

The Principles Of European Contract Law 1998 - (completed and revised version)

European Union

copy @ lexmercatoria.org

Copyright © 1998 European Union

Contents

**THE PRINCIPLES OF EUROPEAN CONTRACT LAW -
completed and revised version 1998**

CHAPTER 1 - GENERAL PROVISIONS

Section 1 - Scope of the Principles

Article 1.101 (ex art. 1.101) - Application of the Principles	1
Article 1.102 - Freedom of contract	1
Article 1.103 - Mandatory Law	1
Article 1.104 - Application to questions of consent	1
Article 1.105 (ex art. 1.103) - Usages and Practices	1
Article 1.106 (ex art. 1.104) - Interpretation and Supplementation	2
Article 1.107 (ex Art. 1.113) - Application of the Principles by Way of Analogy	2

Section 2 - General Obligations

Article 1.201 (ex art. 1.106) - Good Faith and Fair Dealing	2
Article 1.202 (ex art. 1.107) - Duty to Co-operate	2

Section 3 - Terminology and Other Provisions

Article 1.301 (ex art. 1.105) - Meaning of Terms	2
Article 1.302 (ex art. 1.108) - Reasonableness	2
Article 1.303 (ex art. 1.110) - Notice	3
Article 1.304 (ex art. 1.111) - Computation of Time	3
Article 1.305 (ex art. 1.109) - Imputed Knowledge and Intention	3

CHAPTER 2 - FORMATION

Section 1 - General Provisions

Article 2.101 (ex art. 5.101) - Conditions for the Conclusion of a Contract	3
Article 2.102 (ex art. 5.102) - Intention	4
Article 2.103 (ex art. 5.103) - Sufficient Agreement	4
Article 2.104 (ex art. 5.103 A) - Terms not individually negotiated	4
Article 2.105 (ex art. 5.106 A) - Merger Clause	4
Article 2.106 (ex art. 5.106 B) - Written Modification only	4
Article 2.107 (ex art. 5.108) - Promises binding without acceptance	5

Section 2 - Offer and Acceptance

Article 2.201 (ex art. 5.201) - Offer	5
Article 2.202 (ex art. 5.202) - Revocation of an Offer	5
Article 2.203 (ex art. 5.203) - Lapse of an Offer	5
Article 2.204 (ex art. 5.204) - Acceptance	5
Article 2.205 (ex art. 5.205) - Time of Conclusion of the Contract	5
Article 2.206 (ex art. 5.206) - Time Limit for Acceptance	6
Article 2.207 (ex art. 5.208) - Late Acceptance	6
Article 2.208 (ex art. 5.209) - Modified Acceptance	6
Article 2.209 (ex art. 5.210) - Conflicting General conditions	6
Article 2.210 (ex art. 5.211) - Professional's written confirmation	7
Article 2.211 (ex art. 5.212) - Contracts not Concluded through Offer and Acceptance	7

Section 3 - Liability for negotiations

Article 2.301 (ex art. 5.301) - Negotiations Contrary to Good Faith	7
Article 2.302 (ex art. 5.302) - Breach of Confidentiality	7

CHAPTER 3 - AUTHORITY OF AGENTS

Section 1 - General Provisions	7	Article 4.108 (ex art. 6.108) - Threats	12
Article 3.101 - Scope of the Chapter	7	Article 4.109 (ex art. 6.109) - Excessive benefit or un-	
Article 3.102 - Categories of Representation	7	fair advantage	12
Section 2 - Direct Representation	8	Article 4.110 (ex art. 6.110) -Unfair terms which have	
Article 3.201 - Express, implied and apparent authority	8	not been individually negotiated	12
Article 3.202 - Agent acting in exercise of his authority	8	Article 4.111 (ex art. 6.111) - Third persons	12
Article 3.203 - Unidentified Principal	8	Article 4.112 (ex art. 6.112) - Notice of Avoidance	13
Article 3.204 - Agent acting without or outside his au-		Article 4.113 (ex art. 4.113) - Time limits	13
thority	8	Article 4.114 (ex art. 6.114) - Confirmation	13
Article 3.205 - Conflict of Interests	8	Article 4.115 (ex art. 6.116) - Effect of avoidance	13
Article 3.206 - Subagency	9	Article 4.116 (ex art. 6.115) - Partial avoidance	13
Article 3.207 - Ratification by Principal	9	Article 4.117 (ex art. 6.117) - Damages	13
Article 3.208 - Third Party's Right with Respect to Con-		Article 4.118 (ex. art. 6.118) - Exclusion or restriction	
firmation of Authority	9	of remedies	14
Article 3.209 - Duration of Authority	9	Article 4.119 (ex art. 6.119) - Remedies for non-	
		performance	14
Section 3 - Indirect Representation	9	CHAPTER 5 - INTERPRETATION	14
Article 3.301 - Intermediaries not acting in the name		Article 5.101 (Ex art. 7.101/ 101A) - General Rules of	
of a Principal	9	Interpretation	14
Article 3.302 - Intermediary's Insolvency or Funda-		Article 5.102 (ex art. 7.102) - Relevant Circumstances	14
mental Non-performance to Principal	10	Article 5.103 (ex art. 7.103) - Contra Proferentem Rule	14
Article 3.303 - Intermediary's Insolvency or Funda-		Article 5.104 (ex art. 7.104) - Preference to Negotiated	
mental Non-performance to Third Party	10	Terms	15
Article 3.304 - Requirement of Notice	10	Article 5.105 (ex art. 7.105) - Reference to Contract	
		as a Whole	15
CHAPTER 4 - VALIDITY	10	Article 5.106 (ex art. 7.106) - Terms to Be Given (Full)	
Article 4.101 (ex art. 6.101) - Matters not Covered	10	Effect	15
Article 4.102 (ex art. 6.102) - Initial Impossibility	10	Article 5.107 (ex art. 7.107) - Linguistic Discrepancies	15
Article 4.103 (ex art. 6.103) - Mistake as to facts or law	10	CHAPTER 6 - CONTENTS AND EFFECTS	15
Article 4.104 (ex art. 6.104) - Inaccuracy in communi-		Article 6.101 (ex art. 8.101) - Statements giving rise	
cation	11	to contractual obligation	15
Article 4.105 (ex art. 6.105) - Adaptation of contract	11	Article 6.102 (replaces 5.108) - Implied obligations	15
Article 4.106 (ex art. 6.106) - Incorrect information	11	Article 6.103 - Simulation	16
Article 4.107 (ex art. 6.107) - Fraud	11		

