## European Contract Law

Trier, 18-19 March 2010

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How a CFR might be used as a toolbox
Consistency: general


- Consistency of terminology means that the same terms are to be used to express the same concept and that identical terms must not be used to express different concepts.
Consistency check 1: “contract”

• In the DCFR a “contract” is defined as:
  *an agreement which is intended to give rise to a binding legal relationship or to have some other legal effect.*

• In the proposed CRD “contract” means:
  *an agreement (199 times); an obligation (12 times); a relationship (11 times); or a document (3 times).*
Consistency check 2: “obligation” etc

- **Obligation**: owed to a specific creditor; carries with it standard remedies for non-performance.

- **Duty**: more general; not necessarily owed to a specific creditor; does not automatically carry with it the standard remedies for non-performance.

- **Requirement**: something which has to be done if a certain result is to be achieved.
Consistency check 3: “business”, “trader” etc

- “Professional”, “supplier”, “trader”, “business” all found in existing EU law.

- DCFR uses “business”.

- Proposed CRD uses “trader”.

Consistency check 4: “terms”, “clauses”, “conditions”

• In the DCFR:
  “terms” = contractual provisions, e.g. relating to price, date of delivery;
  “clause” = a discrete provision in a contract document;
  “condition” = a particular type of term.

• The proposed CRD is slightly less consistent, but not too bad.
Consistency check 5: “rescission” etc

• The DCFR uses “terminate” for the process of bringing an existing contractual relationship to an end.

• The proposed CRD talks of “terminating the obligations of the parties”, of “terminating the contract”, and of “having the contract rescinded”.

• Note special use of “withdrawal”. 
Consistency check 6: “claim”

- One meaning – a demand based on the assertion of a right
e.g. “the claims which are to be lodged against the debtor’s estate”
- Second meaning – a right to performance of an obligation
- DCFR uses word only in first sense.
Coverage check

• Examples
  – Are unilateral juridical acts covered?
  – Are all a party’s obligations covered?
  – Is a sanction provided?
Suitability check

- “Sales contract” in the proposed CRD = any contract for the sale of goods by the trader to the consumer including any mixed-purpose contract having as its object both goods and services.

- Is that suitable for general use?
Other uses

• For checking ideas

• For checking drafting

• For seeking a principled approach

• For checking national laws?
What sort of toolbox?

• Size

• Contents
How a Common Frame of Reference might be used as a “toolbox” when drafting EU law

Eric Clive*

I Introduction
I am very pleased to be speaking in the session on the Common Frame of Reference as a toolbox. It is a pedestrian image – the toolbox – but we should not scorn it. Human beings can do without civil codes. They can do without optional instruments. They cannot do without tools.

In this talk I will try to explain how a common frame of reference might be used as a toolbox when drafting EU law. I will talk about the draft common frame of reference (the DCFR). It would be better if I could talk of an official CFR but we are not quite there yet. I am assuming, however, that having commissioned the DCFR, and having observed that it is already being found useful at national and European level and is being discussed throughout Europe and beyond, the Commission will want at least to start from it. This assumption seems to be justified by the positions of the European Commission, Parliament and Council as set out at the Stockholm conference on the CFR last October. I will ask how the proposed Consumer Rights Directive (from now on, the proposed CRD) in particular might benefit from more extensive use of a common frame of reference.

Here it is important to draw a distinction between questions of substantive content and questions of drafting and terminology. The substantive content of any eventual Consumer Rights Directive is of course a question for the EU institutions, after due consultation. For example, the length of withdrawal periods, the scope and content of information duties or the question whether some terms in contracts should be regarded as definitely unfair or just presumed to be unfair unless the contrary is proved are clearly all questions of policy for political decision by the EU institutions. The DCFR was never meant to restrict in any way any review or reform of the acquis. Any official CFR should, and no doubt would, incorporate changes to the acquis as they become available. On questions of substantive content the acquis leads and the CFR follows. However, so far as drafting and terminology are concerned it is not unreasonable to suggest that proposed new Directives should follow the CFR when one is developed unless there is some good reason not to.

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1 See e.g. the use made of the DCFR’s rules on distributorship contracts by the Swedish Supreme Court in Case no. T 3-08, 3 November 2009, summarised in European Private Law News at http://www.law.ed.ac.uk/epln/blogentry.aspx?blogentryref=7998 and the references to the DCFR in the Scottish Law Commission’s Eighth Programme of Law Reform (Feb 2010), discussed in European Private Law News at http://www.law.ed.ac.uk/epln/blogentry.aspx?blogentryref=8083).

2 See e.g. the opinion of Advocate General Trstenjak in Ilsinger v Shlank and Schick (Case C 180/06) (14 May 2009) which referred extensively to the Outline Edition of the DCFR on the requirements for the conclusion of a contract and what constituted an offer and an acceptance for the purposes of European private law.
The main purpose of a CFR as a toolbox is to improve the consistency of drafting of European private law instruments.

So far as synchronising the projects is concerned what this suggests to me is that the work on the proposed CRD should concentrate initially on resolving questions of substantive content (which will certainly be challenging and time-consuming enough), that the work on the CFR should meantime proceed as quickly as possible and that the final CRD should, if possible, be drafted or redrafted taking the CFR fully into account.

Legal drafting is to some extent language specific. I must therefore apologise for the fact that some of the following remarks relate specifically to drafting in English and might not be of any significance in relation to drafting in other languages. I believe, however, that many of them are of general application.

II Using a CFR for checking consistency and coherence of basic concepts

One way in which a CFR might properly be used would be for checking whether certain basic concepts are being used in a consistent and coherent way. This has been seen from the start as an essential function of a CFR. In its communications the Commission has always stressed the importance of clear definitions and coherent model rules.3

In the drafting of EU instruments consistency is seen as a key virtue. The Joint Practical Guide for the drafting of Community legislation4 stresses this point. Paragraph 6.2. explains that:

Consistency of terminology means that the same terms are to be used to express the same concept and that identical terms must not be used to express different concepts. … any given term is therefore to be used in a uniform manner to refer to the same thing and another term must be chosen to express a different concept.

The Joint Practical Guide also explains that definitions can be useful but should not be contrary to the ordinary meaning of a term and should not contain autonomous normative provisions.5 Once a term is defined it should be used with the specified meaning throughout the relevant instrument.

Is all this emphasis on consistency, coherence and definitions useful? Some have argued that it is not useful to have definitions and precision in the use of legislative language – that people can tell from the context what is meant. I have heard this argument made by more than one eminent legal scholar. There is an element of truth in it, of course. Context is always important. But some precision does seem to me to be essential or at least useful.

3 See e.g. the Communication from the Commission to the European Parliament and Council on European Contract Law and the revision of the acquis: the way forward (October 2004 (COM (2004) 651 final). “The CFR will provide clear definitions of legal terms, fundamental principles and coherent model rules of contract law, drawing on the EC acquis and on best solutions found in Member States’ legal orders” (para 2.1.1).


5 Guideline 14.
Is a sale a contract? Is a lease a contract? Is a donation a contract? Is agency a contract? You simply cannot answer such questions without knowing how the word “contract” is being used. When laws have to be applied across 28 or more legal systems and translated into many different languages there is a particular need for consistency and precision.

It must be stressed that what is here being advocated is not some sort of 19th century conceptual jurisprudence – some sort of pedantic professors’ law. Everybody accepts that legislation involves policy decisions. Nobody would now argue that one could begin with some basic concepts and construct a whole private law system from them by a process of remorseless logic. Concepts are not enough. Logic is not enough. But they are still important. Clear concepts, consistently used, can make things easier for those preparing legislation, translating it, reading it and advising on it. Unclear concepts or an inconsistent use of terminology, or illogicalities in drafting can lead to an increased level of uncertainty and to disputes and litigation. It does not cost much time or money to use words carefully: it can cost a great deal of time and money to use them carelessly.

I will give a few examples of how a CFR could be used for a check on consistency and coherence. Many other examples could be given. Take first the word “contract”.

**Use of the word “contract”**

In the DCFR a “contract” is defined as

an agreement which is intended to give rise to a binding legal relationship or to have some other legal effect.

The DCFR uses the word consistently in this sense. Other legal instruments often use the word in various senses. It can mean an agreement, or a legal relationship resulting from an agreement, or a contractual obligation or a contractual document.

This problem is not confined to the English language. The book on *Terminologie Contractuelle Commune* produced by an evaluative group co-ordinated by Professor Bénédicte Fauvarque-Cosson and Professor Denis Mazeaud examines the use of the French word “contrat” in international and European instruments and in various national legal systems. It notes and discusses the variety of uses but makes no firm recommendation for the future. It is significant, however, that it finds that in l’acquis communautaire et international the most frequent use of the word contrat is in the sense of an agreement.

Here are some examples of the different usages in the English language.

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6 The book was part of the common frame of reference project and is published by the Société de Législation Comparée (Paris, 2008).
7 P. 24
In the agreement sense we find references to “the negotiation of the contract”, “the conclusion of the contract” and “the terms of the contract”.

In the obligation sense we find references to “the performance of the contract”, which really means the performance of the relevant party’s obligations under the contract.

In the relationship sense we find references to the “termination of the contract”, which really mean the “termination of the contractual relationship”.

In the document sense we find statements such as “consumer contracts should be …legible”, which really means “if consumer contracts are in writing, the writing should be legible”.

How is the word “contract” used in the proposed CRD? It is used as a noun about 225 times in the recitals and articles. The breakdown of the way it is used is roughly as follows. I say “roughly” because I have done only a crude manual count and there are some cases which are hard to classify. I have assumed, for example, that expressions such as “the law on consumer contracts” mean “the law on the negotiation, conclusion and effects of consumer contracts” and that the word “contracts” is here used in the normal “agreement” sense. The picture is clear in any event, even allowing for debatable classifications or minor inaccuracies in counting.

The word “contract” is used in the agreement sense 199 times.
It is used in the obligation sense 12 times.
It is used in the relationship sense 11 times.
And it is used in the document sense 3 times.

So the proposed CRD is predominantly consistent with the DCFR in this respect. It would be quite easy to make it completely consistent with the DCFR. It could include a definition of “contract” in the same terms as the DCFR and it could use that definition consistently. Instead of talking of “performance of the contract” it could talk of “performance of obligations” (as indeed it sometimes does already). It could refer to termination of the relationship instead of termination of the contract. And it could refer to contract documents or contracts in writing when it means to refer to a written document.

If we have the word “contract” in the sense of an agreement intended to have legal effect then we do not need to use other words which have the same meaning. The same word should be used for the same concept. Here, in drafting the DCFR, we found that the main temptation was to use the word “agreement” when “contract” would have been more consistent. We can see the same thing in the proposal for a Regulation on Succession. It talks of “agreements on succession” and defines such an agreement as:
An agreement which confers, modifies or withdraws, with or without consideration, rights to the future succession of one or more persons who are party to the agreement.

It is easy to see why the definition had to be drafted that way in the absence of a common frame of reference. The word “contract” might not have had the same meaning in different legal systems in the Member States. If there were a CFR then the word “contract” could be used. It is interesting to note that in article 18 of the proposal for a Regulation on Succession both words are used. The first sentence of paragraph 2 begins “An agreement shall be valid …” The second sentence begins “If the contract is valid …”

The DCFR distinguishes clearly and consistently between a contract (in the agreement sense) and the contractual relationship arising from it. Other instruments are often inconsistent. There is, for example, in the Rome II Regulation a reference to “a relationship between the parties, such as one arising out of a contract”. That is fine. However, even in this well-drafted instrument we find inconsistency. Article 5(2) refers to “a pre-existing relationship between the parties, such as a contract”. Within the one instrument a contract sometimes gives rise to a relationship and sometimes is the relationship. If a common frame of reference had been available the second of these statements might have read “a pre-existing relationship between the parties, such as one arising out of contract”.

“Obligation”, “duty”, “requirement”

A second important example of the need for greater consistency and coherence is the use of words like “obligation”, “duty” and “requirement”.

In the European legal systems the word “obligation” is used in two ways. Sometimes it means the whole debtor/creditor relationship and sometimes it means the duty owed by the debtor to the creditor. In this second sense the debtor’s obligation is the counterpart of the creditor’s right. So we get references to “the rights and obligations of the parties”. This second sense has become more prevalent in international and European instruments than the first sense. It is this second sense which is used in the DCFR and it is also this second sense which is used in the proposed CRD. We get references, for example, to the trader’s obligations and the consumer’s obligations and to the performance of obligations. We find this sense also in the current proposal for a Regulation on Succession, which refers to “an obligation to restore or account for gifts”. We find it in the recent Regulation on maintenance obligations which refers to a “maintenance obligation towards a child under the age of 18” and we find it in the Rome I Regulation which

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8 Regulation (EC) No 864/2007 of the European Parliament and of the Council of 17 June 2008 on the law applicable to non-contractual obligations, art. 10(1). See also the references in the Brussels I Regulation to the “matrimonial relationship” and in the Rome I Regulation to relationships having “comparable effects to marriage” and to “the relationship between settlors, trustees and beneficiaries”.
9 Art. 19(2).
refers to the liability of officers for “the obligations of the company or body” and to the
question “whether the debtor’s obligations have been discharged”. 11

An “obligation” is defined in the DCFR as:

A duty to perform which one party to a legal relationship, the debtor, owes to
another party, the creditor.

