

HOW WOULD AN OPTIONAL INSTRUMENT FOR SALES OF GOODS LOOK LIKE IF BASED ON THE DCFR ?

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INTRODUCTION

1. Background and purpose

In its Action plan "A more coherent european contract law" of February 12, 2003¹ the European Commission started reflecting on a so-called optional instrument in the area of European contract law, "*which would provide parties to a contract with a modern body of rules particularly adapted to cross-border contracts in the internal market*"; "*parties would not need to cover every detail in contracts specifically drafted or negotiated for this purpose, but could simply refer to this instrument as the applicable law*". According to the Action Plan, the Common Frame of Reference the Commission intended to draft should form the basis of such an optional instrument: "*The content of the common frame of reference should then normally serve as a basis for the development of the new optional instrument. Whether the new instrument would cover the whole scope of the common frame of reference or only parts thereof, or whether it would cover only general contract law rules or also specific contracts, is at present left open*". The Action Plan also stated: "*The optional instrument could be comprehensive, i.e. covering also cross-border contracts of sale between businesses, and thereby include the area covered by the CISG. It could also exclude this area and leave it to the application of the CISG*".

The Communication of October 11, 2004 ("European contract law and the revision of the acquis: the way forward²") basically confirmed this position; in Annex II to this Communication, the Commission has summarised the "parameters" deduced from the responses to the Action Plan. The European Commission made a contract with the CoPECL network for the drafting of a draft for such a Common Frame of Reference, draft which was published early 2009 in an outline edition³, and in October 2009 in a full edition with comments and notes. After some years of silence, the European Commission has taken again position in favour of such an optional instrument. the new Commissioner for Justice, Mrs. Reding, declared on February 23 that she "flagged" as a project "*the move from the first building blocks of European contract law (common frame of reference, standard terms and conditions, consumer rights) to a European Civil Code, which could take the form either of a voluntary tool to improve coherence, or of an*

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¹http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/com_2003_68_nl.pdf

²http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/com2004_nl.pdf

³ *Principles, Definitions and Model Rules of European Private Law - Draft Common Frame of Reference, Interim Outline Edition* edited by Christian von Bar, Eric Clive and Hans Schulte-Nölke and Hugh Beale, Johnny Herre, Jérôme Huet, Matthias Storme, Stephen Swann, Paul Varul, Anna Veneziano and Fryderyk Zoll, ook op <http://www.storme.be/DCFRInterim.html>.

*optional 28th contract law regime or of a more ambitious project"*⁴ and declared on February 24: *"The EU needs to do better. A possible solution is to have a 28th regime for contracts. Such a European Contract Law would exist in parallel to the national contract laws and provide standard terms and conditions. The United States started with a uniform commercial code to become a globally competitive economy. Why couldn't we have, in the end, a European civil code for our single market?"*⁵

Although the Draft CFR is an academic *Draft* for a CFR and not the CFR itself, it is nevertheless useful to know how an optional instrument would look like it is were simply based on the DCFR. This will evidently depend on the first place on the scope of application chosen for the instrument. The following draft is a draft which could be the applicable law for any sale of goods. I have extracted a similar draft for services which can be found at my website <http://storme.be>.

2. Scope

An optional instrument is by definition an instrument parties have opted for. Such an optional instrument requires that either the conflict of law rule or the national substantive law allows parties to set aside the legal rules which normally apply to a certain relationship by opting for an alternative set of rules.

According to the existing European conflict of law rules on matters of the law of obligations, as found in the Rome-I⁶ and Rome-II⁷ regulations, there is a large scope for such a choice of law - not limited to contractual obligations alone - , but these regulations do not for the moment accept the choice of a non-national law. As long as the EU does not implement consideration 14 of the Rome-I Regulation - *"Should the Community adopt, in an appropriate legal instrument, rules of substantive contract law, including standard terms and conditions, such instrument may provide that the parties may choose to apply those rules"* - or change the Regulation, an optional instrument for contractual obligations will only have this effect insofar as national law creates such an option. National legal systems indeed sometimes do have options, whereby parties can opt for a different set of rules than those normally applicable⁸, an option which may be limited to cross-border transactions⁹. In other matters, such optional instruments have already been created by the EU itself, e.g. European intellectual property rights existing alongside national rights (the European Trademark), European forms of legal persons existing

⁴ http://ec.europa.eu/commission_2010-2014/reading/pdf/mandate/reading_replies_en.pdf.

⁵ <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/42&format=HTML&aged=0&language=EN&guiLanguage=en>

⁶ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:177:0006:01:EN:HTML>.

⁷ Regulation 864/2007 on the law applicable to non-contractual obligations, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:199:0040:01:EN:HTML>

⁸ E.g. the Unidroit Convention providing a uniform Law on the Form of an International Will 1973, <http://www.unidroit.org/english/conventions/1973wills/1973wills-e.htm>.

⁹ An example is the CISG for international sales, even if it is an opt-out rather than an opt-in instrument.

alongside national forms (e.g. *Societas Europaea*¹⁰, *Societas Cooperative Europaea*¹¹), optional forms of procedure for cross-border litigation existing alongside national procedure (European order for payment procedure¹²; European Small Claims Procedure¹³). Where not all members States are willing to advance, a cooperation between some of them may create such an instrument; a recent example is the German-French Agreement of 4th February 2010 on an optional Matrimonial property regime for German-French couples¹⁴.

On the other hand, an optional instruments which would be available for consumer contracts (for sales) does not make much sense if the rules of Art. 6 para (2) of the Rome-I Regulation would still apply to such a choice and if Art. 9 para (2) *iuncto* (1) is not interpreted in a restrictive manner. And if the option should not be limited to cross-border contracts, Art. 3 para 3 of the same regulation would also have to be changed.

"Big" Business parties do not have to wait for such an officially recognized instrument if they can escape the restrictive European conflict rules by choosing a different *forum* (in a country outside the EU or in international arbitration) that would apply a less restrictive conflict of law rule. From a European Union perspective, we should not worry about the really "big" players and ask whether rules chosen for an optional instrument are fit for those players. They can take care of themselves. When discussing an optional instrument, we should see which instruments might be useful for "normal" business transactions with SME's and/or for consumer transactions.

One of the advantages of the concept of optional instrument is anyway precisely that it is perfectly possible to have several ones. It is also possible to "extract" from a framework such as a CFR a number of compatible optional instruments: on the basis of the same text, one could extract an optional instrument for contracts in general, one for sales in general or for services in general, one for consumer sales and one for consumer services, one for consumer sales electronically concluded only, one for contracts for a certain type of services only, etc.

In this draft, we have chosen to keep basically all the articles from the DCFR which could be relevant for contracts for sales, except the book on unjust enrichment (relevant for void contracts).

¹⁰ Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001R2157:EN:HTML>.

¹¹ Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003R1435:EN:HTML>.

¹² Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:399:0001:01:EN:HTML>.

¹³ Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32007R0861:EN:HTML>.

¹⁴ <http://www.bmj.bund.de/files/->

[/4320/Abkommen%20zwischen%20der%20Bundesrepublik%20Deutschland%20und%20der%20Franz%20sische%20Republik%20u%20ber%20den%20Wahl-G%20terstand.pdf](http://www.bmj.bund.de/files/-/4320/Abkommen%20zwischen%20der%20Bundesrepublik%20Deutschland%20und%20der%20Franz%20sische%20Republik%20u%20ber%20den%20Wahl-G%20terstand.pdf) or <http://www.bmj.bund.de/files/-/4321/Accord%20entre%20la%20Rep.%20Fed.%20d'Allemagne%20et%20la%20R%20p.%20Fran%20aise%20instituant%20un%20r%20gime%20matrimonial%20optionnel%20de%20la%20participation%20aux%20ac.pdf>.

Given the opt-in character of the instrument and taking into account the existing conflict of law rules, I have added 2 articles in the first section:

- the first inspired by the 1st article of PECL
 - the other inspired by the Scope of the Rome-I Regulation, adapted to what we had in the DCFR;
- and an additional conflict rule in the Chapter on representation, taking into account the Hague Convention on the law applicable to agency.

3. A recontractualised and slightly rearranged DCFR.

In this draft, the changes to the DCFR rules are minimal; I have not changed anything to substance (although I would certainly like to change some provisions) but merely:

- rearranged some provisions, as I thought this was necessary to integrate the sales rules and the general contract rules
- "recontractualised" the rules, i.e. reformulated them where necessary in view of the fact that they only apply to contractual obligations (in connection with service contracts) and not to other obligations.

4. Legend

Where the provisions differ from the corresponding DCFR provision, this is indicated in **yellow**.

The provisions relevant only for consumer contracts are in smaller print, only for B2B contracts in smaller print underlined, only for P2P contracts in smaller print underscored

Evidently, when the contract opting for these rules belongs to a specific type of service contracts, all articles related to other types of services could be cut out.

References are given to articles in CISG, UNIDROIT PICC, PECL and Acquis Principles (AP) having a similar content or dealing with a similar question.

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CHAPTER 1: SCOPE OF APPLICATION AND GENERAL PROVISIONS

Section 1: Scope of application

IV.A.-1:101: Contracts covered

(1) These rules can be chosen as applicable law for contracts for the sale of goods

(2) A contract for the "sale" of goods, i.e. is a contract under which one party, the seller, undertakes to another party, the buyer, to transfer the ownership of the goods to the buyer, or to a third person, either immediately on conclusion of the contract or at some future time, and the buyer undertakes to pay the price.

(3) "Goods" mean corporeal moveables. It includes goods which at the time of the conclusion of the contract do not yet exist.

(4) These rules can be applied with appropriate adaptations to contracts conferring in exchange for a price, rights in information or data, including software and databases.

Comp. 2 CISG

PECL1:101: Applicability

These rules will apply when the parties have agreed that their contract is to be governed by them.

They 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.

Comp. 1 CISG, Preamble UPICC, 1:101 PECL

II.-1:108: Mixed contracts - Goods to be manufactured or produced

(1) For the purposes of this Article a mixed contract is a contract which contains:

(a) parts falling within two or more categories of contracts, i.e. within the category of a contract for the sale of goods and within another specific contract category; or

(b) a part falling within the category of contracts for the sale of goods and another part falling within the category of contracts governed only by the rules applicable to contracts generally.

(2) A contract under which one party undertakes, for a price, to manufacture or produce goods for the other party and to transfer their ownership to the other party is to be considered as primarily a contract for the sale of the goods.

(3) In other cases where a contract is a mixed contract, unless this is contrary to the nature and purpose of the contract, the rules applicable to each relevant category apply, with any appropriate adaptations, to the corresponding part of the contract and the rights and obligations arising from it.

(4) Paragraph (3) does not apply where one part of a mixed contract is in fact so predominant that it would be unreasonable not to regard the contract as falling primarily within one category.

(5) In cases covered by paragraph (2) or paragraph (4) the rules applicable to the category into which the contract primarily falls (the primary category) apply to the contract and the rights and obligations arising from it. However, rules applicable to any elements of the contract falling within another category apply with any appropriate adaptations so far as is necessary to regulate those elements and provided that they do not conflict with the rules applicable to the primary category.

Comp. 3 CISG

I-1:101: Scope of the rules

(1) When these rules are applicable, they govern in particular :

- The formation, existence, validity, contents and interpretation of the contract or of unilateral promises associated with such a contract, or of any term of the contract or promise;*
- consumer goods guarantees associated with the contracts;*
- the performance, non-performance, remedies for non-performance (including the assessment of damages), extinction and prescription of the rights and obligations arising out of the contract;*
- the consequences of nullity of the contract;*
- the transfer of property of rights to performance derived from the contract or its withdrawal, termination or nullity, the conditions under which an assignment of such rights can be invoked against the debtor and any question whether the debtor's obligations have been discharged.*

(2) These rules are not concerned with / do not deal with:

- (a) the status or legal capacity of natural persons or of companies and other bodies corporate or unincorporated, including the invalidity arising out of it;*
- (b) the effect which the contract may have on the property in the goods sold;*
- (c) the non-contractual liability of the parties, other than the precontractual liability regulated by the rules*
- (d) matters relating primarily to procedure or enforcement.*

Comp. 4, 5 CISG, 1:104 PECL, 1:101 (3) AP

PECL1:103: Mandatory Law

- (1) Where the law otherwise applicable so allows, the parties may choose to have their contract governed by these rules, 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.*

Comp. 1:103 PECL

Section 2: Interpretation and development of these rules

I-1:102: Interpretation and development

- (1) These rules are to be interpreted and developed autonomously and in accordance with their objectives and the principles underlying them.*
- (2) They are to be read in the light of any applicable instruments guaranteeing human rights and fundamental freedoms and any applicable constitutional laws.*
- (3) In their interpretation and development regard should be had to the need to promote:
 - (a) uniformity of application;*
 - (b) good faith and fair dealing; and*
 - (c) legal certainty.**
- (4) Issues within the scope of the rules but not expressly settled by them are so far as possible to be settled in accordance with the principles underlying them. (Failing this, the legal system applicable by virtue of the rules of private international law is to be applied)*
- (5) Where there is a general rule and a special rule applying to a particular situation within the scope of the general rule, the special rule prevails in any case of conflict.*

Comp. 7 CISG, 1.6 UPICC, 1:106 PECL

Section 3: General provisions

II.-1:101: Contract and juridical act

(1) A contract is an agreement which gives rise to, or is intended to give rise to, a binding legal relationship or which has, or is intended to have, some other legal effect. It is a bilateral or multilateral juridical act.

(2) A juridical act is any statement or agreement or declaration of intention, whether express or implied from conduct, which has or is intended to have legal effect as such. It may be unilateral, bilateral or multilateral.

II.-1:102: Party autonomy

(1) Parties are free to make a contract or other juridical act and to determine its contents, subject any applicable mandatory rules.

(2) Parties may exclude the application of any of the following rules relating to contracts or other juridical acts, or the rights and obligations arising from them, or derogate from or vary their effects, except as otherwise provided.

(3) A provision to the effect that parties may not exclude the application of a rule or derogate from or vary its effects does not prevent a party from waiving a right which has already arisen and of which that party is aware.

Comp. 6 CISG, 1.1 and 1.5 UPICC, 1:102 PECL

II.-1:103: Binding effect

(1) A valid contract is binding on the parties.

(2) A valid unilateral promise or undertaking is binding on the person giving it if it is intended to be legally binding without acceptance.

(3) This Article does not prevent modification or termination of any resulting right or obligation by agreement between the debtor and creditor or as provided by law.

Comp. 1.3 UPICC, for (2) comp. 2:107 PECL

II.-1:104: Usages and practices

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

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

(3) This Article applies to other juridical acts with any necessary adaptations.

Comp. 9 CISG, 1.9 UPICC, 1:105 PECL

II.-1:105: Imputed knowledge etc.

If any person who with a party's assent was involved in making a contract or other juridical act or in exercising a right or performing an obligation under it:

- (a) knew or foresaw a fact, or is treated as having knowledge or foresight of a fact; or*
 - (b) acted intentionally or with any other relevant state of mind*
- this knowledge, foresight or state of mind is imputed to the party.*

Comp. 1:305 PECL

II.-1:109: Notice

(1) This Article applies in relation to the giving of notice for any purpose under these rules. "Notice" includes the communication information and the communication of a of a promise, offer, acceptance or other juridical act.

(2) The notice may be given by any means appropriate to the circumstances.

(3) The notice becomes effective when it reaches the addressee, unless it provides for a delayed effect.

(4) The notice reaches the addressee:

- (a) when it is delivered to the addressee;*
- (b) when it is delivered to the addressee's place of business, or, where there is no such place of business or the notice does not relate to a business matter, to the addressee's habitual residence;*
- (c) in the case of a notice transmitted by electronic means, when it can be accessed by the addressee; or*
- (d) when it is otherwise made available to the addressee at such a place and in such a way that the addressee could reasonably be expected to obtain access to it without undue delay.*

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

(6) Any reference in these rules to a notice given by or to a person includes a notice given by or to a representative of that person who has authority to give or receive it.

(7) In relations between a business and a consumer the parties may not, to the detriment of the consumer, exclude the rule in paragraph (4)(c) or derogate from or vary its effects.

Comp. 1.10 and 1.11(2) and 2.1.3. and 2.1.10 UPICC; Comp. (4) with 10 and 24 CISG, (3) with 15 CISG, (5) with 15 and 22 CISG; 1:303 PECL; 1:301 to 1:303 AP

II.-1:106: Form

(1) A contract or other juridical act need not be concluded, made or evidenced in writing nor is it subject to any other requirement as to form.

(2) Where a contract or other juridical act is invalid only by reason of non-compliance with a particular requirement as to form, one party (the first party) is liable for any loss suffered by the other (the second party) by acting in the mistaken, but reasonable, belief that it was valid if the first party:

(a) knew it was invalid;

(b) knew or could reasonably be expected to know that the second party was acting to that party's potential prejudice in the mistaken belief that it was valid; and

(c) contrary to good faith and fair dealing, allowed the second party to continue so acting.

Comp. 11, 12 CISG, 1.2 UPICC, 2:101 (2) PECL, 1:304 AP

Section 4. Definitions

I.-1:105: "Consumer" and "business"

(1) A "consumer" means any natural person who is acting primarily for purposes which are not related to his or her trade, business or profession.

(2) A "business" means any natural or legal person, irrespective of whether publicly or privately owned, who is acting for purposes relating to the person's self-employed trade, work or profession, even if the person does not intend to make a profit in the course of the activity.

(3) A person who is within both of the preceding paragraphs is regarded as falling exclusively within paragraph (1) in relation to a rule which would provide protection for that person if that person were a consumer, and otherwise as falling exclusively within paragraph (2).

Comp. 1:201 and 1:203 AP

IV.A.-1:204: Consumer contract for sale

*For the purpose of **these rules** a consumer contract for sale is a contract for sale in which the seller is a business and the buyer is a consumer.*

I. – 1:103: Good faith and fair dealing

(1) The expression "good faith and fair dealing" refers to a standard of conduct characterised by honesty, openness and consideration for the interests of the other party to the transaction or relationship in question.

(2) It is, in particular, contrary to good faith and fair dealing for a party to act inconsistently with that party's prior statements or conduct when the other party has reasonably relied on them to that other party's detriment.

Comp. 1.8 UPICC

I. – 1:104: Reasonableness

Reasonableness is to be objectively ascertained, having regard to the nature and purpose of what is being done, to the circumstances of the case and to any relevant

usages and practices.

Comp. 1:302 PECL

II. – 1:109: Standard terms

A “standard term” is a term which has been formulated in advance for several transactions involving different parties and which has not been individually negotiated by the parties.

:

Comp. 2:209 (3) PECL, 6:101 (3) AP

II. – 1:110: Terms “not individually negotiated”

(1) A term supplied by one party is not individually negotiated if the other party has not been able to influence its content, in particular because it has been drafted in advance, whether or not as part of standard terms.

(2) If one party supplies a selection of terms to the other party, a term will not be regarded as individually negotiated merely because the other party chooses that term from that selection.

(3) If it is disputed whether a term supplied by one party as part of standard terms has since been individually negotiated, that party bears the burden of proving that it has been.

(4) In a contract between a business and a consumer, the business bears the burden of proving that a term supplied by the business has been individually negotiated.

(5) In contracts between a business and a consumer, terms drafted by a third person are considered to have been supplied by the business, unless the consumer introduced them to the contract.

Comp. 6:101 (2) AP

I.–1:106: Meaning of “in writing” and similar expressions

(1) For the purposes of these rules, a statement is “in writing” if it is in textual form, on paper or another durable medium and in directly legible characters.

(2) “Textual form” means a text which is expressed in alphabetical or other intelligible characters by means of any support which permits reading, recording of the information contained in the text and its reproduction in tangible form.

(3) “Durable medium” means any material on which information is stored so that it is accessible for future reference for a period of time adequate to the purposes of the information, and which allows the unchanged reproduction of this information.

