

The Principles Of European Contract Law 2002 (Parts I, II, and III)

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THE PRINCIPLES OF EUROPEAN CONTRACT LAW - Parts I and II

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CHAPTER 1 - GENERAL PROVISIONS

Section 1 - Scope of the Principles

Article 1:101 (ex art. 1.101) - Application of the Principles

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

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

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

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

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

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

Article 1:102 - Freedom of contract

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

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

Article 1:103 - Mandatory Law

(1) Where the 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 applicable.

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

Article 1:104 - Application to questions of consent

17

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

18

(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

Article 1:105 (ex art. 1.103) - Usages and Practices

20

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

21

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

22

Article 1:106 (ex art. 1.104) - Interpretation and Supplementation

23

(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.

24

(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.

25

Article 1:107 (ex Art. 1.113) - Application of the Principles by Way of Analogy

26

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

27

Section 2 - General Obligations

28

Article 1:201 (ex art. 1.106) - Good Faith and Fair Dealing

29

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

30

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

31

Article 1:202 (ex art. 1.107) - Duty to Co-operate

32

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

33

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

Article 1:303 (ex art. 1.110) - Notice

45

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

46

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

47

(3) A notice reaches the addressee when it is delivered to it or to its place of business or mailing address, or, if it does not have a place of business or mailing address, to its habitual residence 48

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

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

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

Article 1:304 (ex art. 1.111) - Computation of Time 52

(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. 53

(2) Official holidays and official non-working days occurring during the period are included in calculating the period. However, if the last day of the period is an official holiday or official non-working day at the address of the addressee, or at the place where a prescribed act is to be performed, the period is extended until the first following working day in that place. 54

(3) Periods of time expressed in days, weeks, months or years shall begin at 00:00 on the next day and shall end at 24:00 on the last day of the period; but any reply that has to reach the party 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. 55

Article 1:305 (ex art. 1.109) - Imputed Knowledge and Intention 56

If any person who with a party's assent was involved in making a contract, or who was entrusted with performance by a party or performed with its assent: 57

(a) knew or foresaw a fact, or ought to have known or foreseen it; or 58

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

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

CHAPTER 2 - FORMATION

61

Section 1 - General Provisions

62

Article 2:101 (ex art. 5.101) - Conditions for the Conclusion of a Contract

63

(1) A contract is concluded if:

64

(a) the parties intend to be legally bound, and

65

(b) they reach a sufficient agreement

66

without any further requirement.

67

(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.

68

Article 2:102 (ex art. 5.102) - Intention

69

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.

70

Article 2:103 (ex art. 5.103) - Sufficient Agreement

71

(1) There is sufficient agreement if the terms:

72

(a) have been sufficiently defined by the parties so that the contract can be enforced, or

73

(b) can be determined under these Principles.

74

(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.

75

Article 2:104 (ex art. 5.103 A) - Terms not individually negotiated

76

(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 to the other party's attention before or when the contract was concluded.

77

(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

79

(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

84

(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

(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.

86

Article 2:107 (ex art. 5.108) - Promises binding without acceptance

87

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

88

Section 2 - Offer and Acceptance

89

Article 2:201 (ex art. 5.201) - Offer

90

(1) A proposal amounts to an offer if:

91

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

92

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

93

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

94

(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.

95

Article 2:202 (ex art. 5.202) - Revocation of an Offer 96

(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). 97

(2) An offer made to the public can be revoked by the same means as were used to make the offer. 98

(3) However, a revocation of an offer is ineffective if: 99

(a) the offer indicates that it is irrevocable; or 100

(b) it states a fixed time for its acceptance; or 101

(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

Article 2:203 (ex art. 5.203) - Lapse of an Offer 103

When a rejection of an offer reaches the offeror, the offer lapses. 104

Article 2:204 (ex art. 5.204) - Acceptance 105

(1) Any form of statement or conduct by the offeree is an acceptance if it indicates assent to the offer. 106

(2) Silence or inactivity does not in itself amount to acceptance. 107

Article 2:205 (ex art. 5.205) - Time of Conclusion of the Contract 108

(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 may accept the offer by performing an act without notice to the offeror, the contract is concluded when the performance of the act begins. 111

Article 2:206 (ex art. 5.206) - Time Limit for Acceptance 112

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

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

(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. 115

Article 2:207 (ex art. 5.208) - Late Acceptance 116

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

(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. 118

Article 2:208 (ex art. 5.209) - Modified Acceptance 119

(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. 120

(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 certain nature, and which have not been individually negotiated between the parties. 131

Article 2:210 (ex art. 5.211) - Professional's written confirmation 132

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: 133

(a) the terms materially alter the terms of the contract, or 134

(b) the addressee objects to them without delay. 135

Article 2:211 (ex art. 5.212) - Contracts not Concluded through Offer and Acceptance 136

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. 137

Section 3 - Liability for negotiations 138

Article 2:301 (ex art. 5.301) - Negotiations Contrary to Good Faith 139

(1) A party is free to negotiate and is not liable for failure to reach an agreement. 140

(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. 141

(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. 142

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

(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). 153

Section 2 - Direct Representation 154

Article 3:201 - Express, implied and apparent authority 155

(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. 156

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

(3) A person is to be treated as having granted authority to an apparent agent if the person's statements or conduct induce the third party reasonably and in good faith to believe that the apparent agent has been granted authority for the act performed by it. 158

Article 3:202 - Agent acting in exercise of his authority 159

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. 160

Article 3:203 - Unidentified Principal

161

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.