So the DCFR reflects, confirms and consolidates the meaning of the word “obligation”
which now prevails in hard European private law. It is worth noting here that that law
already has many provisions on non-contractual obligations. We should not make the
mistake of supposing that the private law acquis is confined to contract law.

The DCFR found it useful to distinguish between an obligation (owed to a specific
creditor and carrying with it certain standard remedies for non-performance) and a “duty”
(a more general concept, not necessarily owed to a particular creditor and not
automatically carrying with it the standard remedies for non-performance).

The DCFR also found it useful to use the word “requirement” to indicate something
which a person is not under any obligation or duty to do but which has to be done if a
certain result is to be achieved. For example, there is no duty or obligation to use writing
for certain contracts but if you do not use it the contract may be invalid. Or, to put it
another way, the only sanction for non-compliance is that you do not achieve the result
you want to achieve.

This may all seem rather pedantic but it can be important.

For example, do the provisions on pre-contractual information for consumers in the
proposed CRD lay down obligations, duties or requirements? This is not at all clear. The
language varies – usually “requirements” is used but sometimes “obligation”. Sometimes
the consumer is said to be entitled to the information, which suggests a corresponding
duty or obligation to provide it. The sanctions are sometimes left to national law (as in
the case of a breach of article 5) and sometimes left entirely unprovided for (as in the
case of most of article 9). Occasionally a specific sanction, like the extension of a
withdrawal period is provided.

It seems that we are not here talking of requirements for validity, nor of ordinary
obligations which can be specifically enforced. It seems that we are talking of
information duties for which specific sanctions are either provided or left to national law.
Some more clarity would be very helpful. 12 A careful use of the concepts in the DCFR
could lead to an improvement in the text.

applicable to contractual obligations, art. 1(2)(h) and art. 14.
12 It is interesting to note that recital 30 to the Rome I Regulation refers, in the context of culpa in contrahendo,
to a “violation of the duty of disclosure”.

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It cannot be argued, of course, that the way in which the DCFR uses the words “obligation”, “duty” and “requirement” is the only possible way. It can be argued, and I would argue, that it is a possible way, that it has been tested and found adequate across a range of applications and that there are advantages in having these distinct terms to use in drafting EU legislation.

What of the evaluative groups’ assessment? The use of the French words “obligation” and “devoir” is considered at length in the book on Terminologie Contractuelle Commune mentioned above. The conclusion is that it would be useful to use these terms more precisely and that this could be important in the context of the construction of a European contract law.

“Business”, “professional” or “trader”

There is a good deal of inconsistency in existing EU legislation in the choice of the appropriate word to denote the counterpart of a consumer in a business-to-consumer contract. Some instruments use “professional”. This was also used in the PECL and carried forward into the earlier drafts of the DCFR. However, the Acquis Group preferred “business” and this was the term chosen for the final version of the DCFR. It has the advantage of corresponding to ordinary usage in European private law circles. It has become common to refer to business-to-consumer contracts and to abbreviate this expression to B2C contracts. Business is also better than “professional” because the latter term, at least in English, tends to denote a member of one of the learned professions. The proposed CRD uses neither “professional” nor “business”. It uses “trader” as the counterpart of “consumer”. There are no doubt reasons for this, possibly connected with other Directives but it seems unfortunate. In English “trader” suggests somebody who buys and sells – not somebody who supplies a service. A company which provides services is a business, but not in ordinary usage a trader. The word “trader” may even suggest a street trader rather than a more up-market business. Most people would not use “trader” to describe a supermarket company. Nor would they use “professional”. They would use “business”. Moreover, it seems strange to have to abandon the term B2C contracts. I would suggest that the use of “trader” rather than “business” in the proposed CRD be reconsidered.

However, there may be some powerful reasons for choosing “trader” of which I am unaware. If so, then so be it. The actual term used is not so important. The important thing is to make a choice now and stick to it. If it is to be “trader” then let it be trader but let us at least stick with that from now on.

13 See note 6 above.
14 At pp. 92 to 93.
16 Ewoud Hondius has noted that there is a similar problem in the Dutch version. See the European Review of Private Law 2010, pp.103-127.
“Terms”, “clauses” and “conditions”

Many existing instruments use varying words to denote provisions in a contract. The PECL commonly uses “clause” but that seems, at least in English, to be more suitable for a written contract. Many contracts, and especially many consumer contracts, are not written. In English legal drafting it is very common to find the couplet “terms and conditions” but this is just bad drafting. There is no need for two words when one will do. The DCFR uses “terms” for contractual provisions, such as those relating to price, date of delivery and so on. It reserves “clause” for a discrete provision in the physical contract document. A clause in the physical or formal sense could contain several terms. The distinction between “clause” and “term” is nicely illustrated by the UNIDROIT Principles of International Commercial Contracts:

A contract in writing which contains a clause indicating that the writing completely embodies the terms on which the parties have agreed…

It is worth noting that it is not only contracts which have terms in the DCFR sense. Unilateral juridical acts, such as a unilateral authorisation of an agent, can have terms, such as provisions setting out the scope of the authority. A court judgment can have terms – e.g. a provision requiring a party to pay within a certain time. A legislative instrument can have terms, indeed must have terms.

The DCFR uses the word “condition” for a particular type of term – namely, a provision which makes a legal relationship or effect depend on the occurrence or non-occurrence of an uncertain future event, either suspensively or resolutively. This makes it unnecessary to use the pleonastic “terms and conditions”.

How are the words “terms”, “clauses” and “conditions” used in the proposed CRD?

The usage is more or less the same as in the DCFR. The word “term” is the one generally used. It is used about 80 times in the recitals and articles of the proposed CRD – often in the context of unfair contract terms. By contrast the word “clause” is used only once in the recitals and articles – in the expression “price-indexation clauses” in Annex III, paragraph 3(c). In the context it is clear that these are a type of contract term. There would be a slight gain in consistency by talking of “price-indexation terms”. In about four cases the word “conditions” is used in the proposed CRD to denote terms. It refers, for example, to “the conditions of … financial guarantees to be provided by the consumer”.

Again, very slight changes would make the proposed CRD completely consistent with the usage in the DCFR. The Rome I Regulation provides a good example to follow. It refers in art 10 paragraph 1 to “the validity of a contract, or of any term of a contract”.

This question does not appear to be covered by the work of the evaluative groups.

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17 Art. 2.1.17 (Emphasis added).
18 Art. 5 (1)(i).
“Avoidance”, “rescission”, “termination”, “cancellation”, “withdrawal”

These terms (and indeed others) are commonly used to describe the process of bringing a contractual relationship to an end. There has been an enormous amount of confusion in existing texts and laws. The confusion is not confined to the English language. The book on Terminologie Contractuelle Commune lists eight different French words which are used in this context.\(^{19}\)

It is well known, for example, that the English text of the CISG talks of the “avoidance” of a contract for the sale of goods when it is referring to the process whereby one party brings the seller/buyer relationship to an end because of a fundamental non-performance of the other party’s obligations. This is an unfortunate choice because “avoidance” by its nature suggests a process of making void. It suggests that there is some invalidity, something wrong with the formation of the contract.\(^{20}\) However, what is in issue is the ending of a valid relationship because of something done or not done during its course. It is notable that the French text of the Convention uses “résolution” in this context. The Unidroit Principles, which also emanate from UNCITRAL, do not follow the CISG usage of the word “avoidance” in the English text. They refer to the termination of the contract. The DCFR talks, slightly more accurately, given its definition of contract, of the termination of the contractual relationship.

“Avoidance” is used in the DCFR to denote the process of rendering a contract ineffective from the beginning on some ground of invalidity such as force or error. This seems more appropriate than the CISG use of the word.

The proposed CRD talks in article 14 of “terminating the obligations of the parties”, which is consistent with the DCFR usage, and in several places of “terminating the contract”, which is slightly less accurate than the DCFR’s usage but still better than using “avoiding the contract” in the CISG sense. In article 26 on the consumer’s remedies for non-conformity the proposed CRD talks of “having the contract rescinded”. It is not clear what “rescinded” means here or how it is brought about. It may be that the proposed CRD is using “rescind” for termination for non-performance and “terminate” for other types of termination of the contractual relationship but this is not made clear. There is room for a good deal more precision in this area and this is where a common frame of reference could be helpful. One of the reasons why the DCFR opted for “termination of the contractual relationship” rather than using “rescission” and then defining that word (which would have been perfectly possible, and indeed would still be possible for an official CFR) was that the drafters wanted to use ordinary descriptive terminology, rather than technical legal terms which might carry national law baggage with them.

The proposed CRD does not use “avoidance” at all, which is not surprising as it does not deal with invalidity.

\(^{19}\) See p. 415 – nullité, résolution, résiliation, rétractation, inefficacité, caducité, inexistence, inopposabilité. See also p. 432, referring to still more expressions of similar meaning.

\(^{20}\) See e.g. Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, art. 4(2)(m), which refers to “the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors”.

“Withdrawal” is the word used in the *acquis* and in the DCFR and in the proposed CRD for the right of a consumer to terminate the relevant legal relationship within a short cooling-off period. Arguably it is unnecessary because the word termination could have been used. It is however useful to have a special term for this special situation. Again we need only one term. We do not need to use sometimes “withdrawal” and sometimes “cancellation”

**“Damage” and “loss”**
In ordinary English, the word “damage” can be used in a wide sense to mean any type of detrimental effect or adverse change or in a narrower sense limited to some adverse change to something corporeal, including bodily organs, or to certain states or conditions – e.g. “structural damage” or “liver damage” or “damage to health” or “damage to reputation”. For the purposes of European private law a choice has to be made. Consistently with the Rome II Regulation, the DCFR opts for the wide sense. It defines “damage” as “any type of detrimental effect”. When a narrower sense is intended it refers, for example, to “property damage”.

The DCFR also uses the word “loss” in a wide sense. It provides that:

> “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. (III. – 3:701(3) and VI. – 2:101(4)).

These terms would seem to be useful terms to have in the legal lexicon for future use when appropriate.

**The troublesome word “claim”**
The word “claim” is used in European private law in two senses.

It is used, first, in the sense of a demand based on the assertion of a right. A claim in this sense may be speculative; it may be unsound; it may even be fraudulent. The Regulation on insolvency refers frequently to “claims” in this sense. Article 4(2)(g) refers, for example, to

> the claims which are to be lodged against the debtor’s estate and the treatment of claims arising after the opening of insolvency proceedings.

Article 20(2) refers to a creditor “who has obtained a dividend on his claim” and article 32(1) provides that:

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21 Regulation (EC) No 864/2007 of the European Parliament and of the Council of 17 June 2008 on the law applicable to non-contractual obligations, art. 2(1). See also recital 24 on “environmental damage”, which refers to “adverse change”.

22 See note 21 above.
Any creditor may lodge his claim in the main proceedings and in any secondary proceedings.

We find this sense of the word “claim” also in the Regulation on a European Enforcement Order for uncontested claims. It appears in the title itself and throughout the Regulation. And we find it again, equally prominently, along with references to “claimants” and “counterclaims”, in the Regulation establishing a European Small Claims Procedure.

European private law instruments need to be able to use “claim” in this sense of a demand based on the assertion of a right. There is no suitable alternative. This use of the word “claim” is not troublesome.

Unfortunately, the word “claim” is also used as the equivalent of “a right to performance of an obligation”. It is confusing and troublesome to have the same word used in these two very different senses. For example, article 14 of the Rome I Regulation refers to “the voluntary assignment or contractual subrogation of a claim against another person (the debtor)”. It seems probable from the scope of the Regulation and the context of the word that “claim” means here the right to performance of a contractual obligation but there is an ambiguity and there is uncertainty in some quarters about the scope of this article. There are even suggestions that it might be advisable to insert a provision to make it clear that assignments of company shares and intellectual property rights are not covered.

We do not need this confusion and uncertainty. A common frame of reference could help. The DCFR for example defines “claim” as “a demand for something based on the assertion of a right” and uses it consistently in that sense. When it wants to refer to a right to performance of an obligation it refers to a right to performance of an obligation.

**Summing up on consistency and coherence**

The point is short and simple. If we are to avoid confusion we should use terms consistently and accurately. A common frame of reference could help in this respect. This is not, as I have heard it suggested by those who like to mock the achievements of the pandectists, a return to 19th century pandectism. It is just good drafting. It is just following the sound advice in the Joint Practical Guide mentioned earlier. It is just basic consideration for the reader.

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24 The word “claim” is defined for the purposes of the Regulation in article 4(2) as: “A claim for payment of a specific sum of money that has fallen due or for which the due date is indicated in the judgment, court settlement or authentic instrument.” This is narrower than any demand based on the assertion of a right. It does not include, for example, a claim for an order for specific enforcement of a non-monetary obligation. But it is clearly a sub-category of that meaning.

III Using CFR for checking coverage

Another potential use for a CFR is in checking the coverage of provisions. It is very easy in debates on legal policy to concentrate on typical situations and to overlook the fact that exactly the same issues need to be regulated for other situations.

In drafting the DCFR we found it useful, for example, to check constantly to see if the rules proposed for contracts should also, for completeness of coverage, apply to unilateral juridical acts. This is not a mere academic matter. It can be of practical importance. For example, in certain countries at least, a proprietary security is often granted by a unilateral act. It would not be sufficient to have rules confined to securities created by bilateral contracts. So a provision in the DCFR says that the rules of Book IX apply with appropriate adaptations to “security rights in movable assets created by unilateral juridical acts”.

