RESOLUTION (78) 3
RELATING TO PENAL CLAUSES IN CIVIL LAW
APPENDIX

Article 1
A penal clause is, for the purposes of this resolution, any clause in a contract which provides that if the promisor fails to perform the principal obligation he shall be bound to pay a sum of money by way of penalty or compensation.
Article 2

The promisee may not obtain concurrently performance of the principal obligation, as specified in the contract, and payment of the sum stipulated in the penal clause unless that sum was stipulated for delayed performance. Any stipulation to the contrary shall be void.

Article 3

A penal clause shall not of itself prevent the promisee from obtaining specific performance of the principal obligation instead of the sum due under that clause.

Article 4

The sum stipulated shall not be due unless the promisor is liable for the failure to perform the principal obligation.

Article 5

The promisee cannot obtain damages in respect of the failure to perform the principal obligation instead of, or in addition to, the sum stipulated.

Article 6

Despite any stipulation to the contrary, the promisee cannot obtain a sum in excess of either the sum stipulated under the penal clause or the damages payable for the failure to perform the principal obligation whichever is the larger.

Article 7

The sum stipulated may be reduced by the court when it is manifestly excessive. In particular, reduction may be made when the principal obligation has been performed in part. The sum may not be reduced below the damages payable for failure to perform the obligation. Any stipulation contrary to the provisions of this article shall be void.

Article 8

The provisions of the preceding articles shall be without prejudice to rules relating to any particular type of contract owing to its special nature.

1The work which resulted in the drafting of this Resolution was based on a comparative law study carried out by UNIDROIT on behalf of the Council of Europe.

Referring Principles:

VI.4 - Promise to pay in case of non-performance