

HOW WOULD AN OPTIONAL INSTRUMENT FOR SERVICE CONTRACTS 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 optional 28th*

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

² http://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.

*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 contract for services. I have extracted a similar draft for sales which can be found on my website @ <http://storme.be/OptionalInstrumentforSales.pdf>.

2. Scope in general

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 alongside national forms (e.g.

⁴ http://ec.europa.eu/commission_2010-2014/reding/pdf/mandate/reding_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.

*Societas Europea*¹⁰, *Societas Cooperative Europea*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 services) 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) *uncto* (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.

3. Scope of this draft

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%20isichen%20Republik%20über%20den%20Wahl-Güterstand.pdf> or <http://www.bmj.bund.de/files/-/4321/accord%20entre%20la%20Rep.%20Fed.%20d'Allemagne%20et%20la%20Rép.%20Française%20instituant%20un%20régime%20matrimonial%20optionnel%20de%20la%20participation%20aux%20ac.pdf>.

This draft is limited to service contract for purely practical reasons of discussion. It is rather meant as an "extract" from a general optional instrument than as a self-standing instrument. I don't think it would be the best solution to have self-standing instruments for different types of contracts; there should be a single optional instrument for at least the whole of contract law. But draft extracts from such a draft general instrument are useful to discuss in a meaningful way such a draft with stakeholders or interested persons. That is the reason why this draft is limited to contracts for services. It would on the other hand be misleading to present a draft which consists only of general contract law. An optional instrument which would be limited to general contract law makes no sense at all, as the rules of the otherwise applicable law on specific contracts would still apply and there is no uniform borderline between general and specific contract law in the legal systems of the member states.

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

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.

4. 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 services 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;
- simplified the numbering without however changing them from the DCFR (for the time being).

5. Legend

Where the (wording of 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.

TABLE OF CONTENTS

CHAPTER 1: SCOPE OF APPLICATION AND GENERAL PROVISIONS	14
Section 1: Scope of application	14
41:101: Scope of application in general: service contracts	14
43:101: Scope of rules for construction contracts	14
44:101: Scope of rules for processing contracts	14
45:101: Scope of rules for storage contracts	15
45:110: Scope of rules for contracts with hotel-keeper	15
46:101: Scope of rules for design contracts.....	15
47:101: Scope of rules for information or advice contracts.....	16
48:101: Scope of rules for treatment contracts.....	16
21:108: Mixed contracts	16
11:101: Scope of the rules.....	17
Section 2: Applicability	17
PECL1:101: Applicability.....	17
PECL1:103: Mandatory Law	18
Section 3: Interpretation and development of these rules	18
11:102: Interpretation and development	18
41:103: Priority rules.....	18
Section 4: General provisions	19
21:101: Contract and juridical act.....	19
21:102: Party autonomy.....	19
21:103: Binding effect	19
21:104: Usages and practices	19
21:105: Imputed knowledge etc.	20
21:109: Notice.....	20
21:106: Form	20
11:110: Computation of time.....	21
Section 5: Other definitions	22
11:105: "Consumer" and "business"	22
11:103: Good faith and fair dealing	22
11:104: Reasonableness	22
21:109: Standard terms	23
21:110: Terms "not individually negotiated"	23
11:106: Meaning of "in writing" and similar expressions.....	23
11:107: Meaning of "signature" and similar expressions	23
CHAPTER 2: MARKETING AND PRE-CONTRACTUAL DUTIES	25
Section 1: Information duties	25
23:101: Duty to disclose information about services	25
42:102: Pre-contractual duties to warn.....	25
46:102: Pre-contractual duty to warn before the conclusion of a design contract	26
23:102: Specific duties for businesses marketing to consumers.....	26
23:103: Duty to provide information when concluding contract with a consumer who is at a particular disadvantage	27
23:104: Information duties in real time distance communication	27
23:105: Formation by electronic means.....	27
23:106: Clarity and form of information	28
23:107: Information about price and additional charges	28
23:108: Information about address and identity of business	28
23:109: Remedies for breach of information duties	29
Section 2: Duty to prevent input errors and acknowledge receipt	29
23:201: Correction of input errors.....	29
23:202: Acknowledgement of receipt.....	30
Section 3: Negotiation and confidentiality duties	30
23:301: Negotiations contrary to good faith and fair dealing.....	30
23:302: Breach of confidentiality	30
Section 4: Unsolicited services	31
23:401 No obligation arising from failure to respond.....	31

23:501: Liability for damages.....	31
CHAPTER 3: NON-DISCRIMINATION IN RELATION TO SERVICES AVAILABLE TO THE PUBLIC	
.....	32
22:101: Right not to be discriminated against.....	32
22:102: Meaning of discrimination.....	32
22:103: Exception.....	32
22:104: Remedies.....	32
22:105: Burden of proof.....	33
CHAPTER 4: FORMATION	34
Section 1: General provisions	34
24:101: Requirements for the conclusion of a contract.....	34
24:102: How intention is determined	34
24:103: Sufficient agreement.....	34
24:104: Merger clause	34
24:105: Modification in certain form only.....	35
Section 2: Offer and acceptance	35
24:201: Offer.....	35
24:202: Revocation of offer.....	35
24:203: Rejection of offer.....	36
24:204: Acceptance.....	36
24:205: Time of conclusion of the contract.....	36
24:206: Time limit for acceptance.....	36
24:207: Late acceptance	36
24:208: Modified acceptance.....	37
24:209: Conflicting standard terms.....	37
24:210: Formal confirmation of contract between businesses.....	37
24:211: Contracts not concluded through offer and acceptance.....	37
Section 3: Other juridical acts	38
24:301: Requirements for a unilateral juridical act	38
24:302: How intention is determined	38
24:303: Right or benefit may be rejected.....	38
CHAPTER 5: RIGHT OF WITHDRAWAL	39
Section 1: Exercise and effects	39
25:101: Scope and mandatory nature	39
25:102: Exercise of right to withdraw.....	39
25:103: Withdrawal period.....	39
25:104: Adequate notification of the right to withdraw.....	39
25:105: Effects of withdrawal.....	40
25:106: Linked contracts.....	40
Section 2: Particular rights of withdrawal	41
25:201: Contracts negotiated away from business premises	41
CHAPTER 6: REPRESENTATION	42
(26:100) Conflict rule	42
26:101: Scope	42
26:102: Definitions	42
26:103: Authorisation	42
26:104: Scope of authority	43
26:105: When representative's act affects principal's legal position	43
26:106: Representative acting in own name	43
26:107: Person purporting to act as representative but not having authority	44
26:108: Unidentified principal.....	44
26:109: Conflict of interest.....	44
26:110: Several representatives	44
26:111: Ratification	45
26:112: Effect of ending or restriction of authorisation.....	45
CHAPTER 7: GROUNDS OF INVALIDITY	46
Section 1: General provisions	46
27:101: Scope	46
27:102: Initial impossibility or lack of right or authority to dispose.....	46

21:108: Partial invalidity or ineffectiveness.....	46
Section 2: Vitiating consent or intention	46
27:201: Mistake.....	46
27:202: Inaccuracy in communication may be treated as mistake.....	47
27:203: Adaptation of contract in case of mistake.....	47
27:204: Liability for loss caused by reliance on incorrect information.....	47
27:205: Fraud.....	48
27:206: Coercion or threats.....	48
27:207: Unfair exploitation.....	48
27:208: Third persons.....	49
27:209: Notice of avoidance.....	49
27:210: Time.....	49
27:211: Confirmation.....	49
27:212: Effects of avoidance.....	49
27:213: Partial avoidance.....	50
27:214: Damages for loss.....	50
27:215: Exclusion or restriction of remedies.....	50
27:216: Overlapping remedies.....	50
Section 3: Infringement of fundamental principles or mandatory rules	51
27:301: Contracts infringing fundamental principles.....	51
27:302: Contracts infringing mandatory rules.....	51
27:303: Effects of nullity or avoidance.....	51
27:304: Damages for loss.....	52
CHAPTER 8: INTERPRETATION	53
Section 1: Interpretation of contracts.....	53
28:101: General rules.....	53
28:102: Relevant matters.....	53
28:103: Interpretation against supplier of term or dominant party.....	54
28:104: Preference for negotiated terms.....	54
28:105: Reference to contract as a whole.....	54
28:106: Preference for interpretation which gives terms effect.....	54
28:107: Linguistic discrepancies.....	54
Section 2: Interpretation of other juridical acts	54
28:201: General rules.....	54
28:202: Application of other rules by analogy.....	55
CHAPTER 9: CONTENTS AND EFFECTS.....	56
Section 1: Contents.....	56
29:101: Terms of a contract.....	56
29:102: Certain pre-contractual statements regarded as contract terms.....	56
29:103: Terms not individually negotiated.....	57
29:105: Unilateral determination by a party.....	57
29:106: Determination by a third person.....	57
29:107: Reference to a non-existent factor.....	58
29:109: Language.....	58
Section 2: Simulation	58
29:201: Effect of simulation.....	58
Section 3: Effect of stipulation in favour of a third party.....	58
29:301: Basic rules.....	58
29:302: Rights, remedies and defences.....	59
29:303: Rejection or revocation of benefit.....	59
Section 4: Unfair terms.....	59
29:401: Mandatory nature of following provisions.....	59
29:402: Duty of transparency in terms not individually negotiated.....	59
29:403: Meaning of “unfair” in contracts between a business and a consumer.....	60
29:404: Meaning of “unfair” in contracts between non-business parties.....	60
29:405: Meaning of “unfair” in contracts between businesses.....	60
29:406: Exclusions from unfairness test.....	60
29:407: Factors to be taken into account in assessing unfairness.....	60
29:408: Effects of unfair terms.....	61