The same point arose in relation to personal security and mandate. It is interesting to note that the Rome I Regulation and the Rome II Regulation have provisions on “a unilateral act intended to have legal effect” and “acts intended to have legal effect”.

An example from the proposed CRD where it would have been useful to check against the DCFR for completeness of coverage can be found in the rules on the seller’s obligations under a contract for the sale of goods. Curiously, in the proposed CRD there is no obligation to transfer ownership of the goods. This is expressly provided for in the DCFR. No single obligation of the seller would seem to be more important than this.

In drafting the DCFR we also found it essential to provide a sanction for any duty imposed. In the case of obligations in the strict sense outlined above the normal sanctions for non-performance always apply unless stated otherwise. The same cannot be said for all EU Directives or Regulations. For example, there does not seem to be any sanction provided in the proposed CRD for a failure to provide some of the information which is required under article 9.

IV Using a CFR for checking suitability of terms for general use

A possible use of the CFR is as a check to ensure that provisions which might have to be used in other instruments at a later date are not used in too narrow a sense. Again, examples can be found in the proposed CRD. We do not need to look beyond the list of definitions in article 2.

This defines a ‘consumer’ as:

any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession.

\[26\] IX.1:101(2)(b).
\[27\] Arts. 11(3) and 21 respectively, on formal validity.
\[28\] Arts. 18(2) and 22(2) respectively, on burden of proof.
\[29\] IV.A.2:101(a).
\[30\] The only sanction relates to a failure to provide information about the right of withdrawal. In this case the withdrawal period is extended. See art. 13.
The relevant point for present purposes is the inclusion of the words “in contracts covered by this Directive”. That immediately makes the definition unsuitable for other purposes. If there were a CFR which included an agreed general definition of “consumer”, whatever that might be, then that agreed definition could be used across a whole range of Directives and Regulations. Exactly the same problem arises in relation to the word “trader” in the same article.

Another dubious definition is that of a 'sales contract'. This is defined in the proposed CRD as:

any contract for the sale of goods by the trader to the consumer including any mixed-purpose contract having as its object both goods and services.

Again that does not seem to be suitable for general use. Not only is it not informative, as it defines a contract for sale in terms of a sale without explaining what a sale is, but it is also too limited. There may well be other Directives and Regulations in the future where the drafters will want to use the term “sales contract” or some equivalent term for cases not covered by this definition. They may want to use it for contracts between two businesses or between two consumers. They may want to use it for contracts which are not so-called “mixed-purpose” contracts. The definition of a “contract for sale” in the DCFR is more informative. It provides that:

A contract for the “sale” of goods or other assets is a contract under which one party, the seller, undertakes to another party, the buyer, to transfer the ownership of the goods or other assets to the buyer, or to a third person, either immediately on conclusion of the contract or at some future time, and the buyer undertakes to pay the price.

That is suitable for general use. If something similar were included in an official CFR it could be used across a whole range of instruments.

A similar criticism can be made of the definition of “goods” in the proposed CRD. This means:

any tangible movable item, with the exception of:
(a) goods sold by way of execution or otherwise by authority of law,
(b) water and gas where they are not put up for sale in a limited volume or set quantity,
(c) electricity.

The first part of that definition “any tangible movable item” is basically all right, except that as gases are included “corporeal” would be better than “tangible”. The exceptions,

31 Other criticisms might be the phrase “in contracts”. A person does not act “in” a contract. This presumably means “in relation to”. The use of “his” rather than “his or her” can also be criticised on general grounds.
however, are all matters of scope rather than definition. Clearly, for example, goods sold by way of execution are goods. They are just not intended to be within the scope of the Directive. The exclusion is perfectly proper but it should not be done via the definition. It makes the definition completely unsuitable for many other purposes. The second exception (for water and gas) is both too wide and too narrow. Why “water and gas” rather than “liquids and gas”? And why take bulk liquids and gases out of the definition? Again it might have been better to achieve the policy intention by a scope rule rather than by adopting an unduly narrow definition not suitable for general purposes. The third exception (electricity) is open to the opposite criticism. Electricity is not a tangible or corporeal movable item at all and does not need to be covered by an exception. If the Directive were to be intended to include “electricity” it would have been necessary to have a rule specifically including it within the scope of the Directive.

The DCFR defines “goods” as:

－ corporeal movables. It includes ships, vessels, hovercraft or aircraft, space objects, animals, liquids and gases.

That is a general definition which could be used as a basis in future instruments.

If a wider term, covering non-corporeal movables or immovables is required, the DCFR provides the term “assets”, which is defined as follows:

－ “Assets” means anything of economic value, including property; rights having a monetary value; and goodwill.

This is a useful term for the lexicon. It is already widely used in, for example, the Regulation on insolvency proceedings.33

V Using a CFR for checking ideas

A lot of work and thought went into the model rules in the DCFR. Over 200 people from all the Member States contributed to it in one way or another. Collectively, these people drew not only on centuries of legal tradition but also on modern reform proposals, soft-law instruments and non-official sources of rules like the standard term contracts widely used in the construction industry. Not everybody will agree with every model rule in the DCFR but nonetheless there are some good things in it and it could be well worth checking for useful ideas when problems have to be solved for the purposes of new EU instruments. For example, the rule on mixed contracts in the DCFR34 might be worth looking at for the purposes of the proposed CRD.

33 Council Regulation No 1346/2000 of 29 May 2000 on insolvency proceedings, in e.g. arts. 2(b) and (c) and 4(2)(b).
34 II.—1:107. Even if it were not followed exactly it might suggest a possible way of approaching the problem which could be more satisfactory than the one currently proposed.
VI Using a CFR for checking drafting

Those drafting EU legislation have the benefit of the excellent Joint Practical Guide for the drafting of Community legislation, which I have mentioned already.\textsuperscript{35} This came out when the drafting of what is now the DCFR was already well under way but it was gratifying to find that many of the drafting conventions we had laid down for ourselves were the same as those recommended in the Joint Practical Guide. Once it became available every effort was made to follow its guidelines. An official CFR should, I would suggest, be an example of good drafting which could be used as a check on the drafting of provisions covering similar subject matter. It will be very important to involve the Commission’s expert drafters and legal advisers in its production from the beginning and to allow them adequate time to do a good job.

In two respects the DCFR is perhaps more in keeping with the spirit of modern legislative drafting than even the admirable and rather progressive Joint Practical Guide.

First, it avoids the use of the drafter’s “shall”. It would not say, for example, “the following definitions shall apply”\textsuperscript{36} but simply “the following definitions apply”.\textsuperscript{37} The drafter’s “shall” infringes the rule of using ordinary language whenever possible. It is unnecessary and rather pompous and is being abandoned by the more progressive legislative drafters in the English-speaking world. It is also capable of being used in several different senses. The Acquis Group has criticised the use of the drafter’s “shall” in the proposed CRD in the following terms:

Within the Proposal, "shall" is used on 136 occasions, and in at least five different meanings: (1) an enforceable obligation ("the trader shall reimburse any payment..."); (2) an unenforceable duty ("shall be drafted in plain intelligible language"); (3) an effect which operates by virtue of law, where "shall" conveys no additional meaning ("shall apply" instead of "applies", "shall be binding" instead of "is binding"); (4) the meaning of "need not", as in "the consumer shall not pay these additional charges", and (5) the meaning of "may", as in "the consumer shall only be charged". We would strongly urge the Commission to follow the example set by the Acquis Principles and the DCFR, which have both banned all use of "shall".\textsuperscript{38}

The pernicious nature of the word “shall” can be illustrated by reference to the Joint Practical Guide itself. In paragraph 2.3.3 it states that “imperative forms” should not be used in non-binding acts. It then immediately proceeds to ignore its own recommendation

\textsuperscript{35} See note 4 above. Reference may also be made to the Interinstitutional style guide, available at http://publications.europa.eu/code/en/en-4100300en.htm. The DCFR follows this in, for example, preferring “-ise” to “-ize” and “movable” to “moveable”. See para. 10.3 of the guide. Some recent regulations do not. For example, we get “moveable” and “immoveable” in Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings.
\textsuperscript{36} As is said in art. 2 of the proposed CRD.
\textsuperscript{37} Cf I.–1:108(1).
by saying in the next (non-binding) guideline that “The drafting of acts shall take account of the persons to whom they are intended to apply …” “Should” would have been better.

Secondly, the DCFR uses gender neutral drafting. It does not use the pronoun “he” to refer to all legal persons. The use of the gender-suggesting personal pronoun is a particular problem in the English language but the principle of gender neutrality ought to be observed in all. It seems inappropriate and offensive to give the impression in the Europe of the 21\(^{st}\) century that only men are legal actors. There are countless examples of this in the acquis and only rare exceptions.\(^{39}\) The Joint Practical Guide can itself be used as an example of what to avoid. Paragraph 5.1 says that “A person drafting a Community act of general application must always be aware that his text must …” This conveys the unfortunate impression that only men draft Community acts of general application. Why not just say “the text”?

It is not my main purpose here to criticise the drafting of the proposed CRD. Indeed I hate to criticise drafting because, having worked closely with legislative drafters and those instructing them for over 20 years, I have developed a great respect for their professionalism and some appreciation of the difficulties they face and the constraints under which they work. These difficulties and constraints are not always appreciated by those who make facile criticisms. They are multiplied in the case of multi-lingual texts. They can, however, be overcome. The drafting of the Rome I and Rome II Regulations is, for example, very impressive indeed and an illustration of what can be done.\(^{40}\) It seems to me that the drafting of the proposed CRD could be very considerably improved if the time and the opportunity presented themselves. I would endorse the Acquis Group’s pertinent comments on this subject.\(^ {41}\) A CFR could help but, of course, would not be enough in itself.

**VII  A principled approach**

I have said something about definitions and model rules but nothing about principles. In fact I do not think that the four principles of freedom, security, justice and efficiency which the DCFR identifies as underlying its model rules can be used as a direct aid or set of tools. These principles, which were heavily influenced by the principles identified in the book on *Principes contractuels communs* prepared by an evaluative group coordinated by Professor Fauvarque-Cosson and Professor Denis Mazeaud,\(^ {42}\) are not meant to be used in that way. They function at a more general level.

What can be said is that a principled approach to the drafting of legislation will generally improve its quality and attractiveness. Much depends on the subject matter but it can never go amiss to ask whether there is an underlying principle lying behind a host of

\(^{39}\) See e.g. Rome II, art. 18. – “may bring his or her claim directly against the insurer…”

\(^{40}\) Although if a common frame of reference had been available it could have been even better. See, for example, the discussion of “claim” above.

\(^{41}\) See note 38 above.

\(^{42}\) See Fauvarque-Cosson/Mazeaud and Wicker/Racine/Sautonie-Laguionie/Bujoli (eds), *Principes contractuels communs. Projet de cadre commun de référence* (Paris 2008). This was prepared under the auspices of the Association Henri Capitant des Amis de la Culture Juridique Française and the Société de Législation Comparée as part of the Copecl project.
detailed rules. The proposed CRD has tried to introduce more principle into the relevant parts of the _acquis_ but I do not think that it has gone far enough in this direction. Could, for example, the rather specific and detailed information duties be generalised? From the point of view of legal science it could be said that the great challenge currently facing European lawmakers is to integrate the _acquis_ - based rules even more thoroughly into a civil law framework. The DCFR tries to do this, using the admirable work of the Acquis Group, but there were limits on what could be done because it was manifestly not for a group of academics to produce model rules of European private law which were elegant in form but which differed greatly from the actual European private law we had. In preparing an official CFR and a final Consumer Rights Directive the EU institutions will have more freedom and I hope that they will take advantage of it. They could with advantage go a good deal further than the DCFR in this direction.

I do not underestimate the difficulties. We live in the real world and in the real world a price has often to be paid for the achievement of consensus. That price, in drafting terms, is sometimes too many specific exceptions and ad hoc rules. Nonetheless every effort should be made to arrive at as principled an approach as possible. I believe that many parts of the DCFR exemplify this approach rather well and that it could prove useful in this respect.

**VIII What about the national notes and comparative law uses?**

It is sometimes suggested that a use for a CFR would be as a resource for determining what the national laws are. This assumes that a CFR would include national notes. Personally I do not think it should include such notes. They are for comparative law works. The DCFR includes many such notes and that is entirely suitable, and extremely useful, in an academic publication. It would not be so suitable in an official publication. The EU could not give its seal of approval to statements about national laws which, even if sufficiently accurate and complete at the time (something which would often be doubtful), could certainly not be guaranteed to remain accurate and up to date. In any event it is not enough to know what the existing laws are. Laws change. Suppose, for example, that the Commission looked at a set of national notes and concluded that it was not necessary to legislate on a particular point because all the laws covered it in a similar way already. Now, if that point was crucial to EU policy this would be a most unwise course to take because there would be no guarantee that all the national laws would remain in the same state. It would be much better to legislate anyway to ensure a stable implementation of the policy. This would be the only safe course.

