

Principles of International Commercial Contracts, 1994 - UNIDROIT

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1 **UNIDROIT PRINCIPLES OF INTERNATIONAL
COMMERCIAL CONTRACTS 2004**

2 **Preamble - (Purpose of the Principles)**

3 These Principles set forth general rules for international commercial
contracts. They shall be applied when the parties have agreed that
their contract be governed by them.¹

4 They may be applied when the parties have agreed that their con-
tract be governed by general principles of law, the *lex mercatoria*
or the like. They may be applied when the parties have not chosen
any law to govern their contract.

5 They may be used to interpret or supplement international uniform
law instruments.

6 They may be used to interpret or supplement domestic law.

7 They may serve as a model for national and international legisla-
tors.

8 **Chapter 1 - General Provisions**

9 **Article 1.1 - Freedom of contract**

10 The parties are free to enter into a contract and to determine its
content.

¹Parties wishing to provide that their agreement be governed by the
Principles might use the following words, adding any desired exceptions or
modifications:

“This contract shall be governed by the UNIDROIT Principles (2004) [except
as to Articles ...].”

Parties wishing to provide in addition for the application of the law of a
particular jurisdiction might use the following words:

"This contract shall be governed by the UNIDROIT Principles (2004) [except
as to Articles...], supplemented when necessary by the law of [jurisdiction X].

Article 1.2 - No form required

11

Nothing in these Principles requires a contract, statement or any
other act to be made in or evidenced by a particular form. It may
be proved by any means, including witnesses.

Article 1.3 - Binding character of contract

13

A contract validly entered into is binding upon the parties. It can
only be modified or terminated in accordance with its terms or by
agreement or as otherwise provided in these Principles.

Article 1.4 - Mandatory rules

15

Nothing in these Principles shall restrict the application of manda-
tory rules, whether of national, international or supranational ori-
gin, which are applicable in accordance with the relevant rules of
private international law.

Article 1.5 - Exclusion or modification by the parties

17

The parties may exclude the application of these Principles or dero-
gate from or vary the effect of any of their provisions, except as
otherwise provided in the Principles.

**Article 1.6 - Interpretation and supplementation of the
Principles**

19

(1) In the interpretation of these Principles, regard is to be had
to their international character and to their purposes including the
need to promote uniformity in their application.

(2) Issues within the scope of these Principles but not expressly

21

settled by them are as far as possible to be settled in accordance 33
with their underlying general principles.

22 **Article 1.7 - Good faith and fair dealing**

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

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

25 **Article 1.8 - Inconsistent Behaviour**

26 A party cannot act inconsistently with an understanding it has
caused the other party to have and upon which that other party
reasonably has acted in reliance to its detriment.

27 **Article 1.9 - Usages and practices**

28 (1) The parties are bound by any usage to which they have agreed
and by any practices which they have established between them-
selves.

29 (2) The parties are bound by a usage that is widely known to and
regularly observed in international trade by parties in the particular
trade concerned except where the application of such a usage would
be unreasonable.

30 **Article 1.10 - Notice**

31 (1) Where notice is required it may be given by any means appro-
priate to the circumstances.

32 (2) A notice is effective when it reaches the person to whom it is
given.

(3) For the purpose of paragraph (2) a notice “reaches” a person
when given to that person orally or delivered at that person's place
of business or mailing address.

(4) For the purpose of this article “notice” includes a declaration, 34
demand, request or any other communication of intention.

Article 1.11 - Definitions 35

In these Principles 36

-- “court” includes an arbitral tribunal; 37

-- where a party has more than one place of business the relevant 38
“place of business” is that which has the closest relationship to the
contract and its performance, having regard to the circumstances
known to or contemplated by the parties at any time before or at
the conclusion of the contract;

-- “obligor” refers to the party who is to perform an obligation and 39
“obligee” refers to the party who is entitled to performance of that
obligation.

-- “writing” means any mode of communication that preserves a 40
record of the information contained therein and is capable of being
reproduced in tangible form.

Article 1.12 - Computation of time set by parties 41

(1) Official holidays or non-business days occurring during a period 42
set by parties for an act to be performed are included in calculating
the period.

(2) However, if the last day of the period is an official holiday or a 43
non-business day at the place of business of the party to perform
the act, the period is extended until the first business day which
follows, unless the circumstances indicate otherwise.

| | | | |
|----|--|---|----|
| 44 | (3) The relevant time zone is that of the place of business of the party setting the time, unless the circumstances indicate otherwise. | (a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or | 57 |
| 45 | Chapter 2 - Formation and Authority of Agents | (b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer. | 58 |
| 46 | Section 1 - Formation | Article 2.1.5 - Rejection of offer | 59 |
| 47 | Article 2.1.1 - Manner of formation | An offer is terminated when a rejection reaches the offeror. | 60 |
| 48 | A contract may be concluded either by the acceptance of an offer or by conduct of the parties that is sufficient to show agreement. | Article 2.1.6 - Mode of acceptance | 61 |
| 49 | Article 2.1.2 - Definition of offer | (1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance. | 62 |
| 50 | A proposal for concluding a contract constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. | (2) An acceptance of an offer becomes effective when the indication of assent reaches the offeror. | 63 |
| 51 | Article 2.1.3 - Withdrawal of offer | (3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act without notice to the offeror, the acceptance is effective when the act is performed. | 64 |
| 52 | (1) An offer becomes effective when it reaches the offeree. | Article 2.1.7 - Time of acceptance | 65 |
| 53 | (2) An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer. | An offer must be accepted within the time the offeror has fixed or, if no time is fixed, within a reasonable time having regard to the circumstances, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise. | 66 |
| 54 | Article 2.1.4 - Revocation of offer | | |
| 55 | (1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before it has dispatched an acceptance. | | |
| 56 | (2) However, an offer cannot be revoked | | |

Article 2.1.8 - Acceptance within a fixed period of time

68 A period of acceptance fixed by the offeror begins to run from the time that the offer is dispatched. A time indicated in the offer is deemed to be the time of dispatch unless the circumstances indicate otherwise.

Article 2.1.9 - Late acceptance. Delay in transmission

69 (1) A late acceptance is nevertheless effective as an acceptance if without undue delay the offeror so informs the offeree or gives notice to that effect.

71 (2) If a communication 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 undue delay, the offeror informs the offeree that it considers the offer as having lapsed.

Article 2.1.10 - Withdrawal of acceptance

72 An acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective.

Article 2.1.11 - Modified acceptance

74 (1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.

76 (2) However, a reply to an offer which purports to be an acceptance

67 but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects to the discrepancy. If the offeror does not object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

Article 2.1.12 - Writings in confirmation

77 If a writing which is sent within a reasonable time after the conclusion of the contract and which purports to be a confirmation of the contract contains additional or different terms, such terms become part of the contract, unless they materially alter the contract or the recipient, without undue delay, objects to the discrepancy.

Article 2.1.13 - Conclusion of contract dependent on agreement on specific matters or in a particular form

78 Where in the course of negotiations one of the parties insists that the contract is not concluded until there is agreement on specific matters or in a particular form, no contract is concluded before agreement is reached on those matters or in that form.

Article 2.1.14 - Contract with terms deliberately left open

80 (1) If the parties intend to conclude a contract, the fact that they intentionally leave a term to be agreed upon in further negotiations or to be determined by a third person does not prevent a contract from coming into existence.

82 (2) The existence of the contract is not affected by the fact that subsequently

- 84 (a) the parties reach no agreement on the term; or
85 (b) the third person does not determine the term, provided that
there is an alternative means of rendering the term definite that is
reasonable in the circumstances, having regard to the intention of
the parties.