Comp. 13 CISG, 1.11 (4) UPICC, 1:301 (6) PECL, 1:305 to 1:307 AP

I.-1:107: Meaning of “signature” and similar expressions

- (1) A reference to a person’s signature includes a reference to that person’s handwritten signature, electronic signature or advanced electronic signature, and references to anything being signed by a person are to be construed accordingly.*
- (2) A “handwritten signature” means the name of, or sign representing, a person written by that person’s own hand for the purpose of authentication.*
- (3) An “electronic signature” means data in electronic form which are attached to or logically associated with other electronic data, and which serve as a method of authentication.*
- (4) An “advanced electronic signature” means an electronic signature which is:
 - (a) uniquely linked to the signatory;*
 - (b) capable of identifying the signatory;*
 - (c) created using means which can be maintained under the signatory’s sole control; and*
 - (d) linked to the data to which it relates in such a manner that any subsequent change of the data is detectable.**
- (5) In this Article, “electronic” means relating to technology with electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.*

Comp. 1:308 AP

I.-1:110: Computation of time

- (1) The provisions of this Article apply in relation to the computation of time for any purpose under these rules.*
- (2) Subject to the following provisions of this Article:
 - (a) a period expressed in hours starts at the beginning of the first hour and ends with the expiry of the last hour of the period;*
 - (b) a period expressed in days starts at the beginning of the first hour of the first day and ends with the expiry of the last hour of the last day of the period;*
 - (c) a period expressed in weeks, months or years starts at the beginning of the first hour of the first day of the period, and ends with the expiry of the last hour of whichever day in the last week, month or year is the same day of the week, or falls on the same date, as the day from which the period runs. If, in a period expressed in months or in years, the day on which it should expire does not occur in the last month, the period ends with the expiry of the last hour of the last day of that month;*
 - (d) if a period includes part of a month, the month is considered to have thirty days for the purpose of calculating the length of the part.**
- (3) Where a period is to be calculated from a specified event or action, then:
 - (a) if the period is expressed in hours, the hour during which the event occurs or the action takes place is not considered to fall within the period in question; and**

(b) if the period is expressed in days, weeks, months or years, the day during which the event occurs or the action takes place is not considered to fall within the period in question.

(4) Where a period is to be calculated from a specified time, then:

(a) if the period is expressed in hours, the first hour of the period is considered to begin at the specified time; and

(b) if the period is expressed in days, weeks, months or years, the day during which the specified time arrives is not considered to fall within the period in question.

(5) The periods concerned include Saturdays, Sundays and public holidays, save where these are expressly excepted or where the periods are expressed in working days.

(6) Where the last day of a period expressed otherwise than in hours is a Saturday, Sunday or public holiday at the place where a prescribed act is to be done, the period ends with the expiry of the last hour of the following working day. This provision does not apply to periods calculated retroactively from a given date or event.

(7) Any period of two days or more is regarded as including at least two working days.

(8) Where a person sends another person a document which sets a period of time within which the addressee has to reply or take other action but does not state when the period is to begin, then, in the absence of indications to the contrary, the period is calculated from the date stated as the date of the document or, if no date is stated, from the moment the document reaches the addressee.

(9) In this Article;

(a) “public holiday” with reference to a member state, or part of a member state, of the European Union means any day designated as such for that state or part in a list published in the official journal; and

(b) “working days” means all days other than Saturdays, Sundays and public holidays.

Comp. 20 CISG, 1.12 UPICC, 1:304 PECL

CHAPTER 2: MARKETING AND PRE-CONTRACTUAL DUTIES

Section 1: Information duties

II.-3:101: Duty to disclose information about goods

(1) Before the conclusion of a contract for the sale of goods by a business to another person, the business has a duty to disclose to the other person such information concerning the goods to be supplied as the other person can reasonably expect, taking into account the standards of quality and performance which would be normal under the circumstances.

(2) In assessing what information the other party can reasonably expect to be disclosed, the test to be applied, if the other party is also a business, is whether the failure to provide the information would deviate from good commercial practice.

Comp. 2:201 AP

II.-3:102: Specific duties for businesses marketing goods to consumers

(1) Where a business is marketing goods to a consumer, the business has a duty not to give misleading information. Information is misleading if it misrepresents or omits material facts which the average consumer could expect to be given for an informed decision on whether to take steps towards the conclusion of a contract.

In assessing what an average consumer could expect to be given, account is to be taken of all the circumstances and of the limitations of the communication medium employed.

(2) Where a business uses a commercial communication which gives the impression to consumers that it contains all the relevant information necessary to make a decision about concluding a contract, the business has a duty to ensure that the communication in fact contains all the relevant information. Where it is not already apparent from the context of the commercial communication, the information to be provided comprises:

(a) the main characteristics of the goods, the identity and address, if relevant, of the business, the price, and any available right of withdrawal;

(b) peculiarities related to payment, delivery, performance and complaint handling, if they depart from the requirements of professional diligence; and

(c) the language to be used for communications between the parties after the conclusion of the contract, if this differs from the language of the commercial communication.

(3) A duty to provide information under this Article is not fulfilled unless all the information to be provided is provided in the same language.

Comp. 2:202 AP

II.-3:103: Duty to provide information when concluding contract with a consumer who is at a particular disadvantage

(1) In the case of transactions that place the consumer at a significant informational disadvantage because of the technical medium used for contracting, the physical distance between business and consumer, or the nature of the transaction, the business has a duty, as appropriate in the circumstances, to provide clear information about the main characteristics of any goods to be supplied, the price, the address and identity

of the business with which the consumer is transacting, the terms of the contract, the rights and obligations of both contracting parties, and any available right of withdrawal or redress procedures. This information must be provided a reasonable time before the conclusion of the contract. The information on the right of withdrawal must, as appropriate in the circumstances, also be adequate in the sense of 25:104 (Adequate notification of the right to withdraw).

(2) Where more specific information duties are provided for specific situations, these take precedence over the general information duties under paragraph (1).

(3) The business bears the burden of proof that it has provided the information required by this Article.

Comp. 2:203 AP

II.–3:104: Information duties in real time distance communication

(1) When initiating real time distance communication with a consumer, a business has a duty to provide at the outset explicit information on its identity and the commercial purpose of the contact.

(2) Real time distance communication means direct and immediate communication of such a type that one party can interrupt the other in the course of the communication. It includes telephone and electronic means such as voice over internet protocol and internet related chat, but does not include communication by electronic mail.

(3) The business bears the burden of proof that the consumer has received the information required under paragraph (1).

(4) If a business has failed to comply with the duty under paragraph (1) and a contract has been concluded as a result of the communication, the other party has a right to withdraw from the contract. The right must be exercised within the period specified in II.–5:103 (Withdrawal period).

(5) A business is liable to the consumer for any loss caused by a breach of the duty under paragraph (1).

Comp. 4:104 AP

II.–3:105: Formation by electronic means

(1) If a contract is to be concluded by electronic means and without individual communication, a business has a duty to provide information about the following matters before the other party makes or accepts an offer:

(a) the technical steps which must be followed in order to conclude the contract;

(b) whether or not a contract document will be filed by the business and whether it will be accessible;

(c) the technical means for identifying and correcting input errors before the other party makes or accepts an offer;

(d) the languages offered for the conclusion of the contract;

(e) any contract terms used.

(2) The contract terms referred to in paragraph (1)(e) must be available in textual form.

(3) If a business has failed to comply with the duty under paragraph (1) and a contract has been concluded in the circumstances there stated, the other party has a right to withdraw from the contract. The right must be exercised within the period specified in II.–5:103 (Withdrawal period).

(4) A business is liable to the other party for any loss caused by a breach of the duty under paragraph (1).

Comp. 4:105 AP

II.–3:106: Clarity and form of information

(1) A duty to provide information imposed on a business under this Chapter is not fulfilled unless the requirements of this Article are satisfied.

(2) The information must be clear and precise, and expressed in plain and intelligible language.

(3) Where rules for specific contracts require information to be provided on a durable medium or in another particular form it must be provided in that way.

*(4) In the case of contracts between a business and a consumer concluded at a distance, information about the main characteristics of any **goods** to be supplied, the price, the address and identity of the business with which the consumer is transacting, the terms of the contract, the rights and obligations of both contracting parties, and any available redress procedures, as may be appropriate in the particular case, must be confirmed in textual form on a durable medium at the time of conclusion of the contract. The information on the right of withdrawal must also be adequate in the sense of II. – 5:104 (Adequate information on the right to withdraw).*

Comp. 2:204 AP

II. – 3:107: Information about price and additional charges

Where under this Chapter a business has a duty to provide information about price, the duty is not fulfilled unless what is provided:

(a) includes information about any deposits payable, delivery charges and any additional taxes and duties where these may be indicated separately;

(b) if an exact price cannot be indicated, gives such information on the basis for the calculation as will enable the consumer to verify the price; and

(c) if the price is not payable in one sum, includes information about the payment schedule.

Comp. 2:206 AP

II. – 3:108: Information about address and identity of business

(1) Where under this Chapter a business has a duty to provide information about its address and identity, the duty is not fulfilled unless the information includes:

(a) the name of the business;

(b) any trading names relevant to the contract in question;

(c) the registration number in any official register, and the name of that register;

(d) the geographical address of the business;

(e) contact details;

(f) where the business has a representative in the consumer's state of residence, the address and identity of that representative;

(g) where the activity of the business is subject to an authorisation scheme, the particulars of the relevant supervisory authority; and

(h) where the business exercises an activity which is subject to VAT, the relevant VAT identification number.

(2) For the purpose of II. – 3:103 (Duty to provide information when concluding contract with a consumer who is at a particular disadvantage), the address and identity of the business include only the information indicated in paragraph (1)(a), (c), (d) and (e).

Comp. 2:205 AP

II.–3:109: Remedies for breach of information duties

(1) If a business is required under II.–3:103 (Duty to provide information when concluding contract with a consumer who is at a particular disadvantage) to provide information to a consumer before the conclusion of a contract from which the consumer has the right to withdraw, the withdrawal period does not commence until all this information has been provided. Regardless of this, the right of withdrawal lapses after one year from the time of the conclusion of the contract.

(2) If a business has failed to comply with any duty imposed by the preceding Articles of this Section and a contract has been concluded, the business has such obligations under the contract as the other party has reasonably expected as a consequence of the absence or incorrectness of the information. Remedies provided under Chapter 16 apply to non-performance of these obligations.

(3) Whether or not a contract is concluded, a business which has failed to comply with any duty imposed by the preceding Articles of this Section is liable for any loss caused to the other party to the transaction by such failure. This paragraph does not apply to the extent that a remedy is available for non-performance of a contractual obligation under the preceding paragraph.

(4) The remedies provided under this Article are without prejudice to any remedy which may be available under II.–7:201 (Mistake).

(5) In relations between a business and a consumer the parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

Comp. 2:208 AP

Section 2: Duty to prevent input errors and acknowledge receipt

II.–3:201: Correction of input errors

(1) A business which intends to conclude a contract by making available electronic means without individual communication for concluding it, has a duty to make available to the other party appropriate, effective and accessible technical means for identifying and correcting input errors before the other party makes or accepts an offer.

(2) Where a person concludes a contract in error because of a failure by a business to comply with the duty under paragraph (1) the business is liable for any loss caused to that person by such failure. This is without prejudice to any remedy which may be available under II.–7:201 (Mistake).

(3) In relations between a business and a consumer the parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

II.-3:202: Acknowledgement of receipt

(1) A business which offers the facility to conclude a contract by electronic means and without individual communication has a duty to acknowledge by electronic means the receipt of an offer or an acceptance by the other party.

(2) If the other party does not receive the acknowledgement without undue delay, that other party may revoke the offer or withdraw from the contract.

(3) The business is liable for any loss caused to the other party by a breach of the duty under paragraph (1).

(4) In relations between a business and a consumer the parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its provisions.

Comp. 4:110 AP

Section 3: Negotiation and confidentiality duties

II.-3:301: Negotiations contrary to good faith and fair dealing

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

(2) A person who is engaged in negotiations has a duty to negotiate in accordance with good faith and fair dealing. This duty may not be excluded or limited by contract.

(3) A person who has negotiated or broken off negotiations contrary to good faith and fair dealing is liable for any loss caused to the other party to the negotiations.

(4) It is contrary to good faith and fair dealing, in particular, for a person to enter into or continue negotiations with no real intention of reaching an agreement with the other party.

Comp. 2.1.15 UPICC, 2:301 and 1:201 (1) PECL, 2:101 AP

II.-3:302: Breach of confidentiality

(1) 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 that party's own purposes whether or not a contract is subsequently concluded.

(2) In this Article, "confidential information" means information which, either from its nature or the circumstances in which it was obtained, the party receiving the information knows or could reasonably be expected to know is confidential to the other party.

(3) A party who reasonably anticipates a breach of the duty may obtain a court order prohibiting it.

(4) A party who is in breach of the duty is liable to pay damages to the other party for any loss caused by the breach and may be ordered to pay over to the other party any benefit obtained by the breach.

Comp. 2.1.16 UPICC, 2:302 PECL

Section 4: Unsolicited goods

II.-3:401 No obligation arising from failure to respond

(1) If a business delivers unsolicited goods to a consumer:

(a) no contract arises from the consumer's failure to respond or from any other action or inaction by the consumer in relation to the goods; and

(b) no non-contractual obligation arises from the consumer's acquisition, retention, rejection or use of the goods.

(2) Sub-paragraph (b) of the preceding paragraph does not apply if the goods were supplied:

(a) by way of benevolent intervention in another's affairs; or

(b) in error or in such other circumstances that there is a right to reversal of an unjustified enrichment.

(3) This Article is subject to the rules on delivery of excess quantity in Art. IVA -3:105.

(4) For the purposes of paragraph (1) delivery occurs when the consumer obtains physical control over the goods.

Comp. 4:106 AP

Section 5:

Damages for breach of duty under this Chapter

II. – 3:501: Liability for damages

(1) Where any rule in this Chapter makes a person liable for loss caused to another person by a breach of a duty, the other person has a right to damages for that loss.

(2) The rules on III. – 3:704 (Loss attributable to creditor) and III. – 3:705 (Reduction of loss) apply with the adaptation that the reference to non-performance of the obligation is to be taken as a reference to breach of the duty.

**CHAPTER 3: NON-DISCRIMINATION IN RELATION TO GOODS
AVAILABLE TO THE PUBLIC**

II.-2:101: Right not to be discriminated against

A person has a right not to be discriminated against on the grounds of sex or ethnic or racial origin in relation to a contract for sale the object of which is to supply goods which are available to the public.

Comp. 3:101 AP

II.-2:102: Meaning of discrimination

(1) “Discrimination” means any conduct whereby, or situation where, on grounds such as those mentioned in the preceding Article:

(a) one person is treated less favourably than another person is, has been or would be treated in a comparable situation; or

(b) an apparently neutral provision, criterion or practice would place one group of persons at a particular disadvantage when compared to a different group of persons.

(2) Discrimination also includes harassment on grounds such as those mentioned in the preceding Article. “Harassment” means unwanted conduct (including conduct of a sexual nature) which violates a person’s dignity, particularly when such conduct creates an intimidating, hostile, degrading, humiliating or offensive environment, or which aims to do so.

(3) Any instruction to discriminate also amounts to discrimination.

Comp. 3:102 AP

II.-2:103: Exception

Unequal treatment which is justified by a legitimate aim does not amount to discrimination if the means used to achieve that aim are appropriate and necessary.

Comp. 3:103 AP

II.-2:104: Remedies

(1) If a person is discriminated against contrary to II.-2:101 (Right not to be discriminated against) then, without prejudice to any remedy which may be available under (Tort law), the remedies for non-performance of an obligation under Chapter 16 (including damages for economic and non-economic loss) are available.

(2) Any remedy granted must be proportionate to the injury or anticipated injury; the dissuasive effect of remedies may be taken into account.

Comp. 3:201 and 202 AP

II.-2:105: Burden of proof

(1) If a person who considers himself or herself discriminated against on one of the grounds mentioned in II.-2:101 (Right not to be discriminated against) establishes, before a court or another competent authority, facts from which it may be presumed that there has been such discrimination, it falls on the other party to prove that there has been no such discrimination.

(2) Paragraph (1) does not apply to proceedings in which it is for the court or another competent authority to investigate the facts of the case.

Comp. 3:203 AP

CHAPTER 4: FORMATION

Section 1: General provisions

II.-4:101: Requirements for the conclusion of a contract for sale

A contract for sale is concluded, without any further requirement, if the parties:

- (a) intend to enter into a binding legal relationship as defined under article IVA-1/101 (definition of contract for sale); and*
- (b) reach a sufficient agreement.*

Comp. 3.2 UPICC, 2:101 (1) PECL, 4:101 AP

II.-4:102: How intention is determined

The intention of a party to enter into a binding legal relationship or bring about some other legal effect is to be determined from the party's statements or conduct as they were reasonably understood by the other party.

Comp. 8 CISG and 4.1 UPICC, 2:102 PECL

II.-4:103: Sufficient agreement

(1) Agreement is sufficient if:

- (a) the terms of the contract for sale have been sufficiently defined by the parties for the contract to be given effect; or*
- (b) the terms of the contract for sale, or the rights and obligations of the parties under it, can be otherwise sufficiently determined for the contract to be given effect.*

(2) 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.

Comp. 2.1.14 UPICC, 2:103 PECL

II.-4:104: Merger clause

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

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

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

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

Comp. 2.1.17 UPICC, 2:105 PECL

II.-4:105: Modification in certain form only

(1) A term in a contract requiring any agreement to modify its terms, or to terminate the relationship resulting from it, to be in a certain form establishes only a presumption that any such agreement is not intended to be legally binding unless it is in that form.

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

Comp. 29 CISG, 2.1.18 UPICC, 2:106 PECL

Section 2: Offer and acceptance

II.-4:201: Offer

(1) A proposal amounts to an offer if:

- (a) it is intended to result in a contract if the other party accepts it; and*
- (b) it contains sufficiently definite terms to form a contract.*

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

(3) A proposal to supply goods from stock at a stated price made by a business in a public advertisement or a catalogue, or by a display of goods, is treated, unless the circumstances indicate otherwise, as an offer to supply at that price until the stock of goods is exhausted.

Comp. 14 CISG, 2.1.2 UPICC, 2:201 PECL

II.-4:202: Revocation of offer

(1) An offer may be revoked if the revocation reaches the offeree before the offeree has dispatched an acceptance or, in cases of acceptance by conduct, before the contract has been concluded.

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

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

- (a) the offer indicates that it is irrevocable;*
- (b) the offer states a fixed time for its acceptance; or*

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

*(4) Paragraph (3) does not apply to an offer if the offeror would have a right under any rule in **these rules** to withdraw from a contract resulting from its acceptance. The parties may not, to the detriment of the offeror, exclude the application of this rule or derogate from or vary its effects.*

Comp. 16 CISG, 2.1.4. UPICC, 2:202 PECL

II.-4:203: Rejection of offer

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

Comp. 17 CISG, 2.1.5 UPICC, 2:203 PECL

II.-4:204: Acceptance

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

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

Comp. 18 (1) CISG, 2.1.6 (1) UPICC, 2:204 PECL

II.-4:205: Time of conclusion of the contract

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

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

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

Comp. 18 (2) & (3) & 23 CISG, 2.1.6 (2) & (3) UPICC, 2:205 PECL, for (1) 4:102 AP

II.-4:206: Time limit for acceptance

(1) An acceptance of an offer is effective only if it reaches the offeror within the time fixed by the offeror.

(2) If no time has been fixed by the offeror the acceptance is effective only if it reaches the offeror within a reasonable time.

(3) Where an offer may be accepted by performing an act without notice to the offeror, the acceptance is effective only if the act is performed within the time for acceptance fixed by the offeror or, if no such time is fixed, within a reasonable time.

Comp. 18 (2) & (3) CISG, 2.1.7 UPICC, 2:206 PECL

II.-4:207: Late acceptance

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

(2) If a letter or other communication containing a late acceptance shows that it has been dispatched 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 the offer is considered to have lapsed.

