

**UNIDROIT PRINCIPLES OF INTERNATIONAL  
COMMERCIAL CONTRACTS 2010<sup>(\*)</sup>**

**PREAMBLE**

*(Purpose of the Principles)*

These Principles set forth general rules for international commercial contracts.

They shall be applied when the parties have agreed that their contract be governed by them. <sup>(\*\*)</sup>

They may be applied when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like.

They may be applied when the parties have not chosen any law to govern their contract.

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

They may be used to interpret or supplement domestic law.

They may serve as a model for national and international legislators.

**CHAPTER 1 — GENERAL PROVISIONS**

**ARTICLE 1.1**

*(Freedom of contract)*

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

**ARTICLE 1.2**

*(No form required)*

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

**ARTICLE 1.3**

*(Binding character of contract)*

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

**ARTICLE 1.4**

*(Mandatory rules)*

Nothing in these Principles shall restrict the application of mandatory rules, whether of national, international or supranational origin, which are applicable in accordance with the relevant rules of private international law.

**ARTICLE 1.5**

*(Exclusion or modification by the parties)*

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

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The reader is reminded that the integral version of the Principles consists of both black-letter rules and Comments (see <http://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010>). For select case law and bibliography relating to the Principles, see [www.unilex.info](http://www.unilex.info).

(\*\*)

Parties wishing to provide that their agreement be governed by the Principles might use one of the *Model Clauses for the Use of the UNIDROIT Principles of International Commercial Contracts* (see <http://www.unidroit.org/instruments/commercial-contracts/upicc-model-clauses>).

**ARTICLE 1.6**

*(Interpretation and supplementation of the Principles)*

- (1) In the interpretation of these Principles, regard is to be had to their international character and to their purposes including the need to promote uniformity in their application.
- (2) Issues within the scope of these Principles but not expressly settled by them are as far as possible to be settled in accordance with their underlying general principles.

**ARTICLE 1.7**

*(Good faith and fair dealing)*

- (1) Each party must act in accordance with good faith and fair dealing in international trade.
- (2) The parties may not exclude or limit this duty.

**ARTICLE 1.8**

*(Inconsistent behaviour)*

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

**ARTICLE 1.9**

*(Usages and practices)*

- (1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.
- (2) The parties are bound by a usage that is widely known to and regularly observed in international trade by parties in the particular trade concerned except where the application of such a usage would be unreasonable.

**ARTICLE 1.10**

*(Notice)*

- (1) Where notice is required it may be given by any means appropriate to the circumstances.
- (2) A notice is effective when it reaches the person to whom it is given.
- (3) For the purpose of paragraph (2) a notice “reaches” a person when given to that person orally or delivered at that person’s place of business or mailing address.
- (4) For the purpose of this Article “notice” includes a declaration, demand, request or any other communication of intention.

**ARTICLE 1.11**

*(Definitions)*

In these Principles

- “court” includes an arbitral tribunal;
- where a party has more than one place of business the relevant “place of business” is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract;
- “obligor” refers to the party who is to perform an obligation and “obligee” refers to the party who is entitled to performance of that obligation.
- “writing” means any mode of communication that preserves a record of the information contained therein and is capable of being reproduced in tangible form.

**ARTICLE 1.12**

*(Computation of time set by parties)*

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

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

(3) The relevant time zone is that of the place of business of the party setting the time, unless the circumstances indicate otherwise.

## CHAPTER 2 — FORMATION AND AUTHORITY OF AGENTS

### SECTION 1: FORMATION

#### ARTICLE 2.1.1 *(Manner of formation)*

A contract may be concluded either by the acceptance of an offer or by conduct of the parties that is sufficient to show agreement.

#### ARTICLE 2.1.2 *(Definition of offer)*

A proposal for concluding a contract constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance.

#### ARTICLE 2.1.3 *(Withdrawal of offer)*

(1) An offer becomes effective when it reaches the offeree.

(2) An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.

#### ARTICLE 2.1.4 *(Revocation of offer)*

(1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before it has dispatched an acceptance.

(2) However, an offer cannot be revoked

(a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or

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

#### ARTICLE 2.1.5 *(Rejection of offer)*

An offer is terminated when a rejection reaches the offeror.

#### ARTICLE 2.1.6 *(Mode of acceptance)*

(1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.

(2) An acceptance of an offer becomes effective when the indication of assent reaches the offeror.

(3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act without notice to the offeror, the acceptance is effective when the act is performed.

#### ARTICLE 2.1.7 *(Time of acceptance)*

An offer must be accepted within the time the offeror has fixed or, if no time is fixed, within a reasonable time having regard to the circumstances, including the rapidity of the means of

communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.

**ARTICLE 2.1.8**

*(Acceptance within a fixed period of time)*

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

**ARTICLE 2.1.9**

*(Late acceptance. Delay in transmission)*

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

(2) If a communication containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without undue delay, the offeror informs the offeree that it considers the offer as having lapsed.

**ARTICLE 2.1.10**

*(Withdrawal of acceptance)*

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

**ARTICLE 2.1.11**

*(Modified acceptance)*

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

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

**ARTICLE 2.1.12**

*(Writings in confirmation)*

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

**ARTICLE 2.1.13**

*(Conclusion of contract dependent on agreement on specific matters or in a particular form)*

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

**ARTICLE 2.1.14**

*(Contract with terms deliberately left open)*

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

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

- (a) the parties reach no agreement on the term; or
- (b) the third person does not determine the term,

provided that there is an alternative means of rendering the term definite that is reasonable in the circumstances, having regard to the intention of the parties.

**ARTICLE 2.1.15**

*(Negotiations in bad faith)*

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

**ARTICLE 2.1.16**

*(Duty of confidentiality)*

Where information is given as confidential by one party in the course of negotiations, the other party is under a duty not to disclose that information or to use it improperly for its own purposes, whether or not a contract is subsequently concluded. Where appropriate, the remedy for breach of that duty may include compensation based on the benefit received by the other party.

**ARTICLE 2.1.17**

*(Merger clauses)*

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

**ARTICLE 2.1.18**

*(Modification in a particular form)*

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

**ARTICLE 2.1.19**

*(Contracting under standard terms)*

- (1) Where one party or both parties use standard terms in concluding a contract, the general rules on formation apply, subject to Articles 2.1.20 - 2.1.22.
- (2) Standard terms are provisions which are prepared in advance for general and repeated use by one party and which are actually used without negotiation with the other party.

