

# **Principles of European Contract Law**

## **CHAPTER 1: GENERAL PROVISIONS**

### *Section 1: Scope of the Principles*

#### **Article 1:101: Application of the Principles**

(1) These Principles are intended to be applied as general rules of contract law in the European Union.

(2) These Principles will apply when the parties have agreed to incorporate them into their contract or that their contract is to be governed by them.

(3) These Principles may be applied when the parties:

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

(b) have not chosen any system or rules of law to govern their contract.

(4) These Principles may provide a solution to the issue raised where the system or rules of law applicable do not do so.

#### **Article 1:102: Freedom of Contract**

(1) Parties are free to enter into a contract and to determine its contents, subject to the requirements of good faith and fair dealing, and the mandatory rules established by these Principles.

(2) The parties may exclude the application of any of the Principles or derogate from or vary their effects, except as otherwise provided by these Principles.

#### **Article 1:103: Mandatory Law**

(1) Where the law otherwise applicable so allows, the parties may choose to have their contract governed by the Principles, with the effect that national mandatory rules are not applicable.

(2) Effect should nevertheless be given to those mandatory rules of national, supranational and international law which, according to the relevant rules of private international law, are applicable irrespective of the law governing the contract.

#### **Article 1:104: Application to Questions of Consent**

(1) The existence and validity of the agreement of the parties to adopt or incorporate these Principles shall be determined by these Principles.

(2) Nevertheless, a party may rely upon the law of the country in which it has its habitual residence to establish that it did not consent if it appears from the circumstances that it would

not be reasonable to determine the effect of the party's conduct in accordance with these Principles.

#### **Article 1:105: Usages and Practices**

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

(2) The parties are bound by a usage which would be considered generally applicable by persons in the same situation as the parties, except where the application of such usage would be unreasonable.

#### **Article 1:106: Interpretation and Supplementation**

(1) These Principles should be interpreted and developed in accordance with their purposes. In particular, regard should be had to the need to promote good faith and fair dealing, certainty in contractual relationships and uniformity of application.

(2) Issues within the scope of these Principles but not expressly settled by them are so far as possible to be settled in accordance with the ideas underlying the Principles. Failing this, the legal system applicable by virtue of the rules of private international law is to be applied.

#### **Article 1:107: Application of the Principles by Way of Analogy**

These Principles apply with appropriate modifications to agreements to modify or end a contract, to unilateral promises and to other statements and conduct indicating intention.

### *Section 2: General Duties*

#### **Article 1:201: Good Faith and Fair Dealing**

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

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

#### **Article 1:202: Duty to Co-operate**

Each party owes to the other a duty to co-operate in order to give full effect to the contract.

### *Section 3: Terminology and Other Provisions*

#### **Article 1:301: Meaning of Terms**

In these Principles, except where the context otherwise requires:

(1) 'act' includes omission;

(2) 'court' includes arbitral tribunal;

(3) an 'intentional' act includes an act done recklessly;

(4) 'non-performance' denotes any failure to perform an obligation under the contract, whether or not excused, and includes delayed performance, defective performance and failure to cooperate in order to give full effect to the contract;

(5) a matter is 'material' if it is one which a reasonable person in the same situation as one party ought to have known would influence the other party in its decision whether to contract on the proposed terms or to contract at all;

(6) 'written' statements include communications made by telegram, telex, telefax and electronic mail and other means of communication capable of providing a readable record of the statement on both sides

### **Article 1:302: Reasonableness**

Under these Principles reasonableness is to be judged by what persons acting in good faith and in the same situation as the parties would consider to be reasonable. In particular, in assessing what is reasonable the nature and purpose of the contract, the circumstances of the case and the usages and practices of the trades or professions involved should be taken into account.

### **Article 1:303: Notice**

(1) Any notice may be given by any means, whether in writing or otherwise, appropriate to the circumstances.

(2) Subject to paragraphs (4) and (5), any notice becomes effective when it reaches the addressee.

(3) A notice reaches the addressee when it is delivered to it or to its place of business or mailing address, or, if it does not have a place of business or mailing address, to its habitual residence.

(4) If one party gives notice to the other because of the other's non-performance or because such non-performance is reasonably anticipated by the first party, and the notice is properly dispatched or given, a delay or inaccuracy in the transmission of the notice or its failure to arrive does not prevent it from having effect. The notice shall have effect from the time at which it would have arrived in normal circumstances.

(5) A notice has no effect if a withdrawal of it reaches the addressee before or at the same time as the notice.

(6) In this Article, 'notice' includes the communication of a promise, statement, offer, acceptance, demand, request or other declaration.

### **Article 1:304: Computation of Time**

(1) A period of time set by a party in a written document for the addressee to reply or take other action begins to run from the date stated as the date of the document. If no date is shown, the period begins to run from the moment the document reaches the addressee.

(2) Official holidays and official non-working days occurring during the period are included in calculating the period. However, if the last day of the period is an official holiday or official non-working day at the address of the addressee, or at the place where a prescribed act is to be performed, the period is extended until the first following working day in that place.

(3) Periods of time expressed in days, weeks, months or years shall begin at 00.00 on the next day and shall end at 24.00 on the last day of the period; but any reply that has to reach the party which set the period must arrive, or any other act which is to be done must be completed, by the normal close of business in the relevant place on the last day of the period.

### **Article 1:305: Imputed Knowledge and Intention**

If any person who with a party's assent was involved in making a contract, or who was entrusted with performance by a party or performed with its assent:

- (a) knew or foresaw a fact, or ought to have known or foreseen it; or
- (b) acted intentionally or with gross negligence, or not in accordance with good faith and fair dealing,

this knowledge, foresight or behaviour is imputed to the party itself.