86 **Article 2.1.15 - Negotiations in bad faith**

- 87 (1) A party is free to negotiate and is not liable for failure to reach
an agreement.
88 (2) However, a party who negotiates or breaks off negotiations in
bad faith is liable for the losses caused to the other party.
89 (3) It is bad faith, in particular, for a party to enter into or continue
negotiations when intending not to reach an agreement with the
other party.

90 **Article 2.1.16 - Duty of confidentiality**

91 Where information is given as confidential by one party in the
course of negotiations, the other party is under a duty not to dis-
close that information or to use it improperly for its own purposes,
whether or not a contract is subsequently concluded. Where ap-
propriate, the remedy for breach of that duty may include compen-
sation based on the benefit received by the other party.

92 **Article 2.1.17 - Merger clauses**

93 A contract in writing which contains a clause indicating that the
writing completely embodies the terms on which the parties have
agreed cannot be contradicted or supplemented by evidence of prior
statements or agreements. However, such statements or agreements
may be used to interpret the writing.

Article 2.1.18 - Modification in a particular form

94

A contract in writing which contains a clause requiring any mod- 95
ification or termination by agreement to be in a particular form
may not be otherwise modified or terminated. However, a party
may be precluded by its conduct from asserting such a clause to
the extent that the other party has reasonably acted in reliance on
that conduct.

Article 2.1.19 - Contracting under standard terms

96

(1) Where one party or both parties use standard terms in con- 97
cluding a contract, the general rules on formation apply, subject to
Articles 2.1.20 - 2.1.22.

(2) Standard terms are provisions which are prepared in advance 98
for general and repeated use by one party and which are actually
used without negotiation with the other party.

Article 2.1.20 - Surprising terms

99

(1) No term contained in standard terms which is of such a charac- 100
ter that the other party could not reasonably have expected it, is
effective unless it has been expressly accepted by that party.

(2) In determining whether a term is of such a character regard 101
shall be had to its content, language and presentation.

**Article 2.1.21 - Conflict between standard terms and
non-standard terms**

102

In case of conflict between a standard term and a term which is not 103
a standard term the latter prevails.

104 **Article 2.1.22 - Battle of forms**

105 Where both parties use standard terms and reach agreement except
on those terms, a contract is concluded on the basis of the agreed
terms and of any standard terms which are common in substance
unless one party clearly indicates in advance, or later and without
undue delay informs the other party, that it does not intend to be
bound by such a contract.

106 **Section 2 - Authority of Agents**

107 **Article 2.2.1 - Scope of the Section**

108 (1) This Section governs the authority of a person (“the agent”),
to affect the legal relations of another person (“the principal”), by
or with respect to a contract with a third party, whether the agent
acts in its own name or in that of the principal.

109 (2) It governs only the relations between the principal or the agent
on the one hand, and the third party on the other.

110 (3) It does not govern an agent's authority conferred by law or
the authority of an agent appointed by a public or judicial author-
ity.

111 **Article 2.2.2 - Establishment and scope of the authority of
the agent**

112 (1) The principal's grant of authority to an agent may be express
or implied.

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

Article 2.2.3 - Agency disclosed

114

(1) Where an agent acts within the scope of its authority and the
third party knew or ought to have known that the agent was acting
as an agent, the acts of the agent shall directly affect the legal
relations between the principal and the third party and no legal
relation is created between the agent and the third party.

(2) However, the acts of the agent shall affect only the relations
between the agent and the third party, where the agent with the
consent of the principal undertakes to become the party to the
contract.

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Article 2.2.4 - Agency undisclosed

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(1) Where an agent acts within the scope of its authority and the
third party neither knew nor ought to have known that the agent
was acting as an agent, the acts of the agent shall affect only the
relations between the agent and the third party.

(2) However, where such an agent, when contracting with the third
party on behalf of a business, represents itself to be the owner of
that business, the third party, upon discovery of the real owner of
the business, may exercise also against the latter the rights it has
against the agent.

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**Article 2.2.5 - Agent acting without or exceeding its
authority**

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(1) Where an agent acts without authority or exceeds its authority,
its acts do not affect the legal relations between the principal and
the third party.

(2) However, where the principal causes the third party reasonably

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122

to believe that the agent has authority to act on behalf of the principal and that the agent is acting within the scope of that authority, the principal may not invoke against the third party the lack of authority of the agent.

123 **Article 2.2.6 - Liability of agent acting without or exceeding its authority**

124 (1) An agent that acts without authority or exceeds its authority is, failing ratification by the principal, liable for damages that will place the third party in the same position as if the agent had acted with authority and not exceeded its authority.

125 (2) However, the agent is not liable if the third party knew or ought to have known that the agent had no authority or was exceeding its authority.

126 **Article 2.2.7 - Conflict of interests**

127 (1) If a contract concluded by an agent involves the agent in a conflict of interests with the principal of which the third party knew or ought to have known, the principal may avoid the contract. The right to avoid is subject to Articles 3.12 and 3.14 to 3.17.

128 (2) However, the principal may not avoid the contract

129 (a) if the principal had consented to, or knew or ought to have known of, the agent's involvement in the conflict of interests; or

130 (b) if the agent had disclosed the conflict of interests to the principal and the latter had not objected within a reasonable time.

131 **Article 2.2.8 - Sub-agency**

132 An agent has implied authority to appoint a sub-agent to perform

acts which it is not reasonable to expect the agent to perform itself. The rules of this Section apply to the sub-agency.

Article 2.2.9 - Ratification

133

(1) An act by an agent that acts without authority or exceeds its authority may be ratified by the principal. On ratification the act produces the same effects as if it had initially been carried out with authority.

134

(2) The third party may by notice to the principal specify a reasonable period of time for ratification. If the principal does not ratify within that period of time it can no longer do so.

135

(3) If, at the time of the agent's act, the third party neither knew nor ought to have known of the lack of authority, it may, at any time before ratification, by notice to the principal indicate its refusal to become bound by a ratification.

136

Article 2.2.10 - Termination of authority

137

(1) Termination of authority is not effective in relation to the third party unless the third party knew or ought to have known of it.

138

(2) Notwithstanding the termination of its authority, an agent remains authorised to perform the acts that are necessary to prevent harm to the principal's interests.

139

Chapter 3 - Validity

140

Article 3.1 - Matters not covered

141

These Principles do not deal with invalidity arising from

142

(a) lack of capacity;

143

144 (b) immorality or illegality.

145 **Article 3.2 - Validity of mere agreement**

146 A contract is concluded, modified or terminated by the mere agreement of the parties, without any further requirement.

147 **Article 3.3 - Initial impossibility**

148 (1) The mere fact that at the time of the conclusion of the contract the performance of the obligation assumed was impossible does not affect the validity of the contract.

149 (2) The mere fact that at the time of the conclusion of the contract a party was not entitled to dispose of the assets to which the contract relates does not affect the validity of the contract.