**ARTICLE 2.1.20**

*(Surprising terms)*

- (1) No term contained in standard terms which is of such a character that the other party could not reasonably have expected it, is effective unless it has been expressly accepted by that party.
- (2) In determining whether a term is of such a character regard shall be had to its content, language and presentation.

**ARTICLE 2.1.21**

*(Conflict between standard terms and non-standard terms)*

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

**ARTICLE 2.1.22**

*(Battle of forms)*

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

**SECTION 2: AUTHORITY OF AGENTS**

**ARTICLE 2.2.1**

*(Scope of the Section)*

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

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

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

**ARTICLE 2.2.2**

*(Establishment and scope of the authority of the agent)*

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

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

**ARTICLE 2.2.3**

*(Agency disclosed)*

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

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

**ARTICLE 2.2.4**

*(Agency undisclosed)*

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

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

**ARTICLE 2.2.5**

*(Agent acting without or exceeding its authority)*

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

(2) However, where the principal causes the third party reasonably to believe that the agent has authority to act on behalf of the principal and that the agent is acting within the scope of that authority, the principal may not invoke against the third party the lack of authority of the agent.

**ARTICLE 2.2.6**

*(Liability of agent acting without or exceeding its authority)*

- (1) An agent that acts without authority or exceeds its authority is, failing ratification by the principal, liable for damages that will place the third party in the same position as if the agent had acted with authority and not exceeded its authority.
- (2) However, the agent is not liable if the third party knew or ought to have known that the agent had no authority or was exceeding its authority.

**ARTICLE 2.2.7**

*(Conflict of interests)*

- (1) If a contract concluded by an agent involves the agent in a conflict of interests with the principal of which the third party knew or ought to have known, the principal may avoid the contract. The right to avoid is subject to Articles 3.2.9 and 3.2.11 to 3.2.15.
- (2) However, the principal may not avoid the contract
  - (a) if the principal had consented to, or knew or ought to have known of, the agent's involvement in the conflict of interests; or
  - (b) if the agent had disclosed the conflict of interests to the principal and the latter had not objected within a reasonable time.

**ARTICLE 2.2.8**

*(Sub-agency)*

An agent has implied authority to appoint a sub-agent to perform acts which it is not reasonable to expect the agent to perform itself. The rules of this Section apply to the sub-agency.

**ARTICLE 2.2.9**

*(Ratification)*

- (1) An act by an agent that acts without authority or exceeds its authority may be ratified by the principal. On ratification the act produces the same effects as if it had initially been carried out with authority.
- (2) The third party may by notice to the principal specify a reasonable period of time for ratification. If the principal does not ratify within that period of time it can no longer do so.
- (3) If, at the time of the agent's act, the third party neither knew nor ought to have known of the lack of authority, it may, at any time before ratification, by notice to the principal indicate its refusal to become bound by a ratification.

**ARTICLE 2.2.10**

*(Termination of authority)*

- (1) Termination of authority is not effective in relation to the third party unless the third party knew or ought to have known of it.
- (2) Notwithstanding the termination of its authority, an agent remains authorised to perform the acts that are necessary to prevent harm to the principal's interests.

**CHAPTER 3 — VALIDITY**

**SECTION 1: GENERAL PROVISIONS**

**ARTICLE 3.1.1**

*(Matters not covered)*

This Chapter does not deal with lack of capacity.

**ARTICLE 3.1.2**  
*(Validity of mere agreement)*

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

**ARTICLE 3.1.3**  
*(Initial impossibility)*

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

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

**ARTICLE 3.1.4**  
*(Mandatory character of the provisions)*

The provisions on fraud, threat, gross disparity and illegality contained in this Chapter are mandatory.

**SECTION 2: GROUNDS FOR AVOIDANCE**

**ARTICLE 3.2.1**  
*(Definition of mistake)*

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

**ARTICLE 3.2.2**  
*(Relevant mistake)*

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

(a) the other party made the same mistake, or caused the mistake, or knew or ought to have known of the mistake and it was contrary to reasonable commercial standards of fair dealing to leave the mistaken party in error; or

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

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

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

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

**ARTICLE 3.2.3**  
*(Error in expression or transmission)*

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

**ARTICLE 3.2.4**  
*(Remedies for non-performance)*

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

**ARTICLE 3.2.5**  
*(Fraud)*

A party may avoid the contract when it has been led to conclude the contract by the other party's fraudulent representation, including language or practices, or fraudulent non-disclosure of

circumstances which, according to reasonable commercial standards of fair dealing, the latter party should have disclosed.

**ARTICLE 3.2.6**

*(Threat)*

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

**ARTICLE 3.2.7**

*(Gross disparity)*

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

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

(b) the nature and purpose of the contract.

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

(3) A court may also adapt the contract or term upon the request of the party receiving notice of avoidance, provided that that party informs the other party of its request promptly after receiving such notice and before the other party has reasonably acted in reliance on it. Article 3.2.10(2) applies accordingly.

**ARTICLE 3.2.8**

*(Third persons)*

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

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

**ARTICLE 3.2.9**

*(Confirmation)*

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

**ARTICLE 3.2.10**

*(Loss of right to avoid)*

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

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

**ARTICLE 3.2.11**

*(Notice of avoidance)*

The right of a party to avoid the contract is exercised by notice to the other party.

**ARTICLE 3.2.12**

*(Time limits)*

(1) Notice of avoidance shall be given within a reasonable time, having regard to the circumstances, after the avoiding party knew or could not have been unaware of the relevant facts or became capable of acting freely.

(2) Where an individual term of the contract may be avoided by a party under Article 3.2.7, the period of time for giving notice of avoidance begins to run when that term is asserted by the other party.

**ARTICLE 3.2.13**

*(Partial avoidance)*

Where a ground of avoidance affects only individual terms of the contract, the effect of avoidance is limited to those terms unless, having regard to the circumstances, it is unreasonable to uphold the remaining contract.

**ARTICLE 3.2.14**

*(Retroactive effect of avoidance)*

Avoidance takes effect retroactively.

**ARTICLE 3.2.15**

*(Restitution)*

(1) On avoidance either party may claim restitution of whatever it has supplied under the contract, or the part of it avoided, provided that the party concurrently makes restitution of whatever it has received under the contract, or the part of it avoided.