## **CHAPTER 2: FORMATION**

### ***Section 1: General Provisions***

### **Article 2:101: Conditions for the Conclusion of a Contract**

(1) A contract is concluded if:

- (a) the parties intend to be legally bound, and
- (b) they reach a sufficient agreement without any further requirement.

(2) A contract need not be concluded or evidenced in writing nor is it subject to any other requirement as to form. The contract may be proved by any means, including witnesses.

### **Article 2:102: Intention**

The intention of a party to be legally bound by contract is to be determined from the party's statements or conduct as they were reasonably understood by the other party.

### **Article 2:103: Sufficient Agreement**

(1) There is sufficient agreement if the terms:

- (a) have been sufficiently defined by the parties so that the contract can be enforced,  
or
- (b) can be determined under these Principles.

(2) However, if one of the parties refuses to conclude a contract unless the parties have agreed on some specific matter, there is no contract unless agreement on that matter has been reached.

#### **Article 2:104: Terms Not Individually Negotiated**

(1) Contract terms which have not been individually negotiated may be invoked against a party which did not know of them only if the party invoking them took reasonable steps to bring them to the other party's attention before or when the contract was concluded.

(2) Terms are not brought appropriately to a party's attention by a mere reference to them in a contract document, even if that party signs the document.

#### **Article 2:105: Merger Clause**

(1) If a written contract contains an individually negotiated clause stating that the writing embodies all the terms of the contract (a merger clause), any prior statements, undertakings or agreements which are not embodied in the writing do not form part of the contract.

(2) If the merger clause is not individually negotiated it will only establish a presumption that the parties intended that their prior statements, undertakings or agreements were not to form part of the contract. This rule may not be excluded or restricted.

(3) The parties' prior statements may be used to interpret the contract. This rule may not be excluded or restricted except by an individually negotiated clause.

(4) A party may by its statements or conduct be precluded from asserting a merger clause to the extent that the other party has reasonably relied on them.

#### **Article 2:106: Written Modification Only**

(1) A clause in a written contract requiring any modification or ending by agreement to be made in writing establishes only a presumption that an agreement to modify or end the contract is not intended to be legally binding unless it is in writing.

(2) A party may by its statements or conduct be precluded from asserting such a clause to the extent that the other party has reasonably relied on them.

#### **Article 2:107: Promises Binding without Acceptance**

A promise which is intended to be legally binding without acceptance is binding.

### *Section 2: Offer and Acceptance*

#### **Article 2:201: Offer**

(1) A proposal amounts to an offer if:

(a) it is intended to result in a contract if the other party accepts it, and

(b) it contains sufficiently definite terms to form a contract.

(2) An offer may be made to one or more specific persons or to the public.

(3) A proposal to supply goods or services at stated prices made by a professional supplier in a public advertisement or a catalogue, or by a display of goods, is presumed to be an offer to sell or supply at that price until the stock of goods, or the supplier's capacity to supply the service, is exhausted.

### **Article 2:202: Revocation of an Offer**

(1) An offer may be revoked if the revocation reaches the offeree before it has dispatched its acceptance or, in cases of acceptance by conduct, before the contract has been concluded under Article 2:205(2) or (3).

(2) An offer made to the public can be revoked by the same means as were used to make the offer.

(3) However, a revocation of an offer is ineffective if:

(a) the offer indicates that it is irrevocable; or

(b) it states a fixed time for its acceptance; or

(c) it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

### **Article 2:203: Rejection**

When a rejection of an offer reaches the offeror, the offer lapses.

### **Article 2:204: Acceptance**

(1) Any form of statement or conduct by the offeree is an acceptance if it indicates assent to the offer.

(2) Silence or inactivity does not in itself amount to acceptance.

### **Article 2:205: Time of Conclusion of the Contract**

(1) If an acceptance has been dispatched by the offeree the contract is concluded when the acceptance reaches the offeror.

(2) In the case of acceptance by conduct, the contract is concluded when notice of the conduct reaches the offeror.

(3) If by virtue of the offer, of practices which the parties have established between themselves, or of a usage, the offeree may accept the offer by performing an act without notice to the offeror, the contract is concluded when the performance of the act begins.

### **Article 2:206: Time Limit for Acceptance**

(1) In order to be effective, acceptance of an offer must reach the offeror within the time fixed by it.

(2) If no time has been fixed by the offeror acceptance must reach it within a reasonable time.

(3) In the case of an acceptance by an act of performance under Article 2:205(3), that act must be performed within the time for acceptance fixed by the offeror or, if no such time is fixed, within a reasonable time.

#### **Article 2:207: Late Acceptance**

(1) A late acceptance is nonetheless effective as an acceptance if without delay the offeror informs the offeree that he treats it as such.

(2) If a letter or other writing containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without delay, the offeror informs the offeree that it considers its offer as having lapsed.

#### **Article 2:208: Modified Acceptance**

(1) A reply by the offeree which states or implies additional or different terms which would materially alter the terms of the offer is a rejection and a new offer.

(2) A reply which gives a definite assent to an offer operates as an acceptance even if it states or implies additional or different terms, provided these do not materially alter the terms of the offer. The additional or different terms then become part of the contract.

(3) However, such a reply will be treated as a rejection of the offer if:

(a) the offer expressly limits acceptance to the terms of the offer; or

(b) the offeror objects to the additional or different terms without delay; or

(c) the offeree makes its acceptance conditional upon the offeror's assent to the additional or different terms, and the assent does not reach the offeree within a reasonable time.

#### **Article 2:209: Conflicting General Conditions**

(1) If the parties have reached agreement except that the offer and acceptance refer to conflicting general conditions of contract, a contract is nonetheless formed. The general conditions form part of the contract to the extent that they are common in substance.

(2) However, no contract is formed if one party:

(a) has indicated in advance, explicitly, and not by way of general conditions, that it does not intend to be bound by a contract on the basis of paragraph (1); or

(b) without delay, informs the other party that it does not intend to be bound by such contract.