162

Article 3:204 - Agent acting without or outside his authority

163

(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.

164

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

165

Article 3:205 - Conflict of Interests

166

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

167

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

168

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

169

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

170

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

171

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

172

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

173

Article 3:206 - Subagency

174

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.

175

Article 3:207 - Ratification by Principal

176

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

177

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

178

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

179

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.

180

Article 3:209 - Duration of Authority

181

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

182

(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

(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

(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

Section 3 - Indirect Representation

189

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

Article 3:302 - Intermediary's Insolvency or Fundamental Non-performance to Principal 196

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

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

(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. 199

Article 3:303 - Intermediary's Insolvency or Fundamental Non-performance to Third Party 200

If the intermediary becomes insolvent, or if it commits a fundamental non-performance towards the third party, or if prior to the time for performance it is clear that there will be a fundamental non-performance: 201

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

(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. 203

Article 3:304 - Requirement of Notice 204

The rights under Articles 3:302 and 3:303 may be exercised only if notice of intention to exercise them is given to the intermediary and to the third party or principal, respectively. Upon receipt of the notice, the third party or the principal is no longer entitled to render performance to the intermediary. 205

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, immorality or lack of capacity. 208

Article 4:102 (ex art. 6.102) - Initial Impossibility 209

A contract is not invalid merely because at the time it was concluded performance of the obligation assumed was impossible, or because a party was not entitled to dispose of the assets to which the contract relates. 210

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 existing when the contract was concluded if: 212

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

(ii) the other party knew or ought to have known of the mistake and it was contrary to good faith and fair dealing to leave the mistaken party in error; or 214

(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. 216

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

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

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

Article 4:104 (ex art. 6.104) - Inaccuracy in communication 220

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. 221

Article 4:105 (ex art. 6.105) - Adaptation of contract

222

(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.

223

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

224

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

225

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

Article 4:108 (ex art. 6.108) - Threats

236

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:

237

(a) which is wrongful in itself, or

238

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

239

240

Article 4:109 (ex art. 6.109) - Excessive benefit or unfair advantage

241

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

242

(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

243

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

244

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

245

(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.

246

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 contract, 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 responsible, 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 conditions as if the behaviour or knowledge had been that of the party itself.

259

(2) Where any other third person:

260

(a) gives incorrect information,

261

(b) commits fraud,

262

(c) makes a threat, or

263

(d) takes excessive benefit or unfair advantage,

264

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.

265

Article 4:112 (ex art. 6.112) - Notice of Avoidance

266

Avoidance must be by notice to the other party.

267

Article 4:113 (ex art. 4.113) - Time limits

268

(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.

269

(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.

270

Article 4:114 (ex art. 6.114) - Confirmation

271

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.

272

Article 4:115 (ex art. 6.116) - Effect of avoidance

273

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.

274

Article 4:116 (ex art. 6.115) - Partial avoidance

275

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.

276

Article 4:117 (ex art. 6.117) - Damages

277

(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.

278

(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.

279

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

280

Article 4:118 (ex. art. 6.118) - Exclusion or restriction of remedies

281

(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.

282

(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. 283

Article 4:119 (ex art. 6.119) - Remedies for non-performance 284

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. 285

CHAPTER 5 - INTERPRETATION 286

Article 5:101 (Ex art. 7.101/ 101A) - General Rules of Interpretation 287

(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. 288

(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. 289

(3) If an intention cannot be established according to (1) or (2), the contract is to be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances. 290

Article 5:102 (ex art. 7.102) - Relevant Circumstances 291

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

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

(b) the conduct of the parties, even subsequent to the conclusion of the contract; 294

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

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

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

(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 individually negotiated, an interpretation of the term against the party who supplied it is to be preferred. 301

Article 5:104 (ex art. 7.104) - Preference to Negotiated Terms 302

Terms which have been individually negotiated take preference over those which are not. 303

Article 5:105 (ex art. 7.105) - Reference to Contract as a Whole 304

Terms are interpreted in the light of the whole contract in which they appear. 305

Article 5:106 (ex art. 7.106) - Terms to Be Given (Full) Effect 306

An interpretation which renders the terms of the contract lawful, or effective, is to be preferred to one which would not. 307

Article 5:107 (ex art. 7.107) - Linguistic Discrepancies 308

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. 309

CHAPTER 6 - CONTENTS AND EFFECTS 310

Article 6:101 (ex art. 8.101) - Statements giving rise to contractual obligation 311

(1) A statement made by one party before or when the contract is concluded is to be treated as giving rise to a contractual obligation if that is how the other party reasonably understood it in the circumstances, taking into account: 312

(a) the apparent importance of the statement to the other party; 313

(b) whether the party was making the statement in the course of business; and 314

(c) the relative expertise of the parties. 315

(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 316

contractual obligation unless it is shown that the other party knew or could not have been unaware that the statement was incorrect.