(2) If restitution in kind is not possible or appropriate, an allowance has to be made in money whenever reasonable.

(3) The recipient of the performance does not have to make an allowance in money if the impossibility to make restitution in kind is attributable to the other party.

(4) Compensation may be claimed for expenses reasonably required to preserve or maintain the performance received.

**ARTICLE 3.2.16**

*(Damages)*

Irrespective of whether or not the contract has been avoided, the party who knew or ought to have known of the ground for avoidance is liable for damages so as to put the other party in the same position in which it would have been if it had not concluded the contract.

**ARTICLE 3.2.17**

*(Unilateral declarations)*

The provisions of this Chapter apply with appropriate adaptations to any communication of intention addressed by one party to the other.

**SECTION 3: ILLEGALITY**

**ARTICLE 3.3.1**

*(Contracts infringing mandatory rules)*

(1) Where a contract infringes a mandatory rule, whether of national, international or supranational origin, applicable under Article 1.4 of these Principles, the effects of that infringement upon 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 upon a contract, the parties have the right to exercise such remedies under the contract as in the circumstances are reasonable.

(3) In determining what is reasonable regard is to be had in particular to:

- (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 one or both parties knew or ought to have known of the infringement;
- (f) whether the performance of the contract necessitates the infringement; and
- (g) the parties' reasonable expectations.

#### **ARTICLE 3.3.2**

##### *(Restitution)*

(1) Where there has been performance under a contract infringing a mandatory rule under Article 3.3.1, restitution may be granted where this would be reasonable in the circumstances.

(2) In determining what is reasonable, regard is to be had, with the appropriate adaptations, to the criteria referred to in Article 3.3.1(3).

(3) If restitution is granted, the rules set out in Article 3.2.15 apply with appropriate adaptations.

### **CHAPTER 4 — INTERPRETATION**

#### **ARTICLE 4.1**

##### *(Intention of the parties)*

(1) A contract shall be interpreted according to the common intention of the parties.

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

#### **ARTICLE 4.2**

##### *(Interpretation of statements and other conduct)*

(1) The statements and other conduct of a party shall be interpreted according to that party's intention if the other party knew or could not have been unaware of that intention.

(2) If the preceding paragraph is not applicable, such statements and other conduct shall be interpreted according to the meaning that a reasonable person of the same kind as the other party would give to it in the same circumstances.

#### **ARTICLE 4.3**

##### *(Relevant circumstances)*

In applying Articles 4.1 and 4.2, regard shall be had to all the circumstances, including

- (a) preliminary negotiations between the parties;
- (b) practices which the parties have established between themselves;
- (c) the conduct of the parties subsequent to the conclusion of the contract;
- (d) the nature and purpose of the contract;
- (e) the meaning commonly given to terms and expressions in the trade concerned;
- (f) usages.

#### **ARTICLE 4.4**

##### *(Reference to contract or statement as a whole)*

Terms and expressions shall be interpreted in the light of the whole contract or statement in which they appear.

**ARTICLE 4.5**

*(All terms to be given effect)*

Contract terms shall be interpreted so as to give effect to all the terms rather than to deprive some of them of effect.

**ARTICLE 4.6**

*(Contra proferentem rule)*

If contract terms supplied by one party are unclear, an interpretation against that party is preferred.

**ARTICLE 4.7**

*(Linguistic discrepancies)*

Where a contract is drawn up in two or more language versions which are equally authoritative there is, in case of discrepancy between the versions, a preference for the interpretation according to a version in which the contract was originally drawn up.

**ARTICLE 4.8**

*(Supplying an omitted term)*

(1) Where the parties to a contract have not agreed with respect to a term which is important for a determination of their rights and duties, a term which is appropriate in the circumstances shall be supplied.

- (2) In determining what is an appropriate term regard shall be had, among other factors, to
- (a) the intention of the parties;
  - (b) the nature and purpose of the contract;
  - (c) good faith and fair dealing;
  - (d) reasonableness.

**CHAPTER 5 — CONTENT AND THIRD PARTY RIGHTS**

**SECTION 1: CONTENT**

**ARTICLE 5.1.1**

*(Express and implied obligations)*

The contractual obligations of the parties may be express or implied.

**ARTICLE 5.1.2**

*(Implied obligations)*

Implied obligations stem from

- (a) the nature and purpose of the contract;
- (b) practices established between the parties and usages;
- (c) good faith and fair dealing;
- (d) reasonableness.

**ARTICLE 5.1.3**

*(Co-operation between the parties)*

Each party shall cooperate with the other party when such co-operation may reasonably be expected for the performance of that party's obligations.

**ARTICLE 5.1.4**

*(Duty to achieve a specific result.*

*Duty of best efforts)*

(1) To the extent that an obligation of a party involves a duty to achieve a specific result, that party is bound to achieve that result.

(2) To the extent that an obligation of a party involves a duty of best efforts in the performance of an activity, that party is bound to make such efforts as would be made by a reasonable person of the same kind in the same circumstances.

**ARTICLE 5.1.5**

*(Determination of kind of duty involved)*

In determining the extent to which an obligation of a party involves a duty of best efforts in the performance of an activity or a duty to achieve a specific result, regard shall be had, among other factors, to

- (a) the way in which the obligation is expressed in the contract;
- (b) the contractual price and other terms of the contract;
- (c) the degree of risk normally involved in achieving the expected result;
- (d) the ability of the other party to influence the performance of the obligation.

**ARTICLE 5.1.6**

*(Determination of quality of performance)*

Where the quality of performance is neither fixed by, nor determinable from, the contract a party is bound to render a performance of a quality that is reasonable and not less than average in the circumstances.

**ARTICLE 5.1.7**

*(Price determination)*

(1) Where a contract does not fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have made reference to the price generally charged at the time of the conclusion of the contract for such performance in comparable circumstances in the trade concerned or, if no such price is available, to a reasonable price.

(2) Where the price is to be determined by one party and that determination is manifestly unreasonable, a reasonable price shall be substituted notwithstanding any contract term to the contrary.

(3) Where the price is to be fixed by a third person, and that person cannot or will not do so, the price shall be a reasonable price.