(3) General conditions of contract are terms which have been formulated in advance for an indefinite number of contracts of a certain nature, and which have not been individually negotiated between the parties.

#### **Article 2:210: Professional's Written Confirmation**

If professionals have concluded a contract but have not embodied it in a final document, and one without delay sends the other a writing which purports to be a confirmation of the contract but which contains additional or different terms, such terms will become part of the contract unless:

- (a) the terms materially alter the terms of the contract, or
- (b) the addressee objects to them without delay.

#### **Article 2:211: Contracts not Concluded through Offer and Acceptance**

The rules in this section apply with appropriate adaptations even though the process of conclusion of a contract cannot be analysed into offer and acceptance.

### *Section 3: Liability for Negotiations*

#### **Article 2:301: Negotiations Contrary to Good Faith**

- (1) A party is free to negotiate and is not liable for failure to reach an agreement.
- (2) However, a party which has negotiated or broken off negotiations contrary to good faith and fair dealing is liable for the losses caused to the other party.
- (3) It is contrary to good faith and fair dealing, in particular, for a party to enter into or continue negotiations with no real intention of reaching an agreement with the other party.

#### **Article 2:302: Breach of Confidentiality**

If confidential information is given by one party in the course of negotiations, the other party is under a duty not to disclose that information or use it for its own purposes whether or not a contract is subsequently concluded. The remedy for breach of this duty may include compensation for loss suffered and restitution of the benefit received by the other party.

## **CHAPTER 3: AUTHORITY OF AGENTS**

### *Section 1: General Provisions*

#### **Article 3:101: Scope of the Chapter**

- (1) This Chapter governs the authority of an agent or other intermediary to bind its principal in relation to a contract with a third party.
- (2) This Chapter does not govern an agent's authority bestowed by law or the authority of an agent appointed by a public or judicial authority.



(3) This Chapter does not govern the internal relationship between the agent or intermediary and its principal.

### **Article 3:102: Categories of Representation**

(1) Where an agent acts in the name of a principal, the rules on direct representation apply (Section 2). It is irrelevant whether the principal's identity is revealed at the time the agent acts or is to be revealed later.

(2) Where an intermediary acts on instructions and on behalf of, but not in the name of, a principal, or where the third party neither knows nor has reason to know that the intermediary acts as an agent, the rules on indirect representation apply (Section 3).

#### ***Section 2: Direct Representation***

### **Article 3:201: Express, Implied and Apparent Authority**

(1) The principal's grant of authority to an agent to act in its name may be express or may be implied from the circumstances.

(2) The agent has authority to perform all acts necessary in the circumstances to achieve the purposes for which the authority was granted.

(3) A person is to be treated as having granted authority to an apparent agent if the person's statements or conduct induce the third party reasonably and in good faith to believe that the apparent agent has been granted authority for the act performed by it.

### **Article 3:202: Agent acting in Exercise of its Authority**

Where an agent is acting within its authority as defined by Article 3:201, its acts bind the principal and the third party directly to each other. The agent itself is not bound to the third party.

### **Article 3:203: Unidentified Principal**

If an agent enters into a contract in the name of a principal whose identity is to be revealed later, but fails to reveal that identity within a reasonable time after a request by the third party, the agent itself is bound by the contract.

### **Article 3:204: Agent acting without or outside its Authority**

(1) Where a person acting as an agent acts without authority or outside the scope of its authority, its acts are not binding upon the principal and the third party.

(2) Failing ratification by the principal according to Article 3:207, the agent is liable to pay the third party such damages as will place the third party in the same position as if the agent had acted with authority. This does not apply if the third party knew or could not have been unaware of the agent's lack of authority.

### **Article 3:205: Conflict of Interest**

(1) If a contract concluded by an agent involves the agent in a conflict of interest of which the third party knew or could not have been unaware, the principal may avoid the contract according to the provisions of Articles 4:112 to 4:116.

(2) There is presumed to be a conflict of interest where:

(a) the agent also acted as agent for the third party; or

(b) the contract was with itself in its personal capacity.

(3) However, the principal may not avoid the contract:

(a) if it had consented to, or could not have been unaware of, the agent's so acting;

or

(b) if the agent had disclosed the conflict of interest to it and it had not objected within a reasonable time.

### **Article 3:206: Subagency**

An agent has implied authority to appoint a subagent to carry out tasks which are not of a personal character and which it is not reasonable to expect the agent to carry out itself. The rules of this Section apply to the subagency; acts of the subagent which are within its and the agent's authority bind the principal and the third party directly to each other.

### **Article 3:207: Ratification by Principal**

(1) Where a person acting as an agent acts without authority or outside its authority, the principal may ratify the agent's acts.

(2) Upon ratification, the agent's acts are considered as having been authorised, without prejudice to the rights of other persons.

### **Article 3:208: Third Party's Right with Respect to Confirmation of Authority**

Where the statements or conduct of the principal gave the third party reason to believe that an act performed by the agent was authorised, but the third party is in doubt about the authorisation, it may send a written confirmation to the principal or request ratification from it. If the principal does not object or answer the request without delay, the agent's act is treated as having been authorised.

### **Article 3:209: Duration of Authority**

(1) An agent's authority continues until the third party knows or ought to know that:

(a) the agent's authority has been brought to an end by the principal, the agent, or both;  
or

(b) the acts for which the authority had been granted have been completed, or the time for which it had been granted has expired; or

(c) the agent has become insolvent or, where a natural person, has died or become incapacitated; or

(d) the principal has become insolvent.

(2) The third party is considered to know that the agent's authority has been brought to an end under paragraph (1)

(a) above if this has been communicated or publicised in the same manner in which the authority was originally communicated or publicised.