(3) Such information and other undertakings given by a person advertising or marketing services, goods or other property for the professional supplier, or by a person in earlier links of the business chain, are to be treated as giving rise to a contractual obligation on the part of the professional supplier unless it did not know and had no reason to know of the information or undertaking. 317

Article 6:102 (replaces 5.108) - Implied obligations 318

In addition to the express terms, a contract may contain implied terms which stem from 319

(a) the intention of the parties, 320

(b) the nature and purpose of the contract, and 321

(c) good faith and fair dealing. 322

Article 6:103 - Simulation 323

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 324

Article 6:104 (ex art. 2.101) - Determination of Price 325

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. 326

Article 6:105 (ex art. 2.102) - Unilateral Determination by a Party 327

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. 328

Article 6:106 (ex art. 2.103) - Determination by a Third Person 329

(1) Where the price or any other contractual term is to be determined by a third person, and it cannot or will not do so, the parties are presumed to have empowered the court to appoint another person to determine it. 330

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

Article 6:107 (ex art. 2.104) - Reference to a Non Existent Factor 332

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

Article 6:108 (ex art. 2.105) - Quality of Performance 334

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

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 by giving notice of reasonable length. 337

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 obligation when its right to do so has been expressly agreed upon between the promisor and the promisee, or when such agreement is to be inferred from the purpose of the contract or the circumstances of the case. The third party need not be identified at the time the agreement is concluded. 339

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

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

(a) the third party has received notice from the promisee that the right has been made irrevocable, or 342

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

Article 6:111 (ex art. 2.117) - Change of Circumstances 344

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

(2) If, however, performance of the contract becomes excessively onerous because of a 346

change of circumstances, the parties are bound to enter into negotiations with a view to adapting the contract or terminating it, provided that:

(a) the change of circumstances occurred after the time of conclusion of the contract, 347

(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 348

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

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

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

(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. 352

In either case, the court may award damages for the loss suffered through a party refusing to negotiate or breaking off negotiations contrary to good faith and fair dealing. 353

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: 356

(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; 357

(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. 358

(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. 359

(3) If a party does not have a place of business its habitual residence is to be treated as its place of business. 360

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 circumstances 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. 365

Article 7:103 (ex art. 2.108) - Early Performance 366

(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. 367

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

Article 7:104 - Order of performance 369

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. 370

Article 7:105 - Alternative performance 371

(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. 372

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

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

(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. 375

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

(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.

387

Article 7:109 (ex art. 2.112) - Appropriation of Performance

388

(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.

389

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

390

(a) is not yet due, or

391

(b) is illegal, or

392

(c) is disputed,

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is invalid.

394

(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:

395

- (a) the obligation which is due or is the first to fall due; 396
- (b) the obligation for which the obligee has the least security; 397
- (c) the obligation which is the most burdensome for the obligor, 398
- (d) the obligation which has arisen first. 399

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

(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. 401

Article 7:110 (ex art. 2.113) - Property Not Accepted 402

(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. 403

(2) The party left in possession may discharge its duty to deliver or return: 404

(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 405

(b) by selling the property on reasonable terms after notice to the other party, and paying the net proceeds to that party. 406

(3) Where, however, the property is liable to rapid deterioration or its preservation is unreasonably expensive, the party must take reasonable steps to dispose of it. It may discharge its duty to deliver or return by paying the net proceeds to the other party. 407

(4) The party left in possession is entitled to be reimbursed or to retain out of the proceeds of sale any expenses reasonably incurred. 408

Article 7:111 (ex art. 2.114) - Money not Accepted 409

Where a party fails to accept money properly tendered by the other party, that party may after notice to the first party discharge its obligation to pay by depositing the money to the order of the first party in accordance with the law of the place where payment is due 410

Article 7:112 - Costs of performance 411

Each party shall bear the costs of performance of its obligations. 412

CHAPTER 8 - NON-PERFORMANCE AND REMEDIES IN GENERAL

413

Article 8:101 (ex art. 3.101) - Remedies Available

414

(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.

415

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

416

(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.

417

Article 8:102 (ex art. 3.102) - Cumulation of Remedies

418

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

419

Article 8:103 (ex art. 3.103) - Fundamental Non-Performance

420

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

428

by the other party may demand adequate assurance of due performance and meanwhile may withhold performance of its own obligations so long as such reasonable belief continues.

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

Article 8:106 (ex art. 3.106) - Notice Fixing Additional Period for Performance

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

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

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

Article 8:107 (ex art. 3.107) - Performance Entrusted to Another

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

Article 8:108 (ex art 3.108) - Excuse Due to an Impediment

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

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

(3) The non-performing party must ensure that notice of the impediment and of its effect on its ability to perform is received by the other party within a reasonable time after the non-performing party knew or ought to have known of these circumstances. The other party is entitled to damages for any loss resulting from the non-receipt of such notice. 439

Article 8:109 (ex 3.109) - Clause Limiting or Excluding Remedies 440

Remedies for non-performance may be excluded or restricted unless it would be contrary to good faith and fair dealing to invoke the exclusion or restriction. 441

CHAPTER 9 - PARTICULAR REMEDIES FOR NON-PERFORMANCE 442

Section 1 - Right to Performance 443

Article 9:101 (ex art. 4.101) - Monetary Obligations 444

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

(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: 446

(a) it could have made a reasonable substitute transaction without significant effort or expense; or 447

(b) performance would be unreasonable in the circumstances. 448

Article 9:102 (ex art. 4.102) - Non-monetary Obligations 449

(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. 450

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

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

(b) performance would cause the obligor unreasonable effort or expense; or 453

(c) the performance consists in the provision of services or work of a personal character or depends upon a personal relationship, or 454

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

(3) The aggrieved party will lose the right to specific performance if it fails to seek it within a reasonable time after it has or ought to have become aware of the non-performance. 456

Article 9:103 (ex art 4.103) - Damages Not Precluded

457

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

458

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 other party may withhold performance until the other has tendered performance or has performed. The first party may withhold the whole of its performance or a part of it as may be reasonable in the circumstances.