(4) Where the price is to be fixed by reference to factors which do not exist or have ceased to exist or to be accessible, the nearest equivalent factor shall be treated as a substitute.

**ARTICLE 5.1.8**

*(Contract for an indefinite period)*

A contract for an indefinite period may be ended by either party by giving notice a reasonable time in advance.

**ARTICLE 5.1.9**

*(Release by agreement)*

(1) An obligee may release its right by agreement with the obligor.

(2) An offer to release a right gratuitously shall be deemed accepted if the obligor does not reject the offer without delay after having become aware of it.

**SECTION 2: THIRD PARTY RIGHTS**

**ARTICLE 5.2.1**

*(Contracts in favour of third parties)*

(1) The parties (the “promisor” and the “promisee”) may confer by express or implied agreement a right on a third party (the “beneficiary”).

(2) The existence and content of the beneficiary’s right against the promisor are determined by the agreement of the parties and are subject to any conditions or other limitations under the agreement.

**ARTICLE 5.2.2**  
*(Third party identifiable)*

The beneficiary must be identifiable with adequate certainty by the contract but need not be in existence at the time the contract is made.

**ARTICLE 5.2.3**  
*(Exclusion and limitation clauses)*

The conferment of rights in the beneficiary includes the right to invoke a clause in the contract which excludes or limits the liability of the beneficiary.

**ARTICLE 5.2.4**  
*(Defences)*

The promisor may assert against the beneficiary all defences which the promisor could assert against the promisee.

**ARTICLE 5.2.5**  
*(Revocation)*

The parties may modify or revoke the rights conferred by the contract on the beneficiary until the beneficiary has accepted them or reasonably acted in reliance on them.

**ARTICLE 5.2.6**  
*(Renunciation)*

The beneficiary may renounce a right conferred on it.

**SECTION 3: CONDITIONS**

**ARTICLE 5.3.1**  
*(Types of condition)*

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

**ARTICLE 5.3.2**  
*(Effect of conditions)*

Unless the parties otherwise agree :

- (a) the relevant contract or contractual obligation takes effect upon fulfilment of a suspensive condition;
- (b) the relevant contract or contractual obligation comes to an end upon fulfilment of a resolutive condition.

**ARTICLE 5.3.3**  
*(Interference with conditions)*

- (1) If fulfilment of a condition is prevented by a party, contrary to the duty of good faith and fair dealing or the duty of co-operation, that party may not rely on the non-fulfilment of the condition.
- (2) If fulfilment of a condition is brought about by a party, contrary to the duty of good faith and fair dealing or the duty of co-operation, that party may not rely on the fulfilment of the condition.

**ARTICLE 5.3.4**  
*(Duty to preserve rights)*

Pending fulfilment of a condition, a party may not, contrary to the duty to act in accordance with good faith and fair dealing, act so as to prejudice the other party's rights in case of fulfilment of the condition.

**ARTICLE 5.3.5**

*(Restitution in case of fulfilment of a resolutive condition)*

(1) On fulfilment of a resolutive condition, the rules on restitution set out in Articles 7.3.6 and 7.3.7 apply with appropriate adaptations.

(2) If the parties have agreed that the resolutive condition is to operate retroactively, the rules on restitution set out in Article 3.2.15 apply with appropriate adaptations.

**CHAPTER 6 — PERFORMANCE**

**SECTION 1: PERFORMANCE IN GENERAL**

**ARTICLE 6.1.1**

*(Time of performance)*

A party must perform its obligations:

- (a) if a time is fixed by or determinable from the contract, at that time;
- (b) if a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the other party is to choose a time;
- (c) in any other case, within a reasonable time after the conclusion of the contract.

**ARTICLE 6.1.2**

*(Performance at one time or in instalments)*

In cases under Article 6.1.1(b) or (c), a party must perform its obligations at one time if that performance can be rendered at one time and the circumstances do not indicate otherwise.

**ARTICLE 6.1.3**

*(Partial performance)*

(1) The obligee may reject an offer to perform in part at the time performance is due, whether or not such offer is coupled with an assurance as to the balance of the performance, unless the obligee has no legitimate interest in so doing.

(2) Additional expenses caused to the obligee by partial performance are to be borne by the obligor without prejudice to any other remedy.

**ARTICLE 6.1.4**

*(Order of performance)*

(1) To the extent that the performances of the parties can be rendered simultaneously, the parties are bound to render them simultaneously unless the circumstances indicate otherwise.

(2) To the extent that the performance of only one party requires a period of time, that party is bound to render its performance first, unless the circumstances indicate otherwise.

**ARTICLE 6.1.5**

*(Earlier performance)*

(1) The obligee may reject an earlier performance unless it has no legitimate interest in so doing.

(2) Acceptance by a party of an earlier performance does not affect the time for the performance of its own obligations if that time has been fixed irrespective of the performance of the other party's obligations.

(3) Additional expenses caused to the obligee by earlier performance are to be borne by the obligor, without prejudice to any other remedy.

**ARTICLE 6.1.6**

*(Place of performance)*

(1) If the place of performance is neither fixed by, nor determinable from, the contract, a party is to perform:

- (a) a monetary obligation, at the obligee's place of business;
- (b) any other obligation, at its own place of business.
- (2) A party must bear any increase in the expenses incidental to performance which is caused by a change in its place of business subsequent to the conclusion of the contract.

**ARTICLE 6.1.7**

*(Payment by cheque or other instrument)*

- (1) Payment may be made in any form used in the ordinary course of business at the place for payment.
- (2) However, an obligee who accepts, either by virtue of paragraph (1) or voluntarily, a cheque, any other order to pay or a promise to pay, is presumed to do so only on condition that it will be honoured.

**ARTICLE 6.1.8**

*(Payment by funds transfer)*

- (1) Unless the obligee has indicated a particular account, payment may be made by a transfer to any of the financial institutions in which the obligee has made it known that it has an account.
- (2) In case of payment by a transfer the obligation of the obligor is discharged when the transfer to the obligee's financial institution becomes effective.