**IX Scope**

From the political point of view, given the stated position of the Council, and no doubt from the point of view of those concerned about time and resources, the pressure is for a CFR limited to contract law. From a longer-term point of view any such limitation would be highly regrettable. European private law is not confined to contract law at present and will not be so confined in the future. Legislative tools are needed outside contract law.
X Conclusion

There could be all sorts of different ideas about what an ideal legislative toolbox might look like. Some people might think of a sort of enhanced Joint Practical Guide, with more definitions of commonly used terms and expression and various options for “boiler plate” provisions. Others might think of a simple legal dictionary for European private law. For various natural and understandable reasons which are now past history, that is not what we have got in the DCFR. We have got much more. Some may regret that. I do not. I do not think that any limited guidebook or dictionary of definitions could serve so well the various purposes I have outlined above. I was glad to hear at the Stockholm conference that the Commission’s plan was to have an official CFR consisting of principles, definitions and model rules, with the model rules being the main part. The preparation of the official CFR will present an opportunity to improve on the DCFR, to take account of sound and constructive criticisms and to produce an even more useful toolbox. I hope it proceeds at a brisk and vigorous pace. We need it.

Eric Clive
March 2010
The Revision
of the Package Travel Directive

Piotr Machnikowski
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The world in 1990

- communication was difficult
- flight tickets were expensive
- pre-arranged travel packages prevailed
- information was provided in paper form
Definition of ‘package’

'package' means the pre-arranged combination of not fewer than two of the following when sold or offered for sale at an inclusive price and when the service covers a period of more than twenty-four hours or includes overnight accommodation:

(a) transport;
(b) accommodation;
(c) other tourist services not ancillary to transport or accommodation and accounting for a significant proportion of the package.

The separate billing of various components of the same package shall not absolve the organizer or retailer from the obligations under this Directive.
Definition of ‘consumer’

'consumer' means the person who takes or agrees to take the package ('the principal contractor'), or any person on whose behalf the principal contractor agrees to purchase the package ('the other beneficiaries') or any person to whom the principal contractor or any of the other beneficiaries transfers the package ('the transferee')
Consumer protection measures

• information duties
• limits to the possibility of the revision of contract
• remedies for non-performance, responsibility for sub-service providers
• financial guarantees in case of insolvency
Transformation of the travel service market

- easy access to the information
- online travel contracts
- travel services purchased from various websites
- the expansion of low cost air carriers
- the emergence of so-called dynamic packages
- the vertical integration in the travel industry
Article 3 - information

Article 3

1. Any descriptive matter concerning a package and supplied by the organizer or the retailer to the consumer, the price of the package and any other conditions applying to the contract must not contain any misleading information.

2. When a brochure is made available to the consumer, it shall indicate in a legible, comprehensible and accurate manner both the price and adequate information concerning:
   (a) the destination and the means, characteristics and categories of transport used;
   (b) the type of accommodation, its location, category or degree of comfort and its main features, its approval and tourist classification under the rules of the host Member State concerned;
   (c) the meal plan;
   (d) the itinerary;
   (e) general information on passport and visa requirements for nationals of the Member State or States concerned and health formalities required for the journey and the stay;
   (f) either the monetary amount or the percentage of the price which is to be paid on account, and the timetable for payment of the balance;
   (g) whether a minimum number of persons is required for the package to take place and, if so, the deadline for informing the consumer in the event of cancellation.

The particulars contained in the brochure are binding on the organizer or retailer, unless:
   - changes in such particulars have been clearly communicated to the consumer before conclusion of the contract, in which case the brochure shall expressly state so,
   - changes are made later following an agreement between the parties to the contract.
Article 4 (1) – information once again

1. (a) The organizer and/or the retailer shall provide the consumer, in writing or any other appropriate form, before the contract is concluded, with general information on passport and visa requirements applicable to nationals of the Member State or States concerned and in particular on the periods for obtaining them, as well as with information on the health formalities required for the journey and the stay;

(b) The organizer and/or retailer shall also provide the consumer, in writing or any other appropriate form, with the following information in good time before the start of the journey:

(i) the times and places of intermediate stops and transport connections as well as details of the place to be occupied by the traveller, e.g. cabin or berth on ship, sleeper compartment on train;

(ii) the name, address and telephone number of the organizer's and/or retailer's local representative or, failing that, of local agencies on whose assistance a consumer in difficulty could call.

Where no such representatives or agencies exist, the consumer must in any case be provided with an emergency telephone number or any other information that will enable him to contract the organizer and/or the retailer;

(iii) in the case of journeys or stays abroad by minors, information enabling direct contact to be established with the child or the person responsible at the child's place of stay;

(iv) information on the optional conclusion of an insurance policy to cover the cost of cancellation by the consumer or the cost of assistance, including repatriation, in the event of accident or illness.
Article 4(2) - form and content of contract

2. Member States shall ensure that in relation to the contract the following principles apply:
   (a) depending on the particular package, the contract shall contain at least the elements listed in the Annex;
   (b) all the terms of the contract are set out in writing or such other form as is comprehensible and accessible to the consumer and must be communicated to him before the conclusion of the contract; the consumer is given a copy of these terms;
   (c) the provision under (b) shall not preclude the belated conclusion of last-minute reservations or contracts.
Article 4(3) - assignment of rights

3. Where the consumer is prevented from proceeding with the package, he may transfer his booking, having first given the organizer or the retailer reasonable notice of his intention before departure, to a person who satisfies all the conditions applicable to the package. The transferor of the package and the transferee shall be jointly and severally liable to the organizer or retailer party to the contract for payment of the balance due and for any additional costs arising from such transfer.
4. (a) The prices laid down in the contract shall not be subject to revision unless the contract expressly provides for the possibility of upward or downward revision and states precisely how the revised price is to be calculated, and solely to allow for variations in:
- transportation costs, including the cost of fuel,
- dues, taxes or fees chargeable for certain services, such as landing taxes or embarkation or disembarkation fees at ports and airports,
- the exchange rates applied to the particular package.
(b) During the twenty days prior to the departure date stipulated, the price stated in the contract shall not be increased.
5. If the organizer finds that before the departure he is constrained to alter significantly any of the essential terms, such as the price, he shall notify the consumer as quickly as possible in order to enable him to take appropriate decisions and in particular:
- either to withdraw from the contract without penalty,
- or to accept a rider to the contract specifying the alterations made and their impact on the price.

The consumer shall inform the organizer or the retailer of his decision as soon as possible.
6. If the consumer withdraws from the contract pursuant to paragraph 5, or if, for whatever cause, other than the fault of the consumer, the organizer cancels the package before the agreed date of departure, the consumer shall be entitled:

(a) either to take a substitute package of equivalent or higher quality where the organizer and/or retailer is able to offer him such a substitute. If the replacement package offered is of lower quality, the organizer shall refund the difference in price to the consumer;

(b) or to be repaid as soon as possible all sums paid by him under the contract.

In such a case, he shall be entitled, if appropriate, to be compensated by either the organizer or the retailer, whichever the relevant Member State's law requires, for non-performance of the contract, except where:

(i) cancellation is on the grounds that the number of persons enrolled for the package is less than the minimum number required and the consumer is informed of the cancellation, in writing, within the period indicated in the package description; or

(ii) cancellation, excluding overbooking, is for reasons of force majeure, i.e. unusual and unforeseeable circumstances beyond the control of the party by whom it is pleaded, the consequences of which could not have been avoided even if all due care had been exercised.
Article 4(7) – non-performance after departure

7. Where, after departure, a significant proportion of the services contracted for is not provided or the organizer perceives that he will be unable to procure a significant proportion of the services to be provided, the organizer shall make suitable alternative arrangements, at no extra cost to the consumer, for the continuation of the package, and where appropriate compensate the consumer for the difference between the services offered and those supplied.

If it is impossible to make such arrangements or these are not accepted by the consumer for good reasons, the organizer shall, where appropriate, provide the consumer, at no extra cost, with equivalent transport back to the place of departure, or to another return-point to which the consumer has agreed and shall, where appropriate, compensate the consumer.
Article 5(1) – liability revisited

1. Member States shall take the necessary steps to ensure that the organizer and/or retailer party to the contract is liable to the consumer for the proper performance of the obligations arising from the contract, irrespective of whether such obligations are to be performed by that organizer and/or retailer or by other suppliers of services without prejudice to the right of the organizer and/or retailer to pursue those other suppliers of services.
Article 5(2) – damages once again, exemption, limitation and duty to assist

2. With regard to the damage resulting for the consumer from the failure to perform or the improper performance of the contract, Member States shall take the necessary steps to ensure that the organizer and/or retailer is/are liable unless such failure to perform or improper performance is attributable neither to any fault of theirs nor to that of another supplier of services, because:

- the failures which occur in the performance of the contract are attributable to the consumer,
- such failures are attributable to a third party unconnected with the provision of the services contracted for, and are unforeseeable or unavoidable,
- such failures are due to a case of force majeure such as that defined in Article 4 (6), second subparagraph (ii), or to an event which the organizer and/or retailer or the supplier of services, even with all due care, could not foresee or forestall.

In the cases referred to in the second and third indents, the organizer and/or retailer party to the contract shall be required to give prompt assistance to a consumer in difficulty.

In the matter of damages arising from the non-performance or improper performance of the services involved in the package, the Member States may allow compensation to be limited in accordance with the international conventions governing such services.

In the matter of damage other than personal injury resulting from the non-performance or improper performance of the services involved in the package, the Member States may allow compensation to be limited under the contract. Such limitation shall not be unreasonable.
Article 5(3) – no exclusion of liability

3. Without prejudice to the fourth subparagraph of paragraph 2, there may be no exclusion by means of a contractual clause from the provisions of paragraphs 1 and 2.
Article 5(4) – duty to inform about the non-performance

4. The consumer must communicate any failure in the performance of a contract which he perceives on the spot to the supplier of the services concerned and to the organizer and/or retailer in writing or any other appropriate form at the earliest opportunity. This obligation must be stated clearly and explicitly in the contract.
Article 2

For the purposes of this Directive:

1. 'package' means the pre-arranged combination of not fewer than two of the following when sold or offered for sale at an inclusive price and when the service covers a period of more than twenty-four hours or includes overnight accommodation:
   (a) transport;
   (b) accommodation;
   (c) other **tourist services** not ancillary to transport or accommodation and accounting for a **significant proportion** of the package.
Article 4

4. (a) The prices laid down in the contract shall not be subject to revision unless the contract expressly provides for the possibility of upward or downward revision and states precisely how the revised price is to be calculated, and solely to allow for variations in:
- transportation costs, including the cost of fuel,
- dues, taxes or fees chargeable for certain services, such as landing taxes or embarkation or disembarkation fees at ports and airports,
- the exchange rates applied to the particular package.
(b) During the twenty days prior to the departure date stipulated, the price stated in the contract shall not be increased.

5. If the organizer finds that before the departure he is constrained to alter significantly any of the essential terms, such as the price, he shall notify the consumer as quickly as possible in order to enable him to take appropriate decisions and in particular:
- either to withdraw from the contract without penalty,
- or to accept a rider to the contract specifying the alterations made and their impact on the price.
The consumer shall inform the organizer or the retailer of his decision as soon as possible.
Article 4

6. If the consumer withdraws from the contract pursuant to paragraph 5, or if, for whatever cause, other than the fault of the consumer, the organizer cancels the package before the agreed date of departure, the consumer shall be entitled:

(a) either to take a substitute package of equivalent or higher quality where the organizer and/or retailer is able to offer him such a substitute. If the replacement package offered is of lower quality, the organizer shall refund the difference in price to the consumer;
(b) or to be repaid as soon as possible all sums paid by him under the contract.

In such a case, he shall be entitled, if appropriate, to be compensated by either the organizer or the retailer, whichever the relevant Member State's law requires, for non-performance of the contract, except where:

(i) cancellation is on the grounds that the number of persons enrolled for the package is less than the minimum number required and the consumer is informed of the cancellation, in writing, within the period indicated in the package description; or
(ii) cancellation, excluding overbooking, is for reasons of force majeure, i.e. unusual and unforeseeable circumstances beyond the control of the party by whom it is pleaded, the consequences of which could not have been avoided even if all due care had been exercised.
Article 5

4. The consumer must communicate any failure in the performance of a contract which he perceives on the spot to the supplier of the services concerned and to the organizer and/or retailer in writing or any other appropriate form at the earliest opportunity. This obligation must be stated clearly and explicitly in the contract.
Article 1: Revision of price

(1) Revision of price in a package travel contract requires an express contractual term which must also state precisely how the revised price is to be calculated. The reasons for revision must be limited to variations in:
(a) transportation costs, including the cost of fuel;
(b) dues, taxes or fees chargeable for certain services, such as landing taxes or embarkation or disembarkation fees at ports and airports; or
(c) the exchange rates applied to this package.
The price may be increased only until the twenty-first day before departure.

(2) The consumer may
(a) terminate the contract; or
(b) accept the revised price.

(3) If the consumer does not notify the organizer of its decision without undue delay, an appropriate price revision is considered as accepted.
Article 2: Modifications of contract

(1) If, before departure, it becomes impossible or excessively burdensome for the organizer to perform the contract without significant modifications, the organizer must immediately notify this to the consumer, indicating proposed modifications. The consumer may
(a) terminate the contract and claim damages for non-performance; or
(b) accept the proposed modifications.

(2) If the consumer does not notify the organizer of its decision without undue delay, proposed appropriate modifications are considered as accepted.
Art. 3: Damages

(1) The consumer is entitled to damages for economic and non-economic loss caused by non-performance of the obligation, unless such non-performance is excused.

(2) Non-performance is excused if it is due to circumstances beyond the control of the organizer and of any person engaged by the organizer for performing this obligation, provided that the consequences of those circumstances could not have been avoided even if all due care had been exercised.