29:409: Exclusive jurisdiction clauses	61
29:410: Terms which are presumed to be unfair in contracts between a business and a consumer	61
44:108: Limitation of liability in processing contracts	62
45:109: Limitation of liability in storage contracts	62
46:107: Limitation of liability in design contracts	63
45:110 (4) Unfair terms in contracts with a hotel-keeper	63
CHAPTER 10: OBLIGATIONS OF THE PARTIES IN GENERAL.....	64
Section 1: General rules for the obligations of both parties	64
31:102: Definitions	64
31:103: Good faith and fair dealing	64
31:104: Co-operation	64
31:105: Non-discrimination.....	65
Section 2: Modalities of performance in general.....	65
32:101: Place of performance	65
32:102: Time of performance.....	65
32:103: Early performance	66
32:104: Order of performance.....	66
32:105: Alternative obligations or methods of performance.....	66
32:106: Performance entrusted to another	66
32:107: Performance by a third person.....	67
32:111: Property not accepted	67
32:113: Costs and formalities of performance	67
Section 2bis: Modalities of performance of monetary obligations	68
32:108: Method of payment.....	68
32:109: Currency of payment.....	68
32:112: Money not accepted.....	68
Section 3: Time-limited obligations	69
31:107: Time-limited rights and obligations.....	69
Section 4 Conditional obligations.....	69
31:106: Conditional rights and obligations.....	69
CHAPTER 11: OBLIGATIONS OF THE SERVICE PROVIDER.....	70
Section 1. Rules for service contracts in general.....	70
42:103: Provider's obligation to co-operate.....	70
42:104: Subcontractors, tools and materials.....	70
29:108: Quality	70
42:105: Obligation of skill and care	70
42:106: (1) Obligation to achieve result.....	71
42:106 (2): Obligation to achieve result + 4a2:305: Third party rights or claims.....	71
42:107: Directions of the client	71
42:108: Contractual obligation of the service provider to warn	72
33:108: Business unable to fulfil consumer's order by distance communication.....	72
Section 2. Rules for construction contracts	73
43:103: Obligation to prevent damage to structure.....	73
43:104: Conformity.....	73
43:105: Inspection, supervision and acceptance	73
43:108: Risks	74
Section 3. Rules for processing contracts	74
44:103: Obligation to prevent damage to thing being processed.....	74
44:104: Inspection and supervision	74
44:105: Return of the thing processed.....	75
44:107: Risks	75
Section 4. Rules for storage contracts.....	76
45:102: Storage place and subcontractors	76
45:103: Protection and use of the thing stored	76
45:104: Return of the thing stored	76
45:105: Conformity.....	76
45:107: Post-storage obligation to inform	77
45:108: Risks	77

Section 5. Rules for contracts with a hotel-keeper	77
45:110: Liability of the hotel-keeper	78
Section 6. Rules for design contracts	78
46:103: Obligation of skill and care	78
46:104: Conformity.....	78
46:106: Records	78
Section 7. Rules for information and advice contracts	79
47:102: Obligation to collect preliminary data.....	79
47:103: Obligation to acquire and use expert knowledge	79
47:104: Obligation of skill and care	79
47:105: Conformity.....	80
47:106: Records	80
47:107: Conflict of interest.....	80
47:108: Influence of ability of the client.....	80
Section 8. Rules for treatment contracts	80
48:102: Preliminary assessment	80
48:103: Obligations regarding instruments, medicines,	81
48:104: Obligation of skill and care	81
48:105: Obligation to inform.....	81
48:106: Obligation to inform in case of unnecessary or experimental treatment.....	81
48:107: Exceptions to the obligation to inform.....	82
48:108: Obligation not to treat without consent	82
48:109: Records	82
48:111: Obligations of treatment-providing organisations	83
CHAPTER 12: OBLIGATIONS OF THE CLIENT	84
Section 1: Rules for service contracts in general	84
42:101: Price + 29:104: Determination of price	84
42:103: Client's obligation to co-operate.....	84
42:110: Client's obligation to notify anticipated non-conformity.....	84
Section 2. Rules for construction contracts	85
43:102: Obligation of client to co-operate.....	85
43:106: Handing-over of the structure	85
43:107: Payment of the price	85
Section 3. Rules for processing contracts	86
44:102: Obligation of client to co-operate.....	86
44:105: Return of the thing processed.....	86
44:106: Payment of the price	86
Section 4. Rules for storage contracts	86
45:104: (Acceptance of the) Return of the thing stored	86
45:106 (1): Payment of the price.....	87
Section 5. Rules for design contracts	87
46:105: Handing over of the design	87
CHAPTER 13: EXTINCTION AND VARIATION OF OBLIGATIONS	88
Section 1: Effects of performance	88
32:114: Extinctive effect of performance.....	88
32:110: Imputation of performance.....	88
Section 2: Variation and termination	88
31:108: Variation or termination by agreement.....	88
31:109 + 42:109: Variation by notice - Unilateral variation of the service contract.....	89
31:109 + 42:111: Termination by notice - Client's right to terminate	90
48:110: Right to terminate in treatment contracts	90
31:109 (3): Effects of termination by notice.....	90
31:110: Variation or termination by court on a change of circumstances	91
31:111: Tacit prolongation.....	91
Section 3: Set-off	91
36:101: Definition and scope.....	91
36:102: Requirements for set-off	92
36:103: Unascertained rights	92
36:104: Foreign currency set-off	92

36:105: Set-off by notice.....	92
36:106: Two or more rights and obligations.....	92
36:107: Effect of set-off.....	93
36:108: Exclusion of right of set-off.....	93
Section 4: Merger of debts	93
36:201: Extinction of obligations by merger.....	93
CHAPTER 14: REMEDIES FOR NON-PERFORMANCE	94
Section 1: General	94
33:101: Remedies available.....	94
33:102: Cumulation of remedies.....	94
33:103: Notice fixing additional period for performance.....	94
33:104: Excuse due to an impediment.....	94
33:105: Term excluding or restricting remedies.....	95
33:106: Notices relating to non-performance.....	95
Section 2: Requirements of examination and notification	95
33:107: Failure to notify non-conformity.....	95
45:110 (5): Duty to inform in a contract with a hotel-keeper.....	96
Section 3: Cure by debtor of non-conforming performance	96
33:201: Scope.....	96
33:202: Cure by debtor: general rules.....	96
33:203: When creditor need not allow debtor an opportunity to cure.....	96
33:204: Consequences of allowing debtor opportunity to cure.....	97
33:205 Return of replaced item.....	97
Section 4: Right to enforce performance	97
33:301: Monetary obligations.....	97
33:302: Non-monetary obligations.....	98
33:303: Damages not precluded.....	98
Section 5: Withholding performance	98
33:401: Right to withhold performance of reciprocal obligation.....	98
45:106 (2): Right to withhold performance in storage contracts	99
45:110 (6): Right to withhold performance of the hotel-keeper	99
48:110: Right to withhold performance in treatment contracts	99
Section 6: Termination	99
33:501: Definition.....	99
Sub-section 1: Grounds for termination	99
33:502: Termination for fundamental non-performance.....	99
33:503: Termination after notice fixing additional time for performance.....	100
33:504: Termination for anticipated non-performance.....	100
33:505: Termination for inadequate assurance of performance.....	100
48:110: Right to terminate in treatment contracts	100
Sub-section 2: Scope, exercise and loss of right to terminate	101
33:506: Scope of right to terminate.....	101
33:507: Notice of termination.....	101
33:508: Loss of right to terminate.....	101
Sub-section 3: Effects of termination	102
33:509: Effect on obligations under the contract.....	102
Sub-section 4: Restitution	102
33:510: Restitution of benefits received by performance.....	102
33:511: When restitution not required.....	102
33:512: Payment of value of benefit.....	103
33:513: Use and improvements.....	103
33:514: Liabilities arising after time when return due.....	104
Section 7: Price reduction	104
33:601: Right to reduce price.....	104
Section 8: Damages and interest	104
33:701: Right to damages.....	104
33:702: General measure of damages.....	105
33:703: Foreseeability.....	105
47:109: Causation in information or advice contracts	105

33:704: Loss attributable to creditor	105
33:705: Reduction of loss.....	105
33:706: Substitute transaction	105
33:707: Current price	106
33:708: Interest on late payment.....	106
33:709: When interest to be added to capital.....	106
33:710: Interest in commercial contracts.....	106
33:711: Unfair terms relating to interest.....	107
33:712: Stipulated payment for non-performance.....	107
33:713: Currency by which damages to be measured.....	107
CHAPTER 15: PLURALITY OF DEBTORS AND CREDITORS.....	108
Section 1: Plurality of debtors	108
34:101: Scope of Section.....	108
34:102: Solidary, divided and joint obligations.....	108
34:103: When different types of obligation arise.....	108
34:104: Liability under divided obligations.....	108
34:105: Joint obligations: special rule when money claimed for non-performance.....	108
34:106: Apportionment between solidary debtors.....	109
34:107: Recourse between solidary debtors.....	109
34:108: Performance, set-off and merger in solidary obligations	109
34:109: Release or settlement in solidary obligations.....	109
34:110: Effect of judgment in solidary obligations.....	110
34:111: Prescription in solidary obligations	110
34:112: Opposability of other defences in solidary obligations.....	110
Section 2: Plurality of creditors	110
34:201: Scope of Section.....	110
34:202: Solidary, divided and joint rights	111
34:203: When different types of right arise.....	111
34:204: Apportionment in cases of divided rights.....	111
34:205: Difficulties of performing in cases of joint rights	111
34:206: Apportionment in cases of solidary rights	111
34:207: Regime of solidary rights	111
CHAPTER 16: CHANGE OF PARTIES	113
Section 1: Assignment of rights.....	113
Sub-section 1: General	113
35:101: Scope of Section.....	113
35:102: Definitions	113
35:103: Priority of provisions on proprietary securities and trusts.....	113
Sub-section 2: Requirements for assignment.....	113
35:104: Basic requirements.....	113
35:105: Assignability: general rule.....	114
35:106: Future and unspecified rights.....	114
35:107: Assignability in part	114
35:108: Assignability: effect of contractual prohibition.....	115
35:109: Assignability: rights personal to the creditor.....	115
35:110: Act of assignment: formation and validity.....	115
35:111: Right or authority to assign.....	115
Sub-section 4: Effects of assignment.....	116
35:113: New creditor.....	116
35:114: When assignment takes place.....	116
35:115: Rights transferred to assignee.....	116
35:116: Effect on defences and rights of set-off.....	116
35:117: Effect on place of performance.....	117
35:118: Effect of initial invalidity, subsequent avoidance, withdrawal, termination and revocation	117
Sub-section 5: Protection of debtor.....	117
35:119: Performance to person who is not the creditor	118
35:120: Adequate proof of assignment.....	118
Sub-section 6: Priority rules.....	118