Article 6.104 (ex art. 2.101) - Determination of Price	16	Article 8.103 (ex art. 3.103) - Fundamental Non-Performance	20
Article 6.105 (ex art. 2.102) - Unilateral Determination by a Party	16	Article 8.104 (ex art. 3.104) - Cure by Non-Performing Party	20
Article 6.106 (ex art. 2.103) - Determination by a Third Person	16	Article 8.105 (ex art. 3.105) - Assurance of Performance	20
Article 6.107 (ex art. 2.104) - Reference to a Non Existing Factor	16	Article 8.106 (ex art. 3.106) - Notice Fixing Additional Period for Performance	21
Article 6.108 (ex art. 2.105) - Quality of Performance	16	Article 8.107 (ex art. 3.107) - Performance Entrusted to Another	21
Article 6.109 (ex art. 2.109) - Contract for an Indefinite Period	16	Article 8.108 (ex art 3.108) - Excuse Due to an Impediment	21
Article 6.110 (ex art. 2.115) - Stipulation in Favour of a Third Party	16	Article 8.109 (ex 3.109) - Clause Limiting or Excluding Remedies	21
Article 6.111 (ex art. 2.117) - Change of Circumstances	17		
CHAPTER 7 - PERFORMANCE	17	CHAPTER 9 - PARTICULAR REMEDIES FOR NON-PERFORMANCE	22
Article 7.101 (ex art. 2.106) - Place of Performance	17	Section 1 - Right to Performance	22
Article 7.102 (ex art. 2.107) - Time of Performance	17	Article 9.101 (ex art. 4.101) - Monetary Obligations	22
Article 7.103 (ex art. 2.108) - Early Performance	18	Article 9.102 (ex art. 4.102) - Non-monetary Obligations	22
Article 7.104 - Order of performance	18	Article 9.103 (ex art 4.103) - Damages Not Precluded	22
Article 7.105 - Alternative performance	18		
Article 7.106 (ex art. 2.116) - Performance by a Third Person	18	Section 2 - Right To Withhold Performance	22
Article 7.107 (ex art. 2.110) - Form of Payment	18	Article 9.201 (ex art 4.201) - Right to Withhold Performance	22
Article 7.108 (ex art. 2.111) - Currency of Payment	18		
Article 7.109 (ex art. 2.112) - Appropriation of Performance	19	Section 3 - Termination Of The Contract	23
Article 7.110 (ex art. 2.113) - Property Not Accepted	19	Article 9.301 (ex art. 4.301) - Right to Terminate the Contract	23
Article 7.111 (ex art. 2.114) - Money not Accepted	20	Article 9.302 (ex art 4.302) - Contract to be Performed in Parts	23
Article 7.112 - Costs of performance	20	Article 9.303 (ex art. 4.303) - Notice of Termination	23
		Article 9.304 (ex art. 4.304) - Anticipatory Non-Performance	23
CHAPTER 8 - NON-PERFORMANCE AND REMEDIES IN GENERAL	20		
Article 8.101 (ex art. 3.101) - Remedies Available	20		
Article 8.102 (ex art. 3.102) - Cumulation of Remedies	20		