461

(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.

462

Section 3 - Termination Of The Contract

463

Article 9:301 (ex art. 4.301) - Right to Terminate the Contract

464

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

465

(2) In the case of delay the aggrieved party may also terminate the contract under Article 8:106 (3).

466

Article 9:302 (ex art 4.302) - Contract to be Performed in Parts

467

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.

468

Article 9:303 (ex art. 4.303) - Notice of Termination

469

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

470

(2) The aggrieved party loses its right to terminate the contract unless it gives notice within a

471

reasonable time after it has or ought to have become aware of the non-performance.

(3) (a) When performance has not been tendered by the time it was due, the aggrieved party need not give notice of termination before a tender has been made. If a tender is later made it loses its right to terminate if it does not give such notice within a reasonable time after it has or ought to have become aware of the tender. 472

(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 480

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. 481

Article 9:307 (ex art. 4.307) - Recovery of Money Paid 482

On termination of the contract a party may recover money paid for a performance which it did not receive or which it properly rejected. 483

Article 9:308 (ex art 4.308) - Recovery of Property

484

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.

485

Article 9:309 (ex art. 4.309) - Recovery for Performance that Cannot be Returned

486

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.

487

Section 4 - Price Reduction

488

Article 9:401 (ex art 4.401) - Right to Reduce Price

489

(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

(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

(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

Section 5 - Damages and Interest

493

Article 9:501 (ex art. 4.501) - Right to Damages

494

(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 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.

500

Article 9:503 (ex art. 4.503) - Foreseeability

501

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.

502

Article 9:504 - Loss Attributable to Aggrieved Party (new; previously part of 4.504)

503

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.

504

Article 9:505 - Reduction of loss (previously part of 4.504)

505

(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.

506

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

507

Article 9:506 (ex art. 4.505) - Substitute Transaction

508

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.

509

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

(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. 517

Article 9:510 (ex art. 4.509) - Currency by which Damages to be Measured 518

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

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CHAPTER 10: Plurality of parties* 521

Section 1 - Plurality of debtors* 522

Article 10:101 Solidary, Separate and Communal Obligations 523

(1) Obligations are solidary when all the debtors are bound to render one and the same performance and the creditor may require it from any one of them until full performance has been received. 524

(2) Obligations are separate when each debtor is bound to render only part of the performance and the creditor may require from each debtor only that debtor's part. 525

(3) An obligation is communal when all the debtors are bound to render the performance together and the creditor may require it only from all of them. 526

Article 10:102 When Solidary Obligations Arise

527

(1) If several debtors are bound to render one and the same performance to a creditor under the same contract, they are solidarily liable, unless the contract or the law provides otherwise.

528

(2)* *Solidary obligations also arise where several persons are liable for the same damage.

529

(3)* *The fact that the debtors are not liable on the same terms does not prevent their obligations from being solidary.

530

Article 10:103 Liability Under Separate Obligations

531

Debtors bound by separate obligations are liable in equal shares unless the contract or the law provides otherwise.

532

Article 10:104 Communal Obligations: Special Rule when Money Claimed for Non-Performance

533

Notwithstanding Article 10:101 (3), when money is claimed for non-performance of a communal obligation, the debtors are solidarily liable for payment to the creditor.

534

Article 10:105 Appointment Between Solidary Debtors

535

(1)* *As between themselves, solidary debtors are liable in equal shares unless the contract or the law provides otherwise.

536

(2) If two or more debtors are liable for the same damage under Article 10:102 (2), their share of liability as between themselves is determined according to the law governing the event which gave rise to the liability.

537

Article 10:106 Recourse Between Solidary Debtors

538

(1)* *A solidary debtor who has performed more than that debtor's share may claim the excess from any of the other debtors to the extent of each debtor's unperformed share, together with a share of any costs reasonably incurred.

539

(2)* **A** *solidary debtor to whom paragraph (1) applies may also, subject to any prior right and interest of the creditor, exercise the rights and actions of the creditor, including accessory securities, to recover the excess from any of the other debtors to the extent of each debtor's unperformed share.

540

(3)* *If a solidary debtor who has performed more than that debtor's share is unable, despite all reasonable efforts, to recover contribution from another solidary debtor, the share of the others, including the one who has performed, is increased proportionally. 541

Article 10:107 Performance, Set-Off and Merger in Solidary Obligations 542

(1)* *Performance or set-off by a solidary debtor or set-off by the creditor against one solidary debtor discharges the other debtors in relation to the creditor to the extent of the performance or set--off. 543

(2)* *Merger of debts between a solidary debtor and the creditor discharges the other debtors only for the share of the debtor concerned. 544

Article 10:108 Release or Settlement in Solidary Obligations 545

(1)* *When the creditor releases, or reaches a settlement with, one solidary debtor, the other debtors are discharged of liability for the share of that debtor. 546

(2) The debtors are totally discharged by the release or settlement if it so provides. 547

(3) As between solidary debtors, the debtor who is discharged from that debtor's share is discharged only to the extent of the share at the time of the discharge and not from any supplementary share for which that debtor may subsequently become liable under Article 10:106 (3). 548

Article 10:109 Effect of Judgment in Solidary Obligations 549

A decision by a court as to the liability to the creditor of one solidary debtor does not affect: 550
(a) the liability to the creditor of the other solidary debtors; or (b) the rights of recourse between the solidary debtors under Article 10:106.