(3) Damages are reduced or excluded to the extent that the consumer wilfully or negligently contributed to the effects of the non-performance or could have reduced the loss by taking reasonable steps.
Art. 4: Duty to inform about non-performance

Any non-performance which the consumer perceives on the spot must be communicated at the earliest opportunity to the supplier of the services concerned or to the organizer.
Article 5: The organizer’s right of termination

(1) The organizer may terminate the package travel contract without incurring liability if the number of persons enrolled is less than the required minimum number set out in the contract.

(2) The termination of the contract releases both parties from their obligations. Each party is obliged to return to the other what has been performed under the contract.
Article 6: Alternative arrangements in case of partial non-performance

(1) After departure, if non-performance of a significant proportion of the obligations of the organizer has occurred, or if the organizer realises that such non-performance will occur, the organizer must make suitable alternative arrangements for the continuation of the package which are to be provided at no extra costs. The organizer must compensate the consumer for the difference in value between the services owed and those supplied. The consumer may reject the alternative arrangements for good reasons.

(2) If alternative arrangements are impossible, or are rejected for good reasons, the organizer must, where appropriate, provide the consumer with an equivalent return transport to the place of departure, or to another return point agreed with the consumer, at no extra cost. This does not affect the consumer’s right to claim damages.
Art. 7: Duty of assistance

If it becomes apparent that the package travel contract will not be performed properly, the organizer must provide prompt assistance to a consumer in difficulty unless the non-performance is attributable to the consumer.
Consumer

Art. 2(4) of the Package Travel Directive
'consumer' means the person who takes or agrees to take the package ('the principal contractor'), or any person on whose behalf the principal contractor agrees to purchase the package ('the other beneficiaries') or any person to whom the principal contractor or any of the other beneficiaries transfers the package ('the transferee')

Art. I.-1:105 DCFR
A „consumer” means any natural person who is acting primarily for purposes which are not related to his or her trade, business or profession.
Dynamic packages

• a package put together by the tour operator or travel agent at the consumer’s request
• a package put together by the consumer and purchased from one website:
  – a website run by a tour operator
  – a website run by a different entity
• separate purchases from various but interlinked websites
Revision of the Package Travel Directive

Abstract

1. Scope of the paper
The European Commission is reviewing the current EU rules on package travel. There are many issues which need to be discussed but in this paper I focus only on two groups of questions:

1) The scope of the protection provided by the directive
2) The basic issues of contract law under the directive (performance of travel services and remedies for non-performance)

2. The world in 1990
At the time when the directive was drafted the travel business was very different than it is today. Communication with foreign service providers (e.g. hotels) was relatively difficult. Flight tickets were relatively expensive. This resulted in a predominance of pre-arranged travel packages. They were put together by organizers and sold mostly by independent retailers acting as intermediaries. What is also important is that information was provided to the buyer in paper form.

3. Scope and means of protection granted by the Package Travel Directive
1) The scope of the application of the 1990 directive was determined mostly by the notion of 'package' as defined by art. 2 – the pre-arranged combination of not fewer than two of the following when sold or offered for sale at an inclusive price and when the service covers a period of more than twenty-four hours or includes overnight accommodation:
   (a) transport;
   (b) accommodation;
   (c) other tourist services not ancillary to transport or accommodation and accounting for a significant proportion of the package.
2) The means of consumer protection that were employed were:
   - information duties
   - limits to the possibility of the revision of contract
   - remedies for non-performance, most of all responsibility for sub-service providers
   - financial guarantees in case of insolvency of the contracting party
4. Transformation of the travel service market and the need for revision of the directive

1) The popularization of the Internet and easy access to the information concerning things such as flights and hotels has resulted in an increasing number of travel contracts concluded online. Travel services are purchased not only from tour operators’ websites but also from airlines’ websites and from Internet-only companies (online travel sites).

2) The expansion of low cost air carriers has made travelling easier and less expensive

3) This has led to the emergence of so-called dynamic packages – packages put together by the consumer

4) The above mentioned process has been accompanied by changes in the travel industry in some countries – the vertical integration and diminishing number of independent travel agencies.

5. Legislative imperfections

Apart from the changes in the outside world, the Package Travel Directive should be revised and amended/replaced because the quality of this piece of legislation is often below standard. It concerns both the structure of the directive (e.g. art. 4 and 5 contain at least seven different issues, most of them are hopelessly confused) and its language. Provisions that are crucial to the proper functioning of consumers’ protection are full of vague terms. For example:

- art. 2(1) – a package may contain “other tourist services not ancillary to transport or accommodation and accounting for a significant proportion of the package” so the very application of the directive depends on what “tourist service” and “significant proportion” mean

- art. 4(5) – the possibility for changing the contract arises when “the organizer finds that (…) he is constrained to alter significantly any of the essential terms”

- art. 4(6) – the consumer is entitled to be compensated for non-performance of the contract “if appropriate”

- the premises of liability under art. 5(2) are not clear

In the quest for a better formulation of the rules on performance and non-performance of the package travel contract, the DCFR and Acquis Principles may be worthy of attention.
6. Possible scope of the new directive

The question about the appropriate scope of protection cannot be answered without identifying risks to the persons buying packages and interests deserving of protection. The doubts and discussions over the definition of consumer in art. 2(4) show it clearly but the same applies to the issue of so-called dynamic packages. Although consumers report the same types of problems as those related to traditional packages, i.e. incorrect or incomplete information, missing bookings, standard of services lower than expected, delayed flights and inconvenient connections (long waiting time), it does not mean that the same set of remedies would be effective.

It’s important to differentiate various kinds of these arrangements and to check to what extent they are similar to traditional packages so that the remedies offered by the directive are appropriate. From this point of view we have to differentiate:

1) a package put together by the tour operator or travel agent at the consumer’s request
2) a package put together by the consumer and purchased from one website
3) separate purchases from various but interlinked websites

The first example has all the important characteristics of the package travel contract. In fact, it is a package travel contract covered by the directive, according to the ECJ decision C-400/00 – Club-Tour.

The second example possibly could be treated the same way; it may, however, depend on the circumstances. The third example is significantly different. The difference lies not in the kind of risk such contracts involve but mostly in the level of expectations that may be induced on the part of consumer. In this case the emphasis should be placed on the information, not the responsibility.
Overview

1 Background
2 The CFR as a toolbox for amending the CRD
3 Specific topics
   - notion of consumer
   - information duties
   - right of withdrawal
   - liability for lack of conformity
   - unfair terms
4 Conclusion
1 Background

- Commission Action Plan 2003
  - Revision acquis
  - CFR as toolbox
  - Horizontal
  - Amendments Council

1 Background (continued)

- Draft Common Frame of Reference 2009
  - Broad scope: beyond contract law; B2C and B2B
  - Based on comparative law
  - From academic to political CFR
2 CFR as a toolbox for amending CRD

- Original aim (toolbox)
  - Commission, *The Way Forward* 2004: ‘It would also be desirable that the Council and the EP could use the CFR when tabling amendments to Commission proposals.’

- Coherence
  - On European level
    - CRD covers only four directives
    - Optional instrument
  - On national level: relation to general private law

2 CFR as a toolbox … (continued)

- Quality
  - Based on research by a large European network of scholars (‘Network of Excellence’)
  - ‘Best solutions’

- European
  - Non-national > cross border contracts
  - Common core
3.1 The notion of consumer

- CRD adopts more restricted notion than CFR
- Art. 2(1) CRD
  - ‘any natural person who, in contracts covered by this Directive, is acting for purposes which are outside of his trade, business, craft or profession’
- Art. I.-1:105(1) CFR
  - ‘any natural person who is acting primarily for purposes which are not related to his or her trade, business or profession’

3.2 Information duties

- Type of information
  - CRD: specific duties
  - CFR: specific duties + in general ‘such information ... as the other person can reasonably expect’
- Remedies
  - CRD: national laws
  - CFR: neutral set of remedies
- Distance and off-premises contracts
  - CRD: no provision on burden of proof
  - CFR: burden of proof on trader
3.3 Right of withdrawal

- Distance and off-premises contracts
  - Both CRD and CFR: fourteen days

- Starting point
  - CRD: according to type of contract
  - CFR: almost irrespective of type of contract

- Omission of information - remedies
  - CRD: expiration withdrawal period three months after the trader has fully performed other contractual obligations / after conclusion or delivery (Council)
  - CFR: one year after the time of conclusion of the contract

3.3 Right of withdrawal (continued)

- Exercise
  - CRD: durable medium
  - CFR: no formal requirements

- Effects
  - both CRD and CFR: termination obligations
  - CFR: withdrawing party does not incur any liability

- Linked contracts
  - CRD: no detailed rules on termination
  - CFR: remedies included
### 3.4 Liability for lack of conformity

**Sale of goods**
- CRD: MS may exclude second-hand goods at public auctions
- CFR: no such exclusion

**Extent of liability**
- CRD: damages according to national laws
- CFR: set of remedies included

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### 3.4 Liability for lack of conformity (cont)

**Hierarchy of remedies**
- CRD: first repair or replacement, then price reduction or rescission
- CFR: no hierarchy

**Time limit**
- CRD: two years / ten years (Council)
- CFR: no time limit

**Notification of non-conformity**
- CRD: within two months of detection / reasonable time (Council)
- CFR: consumer contracts excluded
3.5 Unfair terms

- Definition
  - CRD: terms that have not been individually negotiated
  - CFR\textsuperscript{SGECC}: all terms supplied by trader

- Transparency
  - CRD: no sanction on lack of transparency
  - CFR: breach of duty of transparency may imply unfairness

- Black and grey lists
  - CRD: more extensive grey list than CFR
  - CFR: but more protective with regard to unilateral adaptation of contracts than CRD

4 Conclusion

- CRD compared to CFR
  - In CFR:
    - Broader definition consumer
    - Remedies for non-disclosure
    - Clearer rules on right of withdrawal
    - No hierarchy of remedies in sales
    - No duty to notify the seller about non-conformity
    - Mandatory character always clear
    - Clearer terminology
The consumers’ rights proposal and beyond

Nuria Rodríguez
Senior Legal Officer
Objectives the «revision» should meet

- Simplification, coherency of consumer acquis
- Legal certainty
- Identify and fulfil consumer’s needs
- Ensure a high level of consumer protection
- Foster cross-border trade in B2C sales
- Create a modern, flexible, solid and future-proof legal framework to govern consumer contracts including digital contracts
How?

✓ Applying full harmonisation across the board?

↓↓

- Lack of flexibility to react to market failures

- Problems of delimitation (what is in what is out?)

- Relationship with contract law (not solved!)

- Serious undermining of consumers rights

- Consumers are not more confident with one single law but effective cross-border redress matters more
How?

- Minimum harmonisation as a basis, full harmonisation only where it works
  - Flexibility is maintained where necessary
  - Valuable existing rights are not *lost in harmonisation*
  - Contract law and consumer law can « survive » together
  - Clarity and legal certainty

- Commissioner Reding got the message!
Information requirements (chapter II):

- existing specific national laws will have to be repealed if not in line with the exhaustive list in the proposal

- general contract law principle of general obligation to inform under threat?

- Relationship with other EU directives (e.g. services directive)
Right of withdrawal (chapter III)

- Low level of consumer protection

- The “minimum” rules in the current directives do not fit in a fully harmonised scenario!

- The appropriateness of existing national laws have not been considered
Guarantees

- Reduction of consumer protection in many member states

- Relationship with national contract unclear (UK right to reject, French, Lu, Belgium *vices caches*)

- No Direct producers liability (under threat? in Belgium, Finland, France, Latvia, Luxembourg, Portugal, Spain, Sweden, pending legislation in Hungary and Slovenia)
...BEUC main concerns

**Unfair contract terms**

- Full harmonisation (specially of listed terms)
- Individually negotiated terms not covered
- National terms and national case law on unfair terms under threat Many member states will loose out
Identifying main consumer needs

- High and efficient protection in all consumer contracts:
  - Products/services, Offline/online, Physical/digital products

- An effective, wide and fair right of withdrawal
  - Duration, extension, exercise, conditions...
  - Including on line auctions, transport, accommodation

- Ban on long term duration contracts
Identifying main consumer needs

- Free consumer choice of remedies!
- Extension of guarantee period and of burden of proof
- Direct producers’ liability
- EU-wide ban of certain unfair contract terms (UCT)
- EULAs should be clearly covered by the UCT legislation
...Identifying main consumer needs

✓ Appropriate, efficient means of enforcement

- Collective consumer redress mechanisms
- Charge back - joint liability between the payment service provider and the merchant

✓ Appropriate protection of consumer payments

- Choice of means of payments
- Security: specific means of payment are necessary
Higher level of consumer protection than proposed directive!

- wider scope (electricity, software, digital content)
- free choice of remedies for the consumer
- no duty to notify the defect
- transferability of the guarantee
28th Regime
No benefits for consumers

- Another layer of complexity for consumers!
- Which level of consumer protection for this regime?
- In practice the consumer cannot choose
- Stop the evolution of consumer law
- Impact of such an instrument on the development of national law?
More information on

www.beuc.eu
“THE OPTIONAL INSTRUMENT AS A “28TH SYSTEM””

Prof. Dr. Guillermo Palao Moreno
Universitat de València (SPAIN)

ERA, Trier, 19 March 2009

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4. AN OPTIONAL INSTRUMENT AND MANDATORY RULES

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* An optional instrument in the field of the law of obligations in the EU:
  - Main features and substantive scope
  - Benefits for the citizens in relation to cross-border situations: a neutral choice-of-law/avoiding the problem of the application of foreign law/enhance legal certainty/reduce information costs

* The position of the Council (2009)

“The European Council reaffirms that the common frame of reference for contract law should be a non-binding set of fundamental principles, definitions and model rules to be used by the lawmakers at community level to ensure greater coherence and quality in the law making process.”