Comp. 21 CISG, 2.1.9 UPICC, 2:207 PECL

II.-4:208: Modified acceptance

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

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

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

- (a) the offer expressly limits acceptance to the terms of the offer;*
- (b) the offeror objects to the additional or different terms without undue delay; or*
- (c) the offeree makes the 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.*

Comp. 19 CISG, 2.1.11 UPICC, 2:208 PECL

II.-4:209: Conflicting standard terms

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

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

- (a) has indicated in advance, explicitly, and not by way of standard terms, an intention not to be bound by a contract on the basis of paragraph (1); or*
- (b) without undue delay, informs the other party of such an intention.*

Comp. 2.1.19 and 2.1.22 CISG, 2:209 PECL

II.-4:210: Formal confirmation of contract between businesses

If businesses have concluded a contract but have not embodied it in a final document, and one without undue delay sends the other a notice in textual form on a durable medium which purports to be a

confirmation of the contract but which contains additional or different terms, such terms become part of the contract unless:

(a) the terms materially alter the terms of the contract; or

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

Comp. 2.1.12 UPICC, 2:210 PECL

II.-4:211: Contracts not concluded through offer and acceptance

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

Comp. 2.1.1 UPICC, 2:211 PECL, 4:102 (2) AP

Section 3: Other juridical acts

II.-4:301: Requirements for a unilateral juridical act

The requirements for a unilateral juridical act are:

(a) that the party doing the act intends to be legally bound or to achieve the relevant legal effect;

(b) that the act is sufficiently certain; and

(c) that notice of the act reaches the person to whom it is addressed or, if the act is addressed to the public, the act is made public by advertisement, public notice or otherwise.

Comp. 5.1.9 UPICC, 2:107 PECL

II.-4:302: How intention is determined

The intention of a party to be legally bound or to achieve the relevant legal effect is to be determined from the party's statements or conduct as they were reasonably understood by the person to whom the act is addressed.

Comp. 8 CISG

II.-4:303: Right or benefit may be rejected

Where a unilateral juridical act confers a right or benefit on the person to whom it is addressed, that person may reject it by notice to the maker of the act, provided that is done without undue delay and before the right or benefit has been expressly or impliedly accepted. On such rejection, the right or benefit is treated as never having accrued.

Comp. 5.1.9 (2) UPICC

CHAPTER 5: RIGHT OF WITHDRAWAL

Section 1: Exercise and effects

II.–5:101: Scope and mandatory nature

- (1) The provisions in this Section apply where under any rule in Section 2 a **consumer** has a right to withdraw from a contract within a certain period.*
- (2) The parties may not, to the detriment of the entitled party, exclude the application of the rules in this Chapter or derogate from or vary their effects.*

Comp. 5:101 AP

II.–5:102: Exercise of right to withdraw

- (1) A right to withdraw is exercised by notice to the other party. No reasons need to be given.*
- (2) Returning the subject matter of the contract is considered a notice of withdrawal unless the circumstances indicate otherwise.*

Comp. 5:102 AP

II.–5:103: Withdrawal period

- (1) A right to withdraw may be exercised at any time before the end of the withdrawal period, even if that period has not begun.*
- (2) Unless provided otherwise, the withdrawal period begins at the latest of the following times;*
 - (a) the time of conclusion of the contract;*
 - (b) the time when the entitled party receives from the other party adequate notification of the right to withdraw; or*
 - (c) if the subject-matter of the contract is the delivery of goods, the time when the goods are received.*
- (3) The withdrawal period ends fourteen days after it has begun, but no later than one year after the time of conclusion of the contract.*
- (4) A notice of withdrawal is timely if dispatched before the end of this period.*

Comp. 5:103 AP

II.–5:104: Adequate notification of the right to withdraw

An adequate notification of the right to withdraw requires that the right is appropriately brought to the entitled party's attention, and that the notification provides, in textual form on a durable medium and in clear and comprehensible language, information about how the right may be exercised, the withdrawal period, and the name and address of the person to whom the withdrawal is to be communicated.

Comp. 5:104 AP

II.–5:105: Effects of withdrawal

- (1) Withdrawal terminates the contractual relationship and the obligations of both parties under the contract.*
- (2) The restitutionary effects of such termination are governed by the rules in **III-3:511 to 515** as modified by this Article, unless the contract provides otherwise in favour of the withdrawing party.*
- (3) Where the withdrawing party has made a payment under the contract, the business has an obligation to return the payment without undue delay, and in any case not later than thirty days after the withdrawal becomes effective.*
- (4) The withdrawing party is not liable to pay:*

- (a) for any diminution in the value of anything received under the contract caused by inspection and testing;*
- (b) for any destruction or loss of, or damage to, anything received under the contract, provided the withdrawing party used reasonable care to prevent such destruction, loss or damage.*
- (5) The withdrawing party is liable for any diminution in value caused by normal use, unless that party had not received adequate notice of the right of withdrawal.*
- (6) Except as provided in this Article, the withdrawing party does not incur any liability through the exercise of the right of withdrawal.*
- (7) If a consumer exercises a right to withdraw from a contract after a business has made use of a contractual right to supply something of equivalent quality and price in case what was ordered is unavailable, the business must bear the cost of returning what the consumer has received under the contract.*

Comp. 5:105 and 7A-01AP

II.-5:106: Linked contracts

- (1) If a consumer exercises a right of withdrawal from a contract for the supply of goods by a business, the effects of withdrawal extend to any linked contract.*
- (2) Where a contract is partially or exclusively financed by a credit contract, they form linked contracts, in particular:*
 - (a) if the business supplying goods finances the consumer's performance;*
 - (b) if a third party which finances the consumer's performance uses the services of the business for preparing or concluding the credit contract;*
 - (c) if the credit contract refers to specific goods to be financed with this credit, and if this link between both contracts was suggested by the supplier of the goods or by the supplier of credit; or*
 - (d) if there is a similar economic link.*
- (3) The provisions of II.-5:105 (Effects of withdrawal) apply accordingly to the linked contract.*
- (4) Paragraph (1) does not apply to credit contracts financing the contracts mentioned in paragraph (2)(f) of the following Article.*

Comp. 5:106 AP

Section 2: Particular rights of withdrawal

II.-5:201: Contracts negotiated away from business premises

- (1) A consumer is entitled to withdraw from a contract under which a business supplies goods to the consumer, if the consumer's offer or acceptance was expressed away from the business premises.*
- (2) Paragraph (1) does not apply to:*
 - (a) a contract concluded by means of an automatic vending machine or automated commercial premises;*
 - (b) (...)*
 - (d) a contract for the supply of foodstuffs, beverages or other goods intended for everyday consumption supplied to the home, residence or workplace of the consumer by regular roundsmen;*
 - (e) a contract concluded by means of distance communication, but outside of an organised distance sales-provision scheme run by the supplier;*
 - (f) a contract for the supply of **goods** whose price depends on fluctuations in the financial market outside the supplier's control, which may occur during the withdrawal period;*
 - (g) a contract concluded at an auction;*
 - (h) (...)*
- (3) If the business has exclusively used means of distance communication for concluding the contract, paragraph (1) also does not apply if the contract is for:*

- (a) the supply (...) catering or leisure services, where the business undertakes, when the contract is concluded, to supply these services on a specific date or within a specific period;*
- (b) (...)*
- (c) the supply of goods made to the consumer's specifications or clearly personalised or which, by reason of their nature, cannot be returned or are liable to deteriorate or expire rapidly;*
- (d) the supply of audio or video recordings or computer software*
 - (i) which were unsealed by the consumer, or*
 - (ii) which can be downloaded or reproduced for permanent use, in case of supply by electronic means;*
- (e) the supply of newspapers, periodicals and magazines;*
- (f) gaming and lottery services.*

(4) (...)

Comp. 5A-01 AP

CHAPTER 6: REPRESENTATION

Conflict rule

This Chapter only applies where a written specification by the principal or by the third party of these rules as the law applicable to these questions falling has been expressly accepted by the other party.

< Art. 14 of the 1978 Hague Convention on the law applicable to agency

II.-6:101: Scope

(1) This Chapter applies to the external relationships created by acts of representation – that is to say, the relationships between:

(a) the principal and the third party; and

(b) the representative and the third party.

(2) It applies also to situations where a person purports to be a representative without actually being a representative.

(3) It does not apply to the internal relationship between the representative and the principal.

Comp. 2.2.1 UPICC, 3:301 (1) and (3) PECL

II.-6:102: Definitions

(1) A “representative” is a person who has authority to affect the legal position of another person (the principal) in relation to a third party by acting on behalf of the principal.

(2) The “authority” of a representative is the power to affect the principal’s legal position.

(3) The “authorisation” of the representative is the granting or maintaining of the authority.

(4) “Acting without authority” includes acting beyond the scope of the authority granted.

(5) A “third party”, in this Chapter, includes the representative who, when acting for the principal, also acts in a personal capacity as the other party to the transaction.

II.-6:103: Authorisation

(1) The authority of a representative may be granted by the principal or by the law.

(2) The principal’s authorisation may be express or implied.

(3) If a person causes a third party reasonably and in good faith to believe that the person has authorised a representative to perform certain acts, the person is treated as a principal who has so authorised the apparent representative.

Comp. 2.2.2 (1) and 2.2.5 (2) UPICC, 3:201 (1) and (3) PECL

II.–6:104: Scope of authority

(1) The scope of the representative’s authority is determined by the grant.

(2) The representative has authority to perform all incidental acts necessary to achieve the purposes for which the authority was granted.

(3) A representative has authority to delegate authority to another person (the delegate) to do acts on behalf of the principal which it is not reasonable to expect the representative to do personally. The rules of this Chapter apply to acts done by the delegate.

Comp. 2.2.2 (2) UPICC, 3:201 (2) PECL and for (3) 2.2.8 UPICC and 3:206 PECL

II.–6:105: When representative’s act affects principal’s legal position

When the representative acts:

(a) in the name of a principal or otherwise in such a way as to indicate to the third party an intention to affect the legal position of a principal; and

(b) within the scope of the representative’s authority, the act affects the legal position of the principal in relation to the third party as if it had been done by the principal. It does not as such give rise to any legal relation between the representative and the third party.

Comp. 2.2.3 UPICC, 3:202 PECL

II.–6:106: Representative acting in own name

When the representative, despite having authority, does an act in the representative’s own name or otherwise in such a way as not to indicate to the third party an intention to affect the legal position of a principal, the act affects the legal position of the representative in relation to the third party as if done by the representative in a personal capacity. It does not as such affect the legal position of the principal in relation to the third party unless this is specifically provided for by any rule of law.

Comp. 2.2.4 (1) UPICC, 3:301 PECL

II.–6:107: Person purporting to act as representative but not having authority

(1) When a person acts in the name of a principal or otherwise in such a way as to indicate to the third party an intention to affect the legal position of a principal but acts without authority, the act does not affect the legal position of the purported principal or, save as provided in paragraph (2), give rise to legal relations between the unauthorised person and the third party.

(2) Failing ratification by the purported principal, the person is liable to pay the third party such damages as will place the third party in the same position as if the person had acted with authority.

(3) Paragraph (2) does not apply if the third party knew or could reasonably be expected to have known of the lack of authority.

Comp. 2.2.5 (1) and 2.2.6 UPICC, 3:204 PECL

II.–6:108: Unidentified principal

If a representative acts for 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 representative is treated as having acted in a personal capacity.

Comp. 3:203 PECL

II.–6:109: Conflict of interest

(1) If an act done by a representative involves the representative in a conflict of interest of which the third party knew or could reasonably be expected to have known, the principal may avoid the act according to the provisions of II.–7:209 (Notice of avoidance) to II.–7:213 (Partial avoidance).

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

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

(b) the transaction was with the representative in a personal capacity.

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

(a) if the representative acted with the principal's prior consent; or

(b) if the representative had disclosed the conflict of interest to the principal and the principal did not object within a reasonable time; or

(c) if the principal otherwise knew, or could reasonably be expected to have known, of the representative's involvement in the conflict of interest and did not object within a reasonable time.

*(d) if, for any other reason, the representative was entitled as against the principal to do the act **under the contract of mandate***

Comp. 2.2.7 UPICC, 3:205 PECL

II.–6:110: Several representatives

Where several representatives have authority to act for the same principal, each of them may act separately.

II.–6:111: Ratification

(1) Where a person purports to act as a representative but acts without authority, the purported principal may ratify the act.

(2) Upon ratification, the act is considered as having been done with authority, without prejudice to the rights of other persons.

(3) The third party who knows that an act was done without authority may by notice to the purported principal specify a reasonable period of time for ratification. If the act is not ratified within that period ratification is no longer possible.

Comp. 2.2.9 UPICC, 3:207 and 3:208 PECL

II.–6:112: Effect of ending or restriction of authorisation

(1) The authority of a representative continues in relation to a third party who knew of the authority notwithstanding the ending or restriction of the representative's authorisation until the third party knows or can reasonably be expected to know of the ending or restriction.

(2) Where the principal is under an obligation to the third party not to end or restrict the representative's authorisation, the authority of a representative continues notwithstanding an ending or restriction of the authorisation even if the third party knows of the ending or restriction.

(3) The third party can reasonably be expected to know of the ending or restriction if, in particular, it has been communicated or publicised in the same way as the granting of the authority was originally communicated or publicised.

(4) Notwithstanding the ending of authorisation, the representative continues to have authority for a reasonable time to perform those acts which are necessary to protect the interests of the principal or the principal's successors.

Comp. 2.2.10 UPICC, 3:209 PECL

CHAPTER 7: GROUNDS OF INVALIDITY

Section 1: General provisions

II.-7:101: Scope

(1) This Chapter deals with the effects of:

- (a) mistake, fraud, threats, or unfair exploitation; and*
- (b) infringement of fundamental principles or mandatory rules.*

(2) It does not deal with lack of capacity.

*(3) It applies in relation to contracts **for sale** and, with any necessary adaptations, other juridical acts.*

Comp. 3.1. UPICC, for (3) 3.20 UPICC, 4:101 PECL

II.-7:102: Initial impossibility or lack of right or authority to dispose

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

Comp. 3.3 UPICC, 4:102 PECL

II.-1:108: Partial invalidity or ineffectiveness

Where only part of a contract or other juridical act is invalid or ineffective, the remaining part continues in effect if it can reasonably be maintained without the invalid or ineffective part.

Comp. 15:103 PECL

Section 2: Vitiating consent or intention

II.-7:201: Mistake

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

- (a) the party, but for the mistake, would not have concluded the contract or would have done so only on fundamentally different terms and the other party knew or could reasonably be expected to have known this; and*
- (b) the other party;*

(i) caused the mistake;

- (ii) caused the contract to be concluded in mistake by leaving the mistaken party in error, contrary to good faith and fair dealing, when the other party knew or could reasonably be expected to have known of the mistake;*
 - (iii) caused the contract to be concluded in mistake by failing to comply with a pre-contractual information duty or a duty to make available a means of correcting input errors; or*
 - (iv) made the same mistake.*
- (2) However a party may not avoid the contract for mistake if:*
- (a) the mistake was inexcusable in the circumstances; or*
 - (b) the risk of the mistake was assumed, or in the circumstances should be borne, by that party.*

Comp. 3.4 and 3.5. UPICC, 4:103 PECL

II.-7:202: Inaccuracy in communication may be treated as mistake

An inaccuracy in the expression or transmission of a statement is treated as a mistake of the person who made or sent the statement.

Comp. 3.6 UPICC, 4:104 PECL

II.-7:203: Adaptation of contract in case of mistake

- (1) If a party is entitled to avoid the contract for mistake but the other party performs, or indicates a willingness to perform, the obligations under the contract as it was understood by the party entitled to avoid it, the contract is treated as having been concluded as that party understood it. This applies only if the other party performs, or indicates a willingness to perform, without undue delay after being informed of the manner in which the party entitled to avoid it understood the contract and before that party acts in reliance on any notice of avoidance.*
- (2) After such performance or indication the right to avoid is lost and any earlier notice of avoidance is ineffective.*
- (3) Where both parties have made the same mistake, the court may at the request of either party bring the contract into accordance with what might reasonably have been agreed had the mistake not occurred.*

Comp. 3.13 UPICC, 4:105 PECL

II.-7:204: Liability for loss caused by reliance on incorrect information

- (1) A party who has concluded a contract in reasonable reliance on incorrect information given by the other party in the course of negotiations has a right to damages for loss suffered as a result if the provider of the information:*
 - (a) believed the information to be incorrect or had no reasonable grounds for believing it to be correct; and*

(b) knew or could reasonably be expected to have known that the recipient would rely on the information in deciding whether or not to conclude the contract on the agreed terms.

(2) This Article applies even if there is no right to avoid the contract.

Comp. 34:106 PECL

II.-7:205: Fraud

(1) A party may avoid a contract when the other party has induced the conclusion of the contract by fraudulent misrepresentation, whether by words or conduct, or fraudulent non-disclosure of any information which good faith and fair dealing, or any pre-contractual information duty, required that party to disclose.

(2) A misrepresentation is fraudulent if it is made with knowledge or belief that the representation is false and is intended to induce the recipient to make a mistake. A non-disclosure is fraudulent if it is intended to induce the person from whom the information is withheld to make a mistake.

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

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

Comp. 3.8 UPICC, 4:107 PECL

II.-7:206: Coercion or threats

(1) A party may avoid a contract when the other party has induced the conclusion of the contract by coercion or by the threat of an imminent and serious harm which it is wrongful to inflict, or wrongful to use as a means to obtain the conclusion of the contract.

(2) A threat is not regarded as inducing the contract if in the circumstances the threatened party had a reasonable alternative.

Comp. 3.9 UPICC, 4:108 PECL

II.-7:207: Unfair exploitation

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

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

(b) the other party knew or could reasonably be expected to have known this and, given the circumstances and purpose of the contract, exploited the first party's situation by taking an excessive benefit or grossly unfair advantage.

(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 observed.

(3) A court may similarly adapt the contract upon the request of a party receiving notice of avoidance for unfair exploitation, provided that this party informs the party who gave the notice without undue delay after receiving it and before that party has acted in reliance on it.

Comp. 3.10 UPICC, 4:109 PECL

II.-7:208: Third persons

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

(a) causes a mistake, or knows of or could reasonably be expected to know of a mistake; or

(b) is guilty of fraud, coercion, threats or unfair exploitation, remedies under this Section are available as if the behaviour or knowledge had been that of the party.

(2) Where a third person for whose acts a party is not responsible and who does not have the party's assent to be involved in the making of a contract is guilty of fraud, coercion, threats or unfair exploitation, remedies under this Section are available if the party knew or could reasonably be expected to have known of the relevant facts, or at the time of avoidance has not acted in reliance on the contract.

Comp. 3.11 UPICC, 4:111 PECL

II.-7:209: Notice of avoidance

Avoidance under this Section is effected by notice to the other party.

Comp. 3.14 UPICC, 4:112 PECL

II.-7:210: Time

A notice of avoidance under this Section is ineffective unless given within a reasonable time, with due regard to the circumstances, after the avoiding party knew or could

reasonably be expected to have known of the relevant facts or became capable of acting freely.

Comp. 3.15 UPICC, 4:113 PECL

II.-7:211: Confirmation

If a party who is entitled to avoid a contract under this Section confirms it, expressly or impliedly, after the period of time for giving notice of avoidance has begun to run, avoidance is excluded.

Comp. 3.12 UPICC, 4:114 PECL

II.-7:212: Effects of avoidance

(1) A contract which may be avoided under this Section is valid until avoided but, once avoided, is retrospectively invalid from the beginning.

(2) The question whether either party has a right to the return of whatever has been transferred or supplied under a contract which has been avoided under this Section, or a monetary equivalent, is regulated by the rules on unjustified enrichment.

(3) The effect of avoidance under this Section on the ownership of property which has been transferred under the avoided contract is governed by the rules on the transfer of property.

Comp. 3.17 UPICC, 4:115 PECL

II.-7:213: Partial avoidance

If a ground of avoidance under this Section 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.

Comp. 3.16 UPICC, 4:116 PECL

II.-7:214: Damages for loss

(1) A party who has the right to avoid a contract under this Section (or who had such a right before it was lost by the effect of time limits or confirmation) is entitled, whether or not the contract is avoided, to damages from the other party for any loss suffered as a result of the mistake, fraud, coercion, threats or unfair exploitation, provided that the other party knew or could reasonably be expected to have known of the ground for avoidance.

(2) The damages recoverable are such as to place the aggrieved party as nearly as possible in the position in which that party would have been if the contract had not been concluded, with the further limitation that, if the party does not avoid the contract, the damages are not to exceed the loss caused by the mistake, fraud, coercion, threats or unfair exploitation.