150 **Article 3.4 - Definition of mistake**

151 Mistake is an erroneous assumption relating to facts or to law existing when the contract was concluded.

152 **Article 3.5 - Relevant mistake**

153 (1) A party may only avoid the contract for mistake if, when the contract was concluded, the mistake was of such importance that a reasonable person in the same situation as the party in error would only have concluded the contract on materially different terms or would not have concluded it at all if the true state of affairs had been known, and

154 (a) the other party made the same mistake, or caused the mistake, or knew or ought to have known of the mistake and it was con-

trary to reasonable commercial standards of fair dealing to leave the mistaken party in error; or

(b) the other party had not at the time of avoidance reasonably acted in reliance on the contract. 155

(2) However, a party may not avoid the contract if 156

(a) it was grossly negligent in committing the mistake; or 157

(b) the mistake relates to a matter in regard to which the risk of mistake was assumed or, having regard to the circumstances, should be borne by the mistaken party. 158

Article 3.6 - Error in expression or transmission 159

An error occurring in the expression or transmission of a declaration is considered to be a mistake of the person from whom the declaration emanated. 160

Article 3.7 - Remedies for non-performance 161

A party is not entitled to avoid the contract on the ground of mistake if the circumstances on which that party relies afford, or could have afforded, a remedy for non-performance. 162

Article 3.8 - Fraud 163

A party may avoid the contract when it has been led to conclude the contract by the other party's fraudulent representation, including language or practices, or fraudulent non-disclosure of circumstances which, according to reasonable commercial standards of fair dealing, the latter party should have disclosed. 164

Article 3.9 - Threat

166 A party may avoid the contract when it has been led to conclude
the contract by the other party's unjustified threat which, having
regard to the circumstances, is so imminent and serious as to leave
the first party no reasonable alternative. In particular, a threat
is unjustified if the act or omission with which a party has been
threatened is wrongful in itself, or it is wrongful to use it as a
means to obtain the conclusion of the contract.

167 **Article 3.10 - Gross disparity**

168 (1) A party may avoid the contract or an individual term of it if,
at the time of the conclusion of the contract, the contract or term
unjustifiably gave the other party an excessive advantage. Regard
is to be had, among other factors, to

169 (a) the fact that the other party has taken unfair advantage of the
first party's dependence, economic distress or urgent needs, or of
its improvidence, ignorance, inexperience or lack of bargaining skill,
and

170 (b) the nature and purpose of the contract.

171 (2) Upon the request of the party entitled to avoidance, a court
may adapt the contract or term in order to make it accord with
reasonable commercial standards of fair dealing.

172 (3) A court may also adapt the contract or term upon the request
of the party receiving notice of avoidance, provided that that party
informs the other party of its request promptly after receiving such
notice and before the other party has reasonably acted in reliance
on it. The provisions of Article 3.13(2) apply accordingly.

1735 **Article 3.11 - Third persons**

(1) Where fraud, threat, gross disparity or a party's mistake is 174
imputable to, or is known or ought to be known by, a third person
for whose acts the other party is responsible, the contract may be
avoided under the same conditions as if the behaviour or knowledge
had been that of the party itself.

(2) Where fraud, threat or gross disparity is imputable to a third 175
person for whose acts the other party is not responsible, the con-
tract may be avoided if that party knew or ought to have known of
the fraud, threat or disparity, or has not at the time of avoidance
reasonably acted in reliance on the contract.

Article 3.12 - Confirmation 176

If the party entitled to avoid the contract expressly or impliedly 177
confirms the contract after the period of time for giving notice
of avoidance has begun to run, avoidance of the contract is ex-
cluded.

Article 3.13 - Loss of right to avoid 178

(1) If a party is entitled to avoid the contract for mistake but the 179
other party declares itself willing to perform or performs the con-
tract as it was understood by the party entitled to avoidance, the
contract is considered to have been concluded as the latter party
understood it. The other party must make such a declaration or
render such performance promptly after having been informed of
the manner in which the party entitled to avoidance had under-
stood the contract and before that party has reasonably acted in
reliance on a notice of avoidance.

(2) After such a declaration or performance the right to avoidance 180
is lost and any earlier notice of avoidance is ineffective.

| | | | |
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| 181 | Article 3.14 - Notice of avoidance | Article 3.18 - Damages | 191 |
| 182 | The right of a party to avoid the contract is exercised by notice to the other party. | Irrespective of whether or not the contract has been avoided, the party who knew or ought to have known of the ground for avoidance is liable for damages so as to put the other party in the same position in which it would have been if it had not concluded the contract. | 192 |
| 183 | Article 3.15 - Time limits | Article 3.19 - Mandatory character of the provisions | 193 |
| 184 | (1) Notice of avoidance shall be given within a reasonable time, having regard to the circumstances, after the avoiding party knew or could not have been unaware of the relevant facts or became capable of acting freely. | The provisions of this Chapter are mandatory, except insofar as they relate to the binding force of mere agreement, initial impossibility or mistake. | 194 |
| 185 | (2) Where an individual term of the contract may be avoided by a party under Article 3.10, the period of time for giving notice of avoidance begins to run when that term is asserted by the other party. | Article 3.20 - Unilateral declarations | 195 |
| 186 | Article 3.16 - Partial avoidance | The provisions of this Chapter apply with appropriate adaptations to any communication of intention addressed by one party to the other. | 196 |
| 187 | Where a ground of avoidance affects only individual terms of the contract, the effect of avoidance is limited to those terms unless, having regard to the circumstances, it is unreasonable to uphold the remaining contract. | Chapter 4 - Interpretation | 197 |
| 188 | Article 3.17 - Retroactive effect of avoidance | Article 4.1 - Intention of the parties | 198 |
| 189 | (1) Avoidance takes effect retroactively. | (1) A contract shall be interpreted according to the common intention of the parties. | 199 |
| 190 | (2) On avoidance either party may claim restitution of whatever it has supplied under the contract or the part of it avoided, provided that it concurrently makes restitution of whatever it has received under the contract or the part of it avoided or, if it cannot make restitution in kind, it makes an allowance for what it has received. | (2) If such an intention cannot be established, the contract shall be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances. | 200 |

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| <p>202 Article 4.2 - Interpretation of statements and other conduct</p> <p>(1) The statements and other conduct of a party shall be interpreted according to that party's intention if the other party knew or could not have been unaware of that intention.</p> <p>(2) If the preceding paragraph is not applicable, such statements and other conduct shall be interpreted according to the meaning that a reasonable person of the same kind as the other party would give to it in the same circumstances.</p> <p>204 Article 4.3 - Relevant circumstances</p> <p>In applying Articles 4.1 and 4.2, regard shall be had to all the circumstances, including</p> <p>(a) preliminary negotiations between the parties;</p> <p>(b) practices which the parties have established between themselves;</p> <p>(c) the conduct of the parties subsequent to the conclusion of the contract;</p> <p>(d) the nature and purpose of the contract;</p> <p>(e) the meaning commonly given to terms and expressions in the trade concerned;</p> <p>(f) usages.</p> <p>212 Article 4.4 - Reference to contract or statement as a whole</p> <p>Terms and expressions shall be interpreted in the light of the whole contract or statement in which they appear.</p> | <p>201</p> <p>214</p> <p>215</p> <p>216</p> <p>217</p> <p>218</p> <p>219</p> <p>220</p> <p>221</p> <p>222</p> <p>223</p> <p>224</p> <p>225</p> <p>226</p> | <p>Article 4.5 - All terms to be given effect</p> <p>Contract terms shall be interpreted so as to give effect to all the terms rather than to deprive some of them of effect.</p> <p>Article 4.6 - Contra proferentem rule</p> <p>If contract terms supplied by one party are unclear, an interpretation against that party is preferred.</p> <p>Article 4.7 - Linguistic discrepancies</p> <p>Where a contract is drawn up in two or more language versions which are equally authoritative there is, in case of discrepancy between the versions, a preference for the interpretation according to a version in which the contract was originally drawn up.</p> <p>Article 4.8 - Supplying an omitted term</p> <p>(1) Where the parties to a contract have not agreed with respect to a term which is important for a determination of their rights and duties, a term which is appropriate in the circumstances shall be supplied.</p> <p>(2) In determining what is an appropriate term regard shall be had, among other factors, to</p> <p>(a) the intention of the parties;</p> <p>(b) the nature and purpose of the contract;</p> <p>(c) good faith and fair dealing;</p> <p>(d) reasonableness.</p> | <p>214</p> <p>215</p> <p>216</p> <p>217</p> <p>218</p> <p>219</p> <p>220</p> <p>221</p> <p>222</p> <p>223</p> <p>224</p> <p>225</p> <p>226</p> |
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| | Chapter 5 - Content and Third Party Rights | 227 | to make such efforts as would be made by a reasonable person of the same kind in the same circumstances. | |
| 228 | Section 1 - Content | | | |
| 229 | Article 5.1.1 - Express and implied obligations | | | Article 5.1.5 - Determination of kind of duty involved 242 |
| 230 | The contractual obligations of the parties may be express or implied. | | In determining the extent to which an obligation of a party involves a duty of best efforts in the performance of an activity or a duty to achieve a specific result, regard shall be had, among other factors, to | 243 |
| 231 | Article 5.1.2 - Implied obligations | | (a) the way in which the obligation is expressed in the contract; | 244 |
| 232 | Implied obligations stem from | | (b) the contractual price and other terms of the contract; | 245 |
| 233 | (a) the nature and purpose of the contract; | | (c) the degree of risk normally involved in achieving the expected result; | 246 |
| 234 | (b) practices established between the parties and usages; | | (d) the ability of the other party to influence the performance of the obligation. | 247 |
| 235 | (c) good faith and fair dealing; | | | |
| 236 | (d) reasonableness. | | | |
| 237 | Article 5.1.3 - Co-operation between the parties | | | Article 5.1.6 - Determination of quality of performance 248 |
| 238 | Each party shall cooperate with the other party when such co-operation may reasonably be expected for the performance of that party's obligations. | | Where the quality of performance is neither fixed by, nor determinable from, the contract a party is bound to render a performance of a quality that is reasonable and not less than average in the circumstances. | 249 |
| 239 | Article 5.1.4 - Duty to achieve a specific result. Duty of best efforts | | | Article 5.1.7 - Price determination 250 |
| 240 | (1) To the extent that an obligation of a party involves a duty to achieve a specific result, that party is bound to achieve that result. | | (1) Where a contract does not fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have made reference to the price generally | 251 |
| 241 | (2) To the extent that an obligation of a party involves a duty of best efforts in the performance of an activity, that party is bound | | | |

