

Principles of European Contract Law

European Union

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Part I - Performance, Non-performance, Remedies. 2

Chapter 1 - General Provisions 3

Article 1.101 - Application of the Principles 4

(1) These Principles are intended to be applied as general rules of contract law in the European Community. 5

(2) These Principles will apply when the parties have agreed that their contract is to be governed by them. 6

(3) These Principles may be applied 7

(a) when the parties have agreed that their contract is to be governed by “general principles of law”, the “lex mercatoria” or the like; or 8

(b) when the parties have not chosen any system or rules of law to govern their contract. 9

(4) These Principles may provide a solution to the issue raised where the systems or rules of law applicable do not do so. 10

Article 1.102 - Exclusion or Modification of the Principles 11

The parties may exclude the application of any of these Principles or derogate from or vary their effects except as otherwise provided in the Principles. 12

Article 1.103 - Usages and Practices 13

(1) The parties are bound by any usage to which they have agreed and by any practice they have established between themselves. 14

(2) The parties are bound by any 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. 15

Article 1.104 - Interpretation and Supplementation 16

(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. 17

(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. 18

Failing this, the legal system applicable by virtue of the rules of private international law is to be applied.

Article 1.105 - Meaning of Terms 19

In these Principles, except where the context otherwise requires: 20

(1) “act” includes omission; 21

(2) “court” includes arbitral tribunal; 22

(3) an “intentional” act includes an act done recklessly; 23

(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 co-operate in order to give full effect to the contract. 24

Article 1.106 - Good Faith and Fair Dealing 25

(1) In exercising his rights and performing his duties each party must act in accordance with good faith and fair dealing. 26

(2) The parties may not exclude or limit this duty. 27

Article 1.107 - Duty to Co-operate 28

Each party owes to the other a duty to co-operate in order to give full effect to the contract. 29

Article 1.108 - Reasonableness 30

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 in 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. 31

Article 1.109 - Imputed Knowledge and Intention 32

(1) A part is to be treated as having known or foreseen a fact, or as being in a position where he should have known or foreseen it, if any person for whom he was responsible know or foresaw the fact, or should have known or foreseen it, unless that person was not involved in the making or performance of the contract. 33

(2) A party is to be treated as having acted intentionally or with gross negligence or not in accordance with good faith and fair dealing if a person to whom he entrusted performance or who performed with his assent so acted. 34

Article 1.110 - Notice

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(1) Notice given pursuant to these Principles has effect if given by any means, whether in writing or otherwise, appropriate to the circumstances.

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(2) If pursuant to these Principles 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 error 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 under normal circumstances.

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(3) In any other case, notice does not have effect unless and until it reaches the person to whom it is given.

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(4) For the purpose of this Article, "notice" includes a declaration, demand, request or any other form of communication.

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Chapter 2 - Terms and Performance of the Contract

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Article 2.101 - Determination of Price or other Contractual Terms

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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. The same rule applies to any other contractual term.

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Article 2.102 - Unilateral Determination by a Party

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

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Article 2.103 - Determination by a Third Person

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

46

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

47

Article 2.104 - Reference to a non-existent Factor

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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 be accessible, the nearest equivalent factor shall be substituted.

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Article 2.105 - Quality of Performance

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

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Article 2.106 - Place of Performance

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

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(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;

54

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

55

(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.

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

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Article 2.107 - Time of Performance

58

A party has to effect his performance:

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

60

(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;

61

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

62

Article 2.108 - Early Performance

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

64

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

65

Article 2.109 - Contract for an Indefinite Period

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

67

Article 2.110 - Form of Payment

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(1) Payment of money due may be made in any form used in the ordinary course of business. 69

(2) A creditor who, 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. 70

Article 2.111 - Currency of Payment

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(1) The parties may agree that payment shall be made only in a specified currency. 72

(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. 73

(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. 74

Article 2.112 - Appropriation of Performance

75

(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 his performance declare to which obligation the performance is to be appropriated. 76

(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 he chooses. He shall inform the performing party of the choice. However, any such appropriation to an obligation which: 77

(a) is not yet due; or 78

(b) is illegal; or 79

(c) is disputed, 80

is invalid. 81

(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: 82

(a) the obligation which is due or is the first to fall due; 83

(b) the obligation for which the obligee has the least security; 84

- (c) the obligation which is the most burdensome for the obligor; 85
- (d) the obligation which has arisen first. 86
- If none of the preceding criteria applies, the performance is appropriated proportionately to all obligations. 87
- (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. 88

Article 2.113 - Property not Accepted 89

- (1) A party who 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. 90
- (2) The party left in possession may discharge his duty to deliver or return: 91
- (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 92
- (b) by selling the property on reasonable terms after notice to the other party, and paying the net proceeds to that party. 93
- (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. He may discharge his duty to deliver or return by paying the net proceeds to the other party. 94
- (4) The party left in possession is entitled to be reimbursed or to retain out of the proceeds of sale any expenses reasonably incurred. 95

Article 2.114 - Money not Accepted 96

Where a party fails to accept money properly tendered by the other party, that party may after notice to the first party discharge his 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. 97

Article 2.115 - Stipulation in Favour of a Third Party 98

- (1) A third party may require performance of a contractual obligation when his right to do so has been expressly agreed 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. 99
- (2) If the third party renounces the right to performance the right is treated as never 100

having accrued to him.