35:121: Competition between successive assignees.....	118
Section 2: Substitution and addition of debtors	119
35:201: Scope	119
35:202: Types of substitution or addition	119
35:203: Consent of creditor	119
35:204: Complete substitution	119
35:205: Effects of complete substitution on defences,.....	120
35:206: Incomplete substitution	120
35:207: Effects of incomplete substitution	120
35:208: Addition of new debtor	120
35:209: Effects of addition of new debtor	120
Section 3: Transfer of contractual position	121
35:301: Scope	121
35:302: Transfer of contractual position	121
Section 4: Transfer of rights and obligations on agent's insolvency	121
35:401: Principal's option to take over rights in case of agent's insolvency.....	121
35:402: Third party's counter-option.....	122
CHAPTER 17: PRESCRIPTION	123
Section 1: General provision	123
37:101: Rights subject to prescription	123
Section 2: Periods of prescription and their commencement	123
37:201: General period	123
37:202: Period for a right established by legal proceedings	123
37:203: Commencement	123
Section 3: Extension of period	124
37:301: Suspension in case of ignorance	124
37:302: Suspension in case of judicial and other proceedings	124
37:303: Suspension in case of impediment beyond creditor's control.....	124
37:304: Postponement of expiry in case of negotiations	125
37:305: Postponement of expiry in case of incapacity	125
37:306: Postponement of expiry: deceased's estate	125
37:307: Maximum length of period	125
Section 4: Renewal of period	125
37:401: Renewal by acknowledgement.....	125
37:402: Renewal by attempted execution	126
Section 5: Effects of prescription	126
37:501: General effect.....	126
37:502: Effect on ancillary rights.....	126
37:503: Effect on set-off.....	126
Section 6: Modification by agreement	126
37:601: Agreements concerning prescription	126

CHAPTER 1: SCOPE OF APPLICATION AND GENERAL PROVISIONS

Section 1: Scope of application

41:101: Scope of application in general: service contracts

(1) *These rules can be chosen as applicable law for contracts for services, this is contracts under which one party, the service provider, undertakes to supply a service to the other party, the client, in exchange for a price.*

(2) *They can be chosen in particular for contracts for construction, processing, storage, design, information or advice, and treatment, as defined in the following articles*

(3) *They can be applied with appropriate adaptations, to contracts under which the service provider undertakes to supply a service to the client otherwise than in exchange for a price.*

(4) *They are not intended to apply to contracts in so far as they are for lease, timeshare, transport, insurance, the provision of a security or the supply of a financial product or a financial service.*

(5) *They do not apply to contracts of Mandate and to contracts for Commercial agency, franchise and distributorship)*

43:101: Scope of rules for construction contracts

(1) *The rules for construction contracts apply to contracts under which one party, the constructor, undertakes to construct a building or other immovable structure, or to materially alter an existing building or other immovable structure, following a design provided by the client.*

(2) *They apply with appropriate adaptations to contracts under which the constructor undertakes:*

(a) *to construct a movable or incorporeal thing, following a design provided by the client; or*

(b) *to construct a building or other immovable structure, to materially alter an existing building or other immovable structure, or to construct a movable or incorporeal thing, following a design provided by the constructor.*

44:101: Scope of rules for processing contracts

(1) *The rules for processing contracts apply to contracts under which one party, the processor, undertakes to perform a service on an existing movable or incorporeal thing or to an immovable structure for another party, the client. It does not, however,*

apply to construction work on an existing building or other immovable structure.

(2) They apply in particular to contracts under which the processor undertakes to repair, maintain or clean an existing movable or incorporeal thing or immovable structure.

45:101: Scope of rules for storage contracts

(1) The rules for storage contracts apply to contracts under which one party, the storer, undertakes to store a movable or incorporeal thing for another party, the client.

(2) They do not apply to the storage of:

(a) immovable structures;

(b) movable or incorporeal things during transportation; and

(c) money or securities (except in the circumstances mentioned in paragraph (7) of 45:110 (Liability of the hotel-keeper)) or rights.

45:110: Scope of rules for contracts with hotel-keeper

(1) The rules for contracts with a hotel-keeper apply when a thing is brought to the hotel by any guest who stays at the hotel and has sleeping accommodation there.

(2) For the purposes of paragraph (1) a thing is regarded as brought to the hotel:

(a) if it is at the hotel during the time when the guest has the use of sleeping accommodation there;

(b) if the hotel-keeper or a person for whose actions the hotel-keeper is responsible takes charge of it outside the hotel during the period for which the guest has the use of the sleeping accommodation at the hotel; or

(c) if the hotel-keeper or a person for whose actions the hotel-keeper is responsible takes charge of it whether at the hotel or outside it during a reasonable period preceding or following the time when the guest has the use of sleeping accommodation at the hotel.

(7) They do not apply if and to the extent that a separate storage contract is concluded between the hotel-keeper and any guest for any thing brought to the hotel. A separate storage contract is concluded if a thing is handed over for storage to, and accepted for storage by, the hotel-keeper.

46:101: Scope of rules for design contracts

(1) The rules for design contracts apply to contracts under which one party, the designer, undertakes to design for another party, the client:

(a) an immovable structure which is to be constructed by or on behalf of the client; or

(b) a movable or incorporeal thing or service which is to be constructed or performed by or on behalf of the client.

(2) A contract under which one party undertakes to design and to supply a service which consists of carrying out the design is to be considered as primarily a contract for the supply of the subsequent service.

47:101: Scope of rules for information or advice contracts

- (1) *The rules for information or advice contracts apply to contracts under which one party, the provider, undertakes to provide information or advice to another party, the client.*
- (2) *They do not apply in relation to treatment in so far as the rules on Treatment contracts contains more specific rules on the obligation to inform.*
- (3) *In the rules for information or advice contracts any reference to information includes a reference to advice.*

48:101: Scope of rules for treatment contracts

- (1) *The rules for treatment contracts apply to contracts under which one party, the treatment provider, undertakes to provide medical treatment for another party, the patient.*
- (2) *It applies with appropriate adaptations to contracts under which the treatment provider undertakes to provide any other service in order to change the physical or mental condition of a person.*
- (3) *Where the patient is not the contracting party, the patient is regarded as a third party on whom the contract confers rights corresponding to the obligations of the treatment provider imposed by the rules on treatment contracts.*

21:108: Mixed contracts

- (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 services and within another specific contract category; or within two categories of contracts for services*
 - (b) *a part falling within the category of contracts for services 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.*

11:101: 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;*
- *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, including the invalidity arising out of it;*
- (b) the non-contractual liability of the parties, other than the precontractual liability regulated by the rules*
- (c) matters relating primarily to procedure or enforcement.*
- (d) bills of exchange, cheques and promissory notes and other negotiable instruments;*
- (e) employment relationships;*
- (f) the ownership of, or rights in security over, corporeal property and the effect which the contract may have on it;*
- (a) the creation, capacity, internal organisation, regulation or dissolution of companies and other bodies corporate or unincorporate, including the invalidity arising out of it.*

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

Section 2: Applicability

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. Preamble UPICC, 1:101 PECL

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 3: Interpretation and development of these rules

11:102: 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)*

Comp. 1.6 UPICC, 1:106 PECL

41:103: Priority rules

11:102 (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.*

(2) In the case of any conflict the rules applying in particular to contracts for construction, processing, storage, design, information or advice, and treatment prevail over the rules applying to service contracts in general.

Section 4: General provisions

21:101: 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.

21:102: Party autonomy

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

21:103: 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

21:104: 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

21:105: 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

21:109: 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

21:106: 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. 1.2 UPICC, 2:101 (2) PECL, 1:304 AP

11:110: 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

Section 5: Other definitions

11:105: “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

11:103: 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

11:104: 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

21:109: 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

21:110: 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

11:106: 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

11:107: 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

CHAPTER 2: MARKETING AND PRE-CONTRACTUAL DUTIES

Section 1: Information duties

23:101: Duty to disclose information about services

(1) Before the conclusion of a **contract for the supply of services** by a business to another person, the business has a duty to disclose to the other person such information concerning the **services** 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

42:102: Pre-contractual duties to warn

(1) The service provider is under a pre-contractual duty to warn the client if the service provider becomes aware of a risk that the service requested:

- (a) may not achieve the result stated or envisaged by the client;
- (b) may damage other interests of the client; or
- (c) may become more expensive or take more time than reasonably expected by the client.

(2) The duty to warn in paragraph (1) does not apply if the client:

- (a) already knows of the risks referred to in paragraph (1); or
- (b) could reasonably be expected to know of them.

(3) If a risk referred to in paragraph (1) materialises and the service provider was in breach of the duty to warn of it, a subsequent change of the service by the service provider under 42:109 (Unilateral variation of the service contract) which is based on the materialisation of the risk is of no effect unless the service provider proves that the client, if duly warned, would have entered into a contract anyway. This is without prejudice to any other remedies, including remedies for mistake, which the client may have.

(4) The client is under a pre-contractual duty to warn the service provider if the client becomes aware of unusual facts which are likely to cause the service to become more expensive or time-consuming than expected by the service provider or to cause any danger to the service provider or others when performing the service.

(5) If the facts referred to under paragraph (4) occur and the service provider was not duly warned, the service provider is entitled to:

- (a) damages for the loss the service provider sustained as a consequence of the failure to warn; and
- (b) an adjustment of the time allowed for performance of the service.

(6) For the purpose of paragraph (1), the service provider is presumed to be aware of the risks mentioned if they should be obvious from all the facts and circumstances known to the service provider, considering the information which the service provider must collect about the result stated or envisaged by the client and the circumstances in which the service is to be carried out.

(7) For the purpose of paragraph (2)(b) the client cannot reasonably be expected to know of a risk merely because the client was competent, or was advised by others who were competent, in the relevant field, unless such other person acted as the agent of the client, in which case 21:105 (Imputed knowledge etc.) applies.

(8) For the purpose of paragraph (4), the client is presumed to be aware of the facts mentioned if they should be obvious from all the facts and circumstances known to the client without investigation.

46:102: Pre-contractual duty to warn before the conclusion of a design contract

The designer's pre-contractual duty to warn requires in particular the designer to warn the client in so far as the designer lacks special expertise in specific problems which require the involvement of specialists.

23:102: Specific duties for businesses marketing to consumers

(1) Where a business is marketing services 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 services, 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

23:103: Duty to provide information when concluding contract with a consumer who is at a particular disadvantage

(1) (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 services 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

23:104: 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 25:103 (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

23:105: 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 25:103 (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

23:106: 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 **services** 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 25:104 (Adequate information on the right to withdraw).*

Comp. 2:204 AP

23:107: 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

23:108: 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 23:103 (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

23:109: Remedies for breach of information duties

(1) If a business is required under 23:103 (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.