(3) In other respects the rules on damages for non-performance of a contractual obligation apply with any appropriate adaptation.

Comp. 3:18 UPICC, 4:117 PECL

II.-7:215: Exclusion or restriction of remedies

(1) Remedies for fraud, coercion, threats and unfair exploitation cannot be excluded or restricted.

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

Comp. 4:118 PECL

II.-7:216: Overlapping remedies

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

Comp. 3:7 UPICC (opposite solution), 4:119 PECL

Section 3: Infringement of fundamental principles or mandatory rules

II.-7:301: Contracts infringing fundamental principles

A contract is void to the extent that:

- (a) it infringes a principle recognised as fundamental in the laws of the Member States of the European Union; and*
- (b) nullity is required to give effect to that principle.*

Comp. 15:101 PECL

II.-7:302: Contracts infringing mandatory rules

(1) Where a contract is not void under the preceding Article but infringes a mandatory rule of law, the effects of that infringement on the validity of the contract are the effects, if any, expressly prescribed by that mandatory rule.

(2) Where the mandatory rule does not expressly prescribe the effects of an infringement on the validity of a contract, a court may;

- (a) declare the contract to be valid;*
- (b) avoid the contract, with retrospective effect, in whole or in part; or*
- (c) modify the contract or its effects.*
- (3) A decision reached under paragraph (2) should 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.*

Comp. 15:102 PECL

II.-7:303: Effects of nullity or avoidance

- (1) The question whether either party has a right to the return of whatever has been transferred or supplied under a contract, or part of a contract, which is void or has been avoided under this Section, or a monetary equivalent, is regulated by the rules on unjustified enrichment.*
- (2) The effect of nullity or avoidance under this Section on the ownership of property which has been transferred under the void or avoided contract, or part of a contract, is governed by the rules on the transfer of property.*
- (3) This Article is subject to the powers of the court to modify the contract or its effects.*

Comp. 15:104 PECL

II.-7:304: Damages for loss

- (1) A party to a contract which is void or avoided, in whole or in part, under this Section is entitled to damages from the other party for any loss suffered as a result of the invalidity, provided that the first party did not know and could not reasonably be expected to have known, and the other party knew or could reasonably be expected to have known, of the infringement.*
- (2) The damages recoverable are such as to place the aggrieved party as nearly as possible in the position in which that party would have been if the contract had not been concluded or the infringing term had not been included.*

Comp. 15:105 PECL

Section 4: Unfair terms

II.-9:401: Mandatory nature of following provisions

The parties may not exclude the application of the provisions in this Section or derogate from or vary their effects.

II.-9:402: Duty of transparency in terms not individually negotiated

(1) Terms which have not been individually negotiated must be drafted and communicated in plain, intelligible language.

(2) In a contract between a business and a consumer a term which has been supplied by the business in breach of the duty of transparency imposed by paragraph (1) may on that ground alone be considered unfair.

Comp. 6:302 AP

II.-9:403: Meaning of “unfair” in contracts between a business and a consumer

In a contract between a business and a consumer, a term [which has not been individually negotiated] is unfair for the purposes of this Section if it is supplied by the business and if it significantly disadvantages the consumer, contrary to good faith and fair dealing.

Comp. 6:301 AP

II.-9:404: Meaning of “unfair” in contracts between non-business parties

In a contract between parties neither of whom is a business, a term is unfair for the purposes of this Section only if it is a term forming part of standard terms supplied by one party and significantly disadvantages the other party, contrary to good faith and fair dealing.

II.-9:405: Meaning of “unfair” in contracts between businesses

A term in a contract between businesses is unfair for the purposes of this Section only if it is a term forming part of standard terms supplied by one party and of such a nature that its use grossly deviates from good commercial practice, contrary to good faith and fair dealing.

Comp. 4:110 (1) PECL

II.-9:406: Exclusions from unfairness test

(1) Contract terms are not subjected to an unfairness test under this Section if they are based on:

(a) provisions of the applicable law;

(b) international conventions to which the Member States are parties, or to which the European Union is a party; or

(c) these rules.

(2) For contract terms which are drafted in plain and intelligible language, the unfairness test extends neither to the definition of the main subject matter of the contract, nor to the adequacy of the price to be paid.

Comp. 4:110 (2) PECL, 6:303 AP

II.-9:407: Factors to be taken into account in assessing unfairness

*(1) When assessing the unfairness of a contractual term for the purposes of this Section, regard is to be had to the duty of transparency under II.-9:402 (Duty of transparency in terms not individually negotiated), to the nature of the **goods** to be provided under the contract, to the circumstances prevailing during the conclusion of the contract, to the other terms of the contract and to the terms of any other contract on which the contract depends.*

(2) For the purposes of II.-9:404 (Meaning of “unfair” in contracts between a business and a consumer) the circumstances prevailing during the conclusion of the contract include the extent to which the consumer was given a real opportunity to become acquainted with the term before the conclusion of the contract.

Comp. 4:110 (1) PECL, 6:301 AP

II.-9:408: Effects of unfair terms

(1) A term which is unfair under this Section is not binding on the party who did not supply it.

(2) If the contract can reasonably be maintained without the unfair term, the other terms remain binding on the parties.

Comp. 4:110 PECL, 6:306 AP

II.-9:409: Exclusive jurisdiction clauses

(1) A term in a contract between a business and a consumer is unfair for the purposes of this Section if it is supplied by the business and if it confers exclusive jurisdiction for all disputes arising under the contract on the court for the place where the business is domiciled.

(2) Paragraph (1) does not apply if the chosen court is also the court for the place where the consumer is domiciled.

Comp. 6:304 AP

II.-9:410: Terms which are presumed to be unfair in contracts between a business and a consumer

(1) A term in a contract between a business and a consumer is presumed to be unfair for the purposes of this Section if it is supplied by the business and if it:

(a) excludes or limits the liability of a business for death or personal injury caused to a consumer through an act or omission of that business;

(b) inappropriately excludes or limits the remedies, including any right to set-off, available to the consumer against the business or a third party for non-performance by the business of obligations under the contract;

(c) makes binding on a consumer an obligation which is subject to a condition the fulfilment of which depends solely on the intention of the business;

(d) permits a business to keep money paid by a consumer if the latter decides not to conclude the contract, or perform obligations under it, without providing for the consumer to receive compensation of an equivalent amount from the business in the reverse situation;

(e) requires a consumer who fails to perform his or her obligations to pay a disproportionately high amount of damages;

(f) entitles a business to withdraw from or terminate the contractual relationship on a discretionary basis without giving the same right to the consumer

(g) (...)

(h) (...)

(i) enables a business to alter the terms of the contract unilaterally without a valid reason which is specified in the contract; this does not affect terms under which a business reserves the right to alter unilaterally the conditions of a contract of indeterminate duration, provided that the business is required to inform the consumer with reasonable notice, and that the consumer is free to terminate the contractual relationship;

(j) enables a business to alter unilaterally without a valid reason any characteristics of the goods to be provided;

(k) provides that the price of goods is to be determined at the time of delivery, or allows a business to increase the price without giving the consumer the right to withdraw if the increased price is too high in relation to the price agreed at the conclusion of the contract; this does not affect price-indexation clauses, where lawful, provided that the method by which prices vary is explicitly described;

(l) gives a business the right to determine whether the goods supplied are in conformity with the contract, or gives the business the exclusive right to interpret any term of the contract;

(m) limits the obligation of a business to respect commitments undertaken by its agents, or makes its commitments subject to compliance with a particular formality;

(n) obliges a consumer to fulfil all his or her obligations where the business fails to fulfil its own;

(o) allows a business to transfer its rights and obligations under the contract without the consumer's consent, if this could reduce the guarantees available to the consumer;

(p) excludes or restricts a consumer's right to take legal action or to exercise any other remedy, in particular by referring the consumer to arbitration proceedings which are not covered by legal provisions, by unduly restricting the evidence available to the consumer, or by shifting a burden of proof on to the consumer;

(q) allows a business, where what has been ordered is unavailable, to supply an equivalent without having expressly informed the consumer of this possibility and of the fact that the business must bear the cost of returning what the consumer has received under

(2) Subparagraphs (g), (i) and (k) do not apply to:

(a) (...)

(b) contracts for the purchase or sale of foreign currency, traveller's cheques or international money orders denominated in foreign currency.

Comp. 6:305 AP

CHAPTER 8: INTERPRETATION

Section 1: Interpretation of contracts

II.–8:101: General rules

- (1) A contract is to be interpreted according to the common intention of the parties even if this differs from the literal meaning of the words.*
- (2) If one party intended the contract, or a term or expression used in it, to have a particular meaning, and at the time of the conclusion of the contract the other party was aware, or could reasonably be expected to have been aware, of the first party's intention, the contract is to be interpreted in the way intended by the first party.*
- (3) The contract is, however, to be interpreted according to the meaning which a reasonable person would give to it:*
- (a) if an intention cannot be established under the preceding paragraphs; or*
 - (b) if the question arises with a person, not being a party to the contract or a person who by law has no better rights than such a party, who has reasonably and in good faith relied on the contract's apparent meaning.*

Comp. 4.1. UPICC, 5:101 PECL

II.–8:102: Relevant matters

- (1) In interpreting the contract, regard may be had, in particular, to:*
- (a) the circumstances in which it was concluded, including the preliminary negotiations;*
 - (b) the conduct of the parties, even subsequent to the conclusion of the contract;*
 - (c) the interpretation which has already been given by the parties to terms or expressions which are the same as, or similar to, those used in the contract and the practices they have established between themselves;*
 - (d) the meaning commonly given to such terms or expressions in the branch of activity concerned and the interpretation such terms or expressions may already have received;*
 - (e) the nature and purpose of the contract;*
 - (f) usages; and*
 - (g) good faith and fair dealing.*
- (2) In a question with a person, not being a party to the contract or a person such as an assignee who by law has no better rights than such a party, who has reasonably and in good faith relied on the contract's apparent meaning, regard may be had to the circumstances mentioned in sub-paragraphs (a) to (c) above only to the extent that those circumstances were known to, or could reasonably be expected to have been known to, that person.*

Comp. 4.3. UPICC, 5:102 PECL

II.-8:103: Interpretation against supplier of term or dominant party

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

(2) Where there is doubt about the meaning of any other term, and that term has been established under the dominant influence of one party, an interpretation of the term against that party is to be preferred.

Comp. 4.6. UPICC, 5:103 PECL, 6:203 AP

II.-8:104: Preference for negotiated terms

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

Comp. 2.1.21 UPICC, 5:104 PECL, 6:203 AP

II.-8:105: Reference to contract as a whole

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

Comp. 4.4. UPICC, 5:105 PECL

II.-8:106: Preference for interpretation which gives terms effect

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

Comp. 4.5. UPICC, 5:106 PECL

II.-8:107: Linguistic discrepancies

Where a contract document is 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.

Comp. 4.7. UPICC, 5:107 PECL

Section 2: Interpretation of other juridical acts

II.–8:201: General rules

(1) A unilateral juridical act is to be interpreted in the way in which it could reasonably be expected to be understood by the person to whom it is addressed.

(2) If the person making the juridical act intended the act, or a term or expression used in it, to have a particular meaning, and at the time of the act the person to whom it was addressed was aware, or could reasonably be expected to have been aware, of the first person's intention, the act is to be interpreted in the way intended by the first person.

(3) The act is, however, to be interpreted according to the meaning which a reasonable person would give to it:

(a) if neither paragraph (1) nor paragraph (2) applies; or

(b) if the question arises with a person, not being the addressee or a person who by law has no better rights than the addressee, who has reasonably and in good faith relied on the contract's apparent meaning.

Comp. 4.2. UPICC

II.–8:202: Application of other rules by analogy

The provisions of Section 1, apart from its first Article, apply with appropriate adaptations to the interpretation of a juridical act other than a contract.

Comp. 1:107 PECL

CHAPTER 9: CONTENTS AND EFFECTS

Section 1: Contents

II.-9:101: Terms of a contract

- (1) The terms of a contract may be derived from the express or tacit agreement of the parties, from rules of law or from practices established between the parties or usages.*
- (2) Where it is necessary to provide for a matter which the parties have not foreseen or provided for, a court may imply an additional term, having regard in particular to:*
- (a) the nature and purpose of the contract;*
 - (b) the circumstances in which the contract was concluded; and*
 - (c) the requirements of good faith and fair dealing.*
- (3) Any term implied under paragraph (2) should, where possible, be such as to give effect to what the parties, had they provided for the matter, would probably have agreed.*
- (4) Paragraph (2) does not apply if the parties have deliberately left a matter unprovided for, accepting the consequences of so doing.*

For (1) Comp 5.1.1. UPICC, for (2) Comp. 4.8. and 5.1.2. UPICC, 6:102 PECL

II.-9:102: Certain pre-contractual statements regarded as contract terms

- (1) A statement made by one party before a contract is concluded is regarded as a term of the contract if the other party reasonably understood it as being made on the basis that it would form part of the contract terms if a contract were concluded. In assessing whether the other party was reasonable in understanding the statement in that way account may be taken of:*
- (a) the apparent importance of the statement to the other party;*
 - (b) whether the party was making the statement in the course of business; and*
 - (c) the relative expertise of the parties.*
- (2) If one of the parties to a contract is a business and before the contract is concluded makes a statement, either to the other party or publicly, about the specific characteristics of what is to be supplied by that business under the contract, the statement is regarded as a term of the contract unless:*
- (a) the other party was aware when the contract was concluded, or could reasonably be expected to have been so aware, that the statement was incorrect or could not otherwise be relied on as such a term; or*
 - (b) the other party's decision to conclude the contract was not influenced by the statement.*
- (3) For the purposes of paragraph (2), a statement made by a person engaged in advertising or marketing on behalf of the business is treated as being made by the business.*

(4) Where the other party is a consumer then, for the purposes of paragraph (2), a public statement made by or on behalf of a producer or other person in earlier links of the business chain between the producer and the consumer is treated as being made by the business unless the business, at the time of conclusion of the contract, did not know and could not reasonably be expected to have known of it.

(5) In the circumstances covered by paragraph (4) a business which at the time of conclusion of the contract did not know and could not reasonably be expected to have known that the statement was incorrect has a right to be indemnified by the person making the statement for any liability incurred as a result of that paragraph.

(6) In relations between a business and a consumer the parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

Comp. 6:101 PECL, 4:107 and 4:108 AP

II.-9:103: Terms not individually negotiated

(1) Terms supplied by one party and not individually negotiated may be invoked against the other party only if the other party was aware of them, or if the party supplying the terms took reasonable steps to draw the other party's attention to them, before or when the contract was concluded.

(2) If a contract is to be concluded by electronic means, the party supplying any terms which have not been individually negotiated may invoke them against the other party only if they are made available to the other party in textual form.

(3) For the purposes of this Article:

(a) "not individually negotiated" has the meaning given by II.-1:110 (Terms "not individually negotiated"); and

(b) terms are not sufficiently brought to the other party's attention by a mere reference to them in a contract document, even if that party signs the document.

Comp. 2.1.20 UPICC, 2:104 PECL, 6:201 AP

II.-9:105: Unilateral determination by a party

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

Comp. 5.1.7. (2) UPICC, 6:105 PECL

II.-9:106: Determination by a third person

(1) Where a third person is to determine the price or any other contractual term and cannot or will not do so, a court may, unless this is inconsistent with the terms of the contract, appoint another person to determine it.

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

Comp. 5.1.7. (3) UPICC, 6:106 PECL

II.-9:107: Reference to a non-existent factor

Where the price or any other contractual term is to be determined by reference to a factor which does not exist or has ceased to exist or to be accessible, the nearest equivalent factor is substituted unless this would be unreasonable in the circumstances, in which case a reasonable price or other term is substituted.

Comp. 5.1.7. (4) UPICC, 6:107 PECL

II.-9:109: Language

Where the language to be used for communications relating to the contract or the rights or obligations arising from it cannot be determined from the terms agreed by the parties, from any other applicable rule of law or from usages or practices, the language to be used is that used for the conclusion of the contract.

Comp. 7:105 AP

Section 2: Simulation

II.-9:201: Effect of simulation

(1) When the parties have concluded a contract or an apparent contract and have deliberately done so in such a way that it has an apparent effect different from the effect which the parties intend it to have, the parties' true intention prevails.

(2) However, the apparent effect prevails in relation to a person, not being a party to the contract or apparent contract or a person who by law has no better rights than such a party, who has reasonably and in good faith relied on the apparent effect.

Comp. 6:103 PECL

Section 3: Effect of stipulation in favour of a third party

II.-9:301: Basic rules

(1) The parties to a contract may, by the contract, confer a right or other benefit on a third party. The third party need not be in existence or identified at the time the contract is concluded.

(2) The nature and content of the third party's right or benefit are determined by the contract and are subject to any conditions or other limitations under the contract.

(3) The benefit conferred may take the form of an exclusion or limitation of the third party's liability to one of the contracting parties.

Comp. 5.2.1 and 5.2.2.UPICC, and for (3) 5.2.3 UPICC, 6:110 (1) PECL

II.-9:302: Rights, remedies and defences

Where one of the contracting parties is bound to render a performance to the third party under the contract, then, in the absence of provision to the contrary in the contract:

(a) the third party has the same rights to performance and remedies for non-performance as if the contracting party was bound to render the performance under a binding unilateral promise in favour of the third party; and

(b) the contracting party may assert against the third party all defences which the contracting party could assert against the other party to the contract.

Comp. 5.2.4 UPICC

II.-9:303: Rejection or revocation of benefit

(1) The third party may reject the right or benefit by notice to either of the contracting parties, if that is done without undue delay after being notified of the right or benefit and before it has been expressly or impliedly accepted. On such rejection, the right or benefit is treated as never having accrued to the third party.

(2) The contracting parties may remove or modify the contractual term conferring the right or benefit if this is done before either of them has given the third party notice that the right or benefit has been conferred. The contract determines whether and by whom and in what circumstances the right or benefit can be revoked or modified after that time.

(3) Even if the right or benefit conferred is by virtue of the contract revocable or subject to modification, the right to revoke or modify is lost if the parties have, or the party having the right to revoke or modify has, led the third party to believe that it is not revocable or subject to modification and if the third party has reasonably acted in reliance on it.

Comp. 5.2.5 UPICC (different solution) and 5.2.6 UPICC, 6:110 (2) and (3°) PECL

CHAPTER 10: OBLIGATIONS OF THE PARTIES IN GENERAL

Section 1: Overview

IV.A.–2:101: Overview of obligations of the seller

The seller must:

- (a) transfer the ownership of the goods;*
- (b) deliver the goods (Chapter 11 Section 1)*
- (c) transfer such documents representing or relating to the goods as may be required by the contract; and*
- (d) ensure that the goods conform to the contract (Chapter 11 Section 2).*

Comp. 30 CISG

IV.A.–3:101: Overview of obligations of the buyer

The buyer must:

- (a) pay the price (Chapter 12 Section 2);*
- (b) take delivery of the goods (Chapter 12 Section 3); and*
- (c) take over documents representing or relating to the goods as may be required by the contract.*

Comp. 53 CISG

Section 2: General rules for the obligations of both parties

III.–1:102: Definitions

- (1) An obligation is a duty to perform which one party to a legal relationship (the debtor) owes to another party (the creditor).*
- (2) Performance of an obligation is the doing by the debtor of what is to be done under the obligation or the not doing by the debtor of what is not to be done.*
- (3) Non-performance of an obligation is any failure to perform the obligation, whether or not excused, and includes delayed performance and any other performance which is not in accordance with the terms regulating the obligation.*
- (4) An obligation is reciprocal in relation to another obligation if:
 - (a) performance of the obligation is due in exchange for performance of the other obligation;*
 - (b) it is an obligation to facilitate or accept performance of the other obligation; or*
 - (c) it is so clearly connected to the other obligation or its subject matter that performance of the one can reasonably be regarded as dependent on performance of the other.**

(5) The terms regulating an obligation may be derived from a contract or other juridical act, the law or a legally binding usage or practice, or a court order; and similarly for the terms regulating a right.

for (3), comp. 1:301 (4) PECL and 8:101 AP

III.–1:103: Good faith and fair dealing

(1) A person has a duty to act in accordance with good faith and fair dealing in performing an obligation, in exercising a right to performance, in pursuing or defending a remedy for non-performance, or in exercising a right to terminate an obligation or contractual relationship.