Article 10:110 Prescription in Solidary Obligations 551

Prescription of the creditor's right to performance ("claim") against one solidary debtor does not affect: (a) the liability to the creditor of the other solidary debtors; or (b) the rights of recourse between the solidary debtors under Article 10:106. 552

Article 10:111 Opposability of other Defences in Solidary Obligations 553

(1) A solidary debtor may invoke against the creditor any defence which another solidary debtor can invoke, other than a defence personal to that other debtor. Invoking the defence has no effect with regard to the other solidary debtors. 554

(2) A debtor from whom contribution is claimed may invoke against the claimant any personal defence that that debtor could have invoked against the creditor. 555

Section 2 - Plurality of creditors* 556

Article 10:201 Solidary, Separate and Communal Claims 557

(1) Claims are solidary when any of the creditors may require full performance from the debtor and when the debtor may render performance to any of the creditors. 558

(2) Claims are separate when the debtor owes each creditor only that creditor's share of the claim and each creditor may require performance only of that creditor's share. 559

(3) A claim is communal when the debtor must perform to all the creditors and any creditor may require performance only for the benefit of all. 560

Article 10:202 Apportionment of Separate Claims 561

Separate creditors are entitled to equal shares unless the contract or the law provides otherwise. 562

Article 10:203 Difficulties of Executing a Communal Claim 563

If one of the creditors in a communal claim refuses, or is unable to receive, the performance, the debtor may discharge the obligation to perform by depositing the property or money with a third party according to Articles 7:110 or 7:111 of the Principles. 564

Article 10:204 Apportionment of Solidary Claims 565

(1)* *Solidary creditors are entitled to equal shares unless the contract or the law provides otherwise. 566

(2)* *A creditor who has received more than that creditor's share must transfer the excess to the other creditors to the extent of their respective shares. 567

Article 10:205 Regime of Solidary Claims 568

(1)* **A** *release granted to the debtor by one of the solidary creditors has no effect on the other solidary creditors 569

(2) The rules of Articles 10:107, 10:109, 10:110 and 10:111 (1) apply, with appropriate adaptations, to solidary claims. 570

CHAPTER 11. Assignment of Claims* 571

Section 1 - General Principles* 572

Article 11:101 Scope of Chapter 573

(1) This Chapter applies to the assignment by agreement of a right to performance (“claim”) under an existing or future contract. 574

(2) Except where otherwise stated or the context otherwise requires, this Chapter also applies to the assignment by agreement of other transferable claims. 575

(3) This Chapter does not apply: (a) to the transfer of a financial instrument or investment security where, under the law otherwise applicable, such transfer must be* *by entry in a register maintained by or for the issuer; or (b) to the transfer of a bill of exchange or other negotiable instrument or of a negotiable security or a document of title to goods where, under the law otherwise applicable, such transfer must be by delivery (with any necessary indorsement). 576

(4) In this Chapter “assignment” includes an assignment by way of security. 577

(5) This Chapter also applies, with appropriate adaptations, to the granting by agreement of a right in security over a claim otherwise than by assignment. 578

Article 11:102 Contractual Claims Generally Assignable 579

(1) Subject to Articles 11:301 and 11:302, a party to a contract may assign a claim under it. 580

(2) A future claim arising under an existing or future contract may be assigned if at the time when it comes into existence, or at such other time as the parties agree, it can be identified as the claim to which the assignment relates. 581

Article 11:103 Partial Assignment 582

A claim which is divisible may be assigned in part, but the assignor is liable to the debtor for any increased costs which the debtor thereby incurs. 583

Article 11:104 Form of Assignment 584

An assignment need not be in writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses. 585

Section 2 - Effects of Assignment As Between Assignor and Assignee*

586

Article 11:201 Rights Transferred to Assignee

587

(1) The assignment of a claim transfers to the assignee: (a) all the assignor's rights to performance in respect of the claim assigned; and (b) all accessory rights securing such performance.

588

(2) Where the assignment of a claim under a contract is associated with the substitution of the assignee as debtor in respect of any obligation owed by the assignor under the same contract, this Article takes effect subject to Article 12:201.

589

Article 11:202 When Assignment Takes Effect

590

(1) An assignment of an existing claim takes effect at the time of the agreement to assign or such later time as the assignor and assignee agree.

591

(2) An assignment of a future claim is dependent upon the assigned claim coming into existence but thereupon takes effect from the time of the agreement to assign or such later time as the assignor and assignee agree.

592

Article 11:203 Preservation of Assignee's Rights Against Assignor

593

An assignment is effective as between the assignor and assignee, and entitles the assignee to whatever the assignor receives from the debtor, even if it is ineffective against the debtor under Article 11:301 or 11:302.

594

Article 11:204 Undertakings by Assignor

595

By assigning or purporting to assign a claim the assignor undertakes to the assignee that: (a) at the time when the assignment is to take effect the following conditions will be satisfied except as otherwise disclosed to the assignee: (i) the assignor has the right to assign the claim; (ii) the claim exists and the assignee's rights are not affected by any defences or rights (including any right of set-off) which the debtor might have against the assignor; and (iii) the claim is not subject to any prior assignment or right in security in favour of any other party or to any other incumbrance; (b) the claim and any contract under which it arises will not be modified without the consent of the assignee unless the modification is provided for in the assignment agreement or is one which is made in good faith and is of a nature to which the assignee could not reasonably object; and (c) the assignor will transfer to the assignee all transferable rights intended to secure performance which are not accessory rights.