*(3) 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 14** 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 27:201 (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

23:201: 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 27:201 (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.

23:202: 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

23:301: 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

23:302: 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 services

23:401 No obligation arising from failure to respond

(1) If a business performs unsolicited services for 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 services; and

(b) no non-contractual obligation arises from the consumer's receipt of benefit from the services.

(2) Sub-paragraph (b) of the preceding paragraph does not apply if the services 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) (4) (...)

Comp. 4:106 AP

Section 5:

Damages for breach of duty under this Chapter

23:501: 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 33:704 (Loss attributable to creditor) and 33:705 (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 SERVICES AVAILABLE TO THE PUBLIC

22:101: 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 services the object of which is to provide access to, or supply services which are available to the public.

Comp. 3:101 AP

22:102: 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

22:103: 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

22:104: Remedies

(1) If a person is discriminated against contrary to 22:101 (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 14 (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

22:105: Burden of proof

(1) If a person who considers himself or herself discriminated against on one of the grounds mentioned in 22:101 (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

24:101: Requirements for the conclusion of a contract

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

- (a) intend to enter into a binding legal relationship as defined under article 41:101 (definition of contract for services); and*
- (b) reach a sufficient agreement.*

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

24:102: 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. 4.1 UPICC, 2:102 PECL

24:103: Sufficient agreement

(1) Agreement is sufficient if:

- (a) the terms of the contract have been sufficiently defined by the parties for the contract to be given effect; or*
- (b) the terms of the contract, 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

24:104: 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

24:105: 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. 2.1.18 UPICC, 2:106 PECL

Section 2: Offer and acceptance

24:201: 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 a service at a stated price made by a business in a public advertisement or a catalogue, is treated, unless the circumstances indicate otherwise, as an offer to supply at that price until the business's capacity to supply the service is exhausted.

Comp. 2.1.2 UPICC, 2:201 PECL

24:202: 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

24:203: 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

24:204: 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

24:205: 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

24:206: 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

24:207: 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

24:208: 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

24:209: 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

24:210: 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

24:211: 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

24:301: 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

24:302: 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

24:303: 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

25:101: 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

25:102: 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

25:103: 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) (...).

(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

25:104: 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

25:105: 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 33:511 to 33:515 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

25:106: Linked contracts

(1) *If a consumer exercises a right of withdrawal from a contract for the supply of services 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 services 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 services to be financed with this credit, and if this link between both contracts was suggested by the supplier of the services or by the supplier of credit; or*

(d) *if there is a similar economic link.*

(3) *The provisions of 25:105 (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

25:201: Contracts negotiated away from business premises

(1) A consumer is entitled to withdraw from a contract under which a business supplies **services** to the consumer, including financial services, 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 automated commercial premises;
- (b) a contract concluded with telecommunications operators through the use of public payphones;
- (d) (...);
- (e) a contract concluded by means of distance communication, but outside of an organised distance service-provision scheme run by the supplier;
- (f) a contract for the supply of **services** 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) travel and baggage insurance policies or similar short-term insurance policies of less than one month's duration.

(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 of accommodation, transport, 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) the supply of services other than financial services if performance has begun, at the consumer's express and informed request, before the end of the withdrawal period referred to in 25:103 (Withdrawal period) paragraph (1));
- (c) (...);
- (d) (...);
- (e) (...);
- (f) gaming and lottery services.

(4) With regard to financial services, paragraph (1) also does not apply to contracts that have been fully performed by both parties, at the consumer's express request, before the consumer exercises his or her right of withdrawal.

Comp. 5A-01 AP

CHAPTER 6: REPRESENTATION

(26:100) 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

26:101: 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

26:102: 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.

26:103: 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

26:104: 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

26:105: 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

26:106: 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

26:107: 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

26:108: 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

26:109: 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 27:209 (Notice of avoidance) to 27:213 (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

26:110: Several representatives

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

26:111: 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

26:112: 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

27:101: 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 and, with any necessary adaptations, other juridical acts.*

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

27:102: 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

21:108: 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

27:201: 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

27:202: 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

27:203: 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

27:204: 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.

27:205: 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.*

27:206: 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.

27:207: 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

27:208: 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

27:209: Notice of avoidance

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

Comp. 3.14 UPICC, 4:112 PECL

27:210: 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

27:211: 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

27:212: 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

27:213: 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

27:214: 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

27:215: 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

27:216: 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.

Section 3: Infringement of fundamental principles or mandatory rules

27:301: 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

27:302: 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

27:303: 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

27:304: 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

CHAPTER 8: INTERPRETATION

Section 1: Interpretation of contracts

28:101: 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

28:102: 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

28:103: 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

28:104: 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

28:105: 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

28:106: 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

28:107: 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

28:201: 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

28:202: 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

29:101: 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

29:102: 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

29:103: 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 21:110 (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

29:105: 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

29:106: 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

29:107: 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

29:109: 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

29:201: 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

29:301: 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

29:302: 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

29:303: 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

Section 4: Unfair terms

29:401: 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.

29:402: 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

29:403: 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

29:404: 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.

29:405: 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

29:406: 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

29:407: 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 29:402 (Duty of transparency in terms not individually negotiated), to the nature of the **services** 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 29:404 (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

29:408: 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

29:409: 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

29:410: 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) enables a business to terminate a contractual relationship of indeterminate duration without reasonable notice, except where there are serious grounds for doing so; this does not affect terms in financial services contracts where there is a valid reason, provided that the supplier is required to inform the other contracting party thereof immediately;

(h) automatically extends a contract of fixed duration unless the consumer indicates otherwise, in cases where such terms provide for an unreasonably early deadline;

(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 supplier of financial services reserves the right to change the rate of interest to be paid by, or to, the consumer, or the amount of other charges for financial services without notice where there is a valid reason, provided that the supplier is required to inform the consumer at the earliest opportunity and that the consumer is free to terminate the contractual relationship with immediate effect; neither does it 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 **services** to be provided;

(k) (...);

(l) gives a business the right to determine whether the **services** 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) transactions in transferable securities, financial instruments and other products or services where the price is linked to fluctuations in a stock exchange quotation or index or a financial market rate beyond the control of the business;

(b) (...)

Comp. 6:305 AP

44:108: Limitation of liability **in processing contracts**

In a **processing** contract between two businesses, a term restricting the processor's liability for non-performance to the value of the thing, had the service been performed correctly, is presumed to be fair for the purposes of art. 29:405 (Meaning of "unfair" in contracts between businesses) except to the extent that it restricts liability for damage caused intentionally or by way of grossly negligent behaviour on the part of the processor or any person for whose actions the processor is responsible.

45:109: Limitation of liability **in storage contracts**

In a **storage** contract between two businesses, a term restricting the storer's liability

for non-performance to the value of the thing is presumed to be fair for the purposes of art. 29:405 (Meaning of “unfair” in contracts between businesses), except to the extent that it restricts liability for damage caused intentionally or by way of grossly negligent conduct on the part of the storer or any person for whose actions the storer is responsible.

46:107: Limitation of liability **in design contracts**

*In **design** contracts between two businesses, a term restricting the designer’s liability for non-performance to the value of the structure, thing or service which is to be constructed or performed by or on behalf of the client following the design, is presumed to be fair for the purposes of 29:405 (Meaning of “unfair” in contracts between businesses) except to the extent that it restricts liability for damage caused intentionally or by grossly negligent conduct on the part of the designer or any person for whose actions the designer is responsible.*

45:110 (4) **Unfair terms** in contracts with a hotel-keeper

***In a contract with a hotel-keeper,** a term excluding or limiting the liability of the hotel-keeper under **45:110** is unfair for the purposes of Chapter 9, Section 4 if it excludes or limits liability in a case where the hotel-keeper, or a person for whose actions the hotel-keeper is responsible, causes the damage, destruction or loss intentionally or by way of grossly negligent conduct.*

CHAPTER 10: OBLIGATIONS OF THE PARTIES IN GENERAL

Section 1: General rules for the obligations of both parties

31:102: 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

31:103: 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

31:104: Co-operation

- (1) 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.*

(2) The obligation of co-operation requires in particular the parties to co-ordinate their respective efforts in so far as this may reasonably be considered necessary to perform their respective obligations under the contract.

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

31:105: Non-discrimination

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

- (a) the performance of any obligation to provide access to, or supply, services 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

32:101: 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. 6.1.6 UPICC, 7:101 PECL

32:102: 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

32:103: 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

32:104: 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. 6.1.4 UPICC, 7:104 PECL

32:105: 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

32:106: Performance entrusted to another

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

Comp. 8:107 PECL

32:107: 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

32:111: 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

32:113: 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 2bis: Modalities of performance of monetary obligations

32:108: 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

32:109: 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

32:112: 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

Section 3: Time-limited obligations

31:107: 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 11, Section 6, Sub-section 4 (Restitution) with appropriate adaptations.*

DCFR III-1:107

Section 4 Conditional obligations

31:106: 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 14, 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 SERVICE PROVIDER

Section 1. Rules for service contracts in general

42:103: Provider's obligation to co-operate

The obligation of co-operation requires in particular:

- (d) the service provider to give the client a reasonable opportunity to determine whether the service provider is performing the obligations under the contract; and*
- (e) the parties to co-ordinate their respective efforts in so far as this may reasonably be considered necessary to perform their respective obligations under the contract.*

42:104: Subcontractors, tools and materials

- (1) The service provider may subcontract the performance of the service in whole or in part without the client's consent, unless personal performance is required by the contract.*
- (2) Any subcontractor so engaged by the service provider must be of adequate competence.*
- (3) The service provider must ensure that any tools and materials used for the performance of the service are in conformity with the contract and the applicable statutory rules, and fit to achieve the particular purpose for which they are to be used.*
- (4) In so far as subcontractors are nominated by the client or tools and materials are provided by the client, the responsibility of the service provider is governed by 42:107 (Directions of the client) and 42:108 (Contractual obligation of the service provider to warn).*

29:108: 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

42:105: Obligation of skill and care

- (1) The service provider must perform the service:*
 - (a) with the care and skill which a reasonable service provider would exercise under the circumstances; and*
 - (b) in conformity with any statutory or other binding legal rules which are applicable to the service.*
- (2) If the service provider professes a higher standard of care and skill the provider must exercise that care and skill.*