Article 9.305 (ex art. 4.305) - Effects of Termination in General	23
Article 9.306 (ex art. 4.306) - Property Reduced in Value	24
Article 9.307 (ex art. 4.307) - Recovery of Money Paid	24
Article 9.308 (ex art 4.308) - Recovery of Property . .	24
Article 9.309 (ex art. 4.309) - Recovery for Perform- ance that Cannot be Returned	24
Section 4 - Price Reduction	24
Article 9.401 (ex art 4.401) - Right to Reduce Price . .	24
Section 5 - Damages and Interest	24
Article 9.501 (ex art. 4.501) - Right to Damages	24
Article 9.502 (ex art 4.502) - General Measure of Dam- ages	24
Article 9.503 (ex art. 4.503) - Foreseeability	25
Article 9.504 - Loss Attributable to Aggrieved Party (new; previously part of 4.504)	25
Article 9.505 - Reduction of loss (previously part of 4.504)	25
Article 9.506 (ex art. 4.505) - Substitute Transaction .	25
Article 9.507 (ex art. 4.506) - Current Price	25
Article 9.508 (ex art. 4.507) - Delay in Payment of Money	25
Article 9.509 (ex art. 4.508) - Agreed Payment for Non-performance	25
Article 9.510 (ex art. 4.509) - Currency by which Dam- ages to be Measured	26
Metadata	27
SiSU Metadata, document information	27

1	THE PRINCIPLES OF EUROPEAN CONTRACT LAW - completed and revised version 1998	Article 1.103 - Mandatory Law	14
2	CHAPTER 1 - GENERAL PROVISIONS	(1) Where the otherwise applicable law so allows, the parties may choose to have their contract governed by the Principles, with the effect that national mandatory rules are not applica- ble.	15
3	Section 1 - Scope of the Principles	(2) Effect should nevertheless be given to those mandatory rules of national, supranational and international law which, ac- cording to the relevant rules of private international law, are ap- plicable irrespective of the law governing the contract.	16
4	Article 1.101 (ex art. 1.101) - Application of the Principles	Article 1.104 - Application to questions of consent	17
5	(1) These Principles are intended to be applied as general rules of contract law in the European Communities.	(1) The existence and validity of the agreement of the parties to adopt or incorporate these Principles shall be determined by these Principles.	18
6	(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.	(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 its conduct in accordance with these Principles.	19
7	(3) These Principles may be applied when the parties:	Article 1.105 (ex art. 1.103) - Usages and Practices	20
8	(a) have agreed that their contract is to be governed by “general principles of law”, the “lex mercatoria” or the like; or	(1) The parties are bound by any usage to which they have agreed and by any practice they have established between themselves.	21
9	(b) have not chosen any system or rules of law to govern their contract.	(2) The parties are bound by a usage which would be consid- ered generally applicable by persons in the same situation as the parties, except where the application of such usage would be unreasonable.	22
10	(4) These Principles may provide a solution to the issue raised where the system or rules of law applicable do not do so.		
11	Article 1.102 - Freedom of contract		
12	(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 Princi- ples.		
13	(2) The parties may exclude the application of any of the Princi- ples or derogate from or vary their effects, except as otherwise provided by these Principles.		

	Article 1.106 (ex art. 1.104) - Interpretation and Supplementation		
24	(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.		
25	(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.		
26	Article 1.107 (ex Art. 1.113) - Application of the Principles by Way of Analogy		
27	These Principles apply with appropriate modifications to agreements to modify or end a contract, to unilateral promises and other statements and conduct indicating intention.		
28	Section 2 - General Obligations		
29	Article 1.201 (ex art. 1.106) - Good Faith and Fair Dealing		
30	(1) Each party must act in accordance with good faith and fair dealing.		
31	(2) The parties may not exclude or limit this duty.		
32	Article 1.202 (ex art. 1.107) - Duty to Co-operate		
33	Each party owes to the other a duty to co-operate in order to give full effect to the contract.		
23	Section 3 - Terminology and Other Provisions		34
	Article 1.301 (ex art. 1.105) - Meaning of Terms		35
	In these Principles, except where the context otherwise requires:		36
	(1) 'act' includes omission;		37
	(2) 'court' includes arbitral tribunal;		38
	(3) an 'intentional' act includes an act done recklessly;		39
	(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.		40
	(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. .		41
	(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		42
	Article 1.302 (ex art. 1.108) - Reasonableness		43
	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.		44

45 **Article 1.303 (ex art. 1.110) - Notice**

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

47 (2) Subject to paragraphs (4) and (5), any notice becomes ef-
fective when it reaches the addressee.

48 (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 re-
sidence

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

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

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

52 **Article 1.304 (ex art. 1.111) - Computation of Time**

53 (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.

54 (2) Official holidays and official non-working days occurring dur-
ing 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 ex-
tended until the first following working day in that place.