596

Section 3 - Effects of Assignment As Between Assignee and Debtor*

597

Article 11:301 Contractual Prohibition of Assignment

598

(1) An assignment which is prohibited by or is otherwise not in conformity with the contract under which the assigned claim arises is not effective against the debtor unless: (a) the debtor has consented to it; or (b) the assignee neither knew nor ought to have known of the non-conformity; or (c) the assignment is made under a contract for the assignment of future rights to payment of money.

599

(2) Nothing in the preceding paragraph affects the assignor's liability for the non-conformity.

600

Article 11:302 Other Ineffective Assignments

601

An assignment to which the debtor has not consented is ineffective against the debtor so far as it relates to a performance which the debtor, by reason of the nature of the performance or the relationship of the debtor and the assignor, could not reasonably be required to render to anyone except the assignor.

602

Article 11:303 Effect on Debtor's Obligation

603

(1) Subject to Articles 11:301, 11:302, 11:307 and 11:308, the debtor is bound to perform in favour of the assignee if and only if the debtor has received a notice in writing from the assignor or the assignee which reasonably identifies the claim which has been assigned and requires the debtor to give performance to the assignee.

604

(2) However, if such notice is given by the assignee, the debtor may within a reasonable time request the assignee to provide reliable evidence of the assignment, pending which the debtor may withhold performance.

605

(3) Where the debtor has acquired knowledge of the assignment otherwise than by a notice conforming to paragraph (1), the debtor may either withhold performance from or give performance to the assignee.

606

(4) Where the debtor gives performance to the assignor, the debtor is discharged if and only if the performance is given without knowledge of the assignment.

607

//Article 11:304 PROTECTION OF DEBTOR

608

A debtor who performs in favour of a person identified as assignee in a notice of assignment under Article 11:303 is discharged unless the debtor could not have been unaware that such person was not the person entitled to performance.

609

Article 11:305 Competing Demands

610

A debtor who has received notice of two or more competing demands for performance may discharge liability by conforming to the law of the due place of performance, or, if the performances are due in different places, the law applicable to the claim./.

611

Article 11:306 Place of Performance

612

(1) Where the assigned claim relates to an obligation to pay money at a particular place, the assignee may require payment at any place within the same country or, if that country is a Member State of the European Union, at any place within the European Union, but the assignor is liable to the debtor for any increased costs which the debtor incurs by reason of any change in the place of performance.

613

(2) Where the assigned claim relates to a non-monetary obligation to be performed at a particular place, the assignee may not require performance at any other place.

614

Article 11:307 Defences and Rights of Set-Off

615

(1) The debtor may set up against the assignee all substantive and procedural defences to the assigned claim which the debtor could have used against the assignor.

616

(2) The debtor may also assert against the assignee all rights of set-off which would have been available against the assignor under Chapter 13 in respect of any claim against the assignor: (a) existing at the time when a notice of assignment, whether or not conforming to Article 11:303 (1), reaches the debtor; or (b) closely connected with the assigned claim.

617

Article 11:308 Unauthorised Modification Not Binding on Assignee

618

A modification of the claim made by agreement between the assignor and the debtor, without the consent of the assignee, after a notice of assignment, whether or not conforming to Article 11:303 (1), reaches the debtor does not affect the rights of the assignee against the debtor unless the modification is provided for in the assignment agreement or is one which is made in good faith and is of a nature to which the assignee could not reasonably object.

619

Section 4 - Order of Priority between Assignee and Competing Claimants*

620

Article 11:401 Priorities

621

(1) Where there are successive assignments of the same claim, the assignee whose assignment is first notified to the debtor has priority over any earlier assignee if at the time of the later assignment the assignee under that assignment neither knew nor ought to have known of the earlier assignment.

622

(2) Subject to paragraph (1), the priority of successive assignments, whether of existing or future claims, is determined by the order in which they are made.

623

(3) The assignee's interest in the assigned claim has priority over the interest of a creditor of the assignor who attaches that claim, whether by judicial process or otherwise, after the time the assignment has taken effect under Article 11:202.

624

(4) In the event of the assignor's bankruptcy, the assignee's interest in the assigned claim has priority over the interest of the assignor's insolvency administrator and creditors, subject to any rules of the law applicable to the bankruptcy relating to: (a) publicity required as a condition of such priority; (b) the ranking of claims; or (c) the avoidance or ineffectiveness of transactions in the bankruptcy proceedings.

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CHAPTER 12. Substitution of New Debtor: Transfer of Contract*

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Section 1 - Substitution of New Debtor*

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Article 12:101 Substitution: General Rules

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(1) A third person may undertake with the agreement of the debtor and the creditor to be substituted as debtor, with the effect that the original debtor is discharged.

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(2) A creditor may agree in advance to a future substitution. In such a case the substitution takes effect only when the creditor is given notice by the new debtor of the agreement between the new and the original debtor.

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Article 12:102 Effects of Substitutions on Defences and Securities

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(1) The new debtor cannot invoke against the creditor any rights or defences arising from the relationship between the new debtor and the original debtor.

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(2) The discharge of the original debtor also extends to any security of the original debtor given to the creditor for the performance of the obligation, unless the security is over an

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asset which is transferred to the new debtor as part of a transaction between the original and the new debtor.