(2) The duty may not be excluded or limited by contract.

(3) Breach of the duty does not give rise directly to the remedies for non-performance of an obligation but may preclude the person in breach from exercising or relying on a right, remedy or defence which that person would otherwise have.

Comp. 1.7 UPICC, 1:201 PECL, 7:101 and 7:102 AP

III.–1:104: Co-operation

The debtor and creditor are obliged to co-operate with each other when and to the extent that this can reasonably be expected for the performance of the debtor's obligation.

Comp. 5.1.3 UPICC, 1:202 PECL, 7:104 AP

III.–1:105: Non-discrimination

Chapter 3 (Non-discrimination) applies with appropriate adaptations to:

- (a) the performance of any obligation to provide access to, or supply, goods which are available to members of the public;*
- (b) the exercise of a right to performance of any such obligation or the pursuing or defending of any remedy for non-performance of any such obligation; and*
- (c) the exercise of a right to terminate any such obligation.*

Section 2: Modalities of performance in general

III.–2:101: Place of performance

(1) If the place of performance of an obligation cannot be otherwise determined from the terms regulating the obligation it is:

- (a) in the case of a monetary obligation, the creditor's place of business;*

(b) in the case of any other obligation, the debtor's place of business.

(2) For the purposes of the preceding paragraph:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the obligation; and

(b) if a party does not have a place of business, or the obligation does not relate to a business matter, the habitual residence is substituted.

(3) If, in a case to which paragraph (1) applies, a party causes any increase in the expenses incidental to performance by a change in place of business or habitual residence subsequent to the time when the obligation was incurred, that party must bear the increase.

Comp. 31 and 57 CISG, 6.1.6 UPICC, 7:101 PECL

III.-2:102: Time of performance

(1) If the time at which, or a period of time within which, an obligation is to be performed cannot otherwise be determined from the terms regulating the obligation it must be performed within a reasonable time after it arises.

(2) If a period of time within which the obligation is to be performed can be determined from the terms regulating the obligation, the obligation may be performed at any time within that period chosen by the debtor unless the circumstances of the case indicate that the creditor is to choose the time.

(3) Unless the parties have agreed otherwise, a business must perform the obligations incurred under contracts concluded at a distance no later than 30 days after the contract was concluded.

(4) If a business has an obligation to reimburse money received from a consumer, the reimbursement must be made as soon as possible and in any case no later than 30 days after the obligation arose.

Comp. 33 CISG, 6.1.1. UPICC, 7:102 PECL 7:201 AP

III.-2:103: Early performance

(1) A creditor may reject an offer to perform before performance is due unless the early performance would not cause the creditor unreasonable prejudice.

(2) A creditor's acceptance of early performance does not affect the time fixed for the performance by the creditor of any reciprocal obligation.

Comp. 6.1.5 UPICC, 7:103 PECL

III.-2:104: Order of performance

If the order of performance of reciprocal obligations cannot be otherwise determined from the terms regulating the obligations then, to the extent that the obligations can be

performed simultaneously, the parties are bound to perform simultaneously unless the circumstances indicate otherwise.

Comp. 58 CISG, 6.1.4 UPICC, 7:104 PECL

III.–2:105: Alternative obligations or methods of performance

(1) Where a debtor is bound to perform one of two or more obligations, or to perform an obligation in one of two or more ways, the choice belongs to the debtor, unless the terms regulating the obligations or obligation provide otherwise.

(2) If the party who is to make the choice fails to choose by the time when performance is due, then:

(a) if the delay amounts to a fundamental non-performance, the right to choose passes to the other party;

(b) if the delay does not amount to a fundamental non-performance, 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 still fails to do so, the right to choose passes to the other party.

Comp. 7:105 PECL

III.–2:106: Performance entrusted to another

A debtor who entrusts performance of an obligation to another person remains responsible for performance.

Comp. 8:107 PECL

III.–2:107: Performance by a third person

(1) Where personal performance by the debtor is not required by the terms regulating the obligation, the creditor cannot refuse performance by a third person if:

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

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

(2) Performance by a third person in accordance with paragraph (1) discharges the debtor except to the extent that the third person takes over the creditor's right by assignment or subrogation.

(3) Where personal performance by the debtor is not required and the creditor accepts performance of the debtor's obligation by a third party in circumstances not covered by paragraph (1) the debtor is discharged but the creditor is liable to the debtor for any loss caused by that acceptance.

Comp. 9.2.6 UPICC, 7:106 PECL

III.–2:108: Method of payment

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

(2) A creditor who 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.

Comp. 6.1.7 and 6.1.8 UPICC, 7:107 PECL

III.–2:109: Currency of payment

(1) The debtor and the creditor may agree that payment is to be made only in a specified currency.

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

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

(4) 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.

Comp. 6.1.9 and 6.1.10 UPICC 7:108 PECL

III.–2:111: Property not accepted

(1) A person who has an obligation to deliver or return corporeal property other than money and who is left in possession of the property because of the creditor's failure to accept or retake the property, must take reasonable steps to protect and preserve it.

(2) The debtor may obtain discharge from the obligation to deliver or return:

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

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

(3) Where, however, the property is liable to rapid deterioration or its preservation is unreasonably expensive, the debtor must take reasonable steps to dispose of it. The debtor may obtain discharge from the obligation to deliver or return by paying the net proceeds to the creditor.

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

Comp. 85 - 88 CISG, 7:110 PECL

III.-2:112: Money not accepted

(1) Where a creditor fails to accept money properly tendered by the debtor, the debtor may after notice to the creditor obtain discharge from the obligation to pay by depositing the money to the order of the creditor in accordance with the law of the place where payment is due.

(2) Paragraph (1) applies, with appropriate adaptations, to money properly tendered by a third party in circumstances where the creditor is not entitled to refuse such performance.

Comp. 7:111 PECL

III.-2:113: Costs and formalities of performance

(1) The costs of performing an obligation are borne by the debtor.

(2) In the case of a monetary obligation the debtor's obligation to pay includes taking such steps and complying with such formalities as may be necessary to enable payment to be made.

Comp. 54 CISG, 6.1.11 UPICC, 7:112 PECL

Section 3: Conditional obligations

III.-1:106: Conditional rights and obligations

(1) The terms regulating a right or obligation may provide that it is conditional upon the occurrence of an uncertain future event, so that it takes effect only if the event occurs (suspensive condition) or comes to an end if the event occurs (resolutive condition).

(2) Upon fulfilment of a suspensive condition, the relevant right or obligation takes effect.

(3) Upon fulfilment of a resolutive condition, the relevant right or obligation comes to an end.

(4) When a party, contrary to the duty of good faith and fair dealing or the obligation to co-operate, interferes with events so as to bring about the fulfilment or non-fulfilment of a condition to that party's advantage, the other party may treat the condition as not having been fulfilled or as having been fulfilled as the case may be.

*(5) When a contractual obligation comes to an end on the fulfilment of a resolutive condition any restitutionary effects are regulated by the rules in **Chapter 16, Section 6, Sub-section 4 (Restitution)** with appropriate adaptations.*

Comp. 16:101 to 16:103 PECL: for (1) 16:101, for (2) 16:103 (1), for (3) 16:103 (2°; for (4) 16:102

CHAPTER 11: OBLIGATIONS OF THE SELLER

Section 1: Delivery of the goods

IV.A.-2:201: Delivery

- (1) The seller fulfils the obligation to deliver by making the goods, or where it is agreed that the seller need only deliver documents representing the goods, the documents, available to the buyer.*
- (2) If the contract involves carriage of the goods by a carrier or series of carriers, the seller fulfils the obligation to deliver by handing over the goods to the first carrier for transmission to the buyer and by transferring to the buyer any document necessary to enable the buyer to take over the goods from the carrier holding the goods.*
- (3) In this Article, any reference to the buyer includes a third person to whom delivery is to be made in accordance with the contract.*

IV.A.-2:202: Place and time for delivery

- (1) The place and time for delivery are determined by III.-2:101 (Place of performance) and III.-2:102 (Time of performance) as modified by this Article.*
- (2) If the performance of the obligation to deliver requires the transfer of documents representing the goods, the seller must transfer them at such a time and place and in such a form as is required by the contract.*
- (3) If in a consumer contract for sale the contract involves carriage of goods by a carrier or a series of carriers and the consumer is given a time for delivery, the goods must be received from the last carrier or made available for collection from that carrier by that time.*

Comp. 34 CISG

IV.A.-2:203: Cure in case of early delivery

- (1) If the seller has delivered goods before the time for delivery, the seller may, up to that time, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any non-conforming goods delivered or otherwise remedy any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense.*
- (2) If the seller has transferred documents before the time required by the contract, the seller may, up to that time, cure any lack of conformity in the documents, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense.*

*(3) This Article does not preclude the buyer from claiming damages, in accordance with Article **Chapter 16, Section 8** (Damages and interest), for any loss not remedied by the seller's cure.*

Comp. 37 CISG

IV.A.–2:204: Carriage of the goods

(1) If the contract requires the seller to arrange for carriage of the goods, the seller must make such contracts as are necessary for carriage to the place fixed by means of transportation appropriate in the circumstances and according to the usual terms for such transportation.

(2) If the seller, in accordance with the contract, hands over the goods to a carrier and if the goods are not clearly identified to the contract by markings on the goods, by shipping documents or otherwise, the seller must give the buyer notice of the consignment specifying the goods.

(3) If the contract does not require the seller to effect insurance in respect of the carriage of the goods, the seller must, at the buyer's request, provide the buyer with all available information necessary to enable the buyer to effect such insurance.

Comp. 32 CISG

III. – 3:108: Business unable to fulfil consumer's order by distance communication

(1) Where a business is unable to perform its obligations under a contract concluded with a consumer by means of distance communication, it is obliged to inform the consumer immediately and refund any sums paid by the consumer without undue delay and in any case within 30 days.

The consumer's remedies for non-performance remain unaffected.

(2) The parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

Comp. 8A-01 AP

Section 2: Conformity of the goods

IV.A.–2:301 and 303: Conformity with the contract

(1) The goods do not conform with the contract unless they:

*(a) are of the quantity, quality, **performance capability** and description required by the contract;*

(b) are contained or packaged in the manner required by the contract;

(c) are supplied along with any accessories, installation instructions or other instructions required by the contract; and

(d) comply with the remaining Articles of this Section.

(2) The terms of the contract include the pre-contractual statements of a party or a third person regarded as a term of the contract by virtue of Article 9:102 (Certain pre-contractual statements regarded as contract terms).

(1) Comp. 35 (1) CISG, 7B-01 (1) AP

IV.A.–2:302: Fitness for purpose, qualities, packaging

The goods must:

- (a) be fit for any particular purpose made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for the buyer to rely, on the seller's skill and judgement;*
- (b) be fit for the purposes for which goods of the same description would ordinarily be used;*
- (c) possess the qualities of goods which the seller held out to the buyer as a sample or model;*
- (d) be contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods;*
- (e) be supplied along with such accessories, installation instructions or other instructions as the buyer may reasonably expect to receive; and*
- (f) possess such qualities and performance capabilities as the buyer may reasonably expect.*

Comp. 35 (2) CISG, 7B-01 (1) AP

II.–9:108: Quality

Where the quality of anything to be supplied or provided under the contract cannot be determined from the terms agreed by the parties, from any other applicable rule of law or from usages or practices, the quality required is the quality which the recipient could reasonably expect in the circumstances.

Comp. 5.1.6 UPICC, 6:108 PECL

IV.A.–2:304: Incorrect installation under a consumer contract for sale

Where goods supplied under a consumer contract for sale are incorrectly installed, any lack of conformity resulting from the incorrect installation is deemed to be a lack of conformity of the goods if:

- (a) the goods were installed by the seller or under the seller's responsibility; or*
- (b) the goods were intended to be installed by the consumer and the incorrect installation was due to a shortcoming in the installation instructions.*

Comp. 7B-01 (2) AP

IV.A.–2:305: Third party rights or claims in general

The goods must be free from any right or claim of a third party. However, if such right or claim is based on industrial property or other intellectual property, the seller's obligation is governed by the following Article.

Comp. 41 CISG

IV.A.–2:306: Third party rights or claims based on industrial property or other intellectual property

(1) The goods must be free from any right or claim of a third party which is based on industrial property or other intellectual property and of which at the time of the conclusion of the contract the seller knew or could reasonably be expected to have known.

(2) However, paragraph (1) does not apply where the right or claim results from the seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer.

Comp. 42 CISG

IV.A.–2:307: Buyer's knowledge of lack of conformity

(1) The seller is not liable under IV.A.–2:302 (Fitness for purpose, qualities, packaging), IV.A.–2:305 (Third party rights or claims in general) or IV.A.–2:306 (Third party rights or claims based on industrial property or other intellectual property) if, at the time of the conclusion of the contract, the buyer knew or could reasonably be assumed to have known of the lack of conformity.

(2) The seller is not liable under IV.A.–2:304 (Incorrect installation in a consumer contract for sale) subparagraph (b) if, at the time of the conclusion of the contract, the buyer knew or could reasonably be assumed to have known of the shortcoming in the installation instructions.

Comp. 35 (3) CISG

IV.A.–2:308: Relevant time for establishing conformity

(1) The seller is liable for any lack of conformity which exists at the time when the risk passes to the buyer, even if the lack of conformity becomes apparent only after that time.

(2) In a consumer contract for sale, any lack of conformity which becomes apparent within six months of the time when risk passes to the buyer is presumed to have existed at that time unless this is incompatible with the nature of the goods or the nature of the lack of conformity.

(3) In a case governed by IV.A.–2:304 (Incorrect installation in a consumer contract for sale) any reference in paragraphs (1) or (2) to the time when risk passes to the buyer is to be read as a reference to the time when the installation is complete.

Comp. 36 CISG, 8B-02 and 8B-03AP

IV.A.–2:309: Limits on derogation from conformity rights in a consumer contract for sale

In a consumer contract for sale, any contractual term or agreement concluded with the seller before a lack of conformity is brought to the seller's attention which directly or indirectly waives or restricts the rights resulting from the seller's obligation to ensure that the goods conform to the contract is not binding on the consumer.

CHAPTER 12: OBLIGATIONS OF THE BUYER

Section 1: **Determination of features**

IV.A.–3:102: Determination of form, measurement or other features

(1) If under the contract the buyer is to specify the form, measurement or other features of the goods, or the time or manner of their delivery, and fails to make such specification either within the time agreed upon or within a reasonable time after receipt of a request from the seller, the seller may, without prejudice to any other rights, make the specification in accordance with any requirements of the buyer that may be known to the seller.

(2) A seller who makes such a specification must inform the buyer of the details of the specification and must fix a reasonable time within which the buyer may make a different specification. If, after receipt of such a communication, the buyer fails to do so within the time so fixed, the specification made by the seller is binding.

Comp. 65 CISG

Section 2: Payment of the price

II.–9:104: Determination of price

Where the amount of the price payable under a contract cannot be determined from the terms agreed by the parties, from any other applicable rule of law or from usages or practices, the price payable is the price normally charged in comparable circumstances at the time of the conclusion of the contract or, if no such price is available, a reasonable price.

Comp. 55 CISG, 5.1.7. (1) UPICC, 6:104 PECL

IV.A.–3:103: Price fixed by weight

If the price is fixed according to the weight of the goods, in case of doubt it is to be determined by the net weight.

Comp. 56 CISG

Section 3: Taking delivery of the goods

IV.A.-3:104: Taking delivery

The buyer fulfils the obligation to take delivery by:

- (a) doing all the acts which could reasonably be expected in order to enable the seller to perform the obligation to deliver; and*
- (b) taking over the goods, or the documents representing the goods, as required by the contract.*

Comp. 60 CISG

IV.A.-3:105: Early delivery and delivery of excess quantity

(1) If the seller delivers all or part of the goods before the time fixed, the buyer may take delivery or, except where acceptance of the tender would not unreasonably prejudice the buyer's interests, refuse to take delivery.

(2) If the seller delivers a quantity of goods greater than that provided for by the contract, the buyer may retain or refuse the excess quantity.

(3) If the buyer retains the excess quantity it is deemed to have been supplied under the contract and must be paid for at the contractual rate.

(4) In a consumer contract for sale paragraph (3) does not apply if the buyer believes on reasonable grounds that the seller has delivered the excess quantity intentionally and without error, knowing that it had not been ordered. In such a case the rules on unsolicited goods apply.

Comp. 52 CISG

CHAPTER 13: PASSING OF RISK

Section 1: General provisions

IV.A.–5:101: Effect of passing of risk

Loss of, or damage to, the goods after the risk has passed to the buyer does not discharge the buyer from the obligation to pay the price, unless the loss or damage is due to an act or omission of the seller.

Comp. 66 CISG

IV.A.–5:102: Time when risk passes

(1) The risk passes when the buyer takes over the goods or the documents representing them.

(2) However, if the contract relates to goods not then identified, the risk does not pass to the buyer until the goods are clearly identified to the contract, whether by markings on the goods, by shipping documents, by notice given to the buyer or otherwise.

(3) The rule in paragraph (1) is subject to the Articles in Section 2 of this Chapter.

Comp. 69 CISG

IV.A.–5:103: Passing of risk in a consumer contract for sale

(1) In a consumer contract for sale, the risk does not pass until the buyer takes over the goods.

(2) Paragraph (1) does not apply if the buyer has failed to perform the obligation to take over the goods and the non-performance is not excused under III.–3:104 (Excuse due to an impediment) in which case IV.A.–5:201 (Goods placed at buyer's disposal) applies.

(3) Except in so far as provided in the preceding paragraph, Section 2 of this Chapter does not apply to a consumer contract for sale.

(4) The parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

Section 2: Special rules

IV.A.–5:201: Goods placed at buyer's disposal

(1) If the goods are placed at the buyer's disposal and the buyer is aware of this, the risk passes to the buyer from the time when the goods should have been taken over, unless the buyer was entitled to withhold taking of delivery under III.–3:401 (Right to withhold performance of reciprocal obligation).

(2) If the goods are placed at the buyer's disposal at a place other than a place of business of the seller, the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at the buyer's disposal at that place.

Comp. 69 (2) CISG

IV.A.–5:202: Carriage of the goods

(1) This Article applies to any contract of sale which involves carriage of goods.

(2) If the seller is not bound to hand over the goods at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract.

(3) If the seller is bound to hand over the goods to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place.

(4) The fact that the seller is authorised to retain documents controlling the disposition of the goods does not affect the passing of the risk.

Comp. 67 CISG

IV.A.–5:203: Goods sold in transit

(1) This Article applies to any contract of sale which involves goods sold in transit.

(2) The risk passes to the buyer at the time the goods are handed over to the first carrier. However, if the circumstances so indicate, the risk passes to the buyer as from the time of the conclusion of the contract.

(3) If at the time of the conclusion of the contract the seller knew or could reasonably be expected to have known that the goods had been lost or damaged and did not disclose this to the buyer, the loss or damage is at the risk of the seller.