**ARTICLE 6.1.9**

*(Currency of payment)*

- (1) If a monetary obligation is expressed in a currency other than that of the place for payment, it may be paid by the obligor in the currency of the place for payment unless
  - (a) that currency is not freely convertible; or
  - (b) the parties have agreed that payment should be made only in the currency in which the monetary obligation is expressed.
- (2) If it is impossible for the obligor to make payment in the currency in which the monetary obligation is expressed, the obligee may require payment in the currency of the place for payment, even in the case referred to in paragraph (1)(b).
- (3) Payment in the currency of the place for payment is to be made according to the applicable rate of exchange prevailing there when payment is due.
- (4) However, if the obligor has not paid at the time when payment is due, the obligee may require payment according to the applicable rate of exchange prevailing either when payment is due or at the time of actual payment.

**ARTICLE 6.1.10**

*(Currency not expressed)*

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.

**ARTICLE 6.1.11**

*(Costs of performance)*

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

**ARTICLE 6.1.12**

*(Imputation of payments)*

- (1) An obligor owing several monetary obligations to the same obligee may specify at the time of payment the debt to which it intends the payment to be applied. However, the payment discharges first any expenses, then interest due and finally the principal.
- (2) If the obligor makes no such specification, the obligee may, within a reasonable time after payment, declare to the obligor the obligation to which it imputes the payment, provided that the obligation is due and undisputed.

(3) In the absence of imputation under paragraphs (1) or (2), payment is imputed to that obligation which satisfies one of the following criteria in the order indicated:

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

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

**ARTICLE 6.1.13**

*(Imputation of non-monetary obligations)*

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

**ARTICLE 6.1.14**

*(Application for public permission)*

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

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

**ARTICLE 6.1.15**

*(Procedure in applying for permission)*

- (1) The party required to take the measures necessary to obtain the permission shall do so without undue delay and shall bear any expenses incurred.
- (2) That party shall whenever appropriate give the other party notice of the grant or refusal of such permission without undue delay.

**ARTICLE 6.1.16**

*(Permission neither granted nor refused)*

- (1) If, notwithstanding the fact that the party responsible has taken all measures required, permission is neither granted nor refused within an agreed period or, where no period has been agreed, within a reasonable time from the conclusion of the contract, either party is entitled to terminate the contract.
- (2) Where the permission affects some terms only, paragraph (1) does not apply if, having regard to the circumstances, it is reasonable to uphold the remaining contract even if the permission is refused.

**ARTICLE 6.1.17**

*(Permission refused)*

- (1) The refusal of a permission affecting the validity of the contract renders the contract void. If the refusal affects the validity of some terms only, only such terms are void if, having regard to the circumstances, it is reasonable to uphold the remaining contract.
- (2) Where the refusal of a permission renders the performance of the contract impossible in whole or in part, the rules on non-performance apply.

**SECTION 2: HARDSHIP**

**ARTICLE 6.2.1**

*(Contract to be observed)*

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

**ARTICLE 6.2.2**  
*(Definition of hardship)*

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

- (a) the events occur or become known to the disadvantaged party after the conclusion of the contract;
- (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;
- (c) the events are beyond the control of the disadvantaged party; and
- (d) the risk of the events was not assumed by the disadvantaged party.

**ARTICLE 6.2.3**  
*(Effects of hardship)*

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

(2) The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance.

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

- (4) If the court finds hardship it may, if reasonable,
  - (a) terminate the contract at a date and on terms to be fixed, or
  - (b) adapt the contract with a view to restoring its equilibrium.

**CHAPTER 7 — NON-PERFORMANCE**

**SECTION 1: NON-PERFORMANCE IN GENERAL**

**ARTICLE 7.1.1**  
*(Non-performance defined)*

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

**ARTICLE 7.1.2**  
*(Interference by the other party)*

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

**ARTICLE 7.1.3**  
*(Withholding performance)*

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

(2) Where the parties are to perform consecutively, the party that is to perform later may withhold its performance until the first party has performed.

**ARTICLE 7.1.4**  
*(Cure by non-performing party)*

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

- (a) without undue delay, it gives notice indicating the proposed manner and timing of the cure;
- (b) cure is appropriate in the circumstances;
- (c) the aggrieved party has no legitimate interest in refusing cure; and

- (d) cure is effected promptly.
- (2) The right to cure is not precluded by notice of termination.
- (3) Upon effective notice of cure, rights of the aggrieved party that are inconsistent with the non-performing party's performance are suspended until the time for cure has expired.
- (4) The aggrieved party may withhold performance pending cure.
- (5) Notwithstanding cure, the aggrieved party retains the right to claim damages for delay as well as for any harm caused or not prevented by the cure.

**ARTICLE 7.1.5**

*(Additional period for performance)*

- (1) In a case of non-performance the aggrieved party may by notice to the other party allow an additional period of time for performance.
- (2) During the additional period the aggrieved party may withhold performance of its own reciprocal obligations and may claim damages but may not resort to any other remedy. If it receives notice from the other party that the latter will not perform within that period, or if upon expiry of that period due performance has not been made, the aggrieved party may resort to any of the remedies that may be available under this Chapter.
- (3) Where in a case of delay in performance which is not fundamental the aggrieved party has given notice allowing an additional period of time of reasonable length, it may terminate the contract at the end of that period. If the additional period allowed is not of reasonable length it shall be extended to a reasonable length. The aggrieved party may in its notice provide that if the other party fails to perform within the period allowed by the notice the contract shall automatically terminate.
- (4) Paragraph (3) does not apply where the obligation which has not been performed is only a minor part of the contractual obligation of the non-performing party.

**ARTICLE 7.1.6**

*(Exemption clauses)*

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

**ARTICLE 7.1.7**

*(Force majeure)*

- (1) Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.
- (2) When the impediment is only temporary, the excuse shall have effect for such period as is reasonable having regard to the effect of the impediment on the performance of the contract.
- (3) The party who fails to perform must give notice to the other party of the impediment and its effect on its ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, it is liable for damages resulting from such non-receipt.
- (4) Nothing in this Article prevents a party from exercising a right to terminate the contract or to withhold performance or request interest on money due.

**SECTION 2: RIGHT TO PERFORMANCE**

**ARTICLE 7.2.1**

*(Performance of monetary obligation)*

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

**ARTICLE 7.2.2**

*(Performance of non-monetary obligation)*

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

- (a) performance is impossible in law or in fact;
- (b) performance or, where relevant, enforcement is unreasonably burdensome or expensive;
- (c) the party entitled to performance may reasonably obtain performance from another source;
- (d) performance is of an exclusively personal character; or
- (e) the party entitled to performance does not require performance within a reasonable time after it has, or ought to have, become aware of the non-performance.