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| | charged at the time of the conclusion of the contract for such performance in comparable circumstances in the trade concerned or, if no such price is available, to a reasonable price. | |
| 252 | (2) Where the price is to be determined by one party and that determination is manifestly unreasonable, a reasonable price shall be substituted notwithstanding any contract term to the contrary. | |
| 253 | (3) Where the price is to be fixed by a third person, and that person cannot or will not do so, the price shall be a reasonable price. | |
| 254 | (4) Where the price is to be fixed by reference to factors which do not exist or have ceased to exist or to be accessible, the nearest equivalent factor shall be treated as a substitute. | |
| 255 | Article 5.1.8 - Contract for an indefinite period | |
| 256 | A contract for an indefinite period may be ended by either party by giving notice a reasonable time in advance. | |
| 257 | Article 5.1.9 - Release by agreement | |
| 258 | (1) An obligee may release its right by agreement with the obligor. | |
| 259 | (2) An offer to release a right gratuitously shall be deemed accepted if the obligor does not reject the offer without delay after having become aware of it. | |
| 260 | Section 2 - Third Party Rights | |
| 261 | Article 5.2.1 - Contracts in favour of third parties | |
| 262 | (1) The parties (the “promisor” and the “promisee”) may confer by express or implied agreement a right on a third party (the “beneficiary”). | |
| | (2) The existence and content of the beneficiary's right against the promisor are determined by the agreement of the parties and are subject to any conditions or other limitations under the agreement. | 263 |
| | Article 5.2.2 - Third party identifiable | 264 |
| | The beneficiary must be identifiable with adequate certainty by the contract but need not be in existence at the time the contract is made. | 265 |
| | Article 5.2.3 - Exclusion and limitation clauses | 266 |
| | The conferment of rights in the beneficiary includes the right to invoke a clause in the contract which excludes or limits the liability of the beneficiary. | 267 |
| | Article 5.2.4 - Defences | 268 |
| | The promisor may assert against the beneficiary all defences which the promisor could assert against the promisee. | 269 |
| | Article 5.2.5 - Revocation | 270 |
| | The parties may modify or revoke the rights conferred by the contract on the beneficiary until the beneficiary has accepted them or reasonably acted in reliance on them. | 271 |
| | Article 5.2.6 - Renunciation | 272 |
| | The beneficiary may renounce a right conferred on it. | 273 |

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| | Chapter 6 - Performance | | |
| 275 | Section 1 - Performance in General | 274 | Article 6.1.4 - Order of performance 286 |
| 276 | Article 6.1.1 - Time of performance | | |
| 277 | A party must perform its obligations: | | (1) 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. 287 |
| 278 | (a) if a time is fixed by or determinable from the contract, at that time; | | (2) To the extent that the performance of only one party requires a period of time, that party is bound to render its performance first, unless the circumstances indicate otherwise. 288 |
| 279 | (b) if a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the other party is to choose a time; | | |
| 280 | (c) in any other case, within a reasonable time after the conclusion of the contract. | | Article 6.1.5 - Earlier performance 289 |
| 281 | Article 6.1.2 - Performance at one time or in instalments | | (1) The obligee may reject an earlier performance unless it has no legitimate interest in so doing. 290 |
| 282 | In cases under Article 6.1.1(b) or (c), a party must perform its obligations at one time if that performance can be rendered at one time and the circumstances do not indicate otherwise. | | (2) Acceptance by a party of an earlier performance does not affect the time for the performance of its own obligations if that time has been fixed irrespective of the performance of the other party's obligations. 291 |
| 283 | Article 6.1.3 - Partial performance | | (3) Additional expenses caused to the obligee by earlier performance are to be borne by the obligor, without prejudice to any other remedy. 292 |
| 284 | (1) The obligee may reject an offer to perform in part at the time performance is due, whether or not such offer is coupled with an assurance as to the balance of the performance, unless the obligee has no legitimate interest in so doing. | | Article 6.1.6 - Place of performance 293 |
| 285 | (2) Additional expenses caused to the obligee by partial performance are to be borne by the obligor without prejudice to any other remedy. | | (1) If the place of performance is neither fixed by, nor determinable from, the contract, a party is to perform: 294 |
| | | | (a) a monetary obligation, at the obligee's place of business; 295 |
| | | | (b) any other obligation, at its own place of business. 296 |
| | | | (2) A party must bear any increase in the expenses incidental to performance which is caused by a change in its place of business subsequent to the conclusion of the contract. 297 |