Comp. 68 CISG

CHAPTER 14: CONSUMER GOODS GUARANTEES

IV.A.–6:101: Definition of a consumer goods guarantee

- (1) *A consumer goods guarantee means any undertaking of a type mentioned in the following paragraph given to a consumer in connection with a consumer contract for the sale of goods:*
- (a) *by a producer or a person in later links of the business chain; or*
 - (b) *by the seller in addition to the seller's obligations as seller of the goods.*
- (2) *The undertaking may be that:*
- (a) *apart from misuse, mistreatment or accident the goods will remain fit for their ordinary purpose for a specified period of time, or otherwise;*
 - (b) *the goods will meet the specifications set out in the guarantee document or in associated advertising;*
or
 - (c) *subject to any conditions stated in the guarantee,*
 - (i) *the goods will be repaired or replaced;*
 - (ii) *the price paid for the goods will be reimbursed in whole or in part; or*
 - (iii) *some other remedy will be provided.*

IV.A.–6:102: Binding nature of the guarantee

- (1) *A consumer goods guarantee, whether contractual or in the form of a unilateral undertaking, is binding in favour of the first buyer, and in the case of a unilateral undertaking is so binding without acceptance notwithstanding any provision to the contrary in the guarantee document or the associated advertising.*
- (2) *If not otherwise provided in the guarantee document, the guarantee is also binding without acceptance in favour of every owner of the goods within the duration of the guarantee.*
- (3) *Any requirement in the guarantee whereby it is conditional on the fulfilment by the guarantee holder of any formal requirement, such as registration or notification of purchase, is not binding on the consumer.*

IV.A.–6:103: Guarantee document

- (1) *A person who gives a consumer goods guarantee must (unless such a document has already been provided to the buyer) provide the buyer with a guarantee document which:*
- (a) *states that the buyer has legal rights which are not affected by the guarantee;*
 - (b) *points out the advantages of the guarantee for the buyer in comparison with the conformity rules;*
 - (c) *lists all the essential particulars necessary for making claims under the guarantee, notably:*
 - *the name and address of the guarantor;*
 - *the name and address of the person to whom any notification is to be made and the procedure by which the notification is to be made;*
 - *any territorial limitations to the guarantee; and*
 - (d) *is drafted in plain, intelligible language; and*
 - (e) *is drafted in the same language as that in which the goods were offered.*
- (2) *The guarantee document must be in textual form on a durable medium and be available and accessible to the buyer.*
- (3) *The validity of the guarantee is not affected by any failure to comply with paragraphs (1) and (2), and accordingly the guarantee holder can still rely on the guarantee and require it to be honoured.*
- (4) *If the obligations under paragraphs (1) and (2) are not observed the guarantee holder may, without prejudice to any right to damages which may be available, require the guarantor to provide a guarantee document which conforms to those requirements.*

(5) The parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

IV.A.–6:104: Coverage of the guarantee

If the guarantee document does not specify otherwise:

- (a) the period of the guarantee is 5 years or the estimated life-span of the goods, whichever is shorter;*
- (b) the guarantor's obligations become effective if, for a reason other than misuse, mistreatment or accident, the goods at any time during the period of the guarantee become unfit for their ordinary purpose or cease to possess such qualities and performance capabilities as the guarantee holder may reasonably expect;*
- (c) the guarantor is obliged, if the conditions of the guarantee are satisfied, to repair or replace the goods; and*
- (d) all costs involved in invoking and performing the guarantee are to be borne by the guarantor.*

IV.A.–6:105: Guarantee limited to specific parts

A consumer goods guarantee relating only to a specific part or specific parts of the goods must clearly indicate this limitation in the guarantee document; otherwise the limitation is not binding on the consumer.

IV.A.–6:106: Exclusion or limitation of the guarantor's liability

The guarantee may exclude or limit the guarantor's liability under the guarantee for any failure of or damage to the goods caused by failure to maintain the goods in accordance with instructions, provided that the exclusion or limitation is clearly set out in the guarantee document.

IV.A.–6:107: Burden of proof

(1) Where the guarantee holder invokes a consumer goods guarantee within the period covered by the guarantee the burden of proof is on the guarantor that:

- (a) the goods met the specifications set out in the guarantee document or in associated advertisements; and*
- (b) any failure of or damage to the goods is due to misuse, mistreatment, accident, failure to maintain, or other cause for which the guarantor is not responsible.*

(2) The parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

IV.A.–6:108: Prolongation of the guarantee period

(1) If any defect or failure in the goods is remedied under the guarantee then the guarantee is prolonged for a period equal to the period during which the guarantee holder could not use the goods due to the defect or failure.

(2) The parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

CHAPTER 15: EXTINCTION AND VARIATION OF OBLIGATIONS

Section 1: Effects of performance

III.-2:114: Extinctive effect of performance

Full performance extinguishes the obligation if it is:

- (a) in accordance with the terms regulating the obligation; or*
- (b) of such a type as by law to afford the debtor a good discharge.*

III.-2:110: Imputation of performance

(1) Where a debtor has to perform several obligations of the same nature and makes a performance which does not suffice to extinguish all of the obligations, then subject to paragraph (5), the debtor may at the time of performance notify the creditor of the obligation to which the performance is to be imputed.

(2) If the debtor does not make such a notification the creditor may, within a reasonable time and by notifying the debtor, impute the performance to one of the obligations.

(3) An imputation under paragraph (2) is not effective if it is to an obligation which is not yet due, or is illegal, or is disputed.

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

- (a) the obligation which is due or is the first to fall due;*
- (b) the obligation for which the creditor has the least security;*
- (c) the obligation which is the most burdensome for the debtor;*
- (d) the obligation which has arisen first.*

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

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

Comp. 6.1.12 and 6.1.13 UPICC, 7:109 PECL

Section 2: Time and variation

III.–1:107: Time-limited rights and obligations

- (1) The terms regulating a right or obligation may provide that it is to take effect from or end at a specified time, after a specified period of time or on the occurrence of an event which is certain to occur.*
- (2) It will take effect or come to an end at the time or on the event without further steps having to be taken .*
- (3) When a contractual obligation comes to an end under this Article any restitutionary effects are regulated by the rules in Chapter 3, Section 5, Sub-section 4 (Restitution) with appropriate adaptations.*

III.–1:108: Variation or termination by agreement

- (1) A right, obligation or contractual relationship may be varied or terminated by agreement at any time.*
- (2) Where the parties do not regulate the effects of termination, then:*
 - (a) it has prospective effect only and does not affect any right to damages, or a stipulated payment, for non-performance of any obligation performance of which was due before termination;*
 - (b) it does not affect any provision for the settlement of disputes or any other provision which is to operate even after termination; and*
 - (c) in the case of a contractual obligation or relationship any restitutionary effects are regulated by the rules in Chapter 16, Section 6, Sub-section 4 (Restitution) with appropriate adaptations.*

For (1), Comp. 3.2 and 5.1.9 UPICC

III.–1:109: Variation or termination by notice

- (1) A right, obligation or contractual relationship may be varied or terminated by notice by either party where this is provided for by the terms regulating it.*
- (2) Where, in a case involving continuous or periodic performance of a contractual obligation, the terms of the contract do not say when the contractual relationship is to end or say that it will never end, it may be terminated by either party by giving a reasonable period of notice. If the performance or counter-performance is to be made at regular intervals the reasonable period of notice is not less than the interval between performances or, if longer, between counter-performances.*
- (3) Where the parties do not regulate the effects of termination, then:*
 - (a) it has prospective effect only and does not affect any right to damages, or a stipulated payment, for non-performance of any obligation performance of which was due before termination;*
 - (b) it does not affect any provision for the settlement of disputes or any other provision which is to operate even after termination; and*

*(c) in the case of a contractual obligation or relationship any restitutionary effects are regulated by the rules in in **Chapter 16, Section 6, Sub-section 4 (Restitution)** with appropriate adaptations.*

For (2), Comp. 5.1.8 UPICC, 6:109 PECL

III.–1:110: Variation or termination by court on a change of circumstances

(1) An obligation must be performed even if performance has become more onerous, whether because the cost of performance has increased or because the value of what is to be received in return has diminished.

(2) If, however, performance of a contractual obligation or of an obligation arising from a unilateral juridical act becomes so onerous because of an exceptional change of circumstances that it would be manifestly unjust to hold the debtor to the obligation a court may:

(a) vary the obligation in order to make it reasonable and equitable in the new circumstances; or

(b) terminate the obligation at a date and on terms to be determined by the court.

(3) Paragraph (2) applies only if:

(a) the change of circumstances occurred after the time when the obligation was incurred,

(b) the debtor did not at that time take into account, and could not reasonably be expected to have taken into account, the possibility or scale of that change of circumstances;

(c) the debtor did not assume, and cannot reasonably be regarded as having assumed, the risk of that change of circumstances; and

(d) the debtor has attempted, reasonably and in good faith, to achieve by negotiation a reasonable and equitable adjustment of the terms regulating the obligation.

Comp. 6.2.1 to 6.2.3 UPICC, 6:111 PECL

III.–1:111: Tacit prolongation

Where a contract provides for continuous or repeated performance of obligations for a definite period and the obligations continue to be performed by both parties after that period has expired, the contract becomes a contract for an indefinite period, unless the circumstances are inconsistent with the tacit consent of the parties to such prolongation.

Section 3: Set-off

III.–6:101: Definition and scope

(1) “Set-off” is the process by which a person may use a right to performance held

against another person to extinguish in whole or in part an obligation owed to that person.

(2) This Chapter does not apply to set-off in insolvency.

For (1), comp. 13:106 PECL

III.–6:102: Requirements for set-off

If two parties owe each other obligations of the same kind, either party may set off that party's right against the other party's right, if and to the extent that, at the time of set-off, the first party:

- (a) the performance of the first party is due or, even if it is not due, the first party can oblige the other party to accept performance;*
- (b) the performance of the other party is due; and*
- (c) each party has authority to dispose of that party's right for the purpose of the set-off.*

Comp. 8.1 (1) UPICC, 13:101 PECL

III.–6:103: Unascertained rights

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

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

Comp. 8.1 (2) UPICC, 13:102 PECL

III.–6:104: Foreign currency set-off

Where parties owe each other money in different currencies, each party may set off that party's right against the other party's right, unless the parties have agreed that the party declaring set-off is to pay exclusively in a specified currency.

Comp. 8.2 UPICC, 13:103 PECL

III.–6:105: Set-off by notice

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

Comp. 8.3 UPICC, 13:104 PECL

III.–6:106: Two or more rights and obligations

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

(2) Where the party giving notice of set-off has to perform two or more obligations towards the other party, the rules on imputation of performance apply with appropriate adaptations.

Comp. 8.4 UPICC, 13:105 PECL

III.–6:107: Effect of set-off

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

Comp. 8.5 UPICC, 13:106 PECL

III.–6:108: Exclusion of right of set-off

Set-off cannot be effected:

- (a) where it is excluded by agreement;*
- (b) against a right to the extent that that right is not capable of attachment; and*
- (c) against a right arising from an intentional wrongful act.*

Comp. 13:107 PECL

Section 4: Merger of debts

III.–6:201: Extinction of obligations by merger

(1) An obligation is extinguished if the same person becomes debtor and creditor in the same capacity.

(2) Paragraph (1) does not, however, apply if the effect would be to deprive a third person of a right.

CHAPTER 16: REMEDIES FOR NON-PERFORMANCE

Section 1: General

III.-3:101: Remedies available

- (1) If an obligation is not performed by the debtor and the non-performance is not excused, the creditor may resort to any of the remedies set out in this Chapter.*
- (2) If the debtor's non-performance is excused, the creditor may resort to any of those remedies except enforcing specific performance and damages.*
- (3) The creditor may not resort to any of those remedies to the extent that the creditor caused the debtor's non-performance.*

Comp. 80 CISG, 7.1.2 & 7.4.1. UPICC, 8:101 PECL, for (3) 8:102 AP, for (2) 8:405 AP

IV.A.-4:101: Limits on derogation from remedies for non-conformity in a consumer contract for sale

In a consumer contract for sale, any contractual term or agreement concluded with the seller before a lack of conformity is brought to the seller's attention which directly or indirectly waives or restricts the remedies of the buyer provided in (this Chapter) in respect of the lack of conformity is not binding on the consumer.

III.-3:102: Cumulation of remedies

Remedies which are not incompatible may be cumulated. In particular, a creditor is not deprived of the right to damages by resorting to any other remedy.

.Comp. 45 (2) and 61 (2) CISG, 7.2.5 & 7.4.1. UPICC, 8:102 PECL

III.-3:103: Notice fixing additional period for performance

- (1) In any case of non-performance of an obligation the creditor may by notice to the debtor allow an additional period of time for performance.*
- (2) During the additional period the creditor may withhold performance of the creditor's reciprocal obligations and may claim damages, but may not resort to any other remedy.*
- (3) If the creditor receives notice from the debtor that the debtor will not perform within that period, or if upon expiry of that period due performance has not been made, the creditor may resort to any available remedy.*

Comp. 47 and 63 CISG, 7.1.5 UPICC, 8:106 PECL

III.–3:104: Excuse due to an impediment

(1) A debtor's non-performance of an obligation is excused if it is due to an impediment beyond the debtor's control and if the debtor could not reasonably be expected to have avoided or overcome the impediment or its consequences.

(2) Where the obligation arose out of a contract or other juridical act, non-performance is not excused if the debtor could reasonably be expected to have taken the impediment into account at the time when the obligation was incurred.

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

*(4) Where the excusing impediment is permanent the obligation is extinguished. Any reciprocal obligation is also extinguished. In the case of contractual obligations any restitutionary effects of extinction are regulated by the rules in **Section 6, Sub-section 4 (Restitution) of this Chapter** with appropriate adaptations.*

(5) The debtor must ensure that notice of the impediment and of its effect on the ability to perform reaches the creditor within a reasonable time after the debtor knew or could reasonably be expected to have known of these circumstances. The creditor is entitled to damages for any loss resulting from the non-receipt of such notice.

Comp. 79 CISG, 7.1.7 UPICC, 8:108 and 9:303 (4) PECL

III.–3:105: Term excluding or restricting remedies

(1) A term of a contract or other juridical act which purports to exclude or restrict liability to pay damages for personal injury (including fatal injury) caused intentionally or by gross negligence is void.

(2) A term excluding or restricting a remedy for non-performance of an obligation, even if valid and otherwise effective, having regard in particular to the rules on unfair contract terms in Chapter 9, Section 4, may nevertheless not be invoked if it would be contrary to good faith and fair dealing to do so.

Comp. 7.1.6 UPICC, 8:109 PECL

III.–3:106: Notices relating to non-performance

(1) If the creditor gives notice to the debtor because of the debtor's non-performance of an obligation or because such non-performance is anticipated, 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.

(2) The notice has effect from the time at which it would have arrived in normal circumstances

Comp. 27 CISG, 1:303 (4) PECL

Section 2: Requirements of examination and notification

IV.A.-4:301: Examination of the goods

(1) The buyer should examine the goods, or cause them to be examined, within as short a period as is reasonable in the circumstances. Failure to do so may result in the buyer losing, under III.-3:107 (Failure to notify non-conformity) as supplemented by IV.A.-4:302 (Notification of lack of conformity), the right to rely on the lack of conformity.

(2) If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.

(3) If the goods are redirected in transit, or redispached by the buyer before the buyer has had a reasonable opportunity to examine them, and at the time of the conclusion of the contract the seller knew or could reasonably be expected to have known of the possibility of such redirection or redispach, examination may be deferred until after the goods have arrived at the new destination.

(4) This Article does not apply to a consumer contract for sale.

Comp. 38 CISG

III.-3:107: Failure to notify non-conformity

(1) If, in the case of an obligation to supply goods, the debtor supplies goods which are not in conformity with the terms regulating the obligation, the creditor may not rely on the lack of conformity unless the creditor gives notice to the debtor within a reasonable time specifying the nature of the lack of conformity.

(2) The reasonable time runs from the time when the goods are supplied or from the time, if it is later, when the creditor discovered or could reasonably be expected to have discovered the non-conformity.

(3) The debtor is not entitled to rely on paragraph (1) if the failure relates to facts which the debtor knew or could reasonably be expected to have known and which the debtor did not disclose to the creditor.

(4) This Article does not apply where the creditor is a consumer.

Comp. 39 (1) and 43 (1) CISG

IV.A.-4:302: Notification of lack of conformity (in a contract between two businesses)

(1) In a contract between two businesses the rule in III.-3:107 (Failure to notify non-conformity) requiring notification of a lack of conformity within a reasonable time is supplemented by the following rules.

(2) The buyer in any event loses the right to rely on a lack of conformity if the buyer does not give the seller notice of the lack of conformity at the latest within two years from the time at which the goods were actually handed over to the buyer in accordance with the contract.

(3) If the parties have agreed that the goods must remain fit for a particular purpose or for their ordinary purpose during a fixed period of time, the period for giving notice under paragraph (2) does not expire before the end of the agreed period.

(4) Paragraph (2) does not apply in respect of third party claims or rights pursuant to IV.A.-2:305 (Third party rights or claims in general) and IV.A.-2:306 (Third party rights or claims based on industrial property or other intellectual property).

Comp. 39 (2) and 43 (2) CISG

IV.A.-4:303: Notification of partial delivery

The buyer does not have to notify the seller that not all the goods have been delivered, if the buyer has reason to believe that the remaining goods will be delivered.

IV.A.-4:304: Seller's knowledge of lack of conformity

The seller is not entitled to rely on the provisions of IV.A.-4:301 (Examination of the goods) or IV.A.-4:302 (Notification of lack of conformity) if the lack of conformity relates to facts of which the seller knew or could reasonably be expected to have known and which the seller did not disclose to the buyer.

Comp. 40 CISG

Section 3: Cure by debtor of non-conforming performance

III.-3:201: Scope

This Section applies where a debtor's performance does not conform to the terms regulating the obligation.

III.-3:202: Cure by debtor: general rules

(1) The debtor may make a new and conforming tender if that can be done within the time allowed for performance.

(2) If the debtor cannot make a new and conforming tender within the time allowed for performance but, promptly after being notified of the lack of conformity, offers to cure it within a reasonable time and at the debtor's own expense, the creditor may not pursue any remedy for non-performance, other than withholding performance, before allowing the debtor a reasonable period in which to attempt to cure the non-conformity.

(3) Paragraph (2) is subject to the provisions of the following Article.

Comp. 48 CISG, 7.1.4 UPICC, 8:104 PECL

III.-3:203: When creditor need not allow debtor an opportunity to cure

The creditor need not, under paragraph (2) of the preceding Article, allow the debtor a period in which to attempt cure if:

- (a) failure to perform a contractual obligation within the time allowed for performance amounts to a fundamental non-performance;*
- (b) the creditor has reason to believe that the debtor's performance was made with knowledge of the non-conformity and was not in accordance with good faith and fair dealing;*

- (c) the creditor has reason to believe that the debtor will be unable to effect the cure within a reasonable time and without significant inconvenience to the creditor or other prejudice to the creditor's legitimate interests; or*
- (d) cure would be inappropriate in the circumstances.*

For (a), comp. 8:104 PECL

III.-3:204: Consequences of allowing debtor opportunity to cure

- (1) During the period allowed for cure the creditor may withhold performance of the creditor's reciprocal obligations, but may not resort to any other remedy.*
- (2) If the debtor fails to effect cure within the time allowed, the creditor may resort to any available remedy.*
- (3) Notwithstanding cure, the creditor retains the right to damages for any loss caused by the debtor's initial or subsequent non-performance or by the process of effecting cure.*

III-3:205 Return of replaced item

- (1) Where the debtor has, whether voluntarily or in compliance with an order under III. – 3:302 (Enforcement of non-monetary obligations), remedied a non-conforming performance by replacement, the debtor has a right and an obligation to take back the replaced item at the debtor's expense.*
- (2) The creditor is not liable to pay for any use made of the replaced item in the period prior to the replacement.*

Comp. 8B-05 AP

Section 4: Right to enforce performance

III.-3:301: Monetary obligations

- (1) The creditor is entitled to recover money payment of which is due.*
- (2) Where the creditor has not yet performed the reciprocal obligation for which payment will be due and it is clear that the debtor in the monetary obligation will be unwilling to receive performance, the creditor may nonetheless proceed with performance and may recover payment unless:
 - (a) the creditor could have made a reasonable substitute transaction without significant effort or expense; or*
 - (b) performance would be unreasonable in the circumstances.**

Comp. 7.2.1 UPICC, 9:101 PECL

III.–3:302: Non-monetary obligations

- (1) The creditor is entitled to enforce specific performance of an obligation other than one to pay money.*
- (2) Specific performance includes the remedying free of charge of a performance which is not in conformity with the terms regulating the obligation.*
- (3) Specific performance cannot, however, be enforced where:
 - (a) performance would be unlawful or impossible;*
 - (b) performance would be unreasonably burdensome or expensive; or*
 - (c) performance would be of such a personal character that it would be unreasonable to enforce it.**
- (4) The creditor loses the right to enforce specific performance if performance is not requested within a reasonable time after the creditor has become, or could reasonably be expected to have become, aware of the non-performance.*
- (5) The creditor cannot recover damages for loss or a stipulated payment for non-performance to the extent that the creditor has increased the loss or the amount of the payment by insisting unreasonably on specific performance in circumstances where the creditor could have made a reasonable substitute transaction without significant effort or expense.*

Comp. 28 and 46 CISG, 7.2.2 and 7.2.3 UPICC, 9:102 PECL

III.–3:303: Damages not precluded

The fact that a right to enforce specific performance is excluded under the preceding Article does not preclude a claim for damages.