**ARTICLE 7.2.3**

*(Repair and replacement of defective performance)*

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

**ARTICLE 7.2.4**

*(Judicial penalty)*

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

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

**ARTICLE 7.2.5**

*(Change of remedy)*

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

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

**SECTION 3: TERMINATION**

**ARTICLE 7.3.1**

*(Right to terminate the contract)*

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

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

(a) the non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract unless the other party did not foresee and could not reasonably have foreseen such result;

(b) strict compliance with the obligation which has not been performed is of essence under the contract;

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

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

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

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

**ARTICLE 7.3.2**  
*(Notice of termination)*

- (1) The right of a party to terminate the contract is exercised by notice to the other party.
- (2) If performance has been offered late or otherwise does not conform to the contract the aggrieved party will lose its right to terminate the contract unless it gives notice to the other party within a reasonable time after it has or ought to have become aware of the offer or of the non-conforming performance.

**ARTICLE 7.3.3**  
*(Anticipatory non-performance)*

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

**ARTICLE 7.3.4**  
*(Adequate assurance of due performance)*

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

**ARTICLE 7.3.5**  
*(Effects of termination in general)*

- (1) Termination of the contract releases both parties from their obligation to effect and to receive future performance.
- (2) Termination does not preclude a claim for damages for non-performance.
- (3) Termination does not affect any provision in the contract for the settlement of disputes or any other term of the contract which is to operate even after termination.

**ARTICLE 7.3.6**  
*(Restitution with respect to contracts to be performed at one time)*

- (1) On termination of a contract to be performed at one time either party may claim restitution of whatever it has supplied under the contract, provided that such party concurrently makes restitution of whatever it has received under the contract.
- (2) If restitution in kind is not possible or appropriate, an allowance has to be made in money whenever reasonable.
- (3) The recipient of the performance does not have to make an allowance in money if the impossibility to make restitution in kind is attributable to the other party.
- (4) Compensation may be claimed for expenses reasonably required to preserve or maintain the performance received.

**ARTICLE 7.3.7**  
*(Restitution with respect to contracts to be performed over a period of time)*

- (1) On termination of a contract to be performed over a period of time restitution can only be claimed for the period after termination has taken effect, provided the contract is divisible.
- (2) As far as restitution has to be made, the provisions of Article 7.3.6 apply.

**SECTION 4: DAMAGES**

**ARTICLE 7.4.1**  
*(Right to damages)*

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

**ARTICLE 7.4.2**  
*(Full compensation)*

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

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

**ARTICLE 7.4.3**  
*(Certainty of harm)*

(1) Compensation is due only for harm, including future harm, that is established with a reasonable degree of certainty.

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

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

**ARTICLE 7.4.4**  
*(Foreseeability of harm)*

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

**ARTICLE 7.4.5**  
*(Proof of harm in case of replacement transaction)*

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

**ARTICLE 7.4.6**  
*(Proof of harm by current price)*

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

(2) Current price is the price generally charged for goods delivered or services rendered in comparable circumstances at the place where the contract should have been performed or, if there is no current price at that place, the current price at such other place that appears reasonable to take as a reference.

**ARTICLE 7.4.7**  
*(Harm due in part to aggrieved party)*

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

**ARTICLE 7.4.8**  
*(Mitigation of harm)*

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

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

**ARTICLE 7.4.9**

*(Interest for failure to pay money)*

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

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

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

**ARTICLE 7.4.10**

*(Interest on damages)*

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

**ARTICLE 7.4.11**

*(Manner of monetary redress)*

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

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

**ARTICLE 7.4.12**

*(Currency in which to assess damages)*

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

**ARTICLE 7.4.13**

*(Agreed payment for non-performance)*

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

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

**CHAPTER 8 — SET-OFF**

**ARTICLE 8.1**

*(Conditions of set-off)*

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

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

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

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

#### **ARTICLE 8.2**

*(Foreign currency set-off)*

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

#### **ARTICLE 8.3**

*(Set-off by notice)*

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

#### **ARTICLE 8.4**

*(Content of notice)*

- (1) The notice must specify the obligations to which it relates.
- (2) If the notice does not specify the obligation against which set-off is exercised, the other party may, within a reasonable time, declare to the first party the obligation to which set-off relates. If no such declaration is made, the set-off will relate to all the obligations proportionally.

#### **ARTICLE 8.5**

*(Effect of set-off)*

- (1) Set-off discharges the obligations.
- (2) If obligations differ in amount, set-off discharges the obligations up to the amount of the lesser obligation.
- (3) Set-off takes effect as from the time of notice.

### **CHAPTER 9 — ASSIGNMENT OF RIGHTS, TRANSFER OF OBLIGATIONS, ASSIGNMENT OF CONTRACTS**

#### **SECTION 1: ASSIGNMENT OF RIGHTS**

##### **ARTICLE 9.1.1**

*(Definitions)*

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

##### **ARTICLE 9.1.2**

*(Exclusions)*

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

- (a) of instruments such as negotiable instruments, documents of title or financial instruments,
- or
- (b) of rights in the course of transferring a business.

##### **ARTICLE 9.1.3**

*(Assignability of non-monetary rights)*

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

##### **ARTICLE 9.1.4**

*(Partial assignment)*

- (1) A right to the payment of a monetary sum may be assigned partially.
- (2) A right to other performance may be assigned partially only if it is divisible, and the assignment does not render the obligation significantly more burdensome.

**ARTICLE 9.1.5**

*(Future rights)*

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

**ARTICLE 9.1.6**

*(Rights assigned without individual specification)*

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

**ARTICLE 9.1.7**

*(Agreement between assignor and assignee sufficient)*

(1) A right is assigned by mere agreement between the assignor and the assignee, without notice to the obligor.

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

**ARTICLE 9.1.8**

*(Obligor's additional costs)*

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

**ARTICLE 9.1.9**

*(Non-assignment clauses)*

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

(2) The assignment of a right to other performance is ineffective if it is contrary to an agreement between the assignor and the obligor limiting or prohibiting the assignment. Nevertheless, the assignment is effective if the assignee, at the time of the assignment, neither knew nor ought to have known of the agreement. The assignor may then be liable to the obligor for breach of contract.