(3) Periods of time expressed in days, weeks, months or years 55
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 who set the period must arrive, or 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 (ex art. 1.109) - Imputed Knowledge and 56
Intention**

If any person who with a party's assent was involved in making 57
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 58
it; or

(b) acted intentionally or with gross negligence, or not in accor- 59
dance with good faith and fair dealing,

this knowledge, foresight or behaviour is imputed to the party 60
itself.

CHAPTER 2 - FORMATION 61

Section 1 - General Provisions 62

**Article 2.101 (ex art. 5.101) - Conditions for the Conclusion 63
of a Contract**

(1) A contract is concluded if: 64

(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 (ex art. 5.102) - 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 (ex art. 5.103) - 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 (ex art. 5.103 A) - Terms not individually negotiated

(1) Contract terms which have not been individually negotiated may be invoked against a party who did not know of them only if the party invoking them took reasonable steps to bring them

65 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. 78

Article 2.105 (ex art. 5.106 A) - 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. 80

(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. 81

(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. 82

(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. 83

Article 2.106 (ex art. 5.106 B) - 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. 85

86	(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.	(2) An offer made to the public can be revoked by the same means as were used to make the offer.	98
87	Article 2.107 (ex art. 5.108) - Promises binding without acceptance	(3) However, a revocation of an offer is ineffective if:	99
88	A promise which is intended to be legally binding without acceptance is binding.	(a) the offer indicates that it is irrevocable; or	100
89	Section 2 - Offer and Acceptance	(b) it states a fixed time for its acceptance; or	101
90	Article 2.201 (ex art. 5.201) - Offer	(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.	102
91	(1) A proposal amounts to an offer if:	Article 2.203 (ex art. 5.203) - Lapse of an Offer	103
92	(a) it is intended to result in a contract if the other party accepts it, and	When a rejection of an offer reaches the offeror, the offer lapses.	104
93	(b) it contains sufficiently definite terms to form a contract.	Article 2.204 (ex art. 5.204) - Acceptance	105
94	(2) An offer may be made to one or more specific persons or to the public.	(1) Any form of statement or conduct by the offeree is an acceptance if it indicates assent to the offer.	106
95	(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.	(2) Silence or inactivity does not in itself amount to acceptance.	107
96	Article 2.202 (ex art. 5.202) - Revocation of an Offer	Article 2.205 (ex art. 5.205) - Time of Conclusion of the Contract	108
97	(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).	(1) If an acceptance has been dispatched by the offeree the contract is concluded when the acceptance reaches the offeror.	109
		(2) In case of acceptance by conduct, the contract is concluded when notice of the conduct reaches the offeror.	110
		(3) If by virtue of the offer, of practices which the parties have established between themselves, or of a usage, the offeree	111

may accept the offer by performing an act without notice to the offeror, the contract is concluded when the performance of the act begins.

112 **Article 2.206 (ex art. 5.206) - Time Limit for Acceptance**

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

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

115 (3) In the case of an acceptance by an act of performance under art. 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.

116 **Article 2.207 (ex art. 5.208) - Late Acceptance**

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

118 (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.

119 **Article 2.208 (ex art. 5.209) - Modified Acceptance**

120 (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. 121

(3) However, such a reply will be treated as a rejection of the offer if: 122

(a) the offer expressly limits acceptance to the terms of the offer; or 123

(b) the offeror objects to the additional or different terms without delay; or 124

(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. 125

Article 2.209 (ex art. 5.210) - Conflicting General conditions 126

(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. 127

(2) However, no contract is formed if one party: 128

(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 129

(b) without delay, informs the other party that it does not intend to be bound by such contract. 130

(3) General conditions of contract are terms which have been formulated in advance for an indefinite number of contracts of a 131

certain nature, and which have not been individually negotiated between the parties.

132 **Article 2.210 (ex art. 5.211) - Professional's written confirmation**

133 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:

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

136 **Article 2.211 (ex art. 5.212) - Contracts not Concluded through Offer and Acceptance**

137 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.

138 **Section 3 - Liability for negotiations**

139 **Article 2.301 (ex art. 5.301) - Negotiations Contrary to Good Faith**

- 140 (1) A party is free to negotiate and is not liable for failure to reach an agreement.
141 (2) However, a party who has negotiated or broken off negotiations contrary to good faith and fair dealing is liable for the losses caused to the other party.
142 (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 (ex art. 5.302) - Breach of Confidentiality

143

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.

144

CHAPTER 3 - AUTHORITY OF AGENTS

145

Section 1 - General Provisions

146

Article 3.101 - Scope of the Chapter

147

(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.

148

(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.

149

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

150

Article 3.102 - Categories of Representation

151

(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.

152

153 (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).

154 Section 2 - Direct Representation

155 Article 3.201 - Express, implied and apparent authority

156 (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.

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

158 (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 ap-
parent agent has been granted authority for the act performed
by it.

159 Article 3.202 - Agent acting in exercise of his authority

160 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.