(3) Upon discharge of the original debtor, a security granted by any person other than the new debtor for the performance of the obligation is released, unless that other person agrees that it should continue to be available to the creditor. 634

(4) The new debtor may invoke against the creditor all defences which the original debtor could have invoked against the creditor. 635

Section 2 - Transfer of Contract*

Article 12:201 Transfer of Contract

(1) A party to a contract may agree with a third person that that person is to be substituted as the contracting party. In such a case the substitution takes effect only where, as a result of the other party's assent, the first party is discharged. 638

(2) To the extent that the substitution of the third person as a contracting party involves a transfer of rights to performance ("claims"), the provisions of Chapter 11 apply; to the extent that obligations are transferred, the provisions of Section 1 of this Chapter apply. 639

CHAPTER 13. Set-Off*

Article 13:101 Requirement for Set-Off

If two parties owe each other obligations of the same kind, either party may set off that party's right to performance ("claim") against the other party's claim, if and to the extent that, at the time of set-off, the first party: (a) is entitled to effect performance; and (b) may demand the other party's performance. 640

Article 13:102 Unascertained Claims

(1) A debtor may not set off a claim which is unascertained as to its existence or value unless the set-off will not prejudice the interests of the other party. 641

(2) Where the claims of both parties arise from the same legal relationship it is presumed that the other party's interests will not be prejudiced. 642

Article 13:103 Foreign Currency Set-Off

Where parties owe each other money in different currencies, each party may set off that 643

party's claim against the other party's claim, unless the parties have agreed that the party declaring set-off is to pay exclusively in a specified currency.

Article 13:104 Notice of Set-Off 648

The right of set-off is exercised by notice to the other party. 649

Article 13:105 Plurality of Claims and Obligations 650

(1) Where the party giving notice of set-off has two or more claims against the other party, the notice is effective only if it identifies the claim to which it relates. 651

(2) Where the party giving notice of set-off has to perform two or more obligations towards the other party, the rules in Article 7:109 apply with appropriate adaptations. 652

Article 13:106 Effects of Set-Off 653

Set-off discharges the obligations, as far as they are coextensive, as from the time of notice. 654

Article 13:107 Exclusion of Right of Set-Off 655

Set-off cannot be effected: (a) where it is excluded by agreement; (b) against a claim to the extent that that claim is not capable of attachment; and (c) against a claim arising from a deliberate wrongful act. 656

CHAPTER 14. Prescription* 657

Section 1 - General Provision* 658

Article 14:101 Claims Subject to Prescription 659

A right to performance of an obligation ("claim") is subject to prescription by the expiry of a period of time in accordance with these Principles. 660

Section 2 - Periods of Prescription and their Commencement* 661

Article 14:201 General Period 662

The general period of prescription is three years. 663

Article 14:202 Period for a Claim Established by Legal Proceedings

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(1) The period of prescription for a claim established by judgment is ten years.

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(2) The same applies to a claim established by an arbitral award or other instrument which is enforceable as if it were a judgment.

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Article 14:203 Commencement

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(1) The general period of prescription begins to run from the time when the debtor has to effect performance or, in the case of a right to damages, from the time of the act which gives rise to the claim.

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(2) Where the debtor is under a continuing obligation to do or refrain from doing something, the general period of prescription begins to run with each breach of the obligation.

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(3) The period of prescription set out in Article 14:202 begins to run from the time when the judgment or arbitral award obtains the effect of *res judicata*, or the other instrument becomes enforceable, though not before the debtor has to effect performance.

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Section 3 - Extension of Period*

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Article 14:301 Suspension in Case of Ignorance

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The running of the period of prescription is suspended as long as the creditor does not know of, and could not reasonably know of: (a) the identity of the debtor; or (b) the facts giving rise to the claim including, in the case of a right to damages, the type of damage.

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Article 14:302 Suspension in Case of Judicial and Other Proceedings

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(1) The running of the period of prescription is suspended from the time when judicial proceedings on the claim are begun.

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(2) Suspension lasts until a decision has been made which has the effect of *res judicata*, or until the case has been otherwise disposed of.

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(3) These provisions apply, with appropriate adaptations, to arbitration proceedings and to all other proceedings initiated with the aim of obtaining an instrument which is enforceable as if it were a judgment.

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Article 14:303 Suspension in Case of Impediment Beyond Creditor's Control

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(1) The running of the period of prescription is suspended as long as the creditor is pre-

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vented from pursuing the claim by an impediment which is beyond the creditor's control and which the creditor could not reasonably have been expected to avoid or overcome.

(2) Paragraph (1) applies only if the impediment arises, or subsists, within the last six months of the prescription period. 680

Article 14:304 Postponement of Expiry in Case of Negotiations 681

If the parties negotiate about the claim, or about circumstances from which a claim might arise, the period of prescription does not expire before one year has passed since the last communication made in the negotiations. 682

Article 14:305 Postponement of Expiry in Case of Incapacity 683

(1) If a person subject to an incapacity is without a representative, the period of prescription of a claim held by or against that person does not expire before one year has passed after either the incapacity has ended or a representative has been appointed. 684

(2) The period of prescription of claims between a person subject to an incapacity and that person's representative does not expire before one year has passed after either the incapacity has ended or a new representative has been appointed. 685

Article 14:306 Postponement of Expiry: Deceased's Estate 686

Where the creditor or debtor has died, the period of prescription of a claim held by or against the deceased's estate does not expire before one year has passed after the claim can be enforced by or against an heir, or by or against a representative of the estate. 687

Article 14:307 Maximum Length of Period 688

The period of prescription cannot be extended, by suspension of its running or postponement of its expiry under these Principles, to more than ten years or, in case of claims for personal injuries, to more than thirty years. This does not apply to suspension under Article 14:302. 689

Section 4 - Renewal of Periods* 690

Article 14:401 Renewal by Acknowledgement 691

(1) If the debtor acknowledges the claim, vis-à-vis the creditor, by part payment, payment 692

of interest, giving of security, or in any other manner, a new period of prescription begins to run.