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| 298 | Article 6.1.7 - Payment by cheque or other instrument | 309 | (3) Payment in the currency of the place for payment is to be made according to the applicable rate of exchange prevailing there when payment is due. | |
| 299 | (1) Payment may be made in any form used in the ordinary course of business at the place for payment. | | (4) However, if the obligor has not paid at the time when payment is due, the obligee may require payment according to the applicable rate of exchange prevailing either when payment is due or at the time of actual payment. | 310 |
| 300 | (2) However, an obligee who accepts, either by virtue of paragraph (1) or voluntarily, a cheque, any other order to pay or a promise to pay, is presumed to do so only on condition that it will be honoured. | | | |
| 301 | Article 6.1.8 - Payment by funds transfer | | Article 6.1.10 - Currency not expressed | 311 |
| 302 | (1) Unless the obligee has indicated a particular account, payment may be made by a transfer to any of the financial institutions in which the obligee has made it known that it has an account. | | Where a monetary obligation is not expressed in a particular currency, payment must be made in the currency of the place where payment is to be made. | 312 |
| 303 | (2) In case of payment by a transfer the obligation of the obligor is discharged when the transfer to the obligee's financial institution becomes effective. | | Article 6.1.11 - Costs of performance | 313 |
| 304 | Article 6.1.9 - Currency of payment | | Each party shall bear the costs of performance of its obligations. | 314 |
| 305 | (1) If a monetary obligation is expressed in a currency other than that of the place for payment, it may be paid by the obligor in the currency of the place for payment unless | | Article 6.1.12 - Imputation of payments | 315 |
| 306 | (a) that currency is not freely convertible; or | | (1) An obligor owing several monetary obligations to the same obligee may specify at the time of payment the debt to which it intends the payment to be applied. | 316 |
| 307 | (b) the parties have agreed that payment should be made only in the currency in which the monetary obligation is expressed. | | However, the payment discharges first any expenses, then interest due and finally the principal. | 317 |
| 308 | (2) If it is impossible for the obligor to make payment in the currency in which the monetary obligation is expressed, the obligee may require payment in the currency of the place for payment, even in the case referred to in paragraph (1)(b). | | (2) If the obligor makes no such specification, the obligee may, within a reasonable time after payment, declare to the obligor the obligation to which it imputes the payment, provided that the obligation is due and undisputed. | 318 |
| | | | (3) In the absence of imputation under paragraphs (1) or (2), pay- | 319 |

ment is imputed to that obligation which satisfies one of the following criteria in the order indicated:

- 320 (a) an obligation which is due or which is the first to fall due;
- 321 (b) the obligation for which the obligee has least security;
- 322 (c) the obligation which is the most burdensome for the obligor;
- 323 (d) the obligation which has arisen first.

324 If none of the preceding criteria applies, payment is imputed to all the obligations proportionally.

325 **Article 6.1.13 - Imputation of non-monetary obligations**

326 Article 6.1.12 applies with appropriate adaptations to the imputation of performance of non-monetary obligations.

327 **Article 6.1.14 - Application for public permission**

328 Where the law of a State requires a public permission affecting the validity of the contract or its performance and neither that law nor the circumstances indicate otherwise

- 329 (a) if only one party has its place of business in that State, that party shall take the measures necessary to obtain the permission;
- 330 (b) in any other case the party whose performance requires permission shall take the necessary measures.

331 **Article 6.1.15 - Procedure in applying for permission**

- 332 (1) The party required to take the measures necessary to obtain

the permission shall do so without undue delay and shall bear any expenses incurred.

- (2) That party shall whenever appropriate give the other party 333 notice of the grant or refusal of such permission without undue delay.

Article 6.1.16 - Permission neither granted nor refused 334

- (1) If, notwithstanding the fact that the party responsible has taken 335 all measures required, permission is neither granted nor refused within an agreed period or, where no period has been agreed, within a reasonable time from the conclusion of the contract, either party is entitled to terminate the contract.

- (2) Where the permission affects some terms only, paragraph (1) 336 does not apply if, having regard to the circumstances, it is reasonable to uphold the remaining contract even if the permission is refused.

Article 6.1.17 - Permission refused 337

- (1) The refusal of a permission affecting the validity of the contract 338 renders the contract void. If the refusal affects the validity of some terms only, only such terms are void if, having regard to the circumstances, it is reasonable to uphold the remaining contract.

- (2) Where the refusal of a permission renders the performance of 339 the contract impossible in whole or in part, the rules on non-performance apply.

Section 2 - Hardship

Article 6.2.1 - Contract to be observed

342 Where the performance of a contract becomes more onerous for
 one of the parties, that party is nevertheless bound to perform its
 obligations subject to the following provisions on hardship.

35210 (3) Upon failure to reach agreement within a reasonable time either
 party may resort to the court.

341 (4) If the court finds hardship it may, if reasonable, 353

(a) terminate the contract at a date and on terms to be fixed, 354
 or

(b) adapt the contract with a view to restoring its equilib- 355
 rium.

Article 6.2.2 - Definition of hardship

344 There is hardship where the occurrence of events fundamentally
 alters the equilibrium of the contract either because the cost of
 a party's performance has increased or because the value of the
 performance a party receives has diminished, and

345 (a) the events occur or become known to the disadvantaged party
 after the conclusion of the contract;

346 (b) the events could not reasonably have been taken into account
 by the disadvantaged party at the time of the conclusion of the
 contract;

347 (c) the events are beyond the control of the disadvantaged party;
 and

348 (d) the risk of the events was not assumed by the disadvantaged
 party.

Article 6.2.3 - Effects of hardship

350 (1) In case of hardship the disadvantaged party is entitled to request
 renegotiations. The request shall be made without undue delay and
 shall indicate the grounds on which it is based.

351 (2) The request for renegotiation does not in itself entitle the dis-
 advantaged party to withhold performance.

Chapter 7 - Non-Performance 356

Section 1 - Non-Performance in general 357

Article 7.1.1 - Non-performance defined 358

Non-performance is failure by a party to perform any of its obli- 359
 gations under the contract, including defective performance or late
 performance.

Article 7.1.2 - Interference by the other party 360

A party may not rely on the non-performance of the other party 361
 to the extent that such non-performance was caused by the first
 party's act or omission or by another event as to which the first
 party bears the risk.

Article 7.1.3 - Withholding performance 362

(1) Where the parties are to perform simultaneously, either party 363
 may withhold performance until the other party tenders its perfor-
 mance.

(2) Where the parties are to perform consecutively, the party that is 364

to perform later may withhold its performance until the first party has performed.

365 **Article 7.1.4 - Cure by non-performing party**

366 (1) The non-performing party may, at its own expense, cure any non-performance, provided that

367 (a) without undue delay, it gives notice indicating the proposed manner and timing of the cure;

368 (b) cure is appropriate in the circumstances;

369 (c) the aggrieved party has no legitimate interest in refusing cure; and

370 (d) cure is effected promptly.

371 (2) The right to cure is not precluded by notice of termination.

372 (3) Upon effective notice of cure, rights of the aggrieved party that are inconsistent with the non-performing party's performance are suspended until the time for cure has expired.

373 (4) The aggrieved party may withhold performance pending cure.

374 (5) Notwithstanding cure, the aggrieved party retains the right to claim damages for delay as well as for any harm caused or not prevented by the cure.

375 **Article 7.1.5 - Additional period for performance**

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

377 (2) During the additional period the aggrieved party may withhold

performance of its own reciprocal obligations and may claim damages but 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 this Chapter.

(3) Where in a case of delay in performance which is not fundamental the aggrieved party has given notice allowing an additional period of time of reasonable length, it may terminate the contract at the end of that period. If the additional period allowed is not of reasonable length it shall be extended to a reasonable length. The aggrieved party may in its notice provide that if the other party fails to perform within the period allowed by the notice the contract shall automatically terminate. 378

(4) Paragraph (3) does not apply where the obligation which has not been performed is only a minor part of the contractual obligation of the non-performing party. 379

Article 7.1.6 - Exemption clauses 380

A clause which limits or excludes one party's liability for non-performance or which permits one party to render performance substantially different from what the other party reasonably expected may not be invoked if it would be grossly unfair to do so, having regard to the purpose of the contract. 381

Article 7.1.7 - Force majeure 382

(1) Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract 383

or to have avoided or overcome it or its consequences.

384 (2) When the impediment is only temporary, the excuse shall have
effect for such period as is reasonable having regard to the effect of
the impediment on the performance of the contract.

385 (3) The party who fails to perform must give notice to the other
party of the impediment and its effect on its ability to perform. If
the notice is not received by the other party within a reasonable
time after the party who fails to perform knew or ought to have
known of the impediment, it is liable for damages resulting from
such non-receipt.

386 (4) Nothing in this article prevents a party from exercising a right
to terminate the contract or to withhold performance or request
interest on money due.