161 Article 3.203 - Unidentified Principal

162 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 his 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 author-
ity.

Article 3.205 - Conflict of Interests

(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 ac-
cording 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.

174	Article 3.206 - Subagency			
175	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.		(a) the agent's authority has been brought to an end by the principal, the agent, or both; or	183
			(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	184
			(c) the agent has become insolvent or, where a natural person, has died or become incapacitated; or	185
			(d) the principal has become insolvent.	186
176	Article 3.207 - Ratification by Principal		(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.	187
177	(1) Where a person acting as an agent acts without authority or outside its authority, the principal may ratify the agent's acts.			
178	(2) Upon ratification, the agent's acts are considered as having been authorised, without prejudice to the rights of other persons.		(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	188
179	Article 3.208 - Third Party's Right with Respect to Confirmation of Authority			189
180	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.			
181	Article 3.209 - Duration of Authority			194
182	(1) An agent's authority continues until the third party knows or ought to know that:			195
			Section 3 - Indirect Representation	
			Article 3.301 - Intermediaries not acting in the name of a Principal	190
			(1) Where an intermediary acts:	191
			(a) on instructions and on behalf, but not in the name, of a principal, or	192
			(b) on instructions from a principal but the third party does not know and has no reason to know this,	193
			the intermediary and the third party are bound to each other.	194
			(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.	195

196 **Article 3.302 - Intermediary's Insolvency or Fundamental
Non-performance to Principal**

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

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

199 (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.

200 **Article 3.303 - Intermediary's Insolvency or Fundamental
Non-performance to Third Party**

201 If the intermediary becomes insolvent, or if it commits a funda-
mental 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:

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

203 (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.

204 **Article 3.304 - Requirement of Notice**

The rights under Articles 3.302 and 3.303 may be exercised 205
only if notice of intention to exercise them is given to the inter-
mediary 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 206

Article 4.101 (ex art. 6.101) - Matters not Covered 207

This Chapter does not deal with invalidity arising from illegality, 208
immorality or lack of capacity.

Article 4.102 (ex art. 6.102) - Initial Impossibility 209

A contract is not invalid merely because at the time it was con- 210
cluded 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 (ex art. 6.103) - Mistake as to facts or law 211

(1) A party may avoid a contract for mistake of fact or law ex- 212
isting when the contract was concluded if:

(a) (i) the mistake was caused by information given by the other 213
party; or

(ii) the other party knew or ought to have known of the mistake 214
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 215

(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.

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

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

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

220 **Article 4.104 (ex art. 6.104) - Inaccuracy in communication**

221 An inaccuracy in the expression or transmission of a statement is to be treated as a mistake of the person who made or sent the statement and Article 4.103 applies.

222 **Article 4.105 (ex art. 6.105) - Adaptation of contract**

223 (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.

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

225 (3) Where both parties have made the same mistake, the court may at the request of either party bring the contract into accor-

216 dance with what might reasonably have been agreed had the mistake not occurred.

Article 4.106 (ex art. 6.106) - Incorrect information

226

A party who 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 right to avoid the contract on the ground of mistake under Article 4.103, unless the party who gave the information had reason to believe that the information was correct.

227

Article 4.107 (ex art. 6.107) - Fraud

228

(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.

229

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

230

(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:

231

(a) whether the party had special expertise;

232

(b) the cost to it of acquiring the relevant information;

233

(c) whether the other party could reasonably acquire the information for itself; and

234

(d) the apparent importance of the information to the other party.

235

236 **Article 4.108 (ex art. 6.108) - Threats**

237 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:

238 (a) which is wrongful in itself, or

239 (b) which it is wrongful to use as a means to obtain the conclu-
sion of the contract ,

240 unless in the circumstances the first party had a reasonable
alternative.

241 **Article 4.109 (ex art. 6.109) - Excessive benefit or unfair
advantage**

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

243 (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

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

245 (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 require-
ments of good faith and fair dealing been followed.

246 (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 who
gave the notice promptly after receiving it and before that party
has acted in reliance on it.

**Article 4.110 (ex art. 6.110) -Unfair terms which have not
been individually negotiated**

247

(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.

248

(2) This Article does not apply to:

249

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

250

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

251

Article 4.111 (ex art. 6.111) - Third persons

252

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

253

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

254

(b) gives incorrect information,

255

(c) commits fraud,

256

(d) makes a threat, or

257

(e) takes excessive benefit or unfair advantage,

258

remedies under this Chapter will be available under the same

259

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 (ex art. 6.112) - Notice of Avoidance

Avoidance must be by notice to the other party.

Article 4.113 (ex art. 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 (ex art. 6.114) - 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 (ex art. 6.116) - Effect of avoidance

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

Article 4.116 (ex art. 6.115) - 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 (ex art. 6.117) - 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.