* The position of the European Parliament (2009)

“99. (...) Emphasizes that the political CFR should result in an optional and directly applicable instrument enabling parties to a contract, inter alia companies and consumers, freely to choose European contract law as the law governing their transaction.”

* Spanish presidency (2010):

“The Spanish presidency will also promote the evaluation of the European contract law common reference framework.”

1. THE OPTIONAL INSTRUMENT AND CIVIL JUSTICE IN THE EU (II)

* A domestic oriented optional instrument and its connection to transboundary relationships:
  - Not only domestic relationships but also connecting persons established/resident in different member states?
  - Not only EU relationships but also covering relationships with third countries?

* The need to provide a clear solution to a possible international (“Ad intra” and “Ad extra” the EU) application of an optional instrument

* The importance of conflict-of-law solutions and the interface between consumer protection policy and the development of an area of freedom, security and justice (the optional instrument and EU legislation in the field of judicial cooperation in civil matters):
  - The communication 2009 “An area of freedom, security and justice serving the citizen” (the Stockholm Programme)” and its effects:
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* THE CURRENT DIFFICULTIES OF AN “OPT IN” IN RELATION TO AN OPTIONAL INSTRUMENT

► THE REGULATION ROME I (RRI)

ART. 3 (FREEDOM OF CHOICE)

“1. A CONTRACT SHALL BE GOVERNED BY THE LAW CHOSEN BY THE PARTIES (...)

RECITAL 13 (INCORPORATION BY REFERENCE)

“THIS REGULATION DOES NOT PRECLUDE PARTIES FROM INCORPORATING BY REFERENCE INTO THEIR CONTRACT A NON-STATE BODY OF LAW OR AN INTERNATIONAL CONVENTION”

RECITAL 14 (EXPRESS CHOICE MADE BY THE PARTIES)

“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”

► THE REGULATION ROME II (RRII)

ART. 14 (FREEDOM OF CHOICE)

“1. THE PARTIES MAY AGREE TO SUBMIT NON-CONTRACTUAL OBLIGATIONS TO THE LAW OF THEIR CHOICE (...)

2. CURRENT LEGAL FRAMEWORK: REGULATIONS ROME I AND ROME II (II)

• COMMON FEATURES:
- THE IMPORTANCE OF LEGAL CERTAINTY AND THE OPTIONAL INSTRUMENT
- “LAW” REFERRED ONLY AS TO “NATIONAL LAW”

• DIFFERENCES (QUESTIONS NOT FORESEEN IN RRII):
- INCORPORATION BY REFERENCE
- THE ELECTION OF AN OPTIONAL INSTRUMENT

* THE NEED TO DISTINGUISH BETWEEN THE JUDICIAL AND THE ARBITRAL DIMENSIONS: CONSEQUENCES IN RESPECT TO THE OPTIONAL INSTRUMENT
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  - ONE OPTIONAL INSTRUMENT OR SEVERAL OPTIONAL INSTRUMENTS?
  - AN OPTIONAL INSTRUMENT WITH AN UNIVERSAL APPLICATION?

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  - THE OPTIONAL INSTRUMENT AS PART OF THE LAW OF A COUNTRY
  - GAPS IN THE OPTIONAL INSTRUMENT AND THE ACCESSORY APPLICATION OF NATIONAL LAW (VIA RRI AND RRII)

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  - THE NECESSARY MODIFICATION OF THE EXISTING INSTRUMENTS (ARTS. 3 RRI AND 14 RRII)
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► ALTERNATIVE 3

AN OPTIONAL INSTRUMENT WITH SUBSTANTIVE PROVISIONS AND WITH A RULE ALLOWING AN “OPT-IN” TO THE PARTIES:
  - AN SPECIFIC CONFLICT-OF-LAW RULE WITHIN THE OPTIONAL INSTRUMENT
  - NO NEED FOR REFORM OF RRI (BUT RRII)
  - ITS PRIORITY OVER THE EXISTING INSTRUMENTS (ART. 23 RRI AND 27 RRII)
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- ENHANCE LEGAL CERTAINTY
- REDUCE INFORMATION COSTS

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- THE DISTORTING APPLICATION OF ARTS. 3 (DEPEÇAGE), 6 (CONSUMER CONTRACTS), 7 (INSURANCE CONTRACTS) AND 9 (OVERRIDING MANDATORY PROVISIONS) RRI; ART. 16 (OVERRIDING MANDATORY PROVISIONS) RRII

► ALTERNATIVES 2:

- A PARTIAL CHOICE AND THE ACCESSORY APPLICATION OF NATIONAL MANDATORY PROVISIONS VIA RRI AND RRII

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- THE OPTIONAL INSTRUMENT SHOULD AVOID GAPS AND HIDDEN CONFLICT-OF-LAW RULES TO NATIONAL LAW
- ALTERNATIVE 3 WOULD BE PREFERABLE: THEREFORE AN INSTRUMENT WITH SUBSTANTIVE PROVISIONS AND A RULE ALLOWING AN “OPT-IN” TO THE PARTIES
- THE OPTIONAL INSTRUMENT SHOULD CONTAIN MANDATORY RULES ENVISAGING THE MINIMUM PROTECTION OF EXISTING NATIONAL LAW
THANK YOU!

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An optional instrument for B2B contracts

Hugh Beale
(Warwick, Amsterdam and Oxford)

Why an OI for B2B contracts?

• Present position unsatisfactory
• Harmonisation vs OI
• Different models of contract law
• Different assumptions
• Degree of “protection”
• Scope of the OI
• How it would work
• The DCFR as a model
What’s the problem?

- 2001 Communication
  - Differences do not prevent trade
  - add to cost
  - Or add to risk
- Regulatory aspects worst
  - E.g. Insurance
- Contract-related: security
- General contract rules also

Common core and differences

- Much common core
  - Shared rules
    - Fraudulent misrepresentation
  - Different concepts, similar results
    - Non-fraudulent misrepresentation / mistake
- Differences
  - Mistake and non-disclosure
  - Control of standard terms
  - Pre-contractual liability
Mistake and non-disclosure

- General duty of disclosure?
- Avoidance for mistake that does not result from misrepresentation
  - “unilateral” mistake as to facts
  - Shared mistake
- Duty to point out other’s mistake
  - In declaration
  - As to facts e.g. calculation error in bid

Control of standard terms

- Exclusion or limitation clauses
- Unfair terms in general
  - De, NI, Sw
  - UK: Law Commission’s recommendation
    - for “small business contracts” only
Pre-contractual liability

• “Culpa in contrahendo” vs particular rules
  – No intention to contract
  – Carelessly misleading other to expect contract
  – False statements about other negotiations
  – Tendering procedures
  – Last-minute withdrawal when know other has relied

Harmonisation or OI?

• Harmonisation
  – Full harmonisation?
  – “Removing existing traps”

• Unacceptable
  – Cultural traditions
  – Differences represent different needs/aims
Differences

• not all accidents of history
  – types of case
    • Sophistication of parties
    • Size of contract
    • Nature of market

• Effect on substantive law
  – Case law
  – Legislation

Different assumptions

• Role of contract law
  – Commercial justice model
    • Reflect commercial expectations
    • Guide to behaviour
    • Protection for party who did not take precautions
  – Individualist model
    • Fewer mandatory rules, at extremes
    • Default rules fewer, less concerned at derogation
Different roles for parties and court

- Individualist model
  - Make enquiries
    - Routine questionnaires
  - Agree expressly on higher standards
    - Parties have “comparative advantage”
    - “Penalty default” rules
  - Agreement enforced
    - even if standard form
    - Literal interpretation

The need for choice

- Opposition to harmonisation
- “Law for Export”
  - UCTA 1977 ss 26-27
- Choice of systems:
  - Freedom to choose governing law
  - the Optional Instrument
Why an Optional Instrument

- Cross-border trade
- Targetted
  - Not sophisticated players, big contracts
  - SMEs
    - Less likely to have expertise
    - Lower value contracts
    - Need more protection
  - Certainty less important
    - Less volatile markets

OI: the degree of protection

- NOT the Individualist model
- “Commercial justice” model
  - Pre-contractual obligations
  - Mistake/duties of disclosure
  - Control of standard terms
  - Lesion?
  - Nordic Contracts Act s 36?
    - Ensuring informed consent
    - Not correction of structural inequalities
Ol: coverage

- General contract law
  - “Law applicable to contracts”
    - Pre-contractual duties
    - Liability for wrongs in “contractual context”
      - Personal injury / property damage
    - Restitution after withdrawal, termination or avoidance

- Specific contracts
  - Sales/supply of goods
  - Services

How would the Ol work?

- CISG
  - Part of State’s law
- Rome Regulation
  - Draft art 3(2)
  - (14) 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.
Is the DCFR a good model?

• Great achievement
  – Appropriate for toolbox
  – Optional Instrument?
• Re-contractualise text
  – Cut down to “law applicable to contracts”
    • Trusts, Benevolent intervention
    • Reduce Tort
      – Not needed, less common acceptance
    • Acquisition and loss of ownership, security
  – Simplify structure and language??
From the (D)CFR and the ACQP to the “Blue button“

The forthcoming Acquis Group Draft for an Optional Instrument

Trier, 19 March 2010

The Commission will propose action to tackle bottlenecks in the single market by:

…

Making it easier and less costly for **businesses** and **consumers** to conclude contracts with partners in other EU countries, notably by offering harmonised solutions for consumer contracts, EU model contract clauses and by making progress towards an optional European Contract Law

Prof. Dr. Hans Schulte-Nölke, European Legal Studies Institute Osnabrück
The “Blue Button”

Core Questions on an Optional Instrument

- Scope and coverage
- Legal form and EU legislative competence
- Choice of law
- Relation to national mandatory law
- Economic advantages
- “Legal” advantages
- Relation to CFR
- Relation to existing and forthcoming (full harmonisation) directives
- One or several Optional Instruments
Acquis Group Draft Optional Instrument for Sales Contracts (including digital products)

- Indicative Table of Contents -
  Chapter 1: Applicability and Scope
  Chapter 2: Marketing and pre-contractual duties
  Chapter 3: Formation
  Chapter 4: Right of withdrawal
  Chapter 5: Grounds of invalidity
  Chapter 6: Contents and effects of contracts
  Chapter 7: Obligations of the parties
  Chapter 8: Remedies for non-performance
  Chapter 9: Prescription
  Chapter 10: Definitions and other general provisions

Scope
Which contract parties?
• All Persons
  – B2C
  – B2B
  – P2P
• Cross border contracts
• Domestic contracts
Scope
Which types of contracts?
• All contracts (“General contract law”)
• Sales (including “sales-like products”, i.e. music, software)
• Not: Services
  – All Services
  – Credit
  – Insurance
  – Travel
  – Medical Treatment etc.
• Not: Non-commercial contracts (e.g. donation)

Coverage
- Criterion: case pattern test -
General Contract Law
• Pre-contractual duties, Formation, Grounds of invalidity, Contents and effects of contracts, Obligations of the parties. Remedies for non-performance, Prescription
• Not: Representation, Assignment of claims, Plurality of parties, Set-off
Specific Rules for Sales
• Delivery, Passing of Risk, Examination and Notification
Specific Rules for B2C Relations
• Information duties towards consumers, Right of withdrawal, Unfair terms
Not: Tort law, Unjustified enrichment, Transfer of property, Retention of title
Coverage:
Nature of rules

• International private law
• Substantive law (mandatory for B2C, non-mandatory for P2P including B2B)
• Not: Procedural law

Choice of Law Clause
Cf. recital 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.”.

Indicative proposal for discussion:
“The parties may choose this Optional Instrument as the applicable law [in the sense of Art. 3 (1) of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)]. If this Optional Instrument is chosen as a whole, Art. 6 of this Regulation does not apply.”
Content of Chapter 1: Applicability and Scope

• **Section 1:** Scope of application (new - to be drafted)

• **Section 2:** Applicability and choice of law (new - to be drafted along the proposal made above)

• **Section 3:** Interpretation and development of these rules (along DCFR I.-1:102)

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Content of Chapter 2: Marketing and pre-contractual duties

**Section 1: Individual duties**

• Art. 2:101: Duty to disclose information about goods or services

• Art. 2:102: Information duties in marketing towards consumers

• Art. 2:103: Information duties towards disadvantaged consumers

• Art. 2:104: Pre-contractual information on consumer guarantees

**Section 2: General provisions on information duties**

• Art. 2:105: Clarity and form of information

• Art. 2:106: Information about address and identity

• Art. 2:107: Information about price

• Art. 2:108: Burden of proof

• Art. 2:109: Remedies for breach of information duties

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HOW WOULD AN OPTIONAL INSTRUMENT FOR SERVICE CONTRACTS LOOK LIKE IF BASED ON THE DCFR?

Matthias E. Storme*

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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contract law regime or of a more ambitious project" 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?"