**ARTICLE 9.1.10**

*(Notice to the obligor)*

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

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

**ARTICLE 9.1.11**

*(Successive assignments)*

If the same right has been assigned by the same assignor to two or more successive assignees, the obligor is discharged by paying according to the order in which the notices were received.

**ARTICLE 9.1.12**

*(Adequate proof of assignment)*

(1) If notice of the assignment is given by the assignee, the obligor may request the assignee to provide within a reasonable time adequate proof that the assignment has been made.

(2) Until adequate proof is provided, the obligor may withhold payment.

(3) Unless adequate proof is provided, notice is not effective.

(4) Adequate proof includes, but is not limited to, any writing emanating from the assignor and indicating that the assignment has taken place.

**ARTICLE 9.1.13**

*(Defences and rights of set-off)*

(1) The obligor may assert against the assignee all defences that the obligor could assert against the assignor.

(2) The obligor may exercise against the assignee any right of set-off available to the obligor against the assignor up to the time notice of assignment was received.

**ARTICLE 9.1.14**

*(Rights related to the right assigned)*

The assignment of a right transfers to the assignee:

(a) all the assignor's rights to payment or other performance under the contract in respect of the right assigned, and

(b) all rights securing performance of the right assigned.

**ARTICLE 9.1.15**

*(Undertakings of the assignor)*

The assignor undertakes towards the assignee, except as otherwise disclosed to the assignee, that:

(a) the assigned right exists at the time of the assignment, unless the right is a future right;

(b) the assignor is entitled to assign the right;

(c) the right has not been previously assigned to another assignee, and it is free from any right or claim from a third party;

(d) the obligor does not have any defences;

(e) neither the obligor nor the assignor has given notice of set-off concerning the assigned right and will not give any such notice;

(f) the assignor will reimburse the assignee for any payment received from the obligor before notice of the assignment was given.

**SECTION 2: TRANSFER OF OBLIGATIONS**

**ARTICLE 9.2.1**

*(Modes of transfer)*

An obligation to pay money or render other performance may be transferred from one person (the "original obligor") to another person (the "new obligor") either

(a) by an agreement between the original obligor and the new obligor subject to Article 9.2.3, or

(b) by an agreement between the obligee and the new obligor, by which the new obligor assumes the obligation.

**ARTICLE 9.2.2**

*(Exclusion)*

This Section does not apply to transfers of obligations made under the special rules governing transfers of obligations in the course of transferring a business.

**ARTICLE 9.2.3**

*(Requirement of obligee's consent to transfer)*

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

**ARTICLE 9.2.4**

*(Advance consent of obligee)*

(1) The obligee may give its consent in advance.

(2) If the obligee has given its consent in advance, the transfer of the obligation becomes effective when a notice of the transfer is given to the obligee or when the obligee acknowledges it.

**ARTICLE 9.2.5**

*(Discharge of original obligor)*

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

**ARTICLE 9.2.6**

*(Third party performance)*

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

**ARTICLE 9.2.7**

*(Defences and rights of set-off)*

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

**ARTICLE 9.2.8**

*(Rights related to the obligation transferred)*

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

**SECTION 3: ASSIGNMENT OF CONTRACTS**

**ARTICLE 9.3.1**

*(Definitions)*

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

**ARTICLE 9.3.2**

*(Exclusion)*

This Section does not apply to the assignment of contracts made under the special rules governing transfers of contracts in the course of transferring a business.

**ARTICLE 9.3.3**

*(Requirement of consent of the other party)*

The assignment of a contract requires the consent of the other party.

**ARTICLE 9.3.4**

*(Advance consent of the other party)*

- (1) The other party may give its consent in advance.

(2) If the other party has given its consent in advance, the assignment of the contract becomes effective when a notice of the assignment is given to the other party or when the other party acknowledges it.

**ARTICLE 9.3.5**

*(Discharge of the assignor)*

- (1) The other party may discharge the assignor.
- (2) The other party may also retain the assignor as an obligor in case the assignee does not perform properly.
- (3) Otherwise the assignor and the assignee are jointly and severally liable.

**ARTICLE 9.3.6**

*(Defences and rights of set-off)*

- (1) To the extent that the assignment of a contract involves an assignment of rights, Article 9.1.13 applies accordingly.
- (2) To the extent that the assignment of a contract involves a transfer of obligations, Article 9.2.7 applies accordingly.

**ARTICLE 9.3.7**

*(Rights transferred with the contract)*

- (1) To the extent that the assignment of a contract involves an assignment of rights, Article 9.1.14 applies accordingly.
- (2) To the extent that the assignment of a contract involves a transfer of obligations, Article 9.2.8 applies accordingly.

**CHAPTER 10 — LIMITATION PERIODS**

**ARTICLE 10.1**

*(Scope of the Chapter)*

- (1) The exercise of rights governed by the Principles is barred by the expiration of a period of time, referred to as “limitation period”, according to the rules of this Chapter.
- (2) This Chapter does not govern the time within which one party is required under the Principles, as a condition for the acquisition or exercise of its right, to give notice to the other party or to perform any act other than the institution of legal proceedings.

**ARTICLE 10.2**

*(Limitation periods)*

- (1) The general limitation period is three years beginning on the day after the day the obligee knows or ought to know the facts as a result of which the obligee’s right can be exercised.
- (2) In any event, the maximum limitation period is ten years beginning on the day after the day the right can be exercised.

**ARTICLE 10.3**

*(Modification of limitation periods by the parties)*

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

**ARTICLE 10.4**

*(New limitation period by acknowledgement)*

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

**ARTICLE 10.5**

*(Suspension by judicial proceedings)*

- (1) The running of the limitation period is suspended
  - (a) when the obligee performs any act, by commencing judicial proceedings or in judicial proceedings already instituted, that is recognised by the law of the court as asserting the obligee's right against the obligor;
  - (b) in the case of the obligor's insolvency when the obligee has asserted its rights in the insolvency proceedings; or
  - (c) in the case of proceedings for dissolution of the entity which is the obligor when the obligee has asserted its rights in the dissolution proceedings.
- (2) Suspension lasts until a final decision has been issued or until the proceedings have been otherwise terminated.