387 Section 2 - Right to Performance

388 Article 7.2.1 - Performance of monetary obligation

389 Where a party who is obliged to pay money does not do so, the
other party may require payment.

390 Article 7.2.2 - Performance of non-monetary obligation

391 Where a party who owes an obligation other than one to pay money
does not perform, the other party may require performance, un-
less

392 (a) performance is impossible in law or in fact;

393 (b) performance or, where relevant, enforcement is unreasonably
burdensome or expensive;

394 (c) the party entitled to performance may reasonably obtain per-

formance from another source;

(d) performance is of an exclusively personal character; or 395

(e) the party entitled to performance does not require performance 396
within a reasonable time after it has, or ought to have, become
aware of the non-performance.

Article 7.2.3 - Repair and replacement of defective 397 performance

The right to performance includes in appropriate cases the right to 398
require repair, replacement, or other cure of defective performance.
The provisions of Articles 7.2.1 and 7.2.2 apply accordingly.

Article 7.2.4 - Judicial penalty 399

(1) Where the court orders a party to perform, it may also direct 400
that this party pay a penalty if it does not comply with the or-
der.

(2) The penalty shall be paid to the aggrieved party unless manda- 401
tory provisions of the law of the forum provide otherwise. Payment
of the penalty to the aggrieved party does not exclude any claim
for damages.

Article 7.2.5 - Change of remedy 402

(1) An aggrieved party who has required performance of a non-- 403
monetary obligation and who has not received performance within
a period fixed or otherwise within a reasonable period of time may
invoke any other remedy.

(2) Where the decision of a court for performance of a non-monetary 404
obligation cannot be enforced, the aggrieved party may invoke any
other remedy.

405 **Section 3 - Termination**

406 **Article 7.3.1 - Right to terminate the contract**

407 (1) A party may terminate the contract where the failure of the
other party to perform an obligation under the contract amounts
to a fundamental non-performance.

408 (2) In determining whether a failure to perform an obligation
amounts to a fundamental non-performance regard shall be had,
in particular, to whether

409 (a) 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 such
result;

410 (b) strict compliance with the obligation which has not been per-
formed is of essence under the contract;

411 (c) the non-performance is intentional or reckless;

412 (d) the non-performance gives the aggrieved party reason to believe
that it cannot rely on the other party's future performance;

413 (e) the non-performing party will suffer disproportionate loss as a
result of the preparation or performance if the contract is termi-
nated.

414 (3) In the case of delay the aggrieved party may also terminate the
contract if the other party fails to perform before the time allowed
it under Article 7.1.5 has expired.

415 **Article 7.3.2 - Notice of termination**

416 (1) The right of a party to terminate the contract is exercised by
notice to the other party.

417 (2) If performance has been offered late or otherwise does not con-

form to the contract the aggrieved party will lose its right to termi-
nate the contract unless it gives notice to the other party within a
reasonable time after it has or ought to have become aware of the
offer or of the non-conforming performance.

Article 7.3.3 - Anticipatory non-performance

418

Where prior to the date for performance by one of the parties it
is clear that there will be a fundamental non-performance by that
party, the other party may terminate the contract.

419

Article 7.3.4 - Adequate assurance of due performance

420

A party who reasonably believes that there will be a fundamental
non-performance by the other party may demand adequate assur-
ance of due performance and may meanwhile withhold its own per-
formance. Where this assurance is not provided within a reasonable
time the party demanding it may terminate the contract.

421

Article 7.3.5 - Effects of termination in general

422

(1) Termination of the contract releases both parties from their
obligation to effect and to receive future performance.

423

(2) Termination does not preclude a claim for damages for non-per-
formance.

424

(3) Termination does not affect any provision in the contract for
the settlement of disputes or any other term of the contract which
is to operate even after termination.

425

Article 7.3.6 - Restitution

427 (1) On termination of the contract either party may claim restitu-
 tion of whatever it has supplied, provided that such party concur-
 rently makes restitution of whatever it has received. If restitution
 in kind is not possible or appropriate allowance should be made in
 money whenever reasonable.

428 (2) However, if performance of the contract has extended over a
 period of time and the contract is divisible, such restitution can only
 be claimed for the period after termination has taken effect.

Section 4 - Damages

Article 7.4.1 - Right to damages

431 Any non-performance gives the aggrieved party a right to damages
 either exclusively or in conjunction with any other remedies except
 where the non-performance is excused under these Principles.

Article 7.4.2 - Full compensation

433 (1) The aggrieved party is entitled to full compensation for harm
 sustained as a result of the non-performance. Such harm includes
 both any loss which it suffered and any gain of which it was de-
 prived, taking into account any gain to the aggrieved party resulting
 from its avoidance of cost or harm.

434 (2) Such harm may be non-pecuniary and includes, for instance,
 physical suffering or emotional distress.

Article 7.4.3 - Certainty of harm

436 (1) Compensation is due only for harm, including future harm, that

426 is established with a reasonable degree of certainty.

(2) Compensation may be due for the loss of a chance in proportion 437
 to the probability of its occurrence.

(3) Where the amount of damages cannot be established with a 438
 sufficient degree of certainty, the assessment is at the discretion of
 the court.

Article 7.4.4 - Foreseeability of harm 439

The non-performing party is liable only for harm which it foresaw or 440
 could reasonably have foreseen at the time of the conclusion of the
 contract as being likely to result from its non-performance.

**Article 7.4.5 - Proof of harm in case of replacement 441
 transaction**

Where the aggrieved party has terminated the contract and has 442
 made a replacement transaction within a reasonable time and in a
 reasonable manner it may recover the difference between the con-
 tract price and the price of the replacement transaction as well as
 damages for any further harm.

Article 7.4.6 - Proof of harm by current price 443

(1) Where the aggrieved party has terminated the contract and has 444
 not made a replacement transaction but there is a current price for
 the performance contracted for, it may recover the difference be-
 tween the contract price and the price current at the time the con-
 tract is terminated as well as damages for any further harm.

(2) Current price is the price generally charged for goods deliv- 445
 ered or services rendered in comparable circumstances at the place
 where the contract should have been performed or, if there is no

current price at that place, the current price at such other place that appears reasonable to take as a reference.

(3) The aggrieved party is entitled to additional damages if the non-payment caused it a greater harm. 454

446 **Article 7.4.7 - Harm due in part to aggrieved party**

Article 7.4.10 - Interest on damages 455

447 Where the harm is due in part to an act or omission of the aggrieved party or to another event as to which that party bears the risk, the amount of damages shall be reduced to the extent that these factors have contributed to the harm, having regard to the conduct of each of the parties.

Unless otherwise agreed, interest on damages for non-performance of non-monetary obligations accrues as from the time of non-performance. 456

448 **Article 7.4.8 - Mitigation of harm**

Article 7.4.11 - Manner of monetary redress 457

449 (1) The non-performing party is not liable for harm suffered by the aggrieved party to the extent that the harm could have been reduced by the latter party's taking reasonable steps.

(1) Damages are to be paid in a lump sum. However, they may be payable in instalments where the nature of the harm makes this appropriate. 458

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

(2) Damages to be paid in instalments may be indexed. 459

451 **Article 7.4.9 - Interest for failure to pay money**

Article 7.4.12 - Currency in which to assess damages 460

452 (1) If a party does not pay a sum of money when it falls due the aggrieved party is entitled to interest upon that sum from the time when payment is due to the time of payment whether or not the non-payment is excused.

Damages are to be assessed either in the currency in which the monetary obligation was expressed or in the currency in which the harm was suffered, whichever is more appropriate. 461

453 (2) The rate of interest shall be the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place for payment, or where no such rate exists at that place, then the same rate in the State of the currency of payment. In the absence of such a rate at either place the rate of interest shall be the appropriate rate fixed by the law of the State of the currency of payment.