Comp. 9:103 PECL

Section 5: Withholding performance

III.–3:401: Right to withhold performance of reciprocal obligation

- (1) A creditor who is to perform a reciprocal obligation at the same time as, or after, the debtor performs has a right to withhold performance of the reciprocal obligation until the debtor has tendered performance or has performed.*
- (2) A creditor who is to perform a reciprocal obligation before the debtor performs and who reasonably believes that there will be non-performance by the debtor when the debtor's performance becomes due may withhold performance of the reciprocal obligation for as long as the reasonable belief continues. However, the right to withhold performance is lost if the debtor gives an adequate assurance of due performance.*

(3) A creditor who withholds performance in the situation mentioned in paragraph (2) has a duty to give notice of that fact to the debtor as soon as is reasonably practicable and is liable for any loss caused to the debtor by a breach of that duty.

(4) The performance which may be withheld under this Article is the whole or part of the performance as may be reasonable in the circumstances.

Comp. 71 CISG, 7.1.3. UPICC, 9:201 (1) and (2) and 8:105 (1) PECL

Section 6: Termination

III.-3:501: Definition

(1) In this Section “termination” means the termination of the contractual relationship in whole or in part and “terminate” has a corresponding meaning.

Sub-section 1: Grounds for termination

III.-3:502: Termination for fundamental non-performance

(1) A creditor may terminate if the debtor’s non-performance of a contractual obligation is fundamental.

(2) A non-performance of a contractual obligation is fundamental if:

(a) it substantially deprives the creditor of what the creditor was entitled to expect under the contract, as applied to the whole or relevant part of the performance, unless at the time of conclusion of the contract the debtor did not foresee and could not reasonably be expected to have foreseen that result; or

(b) it is intentional or reckless and gives the creditor reason to believe that the debtor’s future performance cannot be relied on.

(1) Comp. 49 (1) and 64 (1) CISG; (2) Comp. 25 CISG, 7.3.1 UPICC, 8:103 and 9:301 (1) PECL, 8:301 AP

III.-3:503: Termination after notice fixing additional time for performance

(1) A creditor may terminate in a case of delay in performance of a contractual obligation which is not in itself fundamental if the creditor gives a notice fixing an additional period of time of reasonable length for performance and the debtor does not perform within that period.

(2) If the period fixed is unreasonably short, the creditor may terminate only after a reasonable period from the time of the notice.

Comp. 49 (1) and 64 (1) CISG, 7.1.5 and 7.3.1 (3) UPICC, 8:106 (3) PECL, implicit in 8:301 AP

III.–3:504: Termination for anticipated non-performance

A creditor may terminate before performance of a contractual obligation is due if the debtor has declared that there will be a non-performance of the obligation, or it is otherwise clear that there will be such a non-performance, and if the non-performance would have been fundamental.

Comp. 72 CISG, 7.3.3. UPICC, 9:304 PECL

III.–3:505: Termination for inadequate assurance of performance

A creditor who reasonably believes that there will be a fundamental non-performance of a contractual obligation by the debtor may terminate if the creditor demands an adequate assurance of due performance and no such assurance is provided within a reasonable time.

Comp. 7.3.4 UPICC, 8:105 (2) PECL

IV.A.–4:202: Termination by consumer for lack of conformity.

*In a consumer contract for sale, the buyer may terminate the contractual relationship for non-performance under **Section 6** (Termination) in the case of any lack of conformity, unless the lack of conformity is minor.*

Comp. 8:301 AP

Sub-section 2: Scope, exercise and loss of right to terminate

III.–3:506: Scope of right to terminate

(1) Where the debtor's obligations under the contract are not divisible the creditor may only terminate the contractual relationship as a whole.

(2) Where the debtor's obligations under the contract are to be performed in separate parts or are otherwise divisible, then:

(a) if there is a ground for termination under this Section of a part to which a counter-performance can be apportioned, the creditor may terminate the contractual relationship so far as it relates to that part;

(b) the creditor may terminate the contractual relationship as a whole only if the creditor cannot reasonably be expected to accept performance of the other parts or there is a ground for termination in relation to the contractual relationship as a whole.

Comp. 51 and 73 CISG, 7.3.6 (2) UPICC, 9:302 (PECL), 8:303 (1) AP

III.–3:507: Notice of termination

- (1) A right to terminate under this Section is exercised by notice to the debtor.*
- (2) Where a notice under III.–3:503 (Termination after notice fixing additional time for performance) provides for automatic termination if the debtor does not perform within the period fixed by the notice, termination takes effect after that period or a reasonable length of time from the giving of notice (whichever is longer) without further notice.*

Comp. (1) with 26 CISG, 7.3.1. UPICC, 9:303 (1) and 8:106 (3) PECL

III.–3:508: Loss of right to terminate

- (1) If performance has been tendered late or a tendered performance otherwise does not conform to the contract the creditor loses the right to terminate under this Section unless notice of termination is given within a reasonable time.*
- (2) Where the creditor has given the debtor a period of time to cure the non-performance under III.–3:202 (Cure by debtor: general rules) the time mentioned in paragraph (1) begins to run from the expiry of that period. In other cases that time begins to run from the time when the creditor has become, or could reasonably be expected to have become, aware of the tender or the non-conformity.*
- (3) A creditor loses a right to terminate by notice under III.–3:503 (Termination after notice fixing additional time for performance), III.–3:504 (Termination for anticipated non-performance) or III.–3:505 (Termination for inadequate assurance of performance) unless the creditor gives notice of termination within a reasonable time after the right has arisen.*

Comp. 49 (2) and 64 (2) CISG, 7.3.2 UPICC, 9:303 (2) and (3) PECL

Sub-section 3: Effects of termination

III.–3:509: Effect on obligations under the contract

- (1) On termination under this Section, the outstanding obligations or relevant part of the outstanding obligations of the parties under the contract come to an end.*
- (2) Termination does not, however, affect any provision of the contract for the settlement of disputes or other provision which is to operate even after termination.*
- (3) A creditor who terminates under this Section retains existing rights to damages or a stipulated sum for non-performance and in addition has the same right to damages or a stipulated payment for non-performance as the creditor would have had if there had been non-performance of the now extinguished obligations of the debtor. In relation to*

such extinguished obligations the creditor is not regarded as having caused or contributed to the loss merely by exercising the right to terminate.

Comp. 81 (1) CISG, 7.3.5 UPICC, 9:205 (1) and (2) PECL, 8:303 (1) AP

Sub-section 4: Restitution

III.–3:510: Restitution of benefits received by performance

(1) On termination under this Section a party (the recipient) who has received any benefit by the other's performance of obligations under the contract is obliged to return it. Where both parties have obligations to return, the obligations are reciprocal.

(2) If the performance was a payment of money, the amount received is to be repaid.

(3) To the extent that the benefit (not being money) is transferable, it is to be returned by transferring it. However, if a transfer would cause unreasonable effort or expense, the benefit may be returned by paying its value.

(4) To the extent that the benefit is not transferable it is to be returned by paying its value in accordance with III.–3:513(Payment of value of benefit).

(5) The obligation to return a benefit extends to any natural or legal fruits received from the benefit.

Comp. 81 (2) CISG, 7.3.6 (1) UPICC, 9:307 to 9:309 PECL, 8:303 (2) AP

III.–3:511: When restitution not required

(1) There is no obligation to make restitution under this Sub-section to the extent that conforming performance by one party has been met by conforming performance by the other.

(2) The terminating party may elect to treat performance as non-conforming if what was received by that party is of no, or fundamentally reduced, value to that party because of the other party's non-performance.

(3) Restitution under this Sub-section is not required where the contract was gratuitous.

For (2), comp. 9:306 PECL

III.–3:512: Payment of value of benefit

(1) The recipient is obliged to:

(a) pay the value (at the time of performance) of a benefit which is not transferable or which ceases to be transferable before the time when it is to be returned; and

(b) pay recompense for any reduction in the value of a returnable benefit as a result of a change in the condition of the benefit between the time of receipt and the time when it is to be returned.

(2) Where there was an agreed price the value of the benefit is that proportion of the price which the value of the actual performance bears to the value of the promised performance. Where no price was agreed the value of the benefit is the sum of money which a willing and capable provider and a willing and capable recipient, knowing of any non-conformity, would lawfully have agreed.

(3) The recipient's liability to pay the value of a benefit is reduced to the extent that as a result of a non-performance of an obligation owed by the other party to the recipient:

(a) the benefit cannot be returned in essentially the same condition as when it was received; or

(b) the recipient is compelled without compensation either to dispose of it or to sustain a disadvantage in order to preserve it.

(4) The recipient's liability to pay the value of a benefit is likewise reduced to the extent that it cannot be returned in the same condition as when it was received as a result of conduct of the recipient in the reasonable, but mistaken, belief that there was no non-conformity.

Comp. 82 CISG, 9:309 PECL

III.-3:513: Use and improvements

(1) The recipient is obliged to pay a reasonable amount for any use which the recipient makes of the benefit except in so far as the recipient is liable under III.-3:513 (Payment of value of benefit) paragraph (1) in respect of that use.

(2) A recipient who has improved a benefit which the recipient is obliged under this Section to return has a right to payment of the value of improvements if the other party can readily obtain that value by dealing with the benefit unless:

(a) the improvement was a non-performance of an obligation owed by the recipient to the other party; or

(b) the recipient made the improvement when the recipient knew or could reasonably be expected to know that the benefit would have to be returned.

Comp. 84 CISG

III.-3:514: Liabilities arising after time when return due

(1) The recipient is obliged to:

(a) pay the value (at the time of performance) of a benefit which ceases to be transferable after the time when its return was due; and

(b) pay recompense for any reduction in the value of a returnable benefit as a result of a change in the condition of the benefit after the time when its return was due.

(2) If the benefit is disposed of after the time when return was due, the value to be paid is the value of any proceeds, if this is greater.

(3) Other liabilities arising from non-performance of an obligation to return a benefit are unaffected.

Section 7: Price reduction

III.-3:601: Right to reduce price

(1) A creditor who accepts a performance not conforming to the terms regulating the obligation may reduce the price. The reduction is to be proportionate to the decrease in the value of what was received by virtue of the performance at the time it was made compared to the value of what would have been received by virtue of a conforming performance.

(2) A creditor 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 debtor.

(3) A creditor who reduces the price cannot also recover damages for the loss thereby compensated but remains entitled to damages for any further loss suffered.

(4) This Article applies with appropriate adaptations to a reciprocal obligation of the creditor other than an obligation to pay a price.

Comp. 50 CISG, 9:401 PECL

Section 8: Damages and interest

III.-3:701: Right to damages

(1) The creditor is entitled to damages for loss caused by the debtor's non-performance of an obligation, unless the non-performance is excused.

(2) The loss for which damages are recoverable includes future loss which is reasonably likely to occur.

(3) "Loss" includes economic and non-economic loss. "Economic loss" includes loss of income or profit, burdens incurred and a reduction in the value of property. "Non-economic loss" includes pain and suffering and impairment of the quality of life.

(1) Comp. 7.4.1 UPICC; (2) comp. 7.4.3 UPICC, (3) comp. 7.4.2. (2) UPICC, 9:501 PECL, 8:410 AP

III.–3:702: General measure of damages

The general measure of damages for loss caused by non-performance of an obligation is such sum as will put the creditor as nearly as possible into the position in which the creditor would have been if the obligation had been duly performed. Such damages cover loss which the creditor has suffered and gain of which the creditor has been deprived.

Comp. 74 CISG, 7.4.2 (1) UPICC, 9:502 PECL, 8:402 AP

IV.A.–4:203: Limitation of liability for damages of non-business sellers

(1) If the seller is a natural person acting for purposes not related to that person's trade, business or profession, the buyer is not entitled to claim damages for lack of conformity exceeding the contract price.

(2) The seller is not entitled to rely on paragraph (1) if the lack of conformity relates to facts of which the seller, at the time when the risk passed to the buyer, knew or could reasonably be expected to have known and which the seller did not disclose to the buyer before that time.

III.–3:703: Foreseeability

The debtor in an obligation which arises from a contract or other juridical act is liable only for loss which the debtor foresaw or could reasonably be expected to have foreseen at the time when the obligation was incurred as a likely result of the non-performance, unless the non-performance was intentional, reckless or grossly negligent.

Comp. 7.4.4 UPICC, 9:503 PECL

III.–3:704: Loss attributable to creditor

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

Comp. 7.4.7 UPICC, 9:504 PECL, 8:403 AP

III.–3:705: Reduction of loss

(1) The debtor is not liable for loss suffered by the creditor to the extent that the creditor could have reduced the loss by taking reasonable steps.

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

Comp. 77 CISG, 7.4.8 UPICC, 9:505 PECL

III.-3:706: Substitute transaction

A creditor who has terminated a contractual relationship in whole or in part under Section 5 and has made a substitute transaction within a reasonable time and in a reasonable manner may, in so far as entitled to damages, recover the difference between the price and the substitute transaction price as well as damages for any further loss.

Comp. 75 CISG, 7.4.5 UPICC, 9:506 PECL

III.-3:707: Current price

Where the creditor has terminated a contractual relationship in whole or in part under Section 5 and has not made a substitute transaction but there is a current price for the performance, the creditor may, in so far as entitled to damages, recover the difference between the contract price and the price current at the time of termination as well as damages for any further loss.

Comp. 76 CISG, 7.4.6 UPICC, 9:507 PECL

III.-3:708: Interest on late payment

(1) If payment of a sum of money is delayed, whether or not the non-performance is excused, the creditor is entitled to interest on that sum from the time when payment is due to the time of payment at the average commercial bank short-term lending rate to prime borrowers prevailing for the contractual currency of payment at the place where payment is due.

(2) The creditor may in addition recover damages for any further loss.

Comp. 78 CISG, 7.4.9 and 7.4.10 UPICC, 9:508 PECL

III.-3:709: When interest to be added to capital

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

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

Comp. 17:101 PECL

III.–3:710: Interest in commercial contracts

*(1) If a business delays the payment of a price due under a contract for the supply of **goods** without being excused under III.–3:104 (Excuse due to an impediment), interest is due at the rate specified in paragraph (4), unless a higher interest rate is applicable.*

(2) Interest at the rate specified in paragraph (4) starts to run on the day which follows the date or the end of the period for payment provided in the contract. If there is no such date or period, interest at that rate starts to run:

(a) 30 days after the date when the debtor receives the invoice or an equivalent request for payment; or

*(b) 30 days after the date of receipt of the **goods**, if the date under (a) is earlier or uncertain, or if it is uncertain whether the debtor has received an invoice or equivalent request for payment.*

*(3) If conformity of **goods** to the contract is to be ascertained by way of acceptance or verification, the 30 day period under paragraph (2) (b) starts to run on the date of acceptance or verification.*

(4) The interest rate for delayed payment is the interest rate applied by the European Central Bank to its most recent main refinancing operation carried out before the first calendar day of the half-year in question ("the reference rate"), plus seven percentage points, unless otherwise specified in the contract. For the currency of a Member State which is not participating in the third stage of economic and monetary union, the reference rate is the equivalent rate set by its national central bank.

(5) The creditor may in addition recover damages for any further loss.

Comp. 8:406 AP

III.–3:711: Unfair terms relating to interest

(1) A term whereby a business pays interest from a date later than that specified in the preceding Article paragraph (2) (a) and (b) and paragraph (3), or at a rate lower than that specified in paragraph (4), is not binding in so far as this would be grossly unfair to the creditor, taking into account all circumstances, including good commercial practice and the nature of the goods or services.

*(2) A term whereby a debtor is allowed to pay the price for **goods** later than the time when interest starts to run under the preceding Article paragraph (2)(a) and (b) and paragraph (3) does not deprive the creditor of interest to the extent that this would be unfair.*

(3) Something is unfair for the purposes of this Article if it grossly deviates from good commercial practice, contrary to good faith and fair dealing.

Comp. 8:407 AP

III.–3:712: Stipulated payment for non-performance

(1) Where the terms regulating an obligation provide that a debtor who fails to perform the obligation is to pay a specified sum to the creditor for such non-performance, the creditor is entitled to that sum irrespective of the actual loss.

(2) However, despite any provision to the contrary, the sum so specified in a contract or other juridical act 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.

Comp. 7.4.13 UPICC, 9:509 PECL

III.-3:713: Currency by which damages to be measured

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

Comp. 7.4.12 UPICC, 9:510 PECL

CHAPTER 17: PLURALITY OF DEBTORS AND CREDITORS

Section 1: Plurality of debtors

III.-4:101: Scope of Section

This Section applies where two or more debtors are bound to perform one obligation.

III.-4:102: Solidary, divided and joint obligations

(1) An obligation is solidary when each debtor is bound to perform the obligation in full and the creditor may require performance from any of them until full performance has been received.

(2) An obligation is divided when each debtor is bound to perform only part of the obligation and the creditor may claim from each debtor only performance of that debtor's part.

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

Comp. 10:101 PECL

III.-4:103: When different types of obligation arise

(1) Whether an obligation is solidary, divided or joint depends on the terms regulating the obligation.

(2) The default rule is that the liability of two or more debtors to perform the same obligation is solidary. This applies in particular where two or more persons are liable for the same damage.

(3) Incidental differences in the debtors' liabilities do not prevent solidarity.

Comp. 10:102 PECL

III.-4:104: Liability under divided obligations

Debtors bound by a divided obligation are liable in equal shares.

Comp. 10:103 PECL

III.–4:105: Joint obligations: special rule when money claimed for non-performance

Notwithstanding III.–4:102 (Solidary, divided and joint obligations) paragraph (3), when money is claimed for non-performance of a joint obligation, the debtors have solidary liability for payment to the creditor.

Comp. 10:104 PECL

III.–4:106: Apportionment between solidary debtors

(1) As between themselves, solidary debtors are liable in equal shares.

(2) If two or more debtors have solidary liability for the same damage, their share of liability as between themselves is equal unless different shares of liability are more appropriate having regard to all the circumstances of the case and in particular to fault or to the extent to which a source of danger for which one of them was responsible contributed to the occurrence or extent of the damage.

Comp. 10:105 PECL

III.–4:107: Recourse between solidary debtors

(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.

(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 any supporting security rights, to recover the excess from any of the other debtors to the extent of each debtor's unperformed share.

(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.

Comp. 10:106 PECL

III.–4:108: Performance, set-off and merger in solidary obligations

(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.

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

Comp. 10:107 PECL

III.–4:109: Release or settlement in solidary obligations

(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.

(2) 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 III.–4:107 (Recourse between solidary debtors) paragraph (3).

(3) When the debtors have solidary liability for the same damage the discharge under paragraph (1) extends only so far as is necessary to prevent the creditor from recovering more than full reparation and the other debtors retain their rights of recourse against the released or settling debtor to the extent of that debtor's unperformed share.

Comp. 10:108 PECL

III.–4:110: Effect of judgment in solidary obligations

A decision by a court as to the liability to the creditor of 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 III.–4:107 (Recourse between solidary debtors).

Comp. 10:109 PECL

III.–4:111: Prescription in solidary obligations

Prescription of the creditor's right to performance 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 III.–4:107 (Recourse between solidary debtors).

Comp. 10:110 PECL

III.–4:112: Opposability of other defences in solidary obligations

(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.

(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.

Comp. 10:111 PECL

Section 2: Plurality of creditors

III.–4:201: Scope of Section

This Section applies where two or more creditors have a right to performance under one obligation.

III.–4:202: Solidary, divided and joint rights

(1) A right to performance is solidary when any of the creditors may require full performance from the debtor and the debtor may perform to any of the creditors.

(2) A right to performance is divided when each creditor may require performance only of that creditor's share and the debtor owes each creditor only that creditor's share.

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

Comp. 10:201 PECL

III.–4:203: When different types of right arise

(1) Whether a right to performance is solidary, divided or communal depends on the terms regulating right.

