable of being returned, a sum of money equal to the value of such [subject matter] shall be returned.

Article xx. Extinctive prescription

The right of termination based on non-performance as well as the right to demand actions to return to the original state that existed prior to the execution of the contract shall be subject to extinctive prescription of a five-year period from the time when the non-performance occurred.

Article xx. Agreed-upon right of termination and termination by agreement

(1) The parties to a contract may agree under the contract that either one or both of the parties shall be given a right of termination. The provisions of Article 419 through 422 pertaining to termination granted by law shall apply *mutatis mutandis* to the method and effect of an agreed-upon right of termination unless the parties agree otherwise.

(2) Even in the absence of a contractual provision regarding a right of termination, the parties to a contract may agree to terminate the contract. However, the legitimate interests of third parties may not be prejudiced thereby.

Article xx. Effective date PAT THIS IS NOT TRANSITIONAL PROVISION….FINAL PROVISION????

This law is urgent, and shall take effect immediately upon enactment.