281 **Article 4.118 (ex. art. 6.118) - Exclusion or restriction of remedies**

282 (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.

283 (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.

284 **Article 4.119 (ex art. 6.119) - Remedies for non-performance**

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

286 **CHAPTER 5 - INTERPRETATION**

287 **Article 5.101 (Ex art. 7.101/ 101A) - General Rules of Interpretation**

288 (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.

289 (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), 290
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 (ex art. 7.102) - Relevant Circumstances 291

In interpreting the contract, regard shall be had, in particular, 292
to:

(a) the circumstances in which it was concluded, including the 293
preliminary negotiations;

(b) the conduct of the parties, even subsequent to the conclu- 294
sion of the contract;

(c) the nature and purpose of the contract; 295

(d) the interpretation which has already been given to similar 296
clauses by the parties and the practices they have established between themselves;

(e) the meaning commonly given to terms and expressions in 297
the branch of activity concerned and the interpretation similar clauses may already have received;

(f) usages; and 298

(g) good faith and fair dealing 299

Article 5.103 (ex art. 7.103) - Contra Proferentem Rule 300

Where there is doubt about the meaning of a contract term not 301
individually negotiated, an interpretation of the term against the party who supplied it is to be preferred.

302	Article 5.104 (ex art. 7.104) - Preference to Negotiated Terms	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:	
303	Terms which have been individually negotiated take preference over those which are not.	(a) the apparent importance of the statement to the other party;	313
304	Article 5.105 (ex art. 7.105) - Reference to Contract as a Whole	(b) whether the party was making the statement in the course of business; and	314
305	Terms are interpreted in the light of the whole contract in which they appear.	(c) the relative expertise of the parties.	315
306	Article 5.106 (ex art. 7.106) - Terms to Be Given (Full) Effect	(2) If one of the parties is a professional supplier who 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.	316
307	An interpretation which renders the terms of the contract lawful, or effective, is to be preferred to one which would not.	(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.	317
308	Article 5.107 (ex art. 7.107) - Linguistic Discrepancies		
309	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.		
310	CHAPTER 6 - CONTENTS AND EFFECTS	Article 6.102 (replaces 5.108) - Implied obligations	318
311	Article 6.101 (ex art. 8.101) - Statements giving rise to contractual obligation	In addition to the express terms, a contract may contain implied terms which stem from	319
312	(1) A statement made by one party before or when the contract	(a) the intention of the parties,	320
		(b) the nature and purpose of the contract, and	321
		(c) good faith and fair dealing.	322

323 **Article 6.103 - Simulation**

324 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

325 **Article 6.104 (ex art. 2.101) - Determination of Price**

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

327 **Article 6.105 (ex art. 2.102) - Unilateral Determination by a
Party**

328 Where the price or any other contractual term is to be deter-
mined by one party whose determination is grossly unreason-
able, then notwithstanding any provision to the contrary, a rea-
sonable price or other term shall be substituted.

329 **Article 6.106 (ex art. 2.103) - Determination by a Third
Person**

330 (1) Where the price or any other contractual term is to be de-
termined 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.

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

332 **Article 6.107 (ex art. 2.104) - Reference to a Non Existent
Factor**

Where the price or any other contractual term is to be deter- 333
mined by reference to a factor which does not exist or has
ceased to exist or to be accessible, the nearest equivalent fac-
tor shall be substituted.

Article 6.108 (ex art. 2.105) - Quality of Performance 334

If the contract does not specify the quality, a party must tender 335
performance of at least average quality.

**Article 6.109 (ex art. 2.109) - Contract for an Indefinite
Period** 336

A contract for an indefinite period may be ended by either party 337
by giving notice of reasonable length.

**Article 6.110 (ex art. 2.115) - Stipulation in Favour of a Third
Party** 338

(1) A third party may require performance of a contractual obli- 339
gation when its right to do so has been expressly agreed upon
between the promisor and the promisee, or when such agree-
ment is to be inferred from the purpose of the contract or the
circumstances of the case. The third party need not be identi-
fied at the time the agreement is concluded.

(2) If the third party renounces the right to performance the right 340
is treated as never having accrued to it.

(3) The promisee may by notice to the promisor deprive the third 341
party of the right to performance unless:

(a) the third party has received notice from the promisee that 342

the right has been made irrevocable, or

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

344 **Article 6.111 (ex art. 2.117) - Change of
Circumstances**

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

346 (2) If, however, performance of the contract becomes exces-
sively onerous because of a change of circumstances, the par-
ties are bound to enter into negotiations with a view to adapting
the contract or terminating it, provided that:

347 (a) the change of circumstances occurred after the time of con-
clusion of the contract,

348 (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

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

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

351 (a) terminate the contract at a date and on terms to be deter-
mined by the court; or

352 (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.

353 In either case, the court may award damages for the loss suf-

ferred through a party refusing to negotiate or breaking off ne-
gotiations contrary to good faith and fair dealing.