(3) However, the agent remains authorised for a reasonable time to perform those acts which are necessary to protect the interests of the principal or its successors.

### ***Section 3: Indirect Representation***

#### **Article 3:301: Intermediaries not acting in the name of a Principal**

(1) Where an intermediary acts:

(a) on instructions and on behalf, but not in the name, of a principal, or

(b) on instructions from a principal but the third party does not know and has no reason to know this,

the intermediary and the third party are bound to each other.

(2) The principal and the third party are bound to each other only under the conditions set out in Articles 3:302 to 3:304.

#### **Article 3:302: Intermediary's Insolvency or Fundamental Non-Performance to Principal**

If the intermediary becomes insolvent, or if it commits a fundamental non-performance towards the principal, or if prior to the time for performance it is clear that there will be a fundamental non-performance:

(a) on the principal's demand, the intermediary shall communicate the name and address of the third party to the principal; and

(b) the principal may exercise against the third party the rights acquired on the principal's behalf by the intermediary, subject to any defences which the third party may set up against the intermediary.

#### **Article 3:303: Intermediary's Insolvency or Fundamental Non-Performance to Third Party**

If the intermediary becomes insolvent, or if it commits a fundamental non-performance towards the third party, or if prior to the time for performance it is clear that there will be a fundamental non-performance:

(a) on the third party's demand, the intermediary shall communicate the name and address of the principal to the third party; and

(b) the third party may exercise against the principal the rights which the third party has against the intermediary, subject to any defences which the intermediary may set up against the third party and those which the principal may set up against the intermediary.

#### **Article 3:304: Requirement of Notice**

The rights under Articles 3:302 and 3:303 may be exercised only if notice of intention to exercise them is given to the intermediary and to the third party or principal, respectively. Upon receipt of the notice, the third party or the principal is no longer entitled to render performance to the intermediary.

### **CHAPTER 4: VALIDITY**

#### **Article 4:101: Matters not Covered**

This chapter does not deal with invalidity arising from illegality, immorality or lack of capacity.

#### **Article 4:102: Initial Impossibility**

A contract is not invalid merely because at the time it was concluded performance of the obligation assumed was impossible, or because a party was not entitled to dispose of the assets to which the contract relates.

#### **Article 4:103: Fundamental Mistake as to Facts or Law**

(1) A party may avoid a contract for mistake of fact or law existing when the contract was concluded if:

(a) (i) the mistake was caused by information given by the other party; or

(ii) the other party knew or ought to have known of the mistake and it was contrary to good faith and fair dealing to leave the mistaken party in error; or

(iii) the other party made the same mistake,

and

(b) the other party knew or ought to have known that the mistaken party, had it known the truth, would not have entered the contract or would have done so only on fundamentally different terms.

(2) However a party may not avoid the contract if:

(a) in the circumstances its mistake was inexcusable, or

(b) the risk of the mistake was assumed, or in the circumstances should be borne, by it.

#### **Article 4:104: Inaccuracy in Communication**

An inaccuracy in the expression or transmission of a statement is to be treated as a mistake of the person which made or sent the statement and Article 4:103 applies.

#### **Article 4:105: Adaptation of Contract**

(1) If a party is entitled to avoid the contract for mistake but the other party indicates that it is willing to perform, or actually does perform, the contract as it was understood by the party entitled to avoid it, the contract is to be treated as if it had been concluded as the that party understood it. The other party must indicate its willingness to perform, or render such performance, promptly after being informed of the manner in which the party entitled to avoid it understood the contract and before that party acts in reliance on any notice of avoidance.

(2) After such indication or performance the right to avoid is lost and any earlier notice of avoidance is ineffective.

(3) Where both parties have made the same mistake, the court may at the request of either party bring the contract into accordance with what might reasonably have been agreed had the mistake not occurred.

#### **Article 4:106: Incorrect Information**

A party which has concluded a contract relying on incorrect information given it by the other party may recover damages in accordance with Article 4:117(2) and (3) even if the information does not give rise to a fundamental mistake under Article 4:103, unless the party which gave the information had reason to believe that the information was correct.

#### **Article 4:107: Fraud**

(1) A party may avoid a contract when it has been led to conclude it by the other party's fraudulent representation, whether by words or conduct, or fraudulent non-disclosure of any information which in accordance with good faith and fair dealing it should have disclosed.

(2) A party's representation or non-disclosure is fraudulent if it was intended to deceive.

(3) In determining whether good faith and fair dealing required that a party disclose particular information, regard should be had to all the circumstances, including:

- (a) whether the party had special expertise;
- (b) the cost to it of acquiring the relevant information;
- (c) whether the other party could reasonably acquire the information for itself; and
- (d) the apparent importance of the information to the other party.

#### **Article 4:108: Threats**

A party may avoid a contract when it has been led to conclude it by the other party's imminent and serious threat of an act:

(a) which is wrongful in itself, or

(b) which it is wrongful to use as a means to obtain the conclusion of the contract, unless in the circumstances the first party had a reasonable alternative.

#### **Article 4:109: Excessive Benefit or Unfair Advantage**

(1) A party may avoid a contract if, at the time of the conclusion of the contract:

(a) it was dependent on or had a relationship of trust with the other party, was in economic distress or had urgent needs, was improvident, ignorant, inexperienced or lacking in bargaining skill, and

(b) the other party knew or ought to have known of this and, given the circumstances and purpose of the contract, took advantage of the first party's situation in a way which was grossly unfair or took an excessive benefit.

(2) Upon the request of the party entitled to avoidance, a court may if it is appropriate adapt the contract in order to bring it into accordance with what might have been agreed had the requirements of good faith and fair dealing been followed.

(3) A court may similarly adapt the contract upon the request of a party receiving notice of avoidance for excessive benefit or unfair advantage, provided that this party informs the party which gave the notice promptly after receiving it and before that party has acted in reliance on it.