(3) *If the service provider is, or purports to be, a member of a group of professional service providers for which standards have been set by a relevant authority or by that group itself, the service provider must exercise the care and skill expressed in those standards.*

(4) *In determining the care and skill the client is entitled to expect, regard is to be had, among other things, to:*

(a) *the nature, the magnitude, the frequency and the foreseeability of the risks involved in the performance of the service for the client;*

(b) *if damage has occurred, the costs of any precautions which would have prevented that damage or similar damage from occurring;*

(c) *whether the service provider is a business;*

(d) *whether a price is payable and, if one is payable, its amount; and*

(e) *the time reasonably available for the performance of the service.*

(5) *The obligations under this Article require in particular the service provider to take reasonable precautions in order to prevent the occurrence of damage as a consequence of the performance of the service.*

42:106: (1) Obligation to achieve result

The supplier of a service must achieve the specific result stated or envisaged by the client at the time of the conclusion of the contract, provided that in the case of a result envisaged but not stated:

(a) *the result envisaged was one which the client could reasonably be expected to have envisaged; and*

(b) *the client had no reason to believe that there was a substantial risk that the result would not be achieved by the service.*

42:106 (2): Obligation to achieve result + 4a2:305: Third party rights or claims

(1) *In so far as ownership of anything is transferred to the client under the service contract, it must be transferred free from any right or reasonably based claim of a third party.*

(2) *if such right or claim is based on industrial property or other intellectual property, , it must be transferred free from any such right or claim of a third party of which at the time of the conclusion of the contract the service provider knew or could reasonably be expected to have known.*

(3) *However, paragraph (2) does not apply where the right or claim results from the service provider's compliance with technical drawings, designs, formulae or other such specifications furnished by the client.*

Comp. 41-42 CISG

42:107: Directions of the client

(1) *The service provider must follow all timely directions of the client regarding the performance of the service, provided that the directions:*

- (a) are part of the contract itself or are specified in any document to which the contract refers; or*
 - (b) result from the realisation of choices left to the client by the contract; or*
 - (c) result from the realisation of choices initially left open by the parties.*
- (2) If non-performance of one or more of the obligations of the service provider under 42:105 (Obligation of skill and care) or 42:106 (Obligation to achieve result) is the consequence of following a direction which the service provider is obliged to follow under paragraph (1), the service provider is not liable under those Articles, provided that the client was duly warned under 42:108 (Contractual obligation of the service provider to warn).*
- (3) If the service provider perceives a direction falling under paragraph (1) to be a variation of the contract under 42:109 (Unilateral variation of the service contract) the service provider must warn the client accordingly. Unless the client then revokes the direction without undue delay, the service provider must follow the direction and the direction has effect as a variation of the contract.*

42:108: Contractual obligation of the service provider to warn

- (1) The service provider must warn the client if the service provider becomes aware of a risk that the service requested:*
- (a) may not achieve the result stated or envisaged by the client at the time of conclusion of the contract;*
 - (b) may damage other interests of the client; or*
 - (c) may become more expensive or take more time than agreed on in the contract either as a result of following information or directions given by the client or collected in preparation for performance, or as a result of the occurrence of any other risk.*
- (2) The service provider must take reasonable measures to ensure that the client understands the content of the warning.*
- (3) The obligation to warn in paragraph (1) does not apply if the client:*
- (a) already knows of the risks referred to in paragraph (1); or*
 - (b) could reasonably be expected to know of them.*
- (4) If a risk referred to in paragraph (1) materialises and the service provider did not perform the obligation to warn the client of it, a notice of variation by the service provider under 42:109 (Unilateral variation of the service contract) based on the materialisation of that risk is without effect.*
- (5) For the purpose of paragraph (1), the service provider is presumed to be aware of the risks mentioned if they should be obvious from all the facts and circumstances known to the service provider without investigation.*
- (6) For the purpose of paragraph (3)(b), the client cannot reasonably be expected to know of a risk merely because the client was competent, or was advised by others who were competent, in the relevant field, unless such other person acted as the agent of the client, in which case 21:105 (Imputed knowledge etc.) applies.*

33:108: 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. Rules for construction contracts

43:103: Obligation to prevent damage to structure

The constructor must take reasonable precautions in order to prevent any damage to the structure.

43:104: Conformity

(1) The constructor must ensure that the structure is of the quality and description required by the contract. Where more than one structure is to be made, the quantity also must be in conformity with the contract.

(2) The structure does not conform to the contract unless it is:

(a) fit for any particular purpose expressly or impliedly made known to the constructor at the time of the conclusion of the contract or at the time of any variation in accordance with 42:109 (Unilateral variation of the service contract) pertaining to the issue in question; and

(b) fit for the particular purpose or purposes for which a structure of the same description would ordinarily be used.

(3) The client is not entitled to invoke a remedy for non-conformity if a direction provided by the client under 42:107 (Directions of the client) is the cause of the non-conformity and the constructor performed the obligation to warn pursuant to 42:108 (Contractual obligation of the service provider to warn).

43:105: Inspection, supervision and acceptance

(1) The client may inspect or supervise the tools and materials used in the construction process, the process of construction and the resulting structure in a reasonable manner and at any reasonable time, but is not bound to do so.

(2) If the parties agree that the constructor has to present certain elements of the tools and materials used, the process or the resulting structure to the client for acceptance, the constructor may not proceed with the construction before having been allowed by the client to do so.

(3) Absence of, or inadequate, inspection, supervision or acceptance does not relieve the constructor wholly or partially from liability. This rule also applies when the client is under a contractual obligation to inspect, supervise or accept the structure or the construction of it.

43:108: Risks

(1) This Article applies if the structure is destroyed or damaged due to an event which the constructor could not have avoided or overcome and the constructor cannot be held accountable for the destruction or damage.

(2) In this Article the “relevant time” is:

(a) where the control of the structure is to be transferred to the client, the time when such control has been, or should have been, transferred in accordance with 43:106 (Handing-over of the structure);

(b) in other cases, the time when the work has been completed and the constructor has so informed the client.

(3) When the situation mentioned in paragraph (1) has been caused by an event occurring before the relevant time and it is still possible to perform:

(a) the constructor still has to perform or, as the case may be, perform again;

(b) the client is only obliged to pay for the constructor’s performance under (a);

(c) the time for performance is extended in accordance with paragraph

(6) of 42:109 (Unilateral variation of the service contract);

(d) the rules of 33:104 (Excuse due to an impediment) may apply to the constructor’s original performance; and

(e) the constructor is not obliged to compensate the client for losses to materials provided by the client.

(4) When the situation mentioned in paragraph (1) has been caused by an event occurring before the relevant time, and it is no longer possible to perform:

(a) the client does not have to pay for the service rendered;

(b) the rules of 33:104 (Excuse due to an impediment) may apply to the constructor’s performance; and

(c) the constructor is not obliged to compensate the client for losses to materials provided by the client, but is obliged to return the structure or what remains of it to the client.

(5) When the situation mentioned in paragraph (1) has been caused by an event occurring after the relevant time:

(a) the constructor does not have to perform again; and

(b) the client remains obliged to pay the price.

Section 3. Rules for processing contracts

44:103: Obligation to prevent damage to thing being processed

The processor must take reasonable precautions in order to prevent any damage to the thing being processed.

44:104: Inspection and supervision

(1) If the service is to be performed at a site provided by the client, the client may inspect or supervise the tools and material used, the performance of the service and the thing on which the service is performed in a reasonable manner and at any reasonable time, but is not bound to do so.

(2) Absence of, or inadequate inspection or supervision does not relieve the processor wholly or partially from liability. This rule also applies when the client is under a contractual obligation to accept, inspect or supervise the processing of the thing.

44:105: Return of the thing processed

(2) The processor must return the thing or the control of it within a reasonable time after being so requested by the client.

(3) Acceptance by the client of the return of the thing or the control of it does not relieve the processor wholly or partially from liability for nonperformance.

(4) If, by virtue of the rules on the acquisition of property, the processor has become the owner of the thing, or a share in it, as a consequence of the performance of the obligations under the contract, the processor must transfer ownership of the thing or share when the thing is returned.

44:107: Risks

(1) This Article applies if the thing is destroyed or damaged due to an event which the processor could not have avoided or overcome and the processor cannot be held accountable for the destruction or damage.

(2) If, prior to the event mentioned in paragraph (1), the processor had indicated that the processor regarded the service as sufficiently completed and that the processor wished to return the thing or the control of it to the client:

(a) the processor is not required to perform again; and

(b) the client must pay the price.

The price is due when the processor returns the remains of the thing, if any, or the client indicates that the client does not want the remains. In the latter case, the processor may dispose of the remains at the client's expense. This provision does not apply if the client was entitled to refuse the return of the thing under paragraph (1) of 44:105 (Return of the thing processed).

(3) If the parties had agreed that the processor would be paid for each period which has elapsed, the client is obliged to pay the price for each period which has elapsed before the event mentioned in paragraph (1) occurred.

(4) If, after the event mentioned in paragraph (1), performance of the obligations under the contract is still possible for the processor:

(a) the processor still has to perform or, as the case may be, perform again;

(b) the client is only obliged to pay for the processor's performance under (a); the processor's entitlement to a price under paragraph

(3) is not affected by this provision;

(c) the client is obliged to compensate the processor for the costs the processor has to incur in order to acquire materials replacing the materials supplied by the client, unless the client on being so requested by the processor supplies these materials; and

(d) if need be, the time for performance is extended in accordance with paragraph (6) of 42:109 (Unilateral variation of the service contract).

This paragraph is without prejudice to the client's right to terminate the contractual relationship under 42:111 (Client's right to terminate).