CHAPTER 7 - PERFORMANCE

354

Article 7.101 (ex art. 2.106) - Place of Performance

355

(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
obligor's place of business at the time of conclusion of the con-
tract.

(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 res-
idence is to be treated as its place of business.

Article 7.102 (ex art. 2.107) - Time of Performance

361

A party has to effect its performance:

362

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

363

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

364

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

366 **Article 7.103 (ex art. 2.108) - Early Performance**

367 (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.

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

369 **Article 7.104 - Order of performance**

370 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.

371 **Article 7.105 - Alternative performance**

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

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

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

375 (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.

365 **Article 7.106 (ex art. 2.116) - Performance by a Third Person** 376

(1) Except where the contract requires personal performance the obligee cannot refuse performance by a third person if: 377

(a) the third person acts with the assent of the obligor; or 378

(b) the third person has a legitimate interest in performance and the obligor has failed to perform or it is clear that it will not perform at the time performance is due. 379

(2) Performance by the third person in accordance with paragraph (1) discharges the obligor. 380

Article 7.107 (ex art. 2.110) - Form of Payment 381

(1) Payment of money due may be made in any form used in the ordinary course of business. 382

(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. 383

Article 7.108 (ex art. 2.111) - Currency of Payment 384

(1) The parties may agree that payment shall be made only in a specified currency. 385

(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. 386

387 (3) If, in a case falling within the preceding paragraph, the
debtor has not paid at the time when payment is due, the cred-
itor 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.

388 **Article 7.109 (ex art. 2.112) - Appropriation of
Performance**

389 (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.

390 (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 appro-
priation to an obligation which:

391 (a) is not yet due, or

392 (b) is illegal, or

393 (c) is disputed,

394 is invalid.

395 (3) In the absence of an appropriation by either party, and sub-
ject to paragraph 4, the performance is appropriated to that
obligation which satisfies one of the following criteria in the se-
quence indicated:

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

397 (b) the obligation for which the obligee has the least secu-
rity;

(c) the obligation which is the most burdensome for the 398
obligor,

(d) the obligation which has arisen first. 399

If none of the preceding criteria applies, the performance is ap- 400
propriated proportionately to all obligations.

(4) In the case of a monetary obligation, a payment by the 401
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 (ex art. 2.113) - Property Not Accepted 402

(1) A party who is left in possession of tangible property other 403
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 404
or return:

(a) by depositing the property on reasonable terms with a third 405
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 406
the other party, and paying the net proceeds to that party.

(3) Where, however, the property is liable to rapid deterioration 407
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 408
to retain out of the proceeds of sale any expenses reasonably
incurred.

409 **Article 7.111 (ex art. 2.114) - Money not Accepted**

410 Where a party fails to accept money properly tendered by the
other party, that party may after notice to the first party dis-
charge 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

411 **Article 7.112 - Costs of performance**

412 Each party shall bear the costs of performance of its obliga-
tions.

413 **CHAPTER 8 - NON-PERFORMANCE AND REMEDIES
IN GENERAL**

414 **Article 8.101 (ex art. 3.101) - Remedies Available**

415 (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.

416 (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 dam-
ages.

417 (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.

418 **Article 8.102 (ex art. 3.102) - Cumulation of Remedies**

419 Remedies which are not incompatible may be cumulated. In

particular, a party is not deprived of its right to damages by ex-
ercising its right to any other remedy.

**Article 8.103 (ex art. 3.103) - Fundamental
Non-Performance**

420

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

421

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

422

(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

423

(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.

424

**Article 8.104 (ex art. 3.104) - Cure by Non-Performing
Party**

425

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 perfor-
mance has not yet arrived or the delay would not be such as to
constitute a fundamental non-performance.

426

**Article 8.105 (ex art. 3.105) - Assurance of
Performance**

427

(1) A party who reasonably believes that there will be a funda-

428

mental 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.

429 (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.

430 **Article 8.106 (ex art. 3.106) - Notice Fixing Additional Period for Performance**

431 (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.

432 (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.

433 (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 termi-

nate automatically, only after a reasonable period from the time of the notice.

Article 8.107 (ex art. 3.107) - Performance Entrusted to Another 434

A party who entrusts performance of the contract to another person remains responsible for performance. 435

Article 8.108 (ex art 3.108) - Excuse Due to an Impediment 436

(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. 437

(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. 438

(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. 439

Article 8.109 (ex 3.109) - Clause Limiting or Excluding Remedies 440

Remedies for non-performance may be excluded or restricted 441

unless it would be contrary to good faith and fair dealing to in-
voke the exclusion or restriction.

442 **CHAPTER 9 - PARTICULAR REMEDIES FOR NON-PERFORMANCE**

443 **Section 1 - Right to Performance**

444 **Article 9.101 (ex art. 4.101) - Monetary Obligations**

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

446 (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:

447 (a) it could have made a reasonable substitute transaction with-
out significant effort or expense; or

448 (b) performance would be unreasonable in the circum-
stances.