Article 7.4.13 - Agreed payment for non-performance 462

(1) Where the contract provides that a party who does not perform is to pay a specified sum to the aggrieved party for such non-performance, the aggrieved party is entitled to that sum irrespective of its actual harm. 463

(2) However, notwithstanding any agreement to the contrary the specified sum may be reduced to a reasonable amount where it is grossly excessive in relation to the harm resulting from the non-performance and to the other circumstances. 464

465 **Chapter 8 - Set-Off**

466 **Article 8.1 - Conditions of set-off**

467 (1) Where two parties owe each other money or other performances
of the same kind, either of them (“the first party”) may set off its
obligation against that of its obligee (“the other party”) if at the
time of set-off,

468 (a) the first party is entitled to perform its obligation;

469 (b) the other party's obligation is ascertained as to its existence
and amount and performance is due.

470 (2) If the obligations of both parties arise from the same contract,
the first party may also set off its obligation against an obligation
of the other party which is not ascertained as to its existence or to
its amount.

471 **Article 8.2 - Foreign currency set-off**

472 Where the obligations are to pay money in different currencies, the
right of set-off may be exercised, provided that both currencies are
freely convertible and the parties have not agreed that the first
party shall pay only in a specified currency.

473 **Article 8.3 - Set-off by notice**

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

475 **Article 8.4 - Content of notice**

476 (1) The notice must specify the obligations to which it relates.

477 (2) If the notice does not specify the obligation against which set-off
is exercised, the other party may, within a reasonable time, declare

to the first party the obligation to which set-off relates. If no such
declaration is made, the set-off will relate to all the obligations
proportionally.

Article 8.5 - Effect of set-off

478

(1) Set-off discharges the obligations.

479

(2) If obligations differ in amount, set-off discharges the obligations
up to the amount of the lesser obligation.

480

(3) Set-off takes effect as from the time of notice.

481

**Chapter 9 - Assignment of Rights, Transfer of
Obligations, Assignment of Contracts**

482

Section 1 - Assignment of Rights

483

Article 9.1.1 - Definitions

484

“Assignment of a right” means the transfer by agreement from one
person (the “assignor”) to another person (the “assignee”), includ-
ing transfer by way of security, of the assignor's right to payment
of a monetary sum or other performance from a third person (“the
obligor”).

485

Article 9.1.2 - Exclusions

486

This Section does not apply to transfers made under the special
rules governing the transfers:

487

(a) of instruments such as negotiable instruments, documents of
title or financial instruments, or

488

(b) of rights in the course of transferring a business.

489

490 **Article 9.1.3 - Assignability of non-monetary rights**

491 A right to non-monetary performance may be assigned only if the
assignment does not render the obligation significantly more bur-
densome.

492 **Article 9.1.4 - Partial assignment**

493 (1) A right to the payment of a monetary sum may be assigned
partially.

494 (2) A right to other performance may be assigned partially only if
it is divisible, and the assignment does not render the obligation
significantly more burdensome.

495 **Article 9.1.5 - Future rights**

496 A future right is deemed to be transferred at the time of the agree-
ment, provided the right, when it comes into existence, can be
identified as the right to which the assignment relates.

497 **Article 9.1.6 - Rights assigned without individual
specification**

498 A number of rights may be assigned without individual specifica-
tion, provided such rights can be identified as rights to which the
assignment relates at the time of the assignment or when they come
into existence.

499 **Article 9.1.7 - Agreement between assignor and assignee
sufficient**

500 (1) A right is assigned by mere agreement between the assignor and

the assignee, without notice to the obligor.

(2) The consent of the obligor is not required unless the obligation 501
in the circumstances is of an essentially personal character.

Article 9.1.8 - Obligor's additional costs 502

The obligor has a right to be compensated by the assignor or the 503
assignee for any additional costs caused by the assignment.

Article 9.1.9 - Non-assignment clauses 504

(1) The assignment of a right to the payment of a monetary sum 505
is effective notwithstanding an agreement between the assignor
and the obligor limiting or prohibiting such an assignment. How-
ever, the assignor may be liable to the obligor for breach of con-
tract.

(2) The assignment of a right to other performance is ineffective if 506
it is contrary to an agreement between the assignor and the obligor
limiting or prohibiting the assignment. Nevertheless, the assign-
ment is effective if the assignee, at the time of the assignment, nei-
ther knew nor ought to have known of the agreement. The assignor
may then be liable to the obligor for breach of contract.

Article 9.1.10 - Notice to the obligor 507

(1) Until the obligor receives a notice of the assignment from ei- 508
ther the assignor or the assignee, it is discharged by paying the
assignor.

(2) After the obligor receives such a notice, it is discharged only by 509
paying the assignee.

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| <p>Article 9.1.11 - Successive assignments</p> <p>511 If the same right has been assigned by the same assignor to two or more successive assignees, the obligor is discharged by paying according to the order in which the notices were received.</p> <p>512 Article 9.1.12 - Adequate proof of assignment</p> <p>513 (1) If notice of the assignment is given by the assignee, the obligor may request the assignee to provide within a reasonable time adequate proof that the assignment has been made.</p> <p>514 (2) Until adequate proof is provided, the obligor may withhold payment.</p> <p>515 (3) Unless adequate proof is provided, notice is not effective.</p> <p>516 (4) Adequate proof includes, but is not limited to, any writing emanating from the assignor and indicating that the assignment has taken place.</p> <p>517 Article 9.1.13 - Defences and rights of set-off</p> <p>518 (1) The obligor may assert against the assignee all defences that the obligor could assert against the assignor.</p> <p>519 (2) The obligor may exercise against the assignee any right of set-off available to the obligor against the assignor up to the time notice of assignment was received.</p> <p>520 Article 9.1.14 - Rights related to the right assigned</p> <p>521 The assignment of a right transfers to the assignee:</p> <p>522 (a) all the assignor's rights to payment or other performance under the contract in respect of the right assigned, and</p> <p>523 (b) all rights securing performance of the right assigned.</p> | <p>510 Article 9.1.15 - Undertakings of the assignor</p> <p>The assignor undertakes towards the assignee, except as otherwise disclosed to the assignee, that:</p> <p>(a) the assigned right exists at the time of the assignment, unless the right is a future right;</p> <p>(b) the assignor is entitled to assign the right;</p> <p>(c) the right has not been previously assigned to another assignee, and it is free from any right or claim from a third party;</p> <p>(d) the obligor does not have any defences;</p> <p>(e) neither the obligor nor the assignor has given notice of set-off concerning the assigned right and will not give any such notice;</p> <p>(f) the assignor will reimburse the assignee for any payment received from the obligor before notice of the assignment was given.</p> <p>Section 2 - Transfer of Obligations</p> <p>Article 9.2.1 - Modes of transfer</p> <p>An obligation to pay money or render other performance may be transferred from one person (the “original obligor”) to another person (the “new obligor”) either</p> <p>a) by an agreement between the original obligor and the new obligor subject to Article 9.2.3, or</p> <p>b) by an agreement between the obligee and the new obligor, by which the new obligor assumes the obligation.</p> <p>Article 9.2.2 - Exclusion</p> <p>This Section does not apply to transfers of obligations made under</p> | <p>524</p> <p>525</p> <p>526</p> <p>527</p> <p>528</p> <p>529</p> <p>530</p> <p>531</p> <p>532</p> <p>533</p> <p>534</p> <p>535</p> <p>536</p> <p>537</p> <p>538</p> |
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the special rules governing transfers of obligations in the course of transferring a business.