#### **Article 4:110: Unfair Terms not Individually Negotiated**

(1) A party may avoid a term which has not been individually negotiated if, contrary to the requirements of good faith and fair dealing, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of that party, taking into account the nature of the performance to be rendered under the contract, all the other terms of the contract and the circumstances at the time the contract was concluded.

(2) This Article does not apply to:

(a) a term which defines the main subject matter of the contract, provided the term is in plain and intelligible language; or to

(b) the adequacy in value of one party's obligations compared to the value of the obligations of the other party.

#### **Article 4:111: Third Persons**

(1) Where a third person for whose acts a party is responsible, or who with a party's assent is involved in the making of a contract:

(a) causes a mistake by giving information, or knows of or ought to have known of a mistake,

(b) gives incorrect information,

- (c) commits fraud,
- (d) makes a threat, or
- (e) takes excessive benefit or unfair advantage,

remedies under this Chapter will be available under the same conditions as if the behaviour or knowledge had been that of the party itself.

(2) Where any other third person:

- (a) gives incorrect information,
- (b) commits fraud,
- (c) makes a threat, or
- (d) takes excessive benefit or unfair advantage,

remedies under this Chapter will be available if the party knew or ought to have known of the relevant facts, or at the time of avoidance it has not acted in reliance on the contract.

#### **Article 4:112: Notice of Avoidance**

Avoidance must be by notice to the other party.

#### **Article 4:113: Time Limits**

(1) Notice of avoidance must be given within a reasonable time, with due regard to the circumstances, after the avoiding party knew or ought to have known of the relevant facts or became capable of acting freely.

(2) However, a party may avoid an individual term under Article 4:110 if it gives notice of avoidance within a reasonable time after the other party has invoked the term.

#### **Article 4:114: Confirmation**

If the party who is entitled to avoid a contract confirms it, expressly or impliedly, after it knows of the ground for avoidance, or becomes capable of acting freely, avoidance of the contract is excluded.

#### **Article 4:115: Effect of Avoidance**

On avoidance either party may claim restitution of whatever it has supplied under the contract, provided it makes concurrent restitution of whatever it has received. If restitution cannot be made in kind for any reason, a reasonable sum must be paid for what has been received.

#### **Article 4:116: Partial Avoidance**

If a ground of avoidance affects only particular terms of a contract, the effect of an avoidance is limited to those terms unless, giving due consideration to all the circumstances of the case, it is unreasonable to uphold the remaining contract.

#### **Article 4:117: Damages**

(1) A party who avoids a contract under this Chapter may recover from the other party damages so as to put the avoiding party as nearly as possible into the same position as if it had not concluded the contract, provided that the other party knew or ought to have known of the mistake, fraud, threat or taking of excessive benefit or unfair advantage.

(2) If a party has the right to avoid a contract under this Chapter, but does not exercise its right or has lost its right under the provisions of Articles 4:113 or 4:114, it may recover, subject to paragraph (1), damages limited to the loss caused to it by the mistake, fraud, threat or taking of excessive benefit or unfair advantage. The same measure of damages shall apply when the party was misled by incorrect information in the sense of Article 4:106.

(3) In other respects, the damages shall be in accordance with the relevant provisions of Chapter 9, Section 5, with appropriate adaptations.

#### **Article 4:118: Exclusion or Restriction of Remedies**

(1) Remedies for fraud, threats and excessive benefit or unfair advantage-taking, and the right to avoid an unfair term which has not been individually negotiated, cannot be excluded or restricted.

(2) Remedies for mistake and incorrect information may be excluded or restricted unless the exclusion or restriction is contrary to good faith and fair dealing.

#### **Article 4:119: Remedies for Non-Performance**

A party which is entitled to a remedy under this Chapter in circumstances which afford that party a remedy for non-performance may pursue either remedy.

### **CHAPTER 5: INTERPRETATION**

#### **Article 5:101: General Rules of Interpretation**

(1) A contract is to be interpreted according to the common intention of the parties even if this differs from the literal meaning of the words.

(2) If it is established that one party intended the contract to have a particular meaning, and at the time of the conclusion of the contract the other party could not have been unaware of the first party's intention, the contract is to be interpreted in the way intended by the first party.

(3) If an intention cannot be established according to (1) or (2), the contract is to be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances.

#### **Article 5:102: Relevant Circumstances**



In interpreting the contract, regard shall be had, in particular, to:

- (a) the circumstances in which it was concluded, including the preliminary negotiations;
- (b) the conduct of the parties, even subsequent to the conclusion of the contract;
- (c) the nature and purpose of the contract;
- (d) the interpretation which has already been given to similar clauses by the parties and the practices they have established between themselves;
- (e) the meaning commonly given to terms and expressions in the branch of activity concerned and the interpretation similar clauses may already have received ;
- (f) usages; and
- (g) good faith and fair dealing.

#### **Article 5:103: Contra Proferentem Rule**

Where there is doubt about the meaning of a contract term not individually negotiated, an interpretation of the term against the party which supplied it is to be preferred.

#### **Article 5:104: Preference to Negotiated Terms**

Terms which have been individually negotiated take preference over those which have not.

#### **Article 5:105: Reference to Contract as a Whole**

Terms are to be interpreted in the light of the whole contract in which they appear.

#### **Article 5:106: Terms to Be Given Effect**

An interpretation which renders the terms of the contract lawful, or effective, is to be preferred to one which would not.

#### **Article 5:107: Linguistic Discrepancies**

Where a contract is drawn up in two or more language versions none of which is stated to be authoritative, there is, in case of discrepancy between the versions, a preference for the interpretation according to the version in which the contract was originally drawn up.