(5) If, in the situation mentioned in paragraph (1), performance of the obligations under the contract is no longer possible for the processor:

- (a) the client does not have to pay for the service rendered; the processor's entitlement to a price under paragraph (3) is not affected by this provision; and*
- (b) the processor is obliged to return to the client the thing and the materials supplied by the client or what remains of them, unless the client indicates that the client does not want the remains. In the latter case, the processor may dispose of the remains at the client's expense.*

Section 4. Rules for storage contracts

45:102: Storage place and subcontractors

- (1) The storer, in so far as the storer provides the storage place, must provide a place fit for storing the thing in such a manner that the thing can be returned in the condition the client may expect.*
- (2) The storer may not subcontract the performance of the service without the client's consent.*

45:103: Protection and use of the thing stored

- (1) The storer must take reasonable precautions in order to prevent unnecessary deterioration, decay or depreciation of the thing stored.*
- (2) The storer may use the thing handed over for storage only if the client has agreed to such use.*

45:104: Return of the thing stored

- (1) Without prejudice to any other obligation to return the thing, the storer must return the thing at the agreed time or, where the contractual relationship is terminated before the agreed time, within a reasonable time after being so requested by the client.*
- (3) Acceptance by the client of the return of the thing does not relieve the storer wholly or partially from liability for non-performance.*
- (5) If, during storage, the thing bears fruit, the storer must hand this fruit over when the thing is returned to the client.*
- (6) If, by virtue of the rules on the acquisition of ownership, the storer has become the owner of the thing, the storer must return a thing of the same kind and the same quality and quantity and transfer ownership of that thing. This Article applies with appropriate adaptations to the substituted thing.*
- (7) This Article applies with appropriate adaptations if a third party who has the right or authority to receive the thing requests its return.*

45:105: Conformity

- (1) The storage of the thing does not conform with the contract unless the thing is returned in the same condition as it was in when handed over to the storer.*
- (2) If, given the nature of the thing or the contract, it cannot reasonably be expected that the thing is returned in the same condition, the storage of the thing does not*

conform with the contract if the thing is not returned in such condition as the client could reasonably expect.

(3) If, given the nature of the thing or the contract, it cannot reasonably be expected that the same thing is returned, the storage of the thing does not conform with the contract if the thing which is returned is not in the same condition as the thing which was handed over for storage, or if it is not of the same kind, quality and quantity, or if ownership of the thing is not transferred in accordance with paragraph (6) of IV. C. – 5:104 (Return of the thing stored).

45:107: Post-storage obligation to inform

After the ending of the storage, the storer must inform the client of:

(a) any damage which has occurred to the thing during storage; and

(b) the necessary precautions which the client must take before using or transporting the thing, unless the client could reasonably be expected to be aware of the need for such precautions.

45:108: Risks

(1) This Article applies if the thing is destroyed or damaged due to an event which the storer could not have avoided or overcome and if the storer cannot be held accountable for the destruction or damage.

(2) If, prior to the event, the storer had notified the client that the client was required to accept the return of the thing, the client must pay the price. The price is due when the storer returns the remains of the thing, if any, or the client indicates to the storer that the client does not want those remains.

(3) If, prior to the event, the storer had not notified the client that the client was required to accept the return of the thing:

(a) if the parties had agreed that the storer would be paid for each period of time which has elapsed, the client must pay the price for each period which has elapsed before the event occurred;

(b) if further performance of the obligations under the contract is still possible for the storer, the storer is required to continue performance, without prejudice to the client's right to terminate the contractual relationship under 42:111 (Client's right to terminate);

(c) if performance of the obligations under the contract is no longer possible for the storer the client does not have to pay for the service rendered except to the extent that the storer is entitled to a price under subparagraph (a); and the storer must return to the client the remains of the thing unless the client indicates that the client does not want those remains.

(4) If the client indicates to the storer that the client does not want the remains of the thing, the storer may dispose of the remains at the client's expense.

Section 5. Rules for contracts with a hotel-keeper

45:110: Liability of the hotel-keeper

(1) A hotel-keeper is liable as a storer for any damage to, or destruction or loss of, a thing brought to the hotel by any guest who stays at the hotel and has sleeping accommodation there.

(3) The hotel-keeper is not liable in so far as the damage, destruction or loss is caused by:

- (a) a guest or any person accompanying, employed by or visiting the guest;*
- (b) an impediment beyond the hotel-keeper's control; or*
- (c) the nature of the thing.*

Section 6. Rules for design contracts

46:103: Obligation of skill and care

The designer's obligation of skill and care requires in particular the designer to:

- (a) attune the design work to the work of other designers who contracted with the client, to enable there to be an efficient performance of all services involved;*
- (b) integrate the work of other designers which is necessary to ensure that the design will conform to the contract;*
- (c) include any information for the interpretation of the design which is necessary for a user of the design of average competence (or a specific user made known to the designer at the conclusion of the contract) to give effect to the design;*
- (d) enable the user of the design to give effect to the design without violation of public law rules or interference based on justified third-party rights of which the designer knows or could reasonably be expected to know; and*
- (e) provide a design which allows economic and technically efficient realisation.*

46:104: Conformity

(1) The design does not conform to the contract unless it enables the user of the design to achieve a specific result by carrying out the design with the skill and care which could reasonably be expected.

(2) The client is not entitled to invoke a remedy for non-conformity if a direction provided by the client under 42:107 (Directions of the client) is the cause of the non-conformity and the designer performed the obligation to warn under 42:108 (Contractual obligation of the service provider to warn).

46:106: Records

(1) After performance of both parties' other contractual obligations, the designer must, on request by the client, hand over all relevant documents or copies of them.

(2) The designer must store, for a reasonable time, relevant documents which are not handed over. Before destroying the documents, the designer must offer them again to the client.

Section 7. Rules for information and advice contracts

47:102: Obligation to collect preliminary data

(1) The provider must, in so far as this may reasonably be considered necessary for the performance of the service, collect data about:

- (a) the particular purpose for which the client requires the information;*
 - (b) the client's preferences and priorities in relation to the information;*
 - (c) the decision the client can be expected to make on the basis of the information;*
- and*
- (d) the personal situation of the client.*

(2) In case the information is intended to be passed on to a group of persons, the data to be collected must relate to the purposes, preferences, priorities and personal situations that can reasonably be expected from individuals within such a group.

(3) In so far as the provider must obtain data from the client, the provider must explain what the client is required to supply.

47:103: Obligation to acquire and use expert knowledge

The provider must acquire and use the expert knowledge to which the provider has or should have access as a professional information provider or adviser, in so far as this may reasonably be considered necessary for the performance of the service.

47:104: Obligation of skill and care

(1) The provider's obligation of skill and care requires in particular the provider to:

- (a) take reasonable measures to ensure that the client understands the content of the information;*
- (b) act with the care and skill that a reasonable information provider would demonstrate under the circumstances when providing evaluative information; and*
- (c) in any case where the client is expected to make a decision on the basis of the information, inform the client of the risks involved, in so far as such risks could reasonably be expected to influence the client's decision.*

(2) When the provider expressly or impliedly undertakes to provide the client with a recommendation to enable the client to make a subsequent decision, the provider must:

- (a) base the recommendation on a skilful analysis of the expert knowledge to be collected in relation to the purposes, priorities, preferences and personal situation of the client;*
- (b) inform the client of alternatives the provider can personally provide relating to the subsequent decision and of their advantages and risks, as compared with those of the recommended decision; and*
- (c) inform the client of other alternatives the provider cannot personally provide, unless the provider expressly informs the client that only a limited range of alternatives is offered or this is apparent from the situation.*

47:105: Conformity

- (1) The provider must provide information which is of the quantity, quality and description required by the contract.*
- (2) The factual information provided by the information provider to the client must be a correct description of the actual situation described.*

47:106: Records

In so far as this may reasonably be considered necessary, having regard to the interest of the client, the provider must keep records regarding the information provided in accordance with this Chapter and make such records or excerpts from them available to the client on reasonable request.

47:107: Conflict of interest

- (1) When the provider expressly or impliedly undertakes to provide the client with a recommendation to enable the client to make a subsequent decision, the provider must disclose any possible conflict of interest which might influence the performance of the provider's obligations.*
- (2) So long as the contractual obligations have not been completely performed, the provider may not enter into a relationship with another party which may give rise to a possible conflict with the interests of the client, without full disclosure to the client and the client's explicit or implicit consent.*

47:108: Influence of ability of the client

- (1) The involvement in the supply of the service of other persons on the client's behalf or the mere competence of the client does not relieve the provider of any obligation under this Chapter.*
- (2) The provider is relieved of those obligations if the client already has knowledge of the information or if the client has reason to know of the information.*
- (3) For the purpose of paragraph (2), the client has reason to know if the information should be obvious to the client without investigation.*

Section 8. Rules for treatment contracts

48:102: Preliminary assessment

The treatment provider must, in so far as this may reasonably be considered necessary for the performance of the service:

- (a) interview the patient about the patient's health condition, symptoms, previous illnesses, allergies, previous or other current treatment and the patient's preferences and priorities in relation to the treatment;*
- (b) carry out the examinations necessary to diagnose the health condition of the patient; and*

(c) consult with any other treatment providers involved in the treatment of the patient.

48:103: Obligations regarding instruments, medicines, materials, installations and premises

(1) The treatment provider must use instruments, medicines, materials, installations and premises which are of at least the quality demanded by accepted and sound professional practice, which conform to applicable statutory rules, and which are fit to achieve the particular purpose for which they are to be used.

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

48:104: Obligation of skill and care

(1) The treatment provider's obligation of skill and care requires in particular the treatment provider to provide the patient with the care and skill which a reasonable treatment provider exercising and professing care and skill would demonstrate under the given circumstances.

(2) If the treatment provider lacks the experience or skill to treat the patient with the required degree of skill and care, the treatment provider must refer the patient to a treatment provider who can.

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

48:105: Obligation to inform

(1) The treatment provider must, in order to give the patient a free choice regarding treatment, inform the patient about, in particular:

(a) the patient's existing state of health;

(b) the nature of the proposed treatment;

(c) the advantages of the proposed treatment;

(d) the risks of the proposed treatment;

(e) the alternatives to the proposed treatment, and their advantages and risks as compared to those of the proposed treatment; and

(f) the consequences of not having treatment.

(2) The treatment provider must, in any case, inform the patient about any risk or alternative which might reasonably influence the patient's decision on whether to give consent to the proposed treatment or not. It is presumed that a risk might reasonably influence that decision if its materialisation would lead to serious detriment to the patient. Unless otherwise provided, the obligation to inform is subject to the provisions

*on **contracts for** Information and Advice.*

(3) The information must be provided in a way understandable to the patient.

48:106: Obligation to inform in case of unnecessary or experimental treatment

(1) If the treatment is not necessary for the preservation or improvement of the patient's health, the treatment provider must disclose all known risks.

(2) If the treatment is experimental, the treatment provider must disclose all information regarding the objectives of the experiment, the nature of the treatment, its advantages and risks and the alternatives, even if only potential.