**ARTICLE 10.6**

*(Suspension by arbitral proceedings)*

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

**ARTICLE 10.7**

*(Alternative dispute resolution)*

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

**ARTICLE 10.8**

*(Suspension in case of force majeure, death or incapacity)*

- (1) Where the obligee has been prevented by an impediment that is beyond its control and that it could neither avoid nor overcome, from causing a limitation period to cease to run under the preceding Articles, the general limitation period is suspended so as not to expire before one year after the relevant impediment has ceased to exist.
- (2) Where the impediment consists of the incapacity or death of the obligee or obligor, suspension ceases when a representative for the incapacitated or deceased party or its estate has been appointed or a successor has inherited the respective party's position. The additional one-year period under paragraph (1) applies accordingly.

**ARTICLE 10.9**

*(Effects of expiration of limitation period)*

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

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

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

**ARTICLE 10.10**  
*(Right of set-off)*

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

**ARTICLE 10.11**  
*(Restitution)*

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

**CHAPTER 11 — PLURALITY OF OBLIGORS AND OF OBLIGEEES**

**SECTION 1: PLURALITY OF OBLIGORS**

**ARTICLE 11.1.1**  
*(Definitions)*

When several obligors are bound by the same obligation towards an obligee:

- (a) the obligations are joint and several when each obligor is bound for the whole obligation;
- (b) the obligations are separate when each obligor is bound only for its share.

**ARTICLE 11.1.2**  
*(Presumption of joint and several obligations)*

When several obligors are bound by the same obligation towards an obligee, they are presumed to be jointly and severally bound, unless the circumstances indicate otherwise.

**ARTICLE 11.1.3**  
*(Obligee's rights against joint and several obligors)*

When obligors are jointly and severally bound, the obligee may require performance from any one of them, until full performance has been received.

**ARTICLE 11.1.4**  
*(Availability of defences and rights of set-off)*

A joint and several obligor against whom a claim is made by the obligee may assert all the defences and rights of set-off that are personal to it or that are common to all the co-obligors, but may not assert defences or rights of set-off that are personal to one or several of the other co-obligors.

**ARTICLE 11.1.5**  
*(Effect of performance or set-off)*

Performance or set-off by a joint and several obligor or set-off by the obligee against one joint and several obligor discharges the other obligors in relation to the obligee to the extent of the performance or set-off.

**ARTICLE 11.1.6**  
*(Effect of release or settlement)*

(1) Release of one joint and several obligor, or settlement with one joint and several obligor, discharges all the other obligors for the share of the released or settling obligor, unless the circumstances indicate otherwise.

(2) When the other obligors are discharged for the share of the released obligor, they no longer have a contributory claim against the released obligor under Article 11.1.10.

**ARTICLE 11.1.7**

*(Effect of expiration or suspension of limitation period)*

- (1) Expiration of the limitation period of the obligee's rights against one joint and several obligor does not affect:
  - (a) the obligations to the obligee of the other joint and several obligors; or
  - (b) the rights of recourse between the joint and several obligors under Article 11.1.10.
- (2) If the obligee initiates proceedings under Articles 10.5, 10.6 or 10.7 against one joint and several obligor, the running of the limitation period is also suspended against the other joint and several obligors.

**ARTICLE 11.1.8**

*(Effect of judgment)*

- (1) A decision by a court as to the liability to the obligee of one joint and several obligor does not affect:
  - (a) the obligations to the obligee of the other joint and several obligors; or
  - (b) the rights of recourse between the joint and several obligors under Article 11.1.10.
- (2) However, the other joint and several obligors may rely on such a decision, except if it was based on grounds personal to the obligor concerned. In such a case, the rights of recourse between the joint and several obligors under Article 11.1.10 are affected accordingly.

**ARTICLE 11.1.9**

*(Apportionment among joint and several obligors)*

As among themselves, joint and several obligors are bound in equal shares, unless the circumstances indicate otherwise.

**ARTICLE 11.1.10**

*(Extent of contributory claim)*

A joint and several obligor who has performed more than its share may claim the excess from any of the other obligors to the extent of each obligor's unperformed share.

**ARTICLE 11.1.11**

*(Rights of the obligee)*

- (1) A joint and several obligor to whom Article 11.1.10 applies may also exercise the rights of the obligee, including all rights securing their performance, to recover the excess from all or any of the other obligors to the extent of each obligor's unperformed share.
- (2) An obligee who has not received full performance retains its rights against the co-obligors to the extent of the unperformed part, with precedence over co-obligors exercising contributory claims.

**ARTICLE 11.1.12**

*(Defences in contributory claims)*

A joint and several obligor against whom a claim is made by the co-obligor who has performed the obligation :

- (a) may raise any common defences and rights of set-off that were available to be asserted by the co-obligor against the obligee ;
- (b) may assert defences which are personal to itself ;
- (c) may not assert defences and rights of set-off which are personal to one or several of the other co-obligors.

**ARTICLE 11.1.13**  
*(Inability to recover)*

If a joint and several obligor who has performed more than that obligor's share is unable, despite all reasonable efforts, to recover contribution from another joint and several obligor, the share of the others, including the one who has performed, is increased proportionally.

**SECTION 2: PLURALITY OF OBLIGEEES**

**ARTICLE 11.2.1**  
*(Definitions)*

When several obligees can claim performance of the same obligation from an obligor:

- (a) the claims are separate when each obligee can only claim its share;
- (b) the claims are joint and several when each obligee can claim the whole performance;
- (c) the claims are joint when all obligees have to claim performance together.

**ARTICLE 11.2.2**  
*(Effects of joint and several claims )*

Full performance of an obligation in favour of one of the joint and several obligees discharges the obligor towards the other obligees.

**ARTICLE 11.2.3**  
*(Availability of defences against joint and several obligees)*

(1) The obligor may assert against any of the joint and several obligees all the defences and rights of set-off that are personal to its relationship to that obligee or that it can assert against all the co-obligees, but may not assert defences and rights of set-off that are personal to its relationship to one or several of the other co-obligees.

(2) The provisions of Articles 11.1.5, 11.1.6, 11.1.7 and 11.1.8 apply, with appropriate adaptations, to joint and several claims.

**ARTICLE 11.2.4**  
*(Allocation between joint and several obligees)*

(1) As among themselves, joint and several obligees are entitled to equal shares, unless the circumstances indicate otherwise.

(2) An obligee who has received more than its share must transfer the excess to the other obligees to the extent of their respective shares.