### **CHAPTER 6: CONTENTS AND EFFECTS**

#### **Article 6:101: Statements giving rise to Contractual Obligations**

(1) A statement made by one party before or when the contract is concluded is to be treated as giving rise to a contractual obligation if that is how the other party reasonably understood it in the circumstances, taking into account:

- (a) the apparent importance of the statement to the other party;
- (b) whether the party was making the statement in the course of business; and
- (c) the relative expertise of the parties.

(2) If one of the parties is a professional supplier which gives information about the quality or use of services or goods or other property when marketing or advertising them or otherwise before the contract for them is concluded, the statement is to be treated as giving rise to a contractual obligation unless it is shown that the other party knew or could not have been unaware that the statement was incorrect.

(3) Such information and other undertakings given by a person advertising or marketing services, goods or other property for the professional supplier, or by a person in earlier links of the business chain, are to be treated as giving rise to a contractual obligation on the part of the professional supplier unless it did not know and had no reason to know of the information or undertaking.

#### **Article 6:102: Implied Terms**

In addition to the express terms, a contract may contain implied terms which stem from

- (a) the intention of the parties,
- (b) the nature and purpose of the contract, and
- (c) good faith and fair dealing.

#### **Article 6:103: Simulation**

When the parties have concluded an apparent contract which was not intended to reflect their true agreement, as between the parties the true agreement prevails.

#### **Article 6:104: Determination of Price**

Where the contract does not fix the price or the method of determining it, the parties are to be treated as having agreed on a reasonable price.

#### **Article 6:105: Unilateral Determination by a Party**

Where the price or any other contractual term is to be determined by one party and that party's determination is grossly unreasonable, then notwithstanding any provision to the contrary, a reasonable price or other term shall be substituted.

#### **Article 6:106: Determination by a Third Person**

(1) Where the price or any other contractual term is to be determined by a third person, and it cannot or will not do so, the parties are presumed to have empowered the court to appoint another person to determine it.

(2) If a price or other term fixed by a third person is grossly unreasonable, a reasonable price or term shall be substituted.

#### **Article 6:107: Reference to a Non-Existent Factor**

Where the price or any other contractual term is to be determined by reference to a factor which does not exist or has ceased to exist or to be accessible, the nearest equivalent factor shall be substituted.

#### **Article 6:108: Quality of Performance**

If the contract does not specify the quality, a party must tender performance of at least average quality.

#### **Article 6:109: Contract for an Indefinite Period**

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

#### **Article 6:110: Stipulation in Favour of a Third Party**

(1) A third party may require performance of a contractual obligation when its right to do so has been expressly agreed upon between the promisor and the promisee, or when such agreement is to be inferred from the purpose of the contract or the circumstances of the case. The third party need not be identified at the time the agreement is concluded.

(2) If the third party renounces the right to performance the right is treated as never having accrued to it.

(3) The promisee may by notice to the promisor deprive the third party of the right to performance unless:

(a) the third party has received notice from the promisee that the right has been made irrevocable, or

(b) the promisor or the promisee has received notice from the third party that the latter accepts the right.

#### **Article 6:111: Change of Circumstances**

(1) A party is bound to fulfil its obligations even if performance has become more onerous, whether because the cost of performance has increased or because the value of the performance it receives has diminished.

(2) If, however, performance of the contract becomes excessively onerous because of a change of circumstances, the parties are bound to enter into negotiations with a view to adapting the contract or ending it, provided that:

(a) the change of circumstances occurred after the time of conclusion of the contract,

(b) the possibility of a change of circumstances was not one which could reasonably have been taken into account at the time of conclusion of the contract, and

(c) the risk of the change of circumstances is not one which, according to the contract, the party affected should be required to bear.

(3) If the parties fail to reach agreement within a reasonable period, the court may:

(a) end the contract at a date and on terms to be determined by the court ; or

(b) adapt the contract in order to distribute between the parties in a just and equitable manner the losses and gains resulting from the change of circumstances.

In either case, the court may award damages for the loss suffered through a party refusing to negotiate or breaking off negotiations contrary to good faith and fair dealing.

## **CHAPTER 7: PERFORMANCE**

### **Article 7:101: Place of Performance**

(1) If the place of performance of a contractual obligation is not fixed by or determinable from the contract it shall be:

(a) in the case of an obligation to pay money, the creditor's place of business at the time of the conclusion of the contract;

(b) in the case of an obligation other than to pay money, the debtor's place of business at the time of conclusion of the contract.

(2) If a party has more than one place of business, the place of business for the purpose of the preceding paragraph is that which has the closest relationship to the contract, having regard to the circumstances known to or contemplated by the parties at the time of conclusion of the contract.

(3) If a party does not have a place of business its habitual residence is to be treated as its place of business.

### **Article 7:102: Time of Performance**

A party has to effect its performance:

(1) if a time is fixed by or determinable from the contract, at that time;

(2) if a period of time is fixed by or determinable from the contract, at any time within that period unless the circumstances of the case indicate that the other party is to choose the time;

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

### **Article 7:103: Early Performance**

(1) A party may decline a tender of performance made before it is due except where acceptance of the tender would not unreasonably prejudice its interests.

(2) A party's acceptance of early performance does not affect the time fixed for the performance of its own obligation.

#### **Article 7:104: Order of Performance**

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

#### **Article 7:105: Alternative Performance**

(1) Where an obligation may be discharged by one of alternative performances, the choice belongs to the party which is to perform, unless the circumstances indicate otherwise.

(2) If the party which is to make the choice fails to do so by the time required by the contract, then:

(a) if the delay in choosing is fundamental, the right to choose passes to the other party;

(b) if the delay is not fundamental, the other party may give a notice fixing an additional period of reasonable length in which the party to choose must do so. If the latter fails to do so, the right to choose passes to the other party.