449 **Article 9.102 (ex art. 4.102) - Non-monetary Obligations**

450 (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.

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

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

453 (b) performance would cause the obligor 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 relation-
ship, or

(d) the aggrieved party may reasonably obtain performance 455
from another source.

(3) The aggrieved party will lose the right to specific perfor- 456
mance 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 (ex art 4.103) - Damages Not Precluded 457

The fact that a right to performance is excluded under this Sec- 458
tion does not preclude a claim for damages.

Section 2 - Right To Withhold Performance 459

Article 9.201 (ex art 4.201) - Right to Withhold Performance 460

(1) A party who is to perform simultaneously with or after the 461
other party may withhold performance until the other has ten-
dered performance or has performed. The first party may with-
hold the whole of its performance or a part of it as may be rea-
sonable in the circumstances.

(2) A party may similarly withhold performance for as long as it 462
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 (ex art. 4.301) - Right to Terminate the Contract

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

466 (2) In the case of delay the aggrieved party may also terminate the contract under Article 8.106 (3).

Article 9.302 (ex art 4.302) - Contract to be Performed in Parts

468 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 (ex art. 4.303) - Notice of Termination

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

471 (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.

472 (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

463 a reasonable time after it has or ought to have become aware of the tender.

464 (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. 473

(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. 474

Article 9.304 (ex art. 4.304) - Anticipatory Non-Performance

475 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. 476

Article 9.305 (ex art. 4.305) - Effects of Termination in General

477 (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. 478

(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. 479

Article 9.306 (ex art. 4.306) - Property Reduced in Value	488	Section 4 - Price Reduction	
481 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.	489	Article 9.401 (ex art 4.401) - Right to Reduce Price	
482 Article 9.307 (ex art. 4.307) - Recovery of Money Paid		(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.	490
483 On termination of the contract a party may recover money paid for a performance which it did not receive or which it properly rejected.		(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.	491
484 Article 9.308 (ex art 4.308) - Recovery of Property		(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 it has suffered so far as these are recoverable under Section 5 of this Chapter.	492
485 On termination of the contract a party who has supplied property which can be returned and for which it has not received payment or other counter-performance may recover the property.		Section 5 - Damages and Interest	493
486 Article 9.309 (ex art. 4.309) - Recovery for Performance that Cannot be Returned		Article 9.501 (ex art. 4.501) - Right to Damages	494
487 On termination of the contract a party who 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.		(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.	495
		(2) The loss for which damages are recoverable includes:	496
		(a) non-pecuniary loss; and	497
		(b) future loss which is reasonably likely to occur.	498
		Article 9.502 (ex art 4.502) - General Measure of Damages	499
		The general measure of damages is such sum as will put the	500

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.

501 **Article 9.503 (ex art. 4.503) - Foreseeability**

502 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.

503 **Article 9.504 - Loss Attributable to Aggrieved Party (new; previously part of 4.504)**

504 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.

505 **Article 9.505 - Reduction of loss (previously part of 4.504)**

506 (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.

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

508 **Article 9.506 (ex art. 4.505) - Substitute Transaction**

509 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 (ex art. 4.506) - Current Price

510

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.

511

Article 9.508 (ex art. 4.507) - Delay in Payment of Money

512

(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.

513

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

514

Article 9.509 (ex art. 4.508) - Agreed Payment for Non-performance

515

(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 its actual loss.

516

517 (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.

518 **Article 9.510 (ex art. 4.509) - Currency by which Damages to be Measured**

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

Metadata

SiSU Metadata, document information

Document Manifest @:

`<http://www.jus.uio.no/lm/eu.contract.principles.parts.1.and.2.1998/sisu_manifest.html>`

Title: The Principles Of European Contract Law 1998 - (completed and revised version)

Creator: European Union

Rights: Copyright (C) 1998 European Union

Publisher: SiSU `<http://www.jus.uio.no/sisu>` (this copy)

Date: 1998-07

Topics Registered: contract law;principles;principles:European Union

Version Information

Sourcefile: eu.contract.principles.parts.1.and.2.1998.sst

Filetype: SiSU text 2.0

Source Digest: SHA256(eu.contract.principles.parts.1.and.2.1998.sst)=-ac46cf311736c2fae6a990c54b02f128fbc7488cef6f5378fdaa9bbca0ce5ada

Skin Digest: SHA256(skin_lm.rb)=5acda64a9532f9ef6b71693da2b471d4-efac2f23a8499e68de066eec8ea9b8e9

Generated

Document (dal) last generated: Tue Sep 21 16:53:22 -0400 2010

Generated by: SiSU 2.6.3 of 2010w30/3 (2010-07-28)

Ruby version: ruby 1.8.7 (2010-08-16 patchlevel 302) [i486-linux]