(2) The default rule is that the right of co-creditors is divided.

III.–4:204: Apportionment in cases of divided rights

Creditors whose rights are divided are entitled to equal shares.

Comp. 10:202 PECL

III.–4:205: Difficulties of performing in cases of joint rights

If one of the creditors who have joint rights to performance refuses to accept, or is unable to receive, the performance, the debtor may obtain discharge from the obligation by depositing the property or money with a third party according to III.–2:111 (Property not accepted) or III.–2:112 (Money not accepted).

Comp. 10:203 PECL

III.-4:206: Apportionment in cases of solidary rights

(1) Solidary creditors are entitled to equal shares.

(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.

Comp. 10:204 PECL

III.-4:207: Regime of solidary rights

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

(2) The rules of III.-4:108 (Performance, set-off and merger in solidary obligations), III.-4:110 (Effect of judgment in solidary obligations), III.-4:111 (Prescription in solidary obligations) and III.-4:112 (Opposability of other defences in solidary obligations) paragraph (1) apply, with appropriate adaptations, to solidary rights to performance.

Comp. 10:205 PECL

CHAPTER 18: CHANGE OF PARTIES

Section 1: Assignment of rights

Sub-section 1: General

III.-5:101: Scope of Section

This Section applies to the assignment, by a contract or other juridical act, of a right to performance of an obligation (arising under these rules)

(...)

Comp. 11:101 (1) to (3) PECL

III.-5:102: Definitions

(1) An “assignment” of a right is the transfer of the right from one person (the “assignor”) to another person (the “assignee”).

(2) An “act of assignment” is a contract or other juridical act which is intended to effect a transfer of the right.

(3) Where part of a right is assigned, any reference in this Section to a right includes a reference to the assigned part of the right.

Comp. 9.1.1 UPICC

III.-5:103: Priority of provisions on proprietary securities and trusts

(1) In relation to assignments for purposes of security, the provisions on Property Law and the law of Proprietary Security apply and have priority over the provisions in this Chapter.

(2) In relation to assignments for purposes of a trust, or to or from a trust, the provisions of Trust law apply and have priority over the provisions in this Chapter.

Comp. 11:101 (4) and (5) PECL

Sub-section 2: Requirements for assignment

III.–5:104: Basic requirements

- (1) The requirements for an assignment of a right to performance are that:*
- (a) the right exists;*
 - (b) the right is assignable;*
 - (c) the person purporting to assign the right has the right or authority to transfer it.*
 - (d) the assignee is entitled as against the assignor to the transfer by virtue of a contract or other juridical act, a court order or a rule of law; and*
 - (e) there is a valid act of assignment of the right.*
- (2) The entitlement referred to in paragraph (1)(d) need not precede the act of assignment.*
- (3) The same contract or other juridical act may operate as the conferment of entitlement for the purposes of paragraph (1)(d) and as the act of assignment for the purposes of paragraph (1)(e). Unless it provides otherwise a contract or other juridical act containing an undertaking to assign is regarded as being itself an act of assignment.*
- (4) Neither notice to the debtor nor the consent of the debtor to the assignment is required.*

For (4), comp. 11:104 PECL

III.–5:105: Assignability: general rule

- (1) All rights to performance are assignable except where otherwise provided by law.*
- (2) A right to performance which is by law accessory to another right is not assignable separately from that right.*

For (1), comp. 11:102 (1) PECL

III.–5:106: Future and unspecified rights

- (1) A future right to performance may be the subject of an act of assignment but the transfer of the right depends on its coming into existence and being identifiable as the right to which the act of assignment relates.*
- (2) A number of rights to performance may be assigned without individual specification if, at the time when the assignment is to take place in relation to them, they are identifiable as rights to which the act of assignment relates.*

Comp. 9.1.5 and 9.1.6 UPICC, 11:102 (2) PECL

III.-5:107: Assignability in part

- (1) A right to performance of a monetary obligation may be assigned in part.*
- (2) A right to performance of a non-monetary obligation may be assigned in part only if:
 - (a) the debtor consents to the assignment; or*
 - (b) the right is divisible and the assignment does not render the obligation significantly more burdensome.**
- (3) Where a right is assigned in part the assignor is liable to the debtor for any increased costs which the debtor thereby incurs.*

Comp. 9.1.4 UPICC, 11:103 PECL

III.-5:108: Assignability: effect of contractual prohibition

- (1) A contractual prohibition of, or restriction on, the assignment of a right does not affect the assignability of the right.*
- (2) However, where a right is assigned in breach of such a prohibition or restriction:
 - (a) the debtor may perform in favour of the assignor and is discharged by so doing; and*
 - (b) the debtor retains all rights of set-off against the assignor as if the right had not been assigned.**
- (3) Paragraph (2) does not apply if:
 - (a) the debtor has consented to the assignment;*
 - (b) the debtor has caused the assignee to believe on reasonable grounds that there was no such prohibition or restriction; or*
 - (c) the assigned right is a right to payment for the provision of goods.**
- (4) The fact that a right is assignable notwithstanding a contractual prohibition or restriction does not affect the assignor's liability to the debtor for any breach of the prohibition or restriction.*

Comp. 9.1.9 UPICC, 11:301 (1) and (2) and 11:203 PECL

III.-5:109: Assignability: rights personal to the creditor

- (1) A right is not assignable if it is a right to a performance which the debtor, by reason of the nature of the performance or the relationship between the debtor and the creditor, could not reasonably be required to render to anyone except that creditor.*
- (2) Paragraph (1) does not apply if the debtor has consented to the assignment.*

Comp. 11:302 PECL

III.–5:110: Act of assignment: formation and validity

*(1) Subject to paragraphs (2) and (3), the rules of **Chapters 1 to 9** on the formation and validity of contracts and other juridical acts apply to acts of assignment.*

(2) The rules on the formation and validity of contracts of donation apply to gratuitous acts of assignment.

(3) The rules on the formation and validity of security agreements apply to acts of assignment for purposes of security.

Comp. 9.1.7 UPICC, 11:104 PECL

III.–5:111: Right or authority to assign

(1) Only the creditor (whether acting directly or through a representative) or a person authorised by law to transfer the right has the right or authority to assign a right.

(2) The requirement of right or authority in III.–5:104 (Basic requirements) paragraph (1)(c) need not be satisfied at the time of the act of assignment but must be satisfied at the time the assignment is to take place.

Sub-section 4: Effects of assignment

III.–5:113: New creditor

As soon as the assignment takes place the assignor ceases to be the creditor and the assignee becomes the creditor in relation to the right assigned.

Comp. 11:308 PECL (implicit here)

III.–5:114: When assignment takes place

(1) An assignment takes place when the requirements of III.–5:104 (Basic requirements) are satisfied, or at such later time as the act of assignment may provide.

(2) However, an assignment of a right which was a future right at the time of the act of assignment is regarded as having taken place when all requirements other than those dependent on the existence of the right were satisfied.

(3) Where the requirements of III.–5:104 (Basic requirements) are satisfied in relation to successive acts of assignment at the same time, the earliest act of assignment takes effect unless it provides otherwise.

Comp. 11:202 PECL

III.–5:115: Rights transferred to assignee

- (1) The assignment of a right to performance transfers to the assignee not only the primary right but also all accessory rights and transferable supporting security rights.*
- (2) Where the assignment of a right to performance of a contractual obligation 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 III.–5:301 (Transfer of contractual position).*

Comp. 9.1.14 UPICC, PECL 11:201

III.–5:116: Effect on defences and rights of set-off

- (1) The debtor may invoke against the assignee all substantive and procedural defences to a claim based on the assigned right which the debtor could have invoked against the assignor.*
- (2) The debtor may not, however, invoke a defence against the assignee:*
- (a) if the debtor has caused the assignee to believe that there was no such defence; or*
 - (b) if the defence is based on breach by the assignor of a prohibition or restriction on assignment.*
- (3) The debtor may invoke against the assignee all rights of set-off which would have been available against the assignor in respect of rights against the assignor:*
- (a) existing at the time when the debtor could no longer obtain a discharge by performing to the assignor; or*
 - (b) closely connected with the assigned right.*

Comp. 9.1.13 UPICC, 11:307 PECL

III.–5:117: Effect on place of performance

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

Comp. 9.1.8 UPICC, 11:306 PECL

III.–5:118: Effect of initial invalidity, subsequent avoidance, withdrawal, termination and revocation

(1) This Article applies where the assignee's entitlement for the purposes of III.–5:104 (Basic requirements) paragraph (1)(d) arises from a contract or other juridical act (the underlying contract or other juridical act) whether or not it is followed by a separate act of assignment for the purposes of paragraph (1)(e) of that Article.

(2) Where the underlying contract or other juridical act is void from the beginning, no assignment takes place.

(3) Where, after an assignment has taken place, the underlying contract or other juridical act is avoided under Book II, Chapter 7, the right is deemed to have never passed to the assignee (retroactive effect on assignment).

*(4) Where, after an assignment has taken place, the underlying contract or other juridical act is withdrawn in the sense of Chapter 5, or the contractual relationship is terminated under any rule of **Chapter 15 or 16**, or a donation is revoked in the sense of **the rules on donations**, there is no retroactive effect on the assignment.*

(5) This Article does not affect any right to recover based on other provisions of these model rules.

Sub-section 5: Protection of debtor

III.–5:119: Performance to person who is not the creditor

(1) The debtor is discharged by performing to the assignor so long as the debtor has not received a notice of assignment from either the assignor or the assignee and does not know that the assignor is no longer entitled to receive performance.

(2) Notwithstanding that the person identified as the assignee in a notice of assignment received from the assignor is not the creditor, the debtor is discharged by performing in good faith to that person.

(3) Notwithstanding that the person identified as the assignee in a notice of assignment received from a person claiming to be the assignee is not the creditor, the debtor is discharged by performing to that person if the creditor has caused the debtor reasonably and in

Comp. 9.1.10 and 9.1.11 UPICC, 11:303 (1) and (4), 11:304 and 11:305 PECL

III.–5:120: Adequate proof of assignment

(1) A debtor who believes on reasonable grounds that the right has been assigned but who has not received a notice of assignment, may request the person who is believed to have assigned the right to provide a notice of assignment or a confirmation that the right has not been assigned or that the assignor is still entitled to receive payment.

(2) A debtor who has received a notice of assignment which is not in textual form on a durable medium or which does not give adequate information about the assigned right or the name and address of the assignee may request the person giving the notice to provide a new notice which satisfies these requirements.

(3) A debtor who has received a notice of assignment from the assignee but not from the assignor may request the assignee to provide reliable evidence of the assignment. Reliable evidence includes, but is not limited to, any statement in textual form on a durable medium emanating from the assignor indicating that the right has been assigned.

(4) A debtor who has made a request under this Article may withhold performance until the request is met.

Comp. 9.1.12 UPICC, 11:303 (1) to (3) PECL

Sub-section 6: Priority rules

III.-5:121: Competition between successive assignees

(1) Where there are successive purported assignments by the same person of the same right to performance the purported 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 could reasonably be expected to have known of the earlier assignment.

(2) The debtor is discharged by paying the first to notify even if aware of competing demands.

Comp. 11:401 (1) PECL

III.-5:122: (...)

Section 2: Substitution and addition of debtors

III. – 5:201: Scope

This Section applies only to the substitution or addition of a new debtor by agreement.

III. – 5:202: Types of substitution or addition

(1) A new debtor may be substituted or added:

(a) in such a way that the original debtor is discharged (complete substitution of new debtor);

(b) in such a way that the original debtor is retained as a debtor in case the new debtor does not perform properly (incomplete substitution of new debtor); or

(c) in such a way that the original debtor and the new debtor have solidary liability (addition of new debtor).

(2) If it is clear that there is a new debtor but not clear what type of substitution or addition was intended, the original debtor and the new debtor have solidary liability.

Comp. 9.2.1 and 9.2.5 UPICC, 12:101 (1) PECL

III. – 5:203: Consent of creditor

(1) The consent of the creditor is required for the substitution of a new debtor, whether complete or incomplete.

(2) The consent of the creditor to the substitution of a new debtor may be given in advance. 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.

(3) The consent of the creditor is not required for the addition of a new debtor but the creditor, by notice to the new debtor, can reject the right conferred against the new debtor if that is done without undue delay after being informed of the right and before it has been expressly or impliedly accepted. On such rejection the right is treated as never having been conferred.

Comp. 9.2.3 and 9.2.4 UPICC, 12:101 (1) and (2) PECL

III. – 5:204: Complete substitution

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

Comp. 12:101 PECL

III. – 5:205: Effects of complete substitution on defences, set-off and security rights

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

(2) The new debtor may not exercise against the creditor any right of setoff available to the original debtor against the creditor.

(3) The new debtor cannot invoke against the creditor any rights or defences arising

from the relationship between the new debtor and the original debtor.

(4) The discharge of the original debtor also extends to any personal or proprietary security provided by the original debtor to the creditor for the performance of the obligation, unless the security is over an asset which is transferred to the new debtor as part of a transaction between the original and the new debtor.

(5) 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.

Comp. 9.2.7 and 9.2.8 UPICC, 12:102 PECL

III. – 5:206: Incomplete substitution

*A third person may agree with the creditor and with the original debtor to be incompletely substituted as debtor, with the effect that the original debtor is retained as a debtor in case the **new** debtor does not perform properly.*

III. – 5:207: Effects of incomplete substitution

(1) The effects of an incomplete substitution on defences and set-off are the same as the effects of a complete substitution.

(2) To the extent that the original debtor is not discharged, any personal or proprietary security provided for the performance of that debtor's obligations is unaffected by the substitution.

(3) So far as not inconsistent with paragraphs (1) and (2) the liability of the original debtor is governed by the rules on the liability of a provider of dependent personal security with subsidiary liability.

III. – 5:208: Addition of new debtor

A third person may agree with the debtor to be added as a debtor, with the effect that the original debtor and the new debtor have solidary liability.

III. – 5:209: Effects of addition of new debtor

(1) Where there is a contract between the new debtor and the creditor, or a separate unilateral juridical act by the new debtor in favour of the creditor, whereby the new debtor is added as a debtor, the new debtor cannot invoke against the creditor any rights or defences arising from the relationship between the new debtor and the original debtor.

Where there is no such contract or unilateral juridical act the new debtor can invoke against the creditor any ground of invalidity affecting the agreement with the original debtor.

*(2) So far as not inconsistent with paragraph (1), the rules of Chapter **17**, Section 1*

(Plurality of debtors) apply

Section 3: Transfer of contractual position

III.-5:301: Scope

This Section applies only to transfers by agreement.

III-5:302: Transfer of contractual position

(1) A party to a contractual relationship may agree with a third person, with the consent of the other party to the contractual relationship, that that person is to be substituted as a party to the relationship.

(2) The consent of the other party may be given in advance. In such a case the transfer takes effect only when that party is given notice of it.

(3) To the extent that the substitution of the third person involves a transfer of rights, the provisions of Section 1 of this Chapter on the assignment of rights apply; to the extent that obligations are transferred, the provisions of Section 2 of this Chapter on the substitution of a new debtor apply.

Comp. 9.3.1 to 9.3.7 UPICC, 12:201 PECL

Section 4:

Transfer of rights and obligations on agent's insolvency

III. – 5:401: Principal's option to take over rights in case of agent's insolvency

(1) This Article applies where an agent has concluded a contract with a third party on the instructions of and on behalf of a principal but has done so in such a way that the agent, and not the principal, is a party to the contract.

(2) If the agent becomes insolvent the principal may by notice to the third party and to the agent take over the rights of the agent under the contract in relation to the third party.

(3) The third party may invoke against the principal any defence which the third party could have invoked against the agent and has all the other protections which would be available if the rights had been voluntarily assigned by the agent to the principal.

Comp. 3:302 PECL

III. – 5:402: Third party’s counter-option

Where the principal has taken over the rights of the agent under the preceding Article, the third party may by notice to the principal and the agent opt to exercise against the principal the rights which the third party has against the agent, subject to any defences which the agent has against the third party.

Comp. 2.2.4 (2) UPICC

CHAPTER 19: PRESCRIPTION

Section 1: General provision

III.–7:101: Rights subject to prescription

A right to performance of an obligation is subject to prescription by the expiry of a period of time in accordance with the rules in this Chapter.

Comp. 10.1 UPICC, 14:101 PECL

Section 2: Periods of prescription and their commencement

III.–7:201: General period

The general period of prescription is three years.

Comp. 10.2 (1) UPICC, 14:201 PECL

III.–7:202: Period for a right established by legal proceedings

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

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

Comp. 14:202 PECL

III.–7:203: Commencement

(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 right.

(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.

(3) The period of prescription set out in III.–7:202 (Period for a right established by legal proceedings) 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.

Section 3: Extension of period

III.–7:301: Suspension in case of ignorance

The running of the period of prescription is suspended as long as the creditor does not know of, and could not reasonably be expected to know of:

- (a) the identity of the debtor; or*
- (b) the facts giving rise to the right including, in the case of a right to damages, the type of damage.*

III.–7:302: Suspension in case of judicial and other proceedings

(1) The running of the period of prescription is suspended from the time when judicial proceedings to assert the right are begun.

(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. Where the proceedings end within the last six months of the prescription period without a decision on the merits, the period of prescription does not expire before six months have passed after the time when the proceedings ended.

(3) These provisions apply, with appropriate adaptations, to arbitration proceedings, to mediation proceedings, to proceedings whereby an issue between two parties is referred to a third party for a binding decision and to all other proceedings initiated with the aim of obtaining a decision relating to the right.

(4) Mediation proceedings mean structured proceedings whereby two or more parties to a dispute attempt to reach an agreement on the settlement of their dispute with the assistance of a mediator.

III.–7:303: Suspension in case of impediment beyond creditor's control

(1) The running of the period of prescription is suspended as long as the creditor is prevented from pursuing proceedings to assert the right 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.

(3) Where the duration or nature of the impediment is such that it would be unreasonable to expect the creditor to take proceedings to assert the right within the part of the period of prescription which has still to run after the suspension comes to an end, the period of prescription does not expire before six months have passed after the time when the impediment was removed.

(4) In this Article an impediment includes a psychological impediment.

Comp. 10.8 UPICC, 14:303 PECL

III.-7:304: Postponement of expiry in case of negotiations

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

Comp. 14:304 PECL

III.-7:305: Postponement of expiry in case of incapacity

(1) If a person subject to an incapacity is without a representative, the period of prescription of a right 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.

(2) The period of prescription of rights 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.

Comp. 10.8 UPICC, 14:305 PECL

III.-7:306: Postponement of expiry: deceased's estate

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

Comp. 10.8 UPICC, 14:306 PECL

III.-7:307: Maximum length of period

The period of prescription cannot be extended, by suspension of its running or postponement of its expiry under this Chapter, to more than ten years or, in case of

rights to damages for personal injuries, to more than thirty years. This does not apply to suspension under III.–7:302 (Suspension in case of judicial and other proceedings).

Comp. 10.2 (2) UPICC, 14:307 PECL

Section 4: Renewal of period

III.–7:401: Renewal by acknowledgement

(1) If the debtor acknowledges the right, vis-à-vis the creditor, by part payment, payment 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 right was originally subject to the general period of prescription or the ten year period under III.–7:202 (Period for a right established by legal proceedings). In the latter case, however, this Article does not operate so as to shorten the ten year period.

Comp. 10.4 UPICC, 14:401 PECL

III.–7:402: Renewal by attempted execution

The ten year period of prescription laid down in III.–7:202 (Period for a right established by legal proceedings) begins to run again with each reasonable attempt at execution undertaken by the creditor.

Comp. 14:402 PECL

Section 5: Effects of prescription

III.–7:501: General effect

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

(2) Whatever has been paid or transferred by the debtor in performance of the obligation may not be reclaimed merely because the period of prescription had expired.

Comp. 10.9 and 10.11 UPICC, 14:501 PECL

III.–7:502: Effect on ancillary rights

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

Comp. 14:502 PECL

III.–7:503: Effect on set-off

A right 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.

Comp. 10.10 UPICC, 14:503 PECL

Section 6: Modification by agreement

III.–7:601: 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 III.–7:203 (Commencement).

Comp. 10.3 UPICC, 14:601 PECL