(3) The promisee may by notice to the promisor deprive the third party of the right to performance unless: 101

(a) the third party has received notice from the promisee that the right has been made irrevocable; or 102

(b) the promisor or the promisee has received notice from the third party that the latter accepts the rights. 103

Article 2.116 - Performance by a Third Person 104

(1) Except where the contract requires personal performance the obligee cannot refuse performance by a third person if: 105

(a) the third person acts with the assent of the obligor; or 106

(b) the third person has a legitimate interest in performance and the obligor has failed to perform or it is clear that he will not perform at the time performance is due. 107

(2) Performance by the third person in accordance with paragraph (1) discharges the obligor. 108

Article 2.117 - Change of Circumstances 109

(1) A party is bound to fulfil his obligations even if performance has become more onerous, whether because the cost of performance has increased or because the value of the performance he receives has diminished. 110

(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 terminating it, provided that: 111

(a) the change of circumstances occurred after the time of conclusion of the contract, or had already occurred at that time but was not and could not reasonably have been known to the parties; and 112

(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 113

(c) the risk of the change of circumstances is not one which, according to the contract, the party affected should reasonably be required to bear. 114

(3) If the parties fail to reach agreement within a reasonable period, the court may: 115

(a) terminate the contract at a date and on terms to be determined by the court; or 116

(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; and 117

(c) in either case, award damages for the loss suffered through the other party refusing to negotiate or breaking off negotiations in bad faith. 118

Chapter 3 - Non-Performance and Remedies in General 119

Article 3.101 - Remedies Available 120

(1) Whenever a party does not perform an obligation under the contract and the non-performance is not excused under Article 3.108, the aggrieved party may resort to any of the remedies set out in Chapter 4. 121

(2) Where a party's non-performance is excused under Article 3.108, the aggrieved party may resort to any of the remedies set out in Chapter 4 except claiming performance and damages. 122

(3) A party may not resort to any of the remedies set out in Chapter 4 to the extent that his own act caused the other party's non-performance. 123

Article 3.102 - Cumulation of Remedies 124

Remedies which are not incompatible may be cumulated. In particular, a party is not deprived of his right to damages by exercising his right to any other remedy. 125

Article 3.103 - Fundamental Non-Performance 126

A non-performance of an obligation is fundamental to the contract if: 127

(a) strict compliance with the obligation is of the essence of the contract; or 128

(b) the non-performance substantially deprives the aggrieved party of what he was entitled to expect under the contract, unless the other party did not foresee and could not reasonably have foreseen that result; or 129

(c) the non-performance is intentional and gives the aggrieved party reason to believe that he cannot rely on the other party's future performance. 130

Article 3.104 - Cure by Non-Performing Party 131

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. 132

Article 3.105 - Assurance of Performance 133

(1) A party who reasonably believes that there will be a fundamental non-performance by the other party may demand adequate assurance of due performance and meanwhile may withhold performance of his own obligations so long as such reasonable belief continues. 134

(2) Where this assurance is not provided within a reasonable time, the party demanding it may terminate the contract if he still reasonably believes that there will be a fundamental non-performance by the other party and gives notice of termination without delay. 135

Article 3.106 - Notice Fixing Additional Period For Performance 136

(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. 137

(2) During the additional period the aggrieved party may withhold performance of his own reciprocal obligations and may claim damages, but he may not resort to any other remedy. If he 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 4. 138

(3) If in a case of delay in performance which is not fundamental the aggrieved party has given notice fixing an additional period of time of reasonable length, he may terminate the contract at the end of the period of notice. The aggrieved party may in his 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. 139

Article 3.107 - Performance Entrusted to Another 140

A party who entrusts performance of the contract to another person remains responsible for performance. 141

Article 3.108 - Excuse Due to an Impediment 142

(1) A party's non-performance is excused if he proves that it is due to an impediment beyond his control and that he 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. 143

(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 obligee may treat it as such. 144

(3) The non-performing party must ensure that notice of the impediment and of its effect on his 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. 145

Article 3.109 - Clause Limiting or Excluding Liability 146

The parties may agree in advance to limit or exclude their liability for non-performance except where the non-performance is intentional or the limitation or exclusion is unreasonable. 147

Chapter 4 - Particular Remedies for Non-Performance 148

Section 1 - Right to Performance 149

Article 4.101 - Monetary Obligations 150

(1) The creditor is entitled to recover money which is due. 151

(2) Where the creditor has not yet performed his obligations and it is clear that the debtor will be unwilling to receive performance, the creditor may nonetheless proceed with his performance and may recover any sum due under the contract unless: 152