539 **Article 9.2.3 - Requirement of obligee's consent to transfer**

540 The transfer of an obligation by an agreement between the original obligor and the new obligor requires the consent of the obligee.

541 **Article 9.2.4 - Advance consent of obligee**

- 542 (1) The obligee may give its consent in advance.
- 543 (2) If the obligee has given its consent in advance, the transfer of the obligation becomes effective when a notice of the transfer is given to the obligee or when the obligee acknowledges it.

544 **Article 9.2.5 - Discharge of original obligor**

- 545 (1) The obligee may discharge the original obligor.
- 546 (2) The obligee may also retain the original obligor as an obligor in case the new obligor does not perform properly.
- 547 (3) Otherwise the original obligor and the new obligor are jointly and severally liable.

548 **Article 9.2.6 - Third party performance**

- 549 (1) Without the obligee's consent, the obligor may contract with another person that this person will perform the obligation in place of the obligor, unless the obligation in the circumstances has an essentially personal character.
- 550 (2) The obligee retains its claim against the obligor.

Article 9.2.7 - Defences and rights of set-off

551

- (1) The new obligor may assert against the obligee all defences which the original obligor could assert against the obligee. 552
- (2) The new obligor may not exercise against the obligee any right of set-off available to the original obligor against the obligee. 553

Article 9.2.8 - Rights related to the obligation transferred

554

- (1) The obligee may assert against the new obligor all its rights to payment or other performance under the contract in respect of the obligation transferred. 555
- (2) If the original obligor is discharged under Article 9.2.5(1), a security granted by any person other than the new obligor for the performance of the obligation is discharged, unless that other person agrees that it should continue to be available to the obligee. 556
- (3) Discharge of the original obligor also extends to any security of the original obligor given to the obligee for the performance of the obligation, unless the security is over an asset which is transferred as part of a transaction between the original obligor and the new obligor. 557

Section 3 - Assignment of Contracts

558

Article 9.3.1 - Definitions

559

“Assignment of a contract” means the transfer by agreement from one person (the “assignor”) to another person (the “assignee”) of the assignor's rights and obligations arising out of a contract with another person (the “other party”). 560

| | | | |
|-----|--|--|-----|
| 561 | Article 9.3.2 - Exclusion | (2) To the extent that the assignment of a contract involves a transfer of obligations, Article 9.2.7 applies accordingly. | 574 |
| 562 | This Section does not apply to the assignment of contracts made under the special rules governing transfers of contracts in the course of transferring a business. | | |
| 563 | Article 9.3.3 - Requirement of consent of the other party | (1) To the extent that the assignment of a contract involves an assignment of rights, Article 9.1.14 applies accordingly. | 576 |
| 564 | The assignment of a contract requires the consent of the other party. | (2) To the extent that the assignment of a contract involves a transfer of obligations, Article 9.2.8 applies accordingly. | 577 |
| 565 | Article 9.3.4 - Advance consent of the other party | | |
| 566 | (1) The other party may give its consent in advance. | | |
| 567 | (2) If the other party has given its consent in advance, the assignment of the contract becomes effective when a notice of the assignment is given to the other party or when the other party acknowledges it. | | |
| 568 | Article 9.3.5 - Discharge of the assignor | | |
| 569 | (1) The other party may discharge the assignor. | | |
| 570 | (2) The other party may also retain the assignor as an obligor in case the assignee does not perform properly. | | |
| 571 | (3) Otherwise the assignor and the assignee are jointly and severally liable. | | |
| 572 | Article 9.3.6 - Defences and rights of set-off | | |
| 573 | (1) To the extent that the assignment of a contract involves an assignment of rights, Article 9.1.13 applies accordingly. | | |
| | | Article 9.3.7 - Rights transferred with the contract | 575 |
| | | | |
| | | Chapter 10 - Limitation Periods | 578 |
| | | Article 10.1 - Scope of the Chapter | 579 |
| | | (1) The exercise of rights governed by these Principles is barred by the expiration of a period of time, referred to as “limitation period”, according to the rules of this Chapter. | 580 |
| | | (2) This Chapter does not govern the time within which one party is required under these Principles, as a condition for the acquisition or exercise of its right, to give notice to the other party or to perform any act other than the institution of legal proceedings. | 581 |
| | | Article 10.2 - Limitation periods | 582 |
| | | (1) The general limitation period is three years beginning on the day after the day the obligee knows or ought to know the facts as a result of which the obligee's right can be exercised. | 583 |
| | | (2) In any event, the maximum limitation period is ten years beginning on the day after the day the right can be exercised. | 584 |

Article 10.3 - Modification of limitation periods by the parties

- 586 (1) The parties may modify the limitation periods.
 587 (2) However they may not
 588 (a) shorten the general limitation period to less than one year;
 589 (b) shorten the maximum limitation period to less than four years;
 590 (c) extend the maximum limitation period to more than fifteen years.

Article 10.4 - New limitation period by acknowledgement

- 592 (1) Where the obligor before the expiration of the general limitation period acknowledges the right of the obligee, a new general limitation period begins on the day after the day of the acknowledgement.
 593 (2) The maximum limitation period does not begin to run again, but may be exceeded by the beginning of a new general limitation period under Art. 10.2(1).

Article 10.5 - Suspension by judicial proceedings

- 594 (1) The running of the limitation period is suspended
 595 (a) when the obligee performs any act, by commencing judicial proceedings or in judicial proceedings already instituted, that is recognised by the law of the court as asserting the obligee's right against the obligor;
 597 (b) in the case of the obligor's insolvency when the obligee has asserted its rights in the insolvency proceedings; or

- 585 (c) in the case of proceedings for dissolution of the entity which is the obligor when the obligee has asserted its rights in the dissolution proceedings. 598
 (2) Suspension lasts until a final decision has been issued or until the proceedings have been otherwise terminated. 599

Article 10.6 - Suspension by arbitral proceedings

- (1) The running of the limitation period is suspended when the obligee performs any act, by commencing arbitral proceedings or in arbitral proceedings already instituted, that is recognised by the law of the arbitral tribunal as asserting the obligee's right against the obligor. In the absence of regulations for arbitral proceedings or provisions determining the exact date of the commencement of arbitral proceedings, the proceedings are deemed to commence on the date on which a request that the right in dispute should be adjudicated reaches the obligor. 601
 (2) Suspension lasts until a binding decision has been issued or until the proceedings have been otherwise terminated. 602

Article 10.7 - Alternative dispute resolution

The provisions of Articles 10.5 and 10.6 apply with appropriate modifications to other proceedings whereby the parties request a third person to assist them in their attempt to reach an amicable settlement of their dispute. 604

Article 10.8 - Suspension in case of force majeure, death or incapacity

- (1) Where the obligee has been prevented by an impediment that is beyond its control and that it could neither avoid nor overcome, 606

from causing a limitation period to cease to run under the preceding articles, the general limitation period is suspended so as not to expire before one year after the relevant impediment has ceased to exist.

607 (2) Where the impediment consists of the incapacity or death of the obligee or obligor, suspension ceases when a representative for the incapacitated or deceased party or its estate has been appointed or a successor has inherited the respective party's position. The additional one-year period under paragraph (1) applies accordingly.

608 **Article 10.9 - The effects of expiration of limitation period**

609 (1) The expiration of the limitation period does not extinguish the right.

610 (2) For the expiration of the limitation period to have effect, the obligor must assert it as a defence.

611 (3) A right may still be relied on as a defence even though the expiration of the limitation period for that right has been asserted.

612 **Article 10.10 - Right of set-off**

613 The obligee may exercise the right of set-off until the obligor has asserted the expiration of the limitation period.

614 **Article 10.11 - Restitution**

615 Where there has been performance in order to discharge an obligation, there is no right of restitution merely because the limitation period has expired.

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