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://strome.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-I\(^6\) and Rome-II\(^7\) 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"\(^8\) - 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 applicable\(^9\), an option which may be limited to cross-border transactions\(^9\). 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.

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\(^9\) An example is the CIGS for international sales, even if it is an opt-out rather than an opt-in instrument.
Societas Europea\textsuperscript{10}, Societas Cooperative Europea\textsuperscript{11}), optional forms of procedure for cross-border litigation existing alongside national procedure (European order for payment procedure \textsuperscript{12}; European Small Claims Procedure \textsuperscript{13}). Where not all member States are willing to advance, a cooperation between some of them may create such an instrument; a recent example is the German-French Agreement f 4th February 2010 on an optional Matrimonial property regime for German-French couples.\textsuperscript{14}

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) iuncto (1) is not interpreted in a restrictive manner. And if the option should not be limited to cross-border contracts, Art. 3 para (3° of the same regulation would also have to be changed.

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

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

3. Scope of this draft

\textsuperscript{14} http://www.bmj.bund.de/files/4320/Abkommen%20zwischen%20der%20Bundesrepublik%20Deutschland%20und%20der%20Französ ischen%20Republik%20über%20die%20Wahl-Güterstand.pdf or http://www.bmj.bund.de/files/4321/Accord%20entre%20la%20République%20fédérale%20d'Allemagne%20et%20la%20République%20française%20institutionnel%20sur%20la%20matrimonial%20optionnel%20de%20participation%20aux%20ac.pdf.
This draft is limited to service contracts 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 consist 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 form 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.
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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;

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
PECL 1:103: 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
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.
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) 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 consumer 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.
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.

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.

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.
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) 4:10 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.
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.

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.

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.

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.
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.
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: Vitiated 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 inform[s 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 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) (...)
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
suns 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) If 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


(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
(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.
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.

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.

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.

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.

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.

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 original 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.
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
1. The question assigned to me: „What can we expect from an optional instrument?“ has, in my understanding, at least two aspects:

   - (i) In which respects do we expect an optional instrument to be able to improve the current situation, and
   - (ii) what do we think an optional instrument should cover in order to achieve such improvements?

These two questions are interrelated, however, because what an optional instrument can achieve obviously depends on its legal nature and its coverage.

2. The overall aim of an optional instrument is, it seems, to help both businesses and consumers in making full use of their rights and freedoms under Community law. An optional instrument shall first and foremost facilitate the conclusion and performance of contracts, and, should a dispute arise, facilitate its settlement by either the parties themselves or by a court. The idea is that parties to a legal relationship are given the right to choose not only the domestic law of a State but also the rules contained in the optional instrument. The latter would also contain „law“, not only soft law or a set of general contract terms. Only then could it be dealt with as a 28th (or better: a 31st) legal order within the European Union. That in turn would constitute a major progress because such an additional legal order would, speaking in the terms of Private International Law, have to be regarded as part of each court’s own law. Both parties could, for the first time in European legal history, opt for their own law, because in substance it would be the same. There would not only be no need for difficult negotiations as to the question whether one or the other side’s law should govern, there would also be no need for difficult, costly, time-consuming and very often false explorations of foreign law. The lex fori would govern. The need to apply foreign law which in my experience tends to regularly end up in panic and a sort of desaster would be stopped. And the parties would have
a modern law at their disposal. They would become independent of the progress of national law reform projects.

3. If we had an optional instrument, courts would quickly have to adapt themselves to the new regime. They would have to apply it like any other rule of their own country’s law. The situation would be similar to that recently achieved between France and Germany in respect of the applicable matrimonial property regime in French-German marriages. The two countries have developed an additional matrimonial property regime in substantive law for which such couples can opt; they do not any longer have to choose either French or German law. Other Member States are invited to join this arrangement between the two countries. (This too, by the way, might be a possible model for the establishment of an optional instrument, should it turn out impossible to bring it into being right from the beginning as a European instrument. It would do if merely a few Member States felt ready to start. I am not proposing such a solution for the optional instrument, of course; I only mention it to say that there might be more solutions for its implementation than what we have been thinking of so far).

4. I cannot discuss here whether, technically speaking, it would be possible to treat already the emerging „official“ CFR (or even the DCFR) as an optional instrument. Indeed, one might find it

- (i) not very convincing that parties to a French-German or Italian-Polish contract may, under Community law, choose South African or Indonesian law as the law governing their contract, but not a fully elaborated European text derived from the legal orders of all Member States plus Community law,
- (ii) one might equally doubt whether it is still correct to say that the Rome I Regulation does not apply to arbitral tribunals (which have, wrongly I think, so far been convinced that it does not and from that assumption have concluded that only they are entitled to apply texts like PICCL, PECL or the DCFR), and
- (iii) one might even doubt whether in respect of the DCFR any practically traceable line can be drawn between party autonomy on the level of choice of law and freedom of contract on the level of substantive law, because the DCFR already today contains all the jus cogens rules of modern European consumer protection.
5. But there are, admittedly, also strong arguments on the other side, the main being that one can interpret all European and national PIL instruments in a way that today they only refer to State law as „law“. It would indeed be difficult to accept religious law („islamic banking“), the *lex mercatoria*, the *lex sportiva* or anything similar as *lex contractus*. And there is another and to my mind even more weighty argument in favour of the drafting of a separate and official optional instrument: Private texts can never achieve what official texts can; only an EU optional instrument would amount to a regime which ordinary parties would accept and opt for.

6. I have so far spoken of an optional instrument in the singular. I have done so deliberately because I don’t think it would be a good idea to write several contract- or sector-specific optional instruments, e.g. one for sales, another one for consumer sales, further ones for services, securities, leases, and yet another set for, say, package travel, internet sales or medical treatment. Such a technique would doublecount all the problems that we have been facing with many Directives whose lack of internal coherence we have been deploring, and it would end up in an uncontrollable chaos.

7. Not even an optional instrument which were restricted to general contract law – whatever that might mean – would be of any practical use, because with it we would equally end up in a series of unmanageable private international law issues. It is even doubtful whether under the existing Rom I regulation parties to a contract would be allowed to restrict a choice of law clause to matters of general contract law, submitting all other questions to one or more further legal orders. In any case no sensible lawyer would advise his client to sign a choice of law clause restricted to „general contract law“ and leave the rest in darkness. If, for instance, we only had the PECL as point of reference (i.e. as optional instrument) we would face a multitude of questions in respect to the applicability of deviating rules of national contract law. That is so because „specific contracts“ (or rules about specific contracts) are only specific if and in so far as they deviate from the general rules – but how should one know whether or not an optional instrument based e.g. on PECL (or on Books II and III of the DCFR) would leave room for such deviations, i.e. for the applicability of the aforementioned „specific“ rules of national contract law? The optional instrument must not see the light of day before the necessary homework in the area of conflicts of laws is made.
8. As said before, I am convinced that what we should be aiming at is one single optional instrument, and the question therefore remains: what should it cover? My tentative answer is that we should, as general point of departure, start with those areas in which EU law either already today or in the foreseeable future allows (or will allow) for a free choice of law by the parties. That covers all contract law, including consumer protection, because Rome I, although it restricts the effects of a choice of law clause in this area, does not exclude the possibility of an agreement between professional and consumer as to the applicable law. The famous „blue button“ should be taken care of; consumers ordering goods or services must be able to opt for the European regime, whether in a shop or via the internet or any other means of distant communication. But the optional instrument should certainly not be something that were only designed for consumer transactions. For reasons which we, the DCFR team, have explained several times, it should be avoided at all cost that our future European private law is split up into two different legal systems: „ordinary“ private law and consumer protection law.

9. There will, however, remain some areas which certainly need to be excluded from the optional instrument completely. A first list of these areas can be found in DCFR I.-1:101. Labour relations are an example, probably also insurance contracts, and certainly also land and company law. Quite another question, however, is whether the optional instrument should really be restricted to cross-border contracts. I have to confess that such a restriction would not make much sense to me. Think again of the blue button: do we really want the consumer to confirm that he has his habitual residence in another country than the offeror? If a consumer searches the net and finds a European business which offers what he or she is looking for, that should be enough to opt for the European regime. After all it should be construed and understood as an additional legal order which forms part of the lex fori of all our jurisdictions. It should not be seen as another foreign law, it should, like CISG, be qualified as an additional set of domestic rules. Or, to put it differently: the whole purpose of this European private law movement, it seems to me, is to overcome the distinction between purely domestic and cross-border instruments because within Europe we have also overcome the distinction between domestic and cross-border markets.

10. I have been speaking about contract law so far. But the truth is that free choice of law is no longer restricted to contract law. Since the entering into force of the Rome II regulation there is also free choice of law in the area of non-contractual obligations. It is available in tort law, unjustified enrichment law, negotiorum gestio law and the law governing culpa in
contrahendo. And it is not that sort of choice of law which some of us have had for decades, e.g. the possibility to choose, in cases of distant torts, between the place where the tortfeasor acted and the place where his victim was hurt. It is also not only the long-established rule that after the commitment of a tort parties are entitled to opt for the court’s law, and it is also not only the rule that the PIL treatment of the *condictio indebiti* would follow the regime of the void or avoided contract. In B2B contracts parties can now choose whichever law they think fit to govern any non-contractual liability which might arise in the context of their mutual obligations. Neither does it have to be the law governing their contract nor does it have to be a law with which at least one party has any significant relationship. So, in theory, parties to an Italian-Polish contract can opt for Chinese contract law, Californian tort law and German law to govern any obligation arising out of the law of unjustified enrichment. One wonders whether that is really properly thought through, but one equally wonders how one could explain from a political point of view that such rather crazy choice of law clauses would have to be upheld, whereas a choice of the relevant (D)CFR parts would have to be regarded as null and void.

11. The longer I think about it the more difficult I find it to understand why we should need two different texts, i.e. a CFR and an optional instrument. Why not only accept that the future CFR would serve a double function, i.e. would serve as toolbox for both legislators and private parties? I think that point deserves to be carefully discussed. One counter-argument that I could understand would run that we want the CFR as a flexible instrument that can, if the necessity arises, be changed rather easily and quickly. But whether this point is a good one, is very difficult to say at a point in time when we do not know who is going to write the CFR, who will be deciding about its contents, and what legal format will be assigned to it.

12. One important point which also needs careful consideration is property law, and here in particular the law of securities over movable assets. True, choice of law in respect of property rights is, due to the wide-spread *numerus clausus*-principle, still a very delicate issue, but we also had this numeros clausus principle in company law where today, for all practical purposes, it seems to have been moved to legal history. We will, in all probability, have to wait and see what a new PIL regulation in this area will have to say on the issue of the parties’ right to freely choose the applicable property law regime. Even if free choice of law in this area will not be granted, the right to opt for a European regime should be accepted, however. The law of securities over movable assets is an area where, despite of what I said earlier, a
separate optional instrument might be a very good idea. During the period of its preparation the concept of an internet-based register, which has been fully developed in the IXth book of the DCFR, could be discussed and evaluated in detail. It is something that certainly deserves as much attention as the contract law parts of the DCFR.
What can we expect from an optional instrument?

What can we expect from an optional instrument? The answers to this question vary according to who “we” are. Are we European citizens, convinced that European construction should go further, and that law can help in this direction? Are we national legislators, judges, practitioners or parties to various contracts who desire more legal security in Europe?

As European citizens, we would expect an optional instrument to promote European construction and achieve “Unity in Diversity” which is the motto of the European Union (I).

As national legislators, judges, practitioners or parties to a contract, we would expect such an instrument to deal with contract law, to be clear and concise (II).

I. An optional instrument for Europe

An optional instrument adopted by the Commission would not only contribute to the development of a true European legal thinking, alongside with national legal traditions; it would also give the European Union some solid legal foundations.

A. Codification promotes the development of a true European legal thinking.

Developing a truly “European area of Justice based on mutual recognition and mutual trust”1 also necessitates the development of a true European legal thinking. Codification promotes the development of a true European legal thinking.

As European scholars, our role is primarily to train students to think comparatively, in order to build a common legal culture all over Europe. In spite of the considerable efforts that have been made in this respect, the situation is still far from being satisfactory in most European countries (even if the CISG, the PECL, the Unidroit Principles, the DCFR have paved the way).

As European legal academics and experts, our task goes beyond comparative teaching; it is also to help the European legislator in the difficult process of elaborating legal

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foundations for Europe, through the development of European private law. Over the past few years, legal scholarship has claimed and accepted its role as a guide to the European legislator. European academics have organized themselves into various workgroups with the task of drafting legal texts which, for some of them, have become well known private codifications. Some important networks have been set up. One of them received a mandate to elaborate the Common Frame of Reference, in accordance with guidelines set by the European Commission. In 2005, a contract was established under the Sixth Framework Programme for Research and Technological Development between the Commission and the CoPECL Network of Excellence. A Draft Common Frame of Reference (DCFR) has been published, together with other works. This DCFR has been much advertised and commented upon. All over Europe, comparatists will continue to comment upon the DCFR, analyse some of its provisions and use the comparative notes for their research and teaching. This is a considerable achievement as it promotes the spreading of a common legal culture.

A further step is needed for an optional instrument to promote not only the spreading of a common legal culture but also the construction of Europe. This step is political. It relates to the adoption, by the Commission, of the Common Frame of Reference.