(2) The new period is the general period of prescription, regardless of whether the claim was originally subject to the general period of prescription or the ten year period under Article 14:202. In the latter case, however, this Article does not operate so as to shorten the ten year period.

Article 14:402 Renewal by Attempted Execution

The ten year period of prescription laid down in Article 14:202 begins to run again with each reasonable attempt at execution undertaken by the creditor.

Section 5 - Effects of Prescription*

Article 14:501 General Effect

(1) After expiry of the period of prescription the debtor is entitled to refuse performance.

(2) Whatever has been performed in order to discharge a claim may not be reclaimed merely because the period of prescription had expired.

Article 14:502 Effect on Ancillary Claims

The period of prescription for a right to payment of interest, and other claims of an ancillary nature, expires not later than the period for the principal claim.

Article 14:503 Effect on Set-Off

A claim in relation to which the period of prescription has expired may nonetheless be set off, unless the debtor has invoked prescription previously or does so within two months of notification of set-off.

Section 6 - Modification by Agreement*

Article 14:601 Agreements Concerning Prescription

(1) The requirements for prescription may be modified by agreement between the parties, in particular by either shortening or lengthening the periods of prescription.

(2) The period of prescription may not, however, be reduced to less than one year or

extended to more than thirty years after the time of commencement set out in Article 14:203.

CHAPTER 15. Illegality*

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Article 15:101 Contracts Contrary to Fundamental Principles

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A contract is of no effect to the extent that it is contrary to principles recognised as fundamental in the laws of the Member States of the European Union.

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Article 15:102 Contracts Infringing Mandatory Rules

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(1) Where a contract infringes a mandatory rule of law applicable under Article 1:103 of these Principles, the effects of that infringement upon the contract are the effects, if any, expressly prescribed by that mandatory rule.

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(2) Where the mandatory rule does not expressly prescribe the effects of an infringement upon a contract, the contract may be declared to have full effect, to have some effect, to have no effect, or to be subject to modification.

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(3) A decision reached under paragraph (2) must be an appropriate and proportional response to the infringement, having regard to all relevant circumstances, including: (a) the purpose of the rule which has been infringed; (b) the category of persons for whose protection the rule exists; (c) any sanction that may be imposed under the rule infringed; (d) the seriousness of the infringement; (e) whether the infringement was intentional; and (f) the closeness of the relationship between the infringement and the contract.

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Article 15:103 Partial Ineffectiveness

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(1) If only part of a contract is rendered ineffective under Articles 15:101 or 15:102, the remaining part continues in effect unless, giving due consideration to all the circumstances of the case, it is unreasonable to uphold it.

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(2) Articles 15:104 and 15:105 apply, with appropriate adaptations, to a case of partial ineffectiveness.

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Article 15:104 Restitution

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(1) When a contract is rendered ineffective under Articles 15:101 or 15:102, either party may claim restitution of whatever that party has supplied under the contract, provided that, where appropriate, concurrent restitution is made of whatever has been received.

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(2) When considering whether to grant restitution under paragraph (1), and what concurrent restitution, if any, would be appropriate, regard must be had to the factors referred to in Article 15:102 (3). 720

(3) An award of restitution may be refused to a party who knew or ought to have known of the reason for the ineffectiveness. 721

(4) If restitution cannot be made in kind for any reason, a reasonable sum must be paid for what has been received. 722

Article 15:105 Damages 723

(1) A party to a contract which is rendered ineffective under Articles 15:101 or 15:102 may recover from the other party damages putting the first party as nearly as possible into the same position as if the contract had not been concluded, / provided that the other party knew or ought to have known of the reason for the ineffectiveness. 724

(2) When considering whether to award damages under paragraph (1), regard must be had to the factors referred to in Article 15:102 (3). 725

(3) An award of damages may be refused where the first party knew or ought to have known of the reason for the ineffectiveness. 726

CHAPTER 16. Conditions* 727

Article 16:101 Types of Condition 728

A contractual obligation may be made conditional upon the occurrence of an uncertain future event, so that the obligation takes effect only if the event occurs (suspensive condition) or comes to an end if the event occurs (resolutive condition). 729

Article 16:102 Interference with Conditions 730

(1) If fulfilment of a condition is prevented by a party, contrary to duties of good faith and fair dealing or co-operation, and if fulfilment would have operated to that party's disadvantage, the condition is deemed to be fulfilled. 731

(2) If fulfilment of a condition is brought about by a party, contrary to duties of good faith and fair dealing or co-operation, and if fulfilment operates to that party's advantage, the condition is deemed not to be fulfilled. 732

Article 16:103 Effect of Conditions

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(1) Upon fulfilment of a suspensive condition, the relevant obligation takes effect unless the parties otherwise agree.

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(2) Upon fulfilment of a resolutive condition, the relevant obligation comes to an end unless the parties otherwise agree.

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CHAPTER 17. Capitalisation of Interest*

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Article 17:101 When Interest to be Added to Capital

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(1) Interest payable according to Article 9:508 (1) is added to the outstanding capital every 12 months.

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(2) Paragraph (1) of this Article does not apply if the parties have provided for interest upon delay in payment.

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[Note]

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