#### **Article 7:106: Performance by a Third Person**

(1) Except where the contract requires personal performance the creditor cannot refuse performance by a third person if:

(a) the third person acts with the assent of the debtor; or

(b) the third person has a legitimate interest in performance and the debtor has failed to perform or it is clear that it will not perform at the time performance is due.

(2) Performance by the third person in accordance with paragraph (1) discharges the debtor.

#### **Article 7:107: Form of Payment**

(1) Payment of money due may be made in any form used in the ordinary course of business.

(2) A creditor which, pursuant to the contract or voluntarily, accepts a cheque or other order to pay or a promise to pay is presumed to do so only on condition that it will be honoured. The creditor may not enforce the original obligation to pay unless the order or promise is not honoured.

#### **Article 7:108: Currency of Payment**

(1) The parties may agree that payment shall be made only in a specified currency.

(2) In the absence of such agreement, a sum of money expressed in a currency other than that of the place where payment is due may be paid in the currency of that place according to the rate of exchange prevailing there at the time when payment is due.

(3) If, in a case falling within the preceding paragraph, the debtor has not paid at the time when payment is due, the creditor may require payment in the currency of the place where payment is due according to the rate of exchange prevailing there either at the time when payment is due or at the time of actual payment.

#### **Article 7:109: Appropriation of Performance**

(1) Where a party has to perform several obligations of the same nature and the performance tendered does not suffice to discharge all of the obligations, then subject to paragraph (4) the party may at the time of its performance declare to which obligation the performance is to be appropriated.

(2) If the performing party does not make such a declaration, the other party may within a reasonable time appropriate the performance to such obligation as it chooses. It shall inform the performing party of the choice. However, any such appropriation to an obligation which:

(a) is not yet due, or

(b) is illegal, or

(c) is disputed,

is invalid.

(3) In the absence of an appropriation by either party, and subject to paragraph (4), the performance is appropriated to that obligation which satisfies one of the following criteria in the sequence indicated:

(a) the obligation which is due or is the first to fall due;

(b) the obligation for which the creditor has the least security;

(c) the obligation which is the most burdensome for the debtor;

(d) the obligation which has arisen first.

If none of the preceding criteria applies, the performance is appropriated proportionately to all obligations.

(4) In the case of a monetary obligation, a payment by the debtor is to be appropriated, first, to expenses, secondly, to interest, and thirdly, to principal, unless the creditor makes a different appropriation.

#### **Article 7:110: Property Not Accepted**

(1) A party which is left in possession of tangible property other than money because of the other party's failure to accept or retake the property must take reasonable steps to protect and preserve the property.

(2) The party left in possession may discharge its duty to deliver or return:

(a) by depositing the property on reasonable terms with a third person to be held to the order of the other party, and notifying the other party of this; or

(b) by selling the property on reasonable terms after notice to the other party, and paying the net proceeds to that party.

(3) Where, however, the property is liable to rapid deterioration or its preservation is unreasonably expensive, the party must take reasonable steps to dispose of it. It may discharge its duty to deliver or return by paying the net proceeds to the other party.

(4) The party left in possession is entitled to be reimbursed or to retain out of the proceeds of sale any expenses reasonably incurred.

#### **Article 7:111: Money Not Accepted**

Where a party fails to accept money properly tendered by the other party, that party may after notice to the first party discharge its obligation to pay by depositing the money to the order of the first party in accordance with the law of the place where payment is due.

#### **Article 7:112: Costs of Performance**

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

### **CHAPTER 8: NON-PERFORMANCE AND REMEDIES IN GENERAL**

#### **Article 8:101: Remedies Available**

(1) Whenever a party does not perform an obligation under the contract and the non-performance is not excused under Article 8:108, the aggrieved party may resort to any of the remedies set out in Chapter 9.

(2) Where a party's non-performance is excused under Article 8:108, the aggrieved party may resort to any of the remedies set out in Chapter 9 except claiming performance and damages.

(3) A party may not resort to any of the remedies set out in Chapter 9 to the extent that its own act caused the other party's non-performance.

#### **Article 8:102: Cumulation of Remedies**

Remedies which are not incompatible may be cumulated. In particular, a party is not deprived of its right to damages by exercising its right to any other remedy.

#### **Article 8:103: Fundamental Non-Performance**

A non-performance of an obligation is fundamental to the contract if:

- (a) strict compliance with the obligation is of the essence of the contract; or
- (b) the non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract, unless the other party did not foresee and could not reasonably have foreseen that result; or
- (c) the non-performance is intentional and gives the aggrieved party reason to believe that it cannot rely on the other party's future performance.

#### **Article 8:104: Cure by Non-Performing Party**

A party whose tender of performance is not accepted by the other party because it does not conform to the contract may make a new and conforming tender where the time for performance has not yet arrived or the delay would not be such as to constitute a fundamental non-performance.

#### **Article 8:105: Assurance of Performance**

(1) A party which reasonably believes that there will be a fundamental non-performance by the other party may demand adequate assurance of due performance and meanwhile may withhold performance of its own obligations so long as such reasonable belief continues.

(2) Where this assurance is not provided within a reasonable time, the party demanding it may terminate the contract if it still reasonably believes that there will be a fundamental non-performance by the other party and gives notice of termination without delay.

#### **Article 8:106: Notice Fixing Additional Period for Performance**

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

(2) During the additional period the aggrieved party may withhold performance of its own reciprocal obligations and may claim damages, but it may not resort to any other remedy. If it receives notice from the other party that the latter will not perform within that period, or if upon expiry of that period due performance has not been made, the aggrieved party may resort to any of the remedies that may be available under chapter 9.

(3) If in a case of delay in performance which is not fundamental the aggrieved party has given a notice fixing an additional period of time of reasonable length, it may terminate the contract at the end of the period of notice. The aggrieved party may in its notice provide that if the other party does not perform within the period fixed by the notice the contract shall terminate automatically. If the period stated is too short, the aggrieved party may terminate, or, as the case may be, the contract shall terminate automatically, only after a reasonable period from the time of the notice.