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

48:107: Exceptions to the obligation to inform

(1) Information which would normally have to be provided by virtue of the obligation to inform may be withheld from the patient:

(a) if there are objective reasons to believe that it would seriously and negatively influence the patient's health or life; or

(b) if the patient expressly states a wish not to be informed, provided that the non-disclosure of the information does not endanger the health or safety of third parties.

(2) The obligation to inform need not be performed where treatment must be provided in an emergency. In such a case the treatment provider must, so far as possible, provide the information later.

48:108: Obligation not to treat without consent

(1) The treatment provider must not carry out treatment unless the patient has given prior informed consent to it.

(2) The patient may revoke consent at any time.

(3) In so far as the patient is incapable of giving consent, the treatment provider must not carry out treatment unless:

(a) informed consent has been obtained from a person or institution legally entitled to take decisions regarding the treatment on behalf of the patient; or

(b) any rules or procedures enabling treatment to be lawfully given without such consent have been complied with; or

(c) the treatment must be provided in an emergency. (4) In the situation described in paragraph (3), the treatment provider must not carry out treatment without considering, so far as possible, the opinion of the incapable patient with regard to the treatment and any such opinion expressed by the patient before becoming incapable.

(5) In the situation described in paragraph (3), the treatment provider may carry out only such treatment as is intended to improve the health condition of the patient.

(6) In the situation described in paragraph (2) of 48:106 (Obligation to inform in case of unnecessary or experimental treatment), consent must be given in an express and specific way.

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

48:109: Records

(1) The treatment provider must create adequate records of the treatment.

Such records must include, in particular, information collected in any preliminary interviews, examinations or consultations, information regarding the consent of the patient and information regarding the treatment performed.

(2) The treatment provider must, on reasonable request:

(a) give the patient, or if the patient is incapable of giving consent, the person or institution legally entitled to take decisions on behalf of the patient, access to the records; and

(b) answer, in so far as reasonable, questions regarding the interpretation of the records.

(3) If the patient has suffered injury and claims that it is a result of nonperformance by the treatment provider of the obligation of skill and care and the treatment provider fails to comply with paragraph (2), non-performance of the obligation of skill and care and a causal link between such non-performance and the injury are presumed.

(4) The treatment provider must keep the records, and give information about their interpretation, during a reasonable time of at least 10 years after the treatment has ended, depending on the usefulness of these records for the patient or the patient's heirs or representatives and for future treatments. Records which can reasonably be expected to be important after the reasonable time must be kept by the treatment provider after that time. If for any reason the treatment provider ceases activity, the records must be deposited or delivered to the patient for future consultation.

(5) The parties may not, to the detriment of the patient, exclude the application of paragraphs (1) to (4) or derogate from or vary their effects.

(6) The treatment provider may not disclose information about the patient or other persons involved in the patient's treatment to third parties unless disclosure is necessary in order to protect third parties or the public interest. The treatment provider may use the records in an anonymous way for statistical, educational or scientific purposes.

48:111: Obligations of treatment-providing organisations

(1) If, in the process of performance of the obligations under the treatment contract, activities take place in a hospital or on the premises of another treatment-providing organisation, and the hospital or that other treatment-providing organisation is not a party to the treatment contract, it must make clear to the patient that it is not the contracting party.

(2) Where the treatment provider cannot be identified, the hospital or treatment-providing organisation in which the treatment took place is treated as the treatment provider unless the hospital or treatment-providing organisation informs the patient, within a reasonable time, of the identity of the treatment provider.

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

CHAPTER 12: OBLIGATIONS OF THE CLIENT

Section 1: Rules for service contracts in general

42:101: Price + 29:104: Determination of price

(1) *Where the service provider is a business, a price is payable unless the circumstances indicate otherwise.*

(2) *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.*

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

42:103: Client's obligation to co-operate

(1) *The obligation of co-operation requires in particular:*

(a) *the client to answer reasonable requests by the service provider for information in so far as this may reasonably be considered necessary to enable the service provider to perform the obligations under the contract;*

(b) *the client to give directions regarding the performance of the service in so far as this may reasonably be considered necessary to enable the service provider to perform the obligations under the contract;*

(c) *the client, in so far as the client is to obtain permits or licences, to obtain these at such time as may reasonably be considered necessary to enable the service provider to perform the obligations under the contract*

(2) *If the client fails to perform the obligations under paragraph (1)(a) or (b), the service provider may either withhold performance or base performance on the expectations, preferences and priorities the client could reasonably be expected to have, given the information and directions which have been gathered, provided that the client is warned in accordance with 42:108 (Contractual obligation of the service provider to warn).*

(3) *If the client fails to perform the obligations under article 31:104 or under paragraph (1) of this article causing the service to become more expensive or to take more time than agreed on in the contract, the service provider is entitled to:*

(a) *damages for the loss the service provider sustained as a consequence of the non-performance; and*

(b) *an adjustment of the time allowed for supplying the service.*

42:110: Client's obligation to notify anticipated non-conformity

(1) *The client must notify the service provider if the client becomes aware during the period for performance of the service that the service provider will fail to perform the*

obligation under 42:106 (Obligation to achieve result).

(2) The client is presumed to be so aware if from all the facts and circumstances known to the client without investigation the client has reason to be so aware.

(3) If a non-performance of the obligation under paragraph (1) causes the service to become more expensive or to take more time than agreed on in the contract, the service provider is entitled to:

(a) damages for the loss the service provider sustains as a consequence of that failure; and

(b) an adjustment of the time allowed for performance of the service.

Section 2. Rules for construction contracts

43:102: Obligation of client to co-operate

The obligation of co-operation requires in particular the client to:

(a) provide access to the site where the construction has to take place in so far as this may reasonably be considered necessary to enable the constructor to perform the obligations under the contract; and

(b) provide the components, materials and tools, in so far as they must be provided by the client, at such time as may reasonably be considered necessary to enable the constructor to perform the obligations under the contract.

43:106: Handing-over of the structure

(1) If the constructor regards the structure, or any part of it which is fit for independent use, as sufficiently completed and wishes to transfer control over it to the client, the client must accept such control within a reasonable time after being notified. The client may refuse to accept the control when the structure, or the relevant part of it, does not conform to the contract and such non-conformity makes it unfit for use.

(2) Acceptance by the client of the control over the structure does not relieve the constructor wholly or partially from liability. This rule also applies when the client is under a contractual obligation to inspect, supervise or accept the structure or the construction of it.

(3) This Article does not apply if, under the contract, control is not to be transferred to the client.

43:107: Payment of the price

(1) The price or a proportionate part of it is payable when the constructor transfers the control of the structure or a part of it to the client in accordance with the preceding Article.

(2) However, where work remains to be done under the contract on the structure or relevant part of it after such transfer the client may withhold such part of the price as is reasonable until the work is completed.

(3) If, under the contract, control is not to be transferred to the client, the price is

payable when the work has been completed, the constructor has so informed the client and the client has had a chance to inspect the structure.

Section 3. Rules for processing contracts

44:102: Obligation of client to co-operate

The obligation to co-operate requires in particular the client to:

(a) hand over the thing or to give the control of it to the processor, or to give access to the site where the service is to be performed in so far as may reasonably be considered necessary to enable the processor to perform the obligations under the contract; and

(b) in so far as they must be provided by the client, provide the components, materials and tools in time to enable the processor to perform the obligations under the contract.

44:105: Return of the thing processed

(1) If the processor regards the service as sufficiently completed and wishes to return the thing or the control of it to the client, the client must accept such return or control within a reasonable time after being notified. The client may refuse to accept the return or control when the thing is not fit for use in accordance with the particular purpose for which the client had the service performed, provided that such purpose was made known to the processor or that the processor otherwise has reason to know of it.

44:106: Payment of the price

(1) The price is payable when the processor transfers the thing or the control of it to the client in accordance with 44:105 (Return of the thing processed) or the client, without being entitled to do so, refuses to accept the return of the thing.

(2) However, where work remains to be done under the contract on the thing after such transfer or refusal the client may withhold such part of the price as is reasonable until the work is completed.

(3) If, under the contract, the thing or the control of it is not to be transferred to the client, the price is payable when the work has been completed and the processor has so informed the client.

Section 4. Rules for storage contracts

45:104: (Acceptance of the) Return of the thing stored

(2) The client must accept the return of the thing when the storage obligation comes to an end and when acceptance of return is properly requested by the storer.

(4) If the client fails to accept the return of the thing at the time provided under paragraph (2), the storer has the right to sell the thing in accordance with 32:111

(Property not accepted), provided that the storer has given the client reasonable warning of the storer's intention to do so.

45:106 (1): Payment of the price

The price is payable at the time when the thing is returned to the client in accordance with 45:104 (Return of the thing stored) or the client, without being entitled to do so, refuses to accept the return of the thing.

Section 5. Rules for design contracts

46:105: Handing over of the design

(1) In so far as the designer regards the design, or a part of it which is fit for carrying out independently from the completion of the rest of the design, as sufficiently completed and wishes to transfer the design to the client, the client must accept it within a reasonable time after being notified.

(2) The client may refuse to accept the design when it, or the relevant part of it, does not conform to the contract and such non-conformity amounts to a fundamental non-performance.

CHAPTER 13: EXTINCTION AND VARIATION OF OBLIGATIONS

Section 1: Effects of performance

32:114: 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.*

32:110: 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: Variation and termination

31:108: 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 14, Section 6, Sub-section 4 (Restitution)** with appropriate adaptations.*

For (1), Comp. 3.2 and 5.1.9 UPICC

31:109 + 42:109: Variation by notice - Unilateral variation of the service contract

(1) A right, obligation or contractual relationship may be varied by notice by either party where this is provided for by the terms regulating it.

(1) Without prejudice to the client's right to terminate under 42:111 (Client's right to terminate), either party may, by notice to the other party, change the service to be provided, if such a change is reasonable taking into account:

- (a) the result to be achieved;*
- (b) the interests of the client;*
- (c) the interests of the service provider; and*
- (d) the circumstances at the time of the change.*

(2) A change is regarded as reasonable only if it is:

- (a) necessary in order to enable the service provider to act in accordance with 42:105 (Obligation of skill and care) or, as the case may be, 42:106 (Obligation to achieve result);*
- (b) the consequence of a direction given in accordance with paragraph (1) of 42:107 (Directions of the client) and not revoked without undue delay after receipt of a warning in accordance with paragraph (3) of that Article;*
- (c) a reasonable response to a warning from the service provider under 42:108 (Contractual obligation of the service provider to warn); or*
- (d) required by a change of circumstances which would justify a variation of the service provider's obligations under 31:110 (Variation or termination by court on a change of circumstances).*

(3) Any additional price due as a result of the change has to be reasonable and is to be determined using the same methods of calculation as were used to establish the original price for the service.