(a) he could have made a reasonable cover transaction without significant effort or expense; or 153

(b) performance would be unreasonable in the circumstances. 154

Article 4.102 - Non-Monetary Obligations 155

(1) The aggrieved party is entitled to specific performance of an obligation other than one to pay money, including the remedy of a defective performance. 156

(2) Specific performance cannot, however, be obtained where: 157

(a) performance would be unlawful or impossible; or 158

(b) performance would cause the obligor unreasonable effort or expense; or 159

(c) the performance consists in the provision of services or work of a personal character or depends upon a personal relationship; or 160

(d) the aggrieved party may reasonably obtain performance from another source. 161

(3) The aggrieved party will lose the right to specific performance if he fails to seek it within a reasonable time after he has or ought to have become aware of the non-performance. 162

Article 4.103 - Damages Not-Precluded 163

The fact that a right to performance is excluded under this Section does not preclude a claim for damages. 164

Section 2 - Right to Withhold Performance

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Article 4.201 - Right to Withhold Performance

166

(1) A party who 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 his performance or a part of it as may be reasonable in the circumstances.

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(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.

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Section 3 - Termination of the Contract

169

Article 4.301 - Right to Terminate the Contract

170

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

171

(2) In the case of delay the aggrieved party may also terminate the contract under Article 3.106(3).

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Article 4.302 - Contract to be Performed in Parts

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

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Article 4.303 - Notice of Termination

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

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

177

(3)

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(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 he loses his right to terminate if he does not give such notice within a reasonable time after he has or ought to have become aware of the tender.

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(b) If, however, the aggrieved party knows or has reason to know that the other party

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still intends to tender within a reasonable time, and the aggrieved party unreasonably fails to notify the other party that he will not accept performance, he loses his right to terminate if the other party in fact tenders within a reasonable time.

(4) If a party is excused under Article 3.108 through an impediment which is total and permanent, the contract is terminated automatically and without notice at the time the impediment arises. 181

Article 4.304 - Anticipatory Non-Performance 182

Where prior to the time of performance by a party it is clear that there will be a fundamental non- performance by him the other party may terminate the contract. 183

Article 4.305 - Effects of Termination in General 184

(1) Termination of the contract releases both parties from their obligation to effect and receive future performance, but, subject to Articles 4.306, 4.307 and 4.308, does not affect the rights and liabilities accrued up to the time of termination. 185

(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. 186

Article 4.306 - Property Reduced in Value 187

A party who 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. 188

Article 4.307 - Recovery of Money Paid 189

On termination of the contract a party may recover money paid for a performance which he did not receive or which he properly rejected. 190

Article 4.308 - Recovery of Property 191

On termination of the contract a party who has supplied property which can be returned and for which he has not received payment or other counter-performance may recover the property. 192

Article 4.309 - Recovery for Performance that Cannot be Returned 193

On termination of the contract a party who has rendered a performance which cannot be returned and for which he has not received payment or other counter-performance may recover a reasonable amount for the value of the performance to the other party. 194

Section 4 - Price Reduction

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Article 4.401 - Right to Reduce the Price

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(1) A party who 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.

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

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

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Section 5 - Damages and Interest

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Article 4.501 - Right to Damages

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(1) The aggrieved party is entitled to damages for loss caused by the other party's non-performance which is not excused under Article 3.108.

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

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(a) non-pecuniary loss; and

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

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Article 4.502 - General Measure of Damages

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The general measure of damages is such sum as will put the aggrieved party as nearly as possible into the position in which he 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 he has been deprived.

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Article 4.503 - Foreseeability

208

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

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Article 4.504 - Loss Attributable to Aggrieved Party

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(1) The non-performing party is not liable for loss suffered by the aggrieved party to the

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extent that:

- (a) the aggrieved party contributed to the non-performance or its effects; or 212
 - (b) his loss could have been reduced by his taking reasonable steps. 213
- (2) The aggrieved party is entitled to recover any expenses reasonably incurred in attempting to reduce the loss. 214

Article 4.505 - Cover Transaction 215

Where the aggrieved party has terminated the contract and has made a cover transaction within a reasonable time and in a reasonable manner, he may recover the difference between the contract price and the price of the cover transaction as well as damages for any further loss so far as these are recoverable under this Section. 216

Article 4.506 - Current Price 217

Where the aggrieved party has terminated the contract and has not made a cover transaction but there is a current price for the performance contracted for, he 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. 218

Article 4.507 - Delay in Payment of Money 219

- (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. 220
- (2) The aggrieved party may in addition recover damages for any further loss so far as these are recoverable under this Section. 221

Article 4.508 - Agreed Payment for Non-Performance 222

- (1) Where the contract provides that a party who 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 his actual loss. 223
- (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. 224

Article 4.509 - Currency by which Damages to be Measured

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

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