#### **Article 8:107: Performance Entrusted to Another**

A party which entrusts performance of the contract to another person remains responsible for performance.

#### **Article 8:108: Excuse Due to an Impediment**



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

(2) Where the impediment is only temporary the excuse provided by this Article has effect for the period during which the impediment exists. However, if the delay amounts to a fundamental non-performance, the creditor may treat it as such.

(3) The non-performing party must ensure that notice of the impediment and of its effect on its ability to perform is received by the other party within a reasonable time after the non-performing party knew or ought to have known of these circumstances. The other party is entitled to damages for any loss resulting from the non-receipt of such notice.

#### **Article 8:109: Clause Excluding or Restricting Remedies**

Remedies for non-performance may be excluded or restricted unless it would be contrary to good faith and fair dealing to invoke the exclusion or restriction.

### **CHAPTER 9: PARTICULAR REMEDIES FOR NON-PERFORMANCE**

#### *Section 1: Right to Performance*

#### **Article 9:101: Monetary Obligations**

(1) The creditor is entitled to recover money which is due.

(2) Where the creditor has not yet performed its obligation and it is clear that the debtor will be unwilling to receive performance, the creditor may nonetheless proceed with its performance and may recover any sum due under the contract unless:

(a) it could have made a reasonable substitute transaction without significant effort or expense; or

(b) performance would be unreasonable in the circumstances.

#### **Article 9:102: Non-Monetary Obligations**

(1) The aggrieved party is entitled to specific performance of an obligation other than one to pay money, including the remedying of a defective performance.

(2) Specific performance cannot, however, be obtained where:

(a) performance would be unlawful or impossible; or

(b) performance would cause the debtor unreasonable effort or expense; or

(c) the performance consists in the provision of services or work of a personal character or depends upon a personal relationship, or

(d) the aggrieved party may reasonably obtain performance from another source.

(3) The aggrieved party will lose the right to specific performance if it fails to seek it within a reasonable time after it has or ought to have become aware of the non-performance.

### **Article 9:103: Damages Not Precluded**

The fact that a right to performance is excluded under this Section does not preclude a claim for damages.

### *Section 2: Withholding Performance*

#### **Article 9:201: Right to Withhold Performance**

(1) A party which is to perform simultaneously with or after the other party may withhold performance until the other has tendered performance or has performed. The first party may withhold the whole of its performance or a part of it as may be reasonable in the circumstances.

(2) A party may similarly withhold performance for as long as it is clear that there will be a non-performance by the other party when the other party's performance becomes due.

### *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).

#### **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.

#### **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.

#### **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.

#### **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.

#### **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.

#### **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.

#### **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.

#### **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.

### *Section 4: Price Reduction*

#### **Article 9:401: Right to Reduce Price**

(1) A party which accepts a tender of performance not conforming to the contract may reduce the price. This reduction shall be proportionate to the decrease in the value of the performance at the time this was tendered compared to the value which a conforming tender would have had at that time.

(2) A party which is entitled to reduce the price under the preceding paragraph and which has already paid a sum exceeding the reduced price may recover the excess from the other party.

(3) A party which reduces the price cannot also recover damages for reduction in the value of the performance but remains entitled to damages for any further loss it has suffered so far as these are recoverable under Section 5 of this Chapter.

### *Section 5: Damages and Interest*

#### **Article 9:501: Right to Damages**

(1) The aggrieved party is entitled to damages for loss caused by the other party's non-performance which is not excused under Article 8:108.

(2) The loss for which damages are recoverable includes:

(a) non-pecuniary loss; and

(b) future loss which is reasonably likely to occur.

#### **Article 9:502: General Measure of Damages**

The general measure of damages is such sum as will put the aggrieved party as nearly as possible into the position in which it would have been if the contract had been duly performed. Such damages cover the loss which the aggrieved party has suffered and the gain of which it has been deprived.

#### **Article 9:503: Foreseeability**

The non-performing party is liable only for loss which it foresaw or could reasonably have foreseen at the time of conclusion of the contract as a likely result of its non-performance, unless the non-performance was intentional or grossly negligent.

#### **Article 9:504: Loss Attributable to Aggrieved Party**

The non-performing party is not liable for loss suffered by the aggrieved party to the extent that the aggrieved party contributed to the non-performance or its effects.

#### **Article 9:505: Reduction of Loss**

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

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

#### **Article 9:506: Substitute Transaction**

Where the aggrieved party has terminated the contract and has made a substitute transaction within a reasonable time and in a reasonable manner, it may recover the difference between the contract price and the price of the substitute transaction as well as damages for any further loss so far as these are recoverable under this Section.

#### **Article 9:507: Current Price**

Where the aggrieved party has terminated the contract and has not made a substitute transaction but there is a current price for the performance contracted for, it may recover the difference between the contract price and the price current at the time the contract is terminated as well as damages for any further loss so far as these are recoverable under this Section.

#### **Article 9:508: Delay in Payment of Money**

(1) If payment of a sum of money is delayed, the aggrieved party is entitled to interest on that sum from the time when payment is due to the time of payment at the average commercial bank short-term lending rate to prime borrowers prevailing for the contractual currency of payment at the place where payment is due.

(2) The aggrieved party may in addition recover damages for any further loss so far as these are recoverable under this Section.

#### **Article 9:509: Agreed Payment for Non-Performance**

(1) Where the contract provides that a party which fails to perform is to pay a specified sum to the aggrieved party for such non-performance, the aggrieved party shall be awarded that sum irrespective of its actual loss.

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

#### **Article 9:510: Currency by which Damages to be Measured**

Damages are to be measured by the currency which most appropriately reflects the aggrieved party's loss.