B. Codification promotes the construction of Europe

History shows how codification projects have helped to construct a framework for a civil society, particularly in France where the Code civil is, following the famous saying of Jean Carbonnier, considered the “Constitution civile de la nation”. The European Union lacks such a framework. The stage we have now reached in Europe, with integrated legislation scattered all over the place, is not satisfactory. It creates many problems, well exposed by the European Commission itself. Moreover, partial and inconsistent legislation cannot favour the promotion of a true European civil society. More than ever, the rapid development of fundamental rights and more generally the pluralism of the sources of law reveal the necessity for legal coherence and clarity for legal models.

The major reasons for adopting an optional instrument in the field of contract law may thus not be primarily economic, as it is often argued, but rather cultural and political.

As explained by Hugh Collins who strongly advocates in favour of a European civil code, the construction of Europe, with a truly transnational civil society, would be greatly served by a codification process. “The first reason for constructing a European civil code is that it will help to build a transnational community in which there is a shared identity of being European”. The second reason for constructing a European civil code is the promotion of “social and economic progress and cohesion”. In this respect “in order to construct and defend this social model against the forces of globalization, it will be necessary to articulate and institutionalize the model through principles of private law.”

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4 Hugh Collins, Why Europe needs a civil code, prec., p. 259 et seq. According to Hugh Collins a code (as opposed to a mere common framework of principles of private law) « will help to address the problem that citizens of the European Union do not on the whole readily identify themselves as Europeans” and further argues that “instead of proposing constitutional treaties and augmented powers for the current European institutions (...) a crucial way in which to address this task of building a European polis or sense of common identity among the peoples of Europe comprises the broadening and deepening of a European civil society. Private law in the forms of a Code or common principles to govern dealings between citizens can provide the foundations for the construction of a European civil society”.

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Even if such a code (or Common Frame of Reference) is, at least for the time being, optional and limited to contracts, the arguments put forward by Hugh Collins when advocating for a European civil code are convincing.

Yet, there are some objections.

It is sometimes objected that codification is not compatible with the common law systems. However, in spite of it being traditionally viewed as a key feature of civil law countries, codification is not incompatible with common law systems. Indeed, there no longer is that strong repugnance to the idea of a codification in common law systems and it is doubtful that English law would be deeply threatened, in its very core, by a codification project at European level. This is demonstrated by the creation of the Law Commission whose task is to reform the law by codifying it precisely because « the law would be more accessible to the citizen, and easier for the courts to understand, through a series of statutory codes”. Besides, major statutes, which operate in a similar way to codes, have been enacted even in England (not to mention the United States and other common law countries). For instance, the Civil Procedure Rules formulate fundamental principles in civil procedure, just like a civilist Code de procedure would. Nowadays, the experience of integration of EC law or of the Human Rights Act shows how, even if it is difficult, the common law system can adapt in order to integrate European law, whatever its juridical nature.

Another criticism is often voiced by practitioners and by common lawyers: a code would now be irrelevant as it is international practice which determines contractual rules. However, codification is not made pointless by the development of practice, case law and other sources of the law, far from it. In fact, codification is all the more needed since there is a wide variety of sources and since contract law is fragmented. In such a context, an optional model shows the way. It does not harm diversity, quite to the contrary, since it is added to the existing models and to the others sources of the law.

Finally, let us not forget that, at least as regards the law of contract, the economic argument - strengthening the single market -, set forth by those who favour a European codification of the law of contracts, particularly by the European Commission in several communications, has its value, as demonstrated by some surveys which have been conducted.

This leads us to the second aspect of this paper: as national legislators, judges, practitioners or parties to a contract, we would expect such an instrument to deal with contract law, to be clear and concise.

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6 http://www.lawcom.gov.uk/about.htm
7 This economic argument is not, however, sufficient in order to overturn the problem of the lack of a legal basis, in the Treaty. Indeed, the ECJ was clearly of the view that a Community act must genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market and it is therefore not sufficient to find disparities between national rules or to point out the abstract risks of obstacles to the exercise of fundamental freedoms or of distortions of competition liable to result therefrom to justify the process of European harmonization of law (Allemagne c. le Parlement européen et le Conseil (2000) ECR I-8419, points 83 et 84 C-434/02, Arnold André GmbH & Co. KG c. Landrat des Kreises Herford, Recueil, 2004, I-11825 ; C-210/03, Swedish Match AB c. Ministre de la Santé, Recueil, 2004, I-11893).
II. An optional instrument for the law of contracts

In the field of European contract law, we can first expect an optional instrument to serve as a model for legislators and judges, European or national. We can also expect that arbitrators will draw inspiration from such a model, or even apply it as the best applicable law. Finally, we can expect that the parties to a contract will not only copy it in their contract (by way of incorporation) but that they also will be entitled to choose such an instrument as a 28th regime and, more importantly, that they will indeed choose it.8

In order for this optional instrument to fulfill all these various functions, we would expect it to satisfy what I shall call « the three 3 c’s ». In other words, we would expect it to deal with contracts, to be clear and concise.

A. An instrument for contracts

In any codifying process, there is a good case for trying to encompass all legal fields, at least all private law matters. The very idea of a European civil code seems to call for such an overarching instrument. However, a Code capable of forging a shared European identity requires time and preliminary steps. Legal traditions are too different and law has become too complex to promote, all at once, in all fields of private law, effective and comprehensive legal unification. The codification process should take place incrementally.

There are at least 5 good reasons for restricting, for the time being, the instrument to the law of contract.

- Firstly, due to commercial practice, the subject of contracts lends itself to unification. There is a true need for unification, at a European but also international level, strongly felt by businesses.
- Secondly, the disadvantages of a sectorial European approach, tirelessly denounced by the Commission are real. They call for a more coherent and more complete set of rules to govern contracts and the emphasis currently placed on the revision of the ‘Community acquis’, largely made up of directives for consumers’ rights, makes the unification project even more relevant.
- Thirdly, contract law is a core subject in private law and European contract law has a high symbolic dimension in legal education.
- Fourthly, contract law rests on core principles, such as freedom of will, binding force of contract, good faith, which are widely shared in national legal systems.
- Fifthly, a lot of comparative work has already been achieved, and this paves the way for a successful codification, based on some existing and worldwide famous models.

In the field of contract law, two worldwide famous models were elaborated in the twentieth century:
- The Principles of international commercial contracts, elaborated by Unidroit, also named the Unidroit Principles (UP).9
- The Principles of European contract law elaborated by the Lando Commission (named after its founding father, Ole Lando) 10.

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8 A modification of the Rome regulation, in order to expressly grant the parties the power to choose this instrument as the applicable law, would be necessary for indeed, the existing recital may not be sufficient to legitimate such a choice.
The Principles of European contract law are, to date, probably the most well-known work carried out by European academics. Largely inspired by the laws of the different member States, they were elaborated by legal scholars who compared national laws. According to the experts who drafted them, they were intended to « provide a foundation to contract law within the European Union, on the basis of which more specific harmonization measures can be elaborated ». These « principles » are drafted in terms which are sufficiently precise and structured to be turned into a set of rules, ready to be introduced into an optional instrument dealing with contracts.

Since the beginning of this new century, the major achievement is the DCFR. I have mentioned it already and of course, it should also serve as an additional model in the process of the elaboration of the final CFR.

In order to complete the list, one should also mention the work of the Association Henri Capitant des Amis de la Culture Juridique Française and of the Société de législation comparée (AHC-SLC). Within the Academic network in charge of the preparation of a Draft common frame of reference, this “evaluative group” has produced a work named, in its English version, « European Contract Law: Materials for a Common Frame of Reference. Terminology, Guiding Principles, Model Rules ». This work gives all its importance to each of the three drawers of the toolbox that was requested by the European Commission: terminology, principles and model rules. The entire work has first been published in French, in two volumes; a major part of it is also available in English (the first and second parts on terminology as well as the guiding principles are entirely translated ; as regards the third part, only the model rules have been translated, not the extensive comparative comments that accompany these rules in the French version). The work on terminology is most valuable for comparative law but also as a drafting tool. Moreover, it will give guidance to the translators when the time comes to translate the DCFR or CFR in all the languages of the Member states. The work on the guiding principles and the model rules has a greater political value and could influence the Commission in its choice as to the content and scope of the final CFR.

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12 Principles of European Contract Law, prec., Introduction.


B. Clarity

1. Clarity means, first, that the basic principles that underly the law of contract should be explained.

At the time the PECL were elaborated, the debate on the political, economical and social implications of contract law was not as strong as it is now. This is why a revision of PECL and a new reflection on its underlying or guiding principles is required. There is a need for an optional instrument to forge the theoretical foundations of European private law and this optional instrument should contain clear guiding principles, as well as general model rules.

In the absence of a clear explanation as to the founding principles of the law of contract, the most diverse fears will thrive as regards any codified European contract set of rules. Inevitably, practitioners, who are strong believers in contractual freedom, are worried that the harmonization of European contract law will entail further restrictions on the contractual autonomy of the parties, while on the contrary, academics usually insist on the necessity of promoting more social justice in European contract law.\(^\text{15}\)

In particular, in view of all academic thinking and legislative enterprises in the field of the protection of the weak party, any future European instrument in the field contracts should give special consideration to these questions:

- How can contract law promote an economy in which social responsibility and solidarity have a place?
- More concretely, which protective rules are to be included into general contract law and should consumer law form part of general contract law?\(^\text{16}\)
- What place do the principles of contractual autonomy and contractual freedom, so characteristic to contract law, leave for the principles of justice and protection of the weaker party?

There is no single answer to these much debated questions which are highly political and yet cannot and should not be avoided in an attempt to codify contract law in Europe. In the field of contract law, the principle of freedom of contract partially conflicts with others, such as the fairness and good faith principles.\(^\text{17}\)

In order to promote a European legal culture, some common guiding principles need to be stated. Model rules should then be inspired by them. This approach is supported by the mission that was given by the European Commission to the academics in charge of the preliminary work towards the final CFR. Indeed, the European Commission placed emphasis on the elaboration of common principles, as well as concepts and definitions. Initially, drafting detailed rules was only presented as a third (possible) drawer of the «toolbox», the first two drawers of which would contain principles and definitions.\(^\text{18}\)


\(^{18}\) A that time, the CFR had even been compared to a mere legal dictionary containing explanatory notes, in which parties could find inspiration to draft other documents.
2. Clarity means, secondly, that the rules should not be too detailed

A legislator can never predict everything because life is unpredictable. Sooner or later, some creative interpretation of legal texts is needed. It would be a vain fight to try to have a selfstanding instrument, without loopholes. It would be counterproductive to want to get rid of the existing legal background. In the field of general contract law, a European model is necessary. Its main function is to set the general core of contract law, not to deal with every particular situation or type of contract.

The most widespread, simple and logical model is to have an instrument on « contract law » without distinguishing between the contract as the instrument and the rights and obligations which result from it. It is also to adopt a chronological order (formation, validity, content, performance and non-performance). This structure is familiar to many national legal systems. The PECL adopted it. So did the Unidroit Principles and the AHC/SLC work. There are many arguments in favour of keeping such a structure in an instrument which should serve as a « model ». This is a difference with the DCFR which not only covers a wider scope, but is based on a distinction between the contract itself (a “juridical act” among others, all of them dealt with in Book II) and the “obligations and rights” which result from it (Book III).

C. Conciseness

1. An optional instrument should contain real « model rules ».

Various meanings can be given to the adjective « model ». The introduction to the DCFR (paragraph 24) explains that « the adjective ‘model’ indicates that the rules are not put forward as having any normative force but are soft law rules of the kind contained in the Principles of European Contract law and similar publications ». It seems to me that this lack of normative force is made clearer by the use of the adjective « optional ».

Usually, the word « model » refers to something that can be imitated or serve as a source of inspiration. Rules can serve as models in many respects: they can be models for parties who draft their contracts, for national legislators who modernise their law of contract or for the European legislator (particularly in view of the revision of the Acquis communautaire in the field of consumer law).

« Model rules », according to the usual meaning of the term, should present some characteristics which enable them to serve as models. As already mentioned above, in order to play their role as a future source of inspiration for all legislators and all forms of contracts, model rules should not try to encompass all sorts of situations but serve as a reference upon which more instruments will be elaborated. They should remain clear, concise and not too numerous. In this respect, they should not present a set of very detailed rules for consumer law.

2. What about consumers ?

Can we expect an optional instrument to include not only general provision for all sorts of contracts but also consumer provisions? This is indeed possible as such an instrument should protect the weak party and therefore, be pro-consumer orientated. However, as regards the insertion of specific consumer provisions, this should only be done with
caution and parcimony. The Acquis communautaire is currently made up of detailed texts which sometimes contradict one another. These texts should not be reproduced as such in a European code on contracts.

In the DCFR, the integration of the Acquis communautaire raised various problems, already highlighted by many academics¹⁹. The current discussions on the consumer directives show how difficult a task it is to draw general principles and model rules from all these texts. Some further thought is needed in this respect.

3. What about specific contracts?

At this stage, it seems premature to draft specific model rules for specific contracts. As regard sales contracts, the existing international instruments already provide for a framework and the CISG is a great achievement. The same is not true for insurance contracts: the Restatement on insurance contracts that has been elaborated by a group of European scholars. As for services, probably the most important category of contracts nowadays, it is so diverse and wide that it first needs a model from which inspiration can be drawn in order to set up a common core. This is precisely what we can expect from an optional instrument in the field of contract law in general: to serve as a model for the development of additional instruments, for specific contracts and hopefully also, in other parts of the law.