(4) In so far as the service is reduced, the loss of profit, the expenses saved and any possibility that the service provider may be able to use the released capacity for other purposes are to be taken into account in the calculation of the price due as a result of the change.

(5) A change of the service may lead to an adjustment of the time of performance proportionate to the extra work required in relation to the work originally required

for the performance of the service and the time span determined for performance of the service.

31:109 + 42:111: Termination by notice - Client's right to terminate

(1) A right, obligation or contractual relationship may be 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) The client may terminate the contractual relationship at any time by giving notice to the service provider.

(4) When the client was justified in terminating the relationship no damages are payable for so doing.

(5) When the client was not justified in terminating the relationship, the termination is nevertheless effective but, the service provider has a right to damages in accordance with the rules in Chapter 14 (Non-Performance)

(6) For the purposes of this Article, the client is justified in terminating the relationship if the client:

(a) was entitled to terminate the relationship under the express terms

of the contract and observed any requirements laid down in the contract for doing so;

(b) was entitled to terminate the relationship under Chapter 14, Section 6 (Termination); or

(c) was entitled to terminate the relationship under paragraph (2) of this article and gave a reasonable period of notice as required by that provision.

48:110: Right to terminate in treatment contracts

With regard to any non-performance of an obligation under a contract for treatment, Chapter 14 (Remedies for Non-performance) and 42:111 (Client's right to terminate) apply with the following adaptations:

(a) the treatment provider may not (...) terminate the contractual relationship if this would seriously endanger the health of the patient; and

(b) in so far as the treatment provider has the right to (...) terminate the contractual relationship and is planning to exercise that right, the treatment provider must refer the patient to another treatment provider.

31:109 (3): Effects of termination by notice

(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 14, Section 6, Sub-section 4 (Restitution)with appropriate adaptations.*

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

31:110: 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

31:111: 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

36:101: 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

36:102: 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

36:103: 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

36:104: 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

36:105: Set-off by notice

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

Comp. 8.3 UPICC, 13:104 PECL

36:106: 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

36:107: 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

36:108: 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

36:201: 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 14: REMEDIES FOR NON-PERFORMANCE

Section 1: General

33:101: 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. 7.1.2 & 7.4.1. UPICC, 8:101 PECL, for (3) 8:102 AP, for (2) 8:405 AP

33:102: 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

33:103: 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

33:104: 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

33:105: 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

33:106: 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

33:107: Failure to notify non-conformity

(1) If, in the case of an obligation to supply **services**, the debtor supplies **services** 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 **services** 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

45:110 (5): **Duty to inform** in a contract with a hotel-keeper

Except where the damage, destruction or loss is caused intentionally or by way of grossly negligent conduct of the hotel-keeper or a person for whose actions the hotel-keeper is responsible, the guest is required to inform the hotel-keeper of the damage, destruction or loss without undue delay. If the guest fails to inform the hotel-keeper without undue delay, the hotel-keeper is not liable.

Section 3: Cure by debtor of non-conforming performance

33:201: Scope

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

33:202: 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

33:203: 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

33:204: 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.*

33:205 Return of replaced item

- (1) Where the debtor has, whether voluntarily or in compliance with an order under 33:302 (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

33:301: 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

33:302: 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

33:303: 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

33:401: 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

45:106 (2): **Right to withhold performance in storage contracts**

The storer may withhold the thing until the client pays the price. 33:401 (Right to withhold performance of reciprocal obligation) applies accordingly.

45:110 (6): **Right to withhold performance of the hotel-keeper**

The hotel-keeper has the right to withhold any thing brought to the hotel by any guest who stays at the hotel and has sleeping accommodation there, as defined in Art. 45:110 (2) until the guest has satisfied any right the hotel-keeper has against the guest with respect to accommodation, food, drink and solicited services performed for the guest in the hotel-keeper's professional capacity.

48:110: **Right to withhold performance in treatment contracts**

*(a) The treatment provider may not withhold performance (...) if this would seriously endanger the health of the patient; and
(b) In so far as the treatment provider has the right to withhold performance or to terminate the contractual relationship and is planning to exercise that right, the treatment provider must refer the patient to another treatment provider.*

Section 6: Termination

33:501: 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

33:502: 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

33:503: 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

33:504: 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

33:505: 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

48:110: Right to terminate in treatment contracts

With regard to any non-performance of an obligation under a contract for treatment, Chapter 14 (Remedies for Non-performance) and 42:111 (Client's right to terminate) apply with the following adaptations:

(a) the treatment provider may not (...) terminate the contractual relationship if this would seriously endanger the health of the patient; and

(b) in so far as the treatment provider has the right to (...) terminate the contractual relationship and is planning to exercise that right, the treatment provider must refer

the patient to another treatment provider.

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

33:506: 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

33:507: Notice of termination

(1) A right to terminate under this Section is exercised by notice to the debtor.

(2) Where a notice under 33:503 (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

33:508: 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 33:202 (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 33:503 (Termination after notice fixing additional time for performance), 33:504 (Termination for anticipated non-performance) or 33:505 (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

33:509: 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

33:510: 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 33:513(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

33:511: 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

33:512: 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

33:513: 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 33:513 (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

33:514: 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

33:601: 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

33:701: 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

33:702: 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

33:703: 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

47:109: Causation in information or advice contracts

If the provider knows or could reasonably be expected to know that a subsequent decision will be based on the information to be provided, and if the client makes such a decision and suffers loss as a result, any non-performance of an obligation under the contract by the provider is presumed to have caused the loss if the client proves that, if the provider had provided all information required, it would have been reasonable for the client to have seriously considered making an alternative decision.

33:704: 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

33:705: 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

33:706: 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

33:707: 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

33:708: 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

33:709: 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

33:710: Interest in commercial contracts

*(1) If a business delays the payment of a price due under a contract for the supply of **services** without being excused under 33:104 (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 **services**, 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 **services** 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

33:711: 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 to the extent that this would be unfair.

(2) A term whereby a debtor is allowed to pay the price for **services** 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

33:712: 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

33:713: 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 15: PLURALITY OF DEBTORS AND CREDITORS

Section 1: Plurality of debtors

34:101: Scope of Section

This Section applies where two or more debtors are bound to perform one obligation.

34:102: 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

34:103: 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

34:104: Liability under divided obligations

Debtors bound by a divided obligation are liable in equal shares.

Comp. 10:103 PECL

34:105: Joint obligations: special rule when money claimed for non-performance

Notwithstanding 34:102 (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

34:106: 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

34:107: 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

34:108: 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

34:109: 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 34:107 (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

34:110: 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 34:107 (Recourse between solidary debtors).*

Comp. 10:109 PECL

34:111: 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 34:107 (Recourse between solidary debtors).*

Comp. 10:110 PECL

34:112: 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

34:201: Scope of Section

This Section applies where two or more creditors have a right to performance under one obligation.

34:202: 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

34:203: 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.

34:204: Apportionment in cases of divided rights

Creditors whose rights are divided are entitled to equal shares.

Comp. 10:202 PECL

34:205: 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 32:111 (Property not accepted) or 32:112 (Money not accepted).

Comp. 10:203 PECL

34:206: 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

34:207: 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 34:108 (Performance, set-off and merger in solidary obligations), 34:110 (Effect of judgment in solidary obligations), 34:111 (Prescription in solidary

obligations) and 34:112 (Opposability of other defences in solidary obligations) paragraph (1) apply, with appropriate adaptations, to solidary rights to performance.

Comp. 10:205 PECL

CHAPTER 16: CHANGE OF PARTIES

Section 1: Assignment of rights

Sub-section 1: General

35:101: 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

35:102: 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

35:103: Priority of provisions on proprietary securities and trusts

(1) In relation to assignments for purposes of security, the provisions of 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

35:104: 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

35:105: 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

35:106: 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

35:107: 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

35:108: 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 **services**.**
- (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

35:109: 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

35:110: 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

35:111: 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 35:104 (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

35:113: 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)

35:114: When assignment takes place

(1) An assignment takes place when the requirements of 35:104 (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 35:104 (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

35:115: 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 35:301 (Transfer of contractual position).

Comp. 9.1.14 UPICC, PECL 11:201

35:116: 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

35:117: 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

35:118: Effect of initial invalidity, subsequent avoidance, withdrawal, termination and revocation

(1) This Article applies where the assignee's entitlement for the purposes of 35:104 (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 **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 **Chapters 13 or 14**, 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

35:119: 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

35:120: 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

35:121: 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.*

Section 2: Substitution and addition of debtors

35:201: Scope

This Section applies only to the substitution or addition of a new debtor by agreement.

35:202: 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

35:203: 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

35:204: 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.

35:205: 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

35:206: 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.*

35:207: 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.*

35:208: 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.

35:209: 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 15, Section 1 (Plurality of debtors) apply

Section 3: Transfer of contractual position

35:301: Scope

This Section applies only to transfers by agreement.

35:302: 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

35:401: 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

35:402: 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 17: PRESCRIPTION

Section 1: General provision

37:101: 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

37:201: General period

The general period of prescription is three years.

Comp. 10.2 (1) UPICC, 14:201 PECL

37:202: 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

37:203: 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 37:202 (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.*

Comp. 14:203 PECL

Section 3: Extension of period

37:301: 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.*

Comp. 14:301 PECL

37:302: 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.

Comp. 10.5 and 10.6 and 10.7 UPICC, 14:302 PECL

37:303: 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

37:304: 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

37:305: 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

37:306: 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

37:307: 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 37:302 (Suspension in case of judicial and other proceedings).

Comp. 10.2 (2) UPICC, 14:307 PECL

Section 4: Renewal of period

37:401: 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 37:202 (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

37:402: Renewal by attempted execution

The ten year period of prescription laid down in 37:202 (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

37:501: 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

37:502: 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

37:503: 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

37:601: 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 37:203 (Commencement).

Comp. 10.3 UPICC, 14:601 PECL