

EUROPEAN CONTRACT CODE
(ENGLISH VERSION)

BOOK ONE (*)

CONTRACTS IN GENERAL

TITLE I

PRELIMINARY PROVISIONS

Art. 1.

Notion

1. A contract is the agreement of two or more parties to establish, regulate, alter or extinguish a legal relationship between said parties. It can also produce obligations or other effects on only one of the parties.

2. Except as provided for in the following provisions, a contract can also be created by conclusive behaviours, following a previous statement of intent or according to usage or good faith.

Art. 2.

Contractual autonomy

1. The parties can freely determine the contents of the contract, within the limits imposed by mandatory rules, morals and public policy, as

(*) The first translation from French into English of this preliminary draft was done by Dr. John Coggan of Oxford. The final version was the result of revision by Prof. Maria Letizia Ruffini Gandolfi of Milan and Prof. Peter Stein of Cambridge. In this last version, the use of technical terms, typical of English legal language, was often and deliberately avoided with the purpose of preventing the reader being led to believe that the notions in the Code constitute purely and simply transpositions of concepts inherent in Common Law. And this conforms to the criteria followed in translations into different languages of the same text possessing its own conceptual autonomy, as has happened recently also for the civil codes of Holland and Quebec. Other versions are contained in: O. RADLEY-GARDNER, H. BEALE, R. ZIMMERMANN and R. SCHULZE (eds.), *Fundamental Texts on European Private Law*, Hart Publishing, Oxford and Portland-Oregon, 2003, p. 439; and in the *Edinburgh Law Review*, 2004, 8, Special issue, with a foreword by LORD HOPE OF CRAIGHEAD.

established in the present code, Community law or national laws of the Member States of the European Union, provided always that the parties thereby do not solely aim to harm others.

2. Within the limits imposed by the preceding paragraph, the parties may draw up contracts not regulated by the present code, particularly by combining different legal types and connecting several acts.

Art. 3.

General and specific rules relating to contracts

1. Contracts, whether or not specifically named in the present code, are subject to the general rules contained in this book.

2. Rules applicable to contracts specifically named in this code also apply, by analogy, to contracts not so named.

Art. 4.

Rules relating to unilateral acts

Unless otherwise provided for in this code or Community Law or mandatory rules in force in European Union Member States, the following rules relating to contracts must be observed, insofar as they are compatible, for unilateral acts carried out for the drawing up of a contract or during the subsequent relationship, even if intended to extinguish or invalidate said contract.

Art 5.

Contractual capacity and essential requirements of contract

1. Unless otherwise provided, persons concluding a contract shall have completed their eighteenth year of age, or, if emancipated, shall have obtained the necessary authorizations required by their national laws.

2. A contract concluded by an unemancipated minor, by a person declared legally incapable or, even temporarily, incapable of understanding or intending, can be annulled in accordance with Article 150.

3. The essential elements of a contract are:

- a) the agreement of the parties;
- b) the content.

4. A special form is not required, except in the cases and for the purposes specified by the rules of the present code.

TITLE II

FORMATION OF CONTRACT

Section 1

Pre-contractual negotiations

Art. 6.

Obligation of good faith

1. Each of the parties is free to undertake negotiations with a view to concluding a contract without being held at all responsible if said contract is not drawn up, unless his behaviour is contrary to good faith.

2. To enter into or continue negotiations with no real intention of concluding a contract is contrary to good faith.

3. If in the course of negotiations the parties have already considered the essentials of the contract whose conclusion is predictable, either party who breaks off negotiations without justifiable grounds, having created reasonable confidence in the other, is acting contrary to good faith.

4. If the situations considered in the above paragraphs occur, the party who acted contrary to good faith shall be liable for the harm he has caused to the other party to the extent of the costs the latter had to incur while the contract was being negotiated. Loss of opportunities caused by the negotiations underway shall also be made good.

Art. 7.

Obligation to inform

1. During negotiations each party who knows or should know any fact or right which would help the other party to appreciate the validity of the contract and the benefit of concluding it is under a duty to inform the other.

2. In the event of information being omitted or falsely or partially declared, if the contract has not been made or is null, that party who has acted contrary to good faith is responsible to the other party as stated in Article 6, para.

4. If the contract has been concluded, the former party must return monies paid or indemnify the latter, in both cases the amount being determined on equitable grounds by the court, save the other party's right to annul the contract on grounds of mistake.

Art. 8.

Duty of confidentiality

1. The parties are bound to handle with reserve any confidential information obtained during negotiations.

2. Whichever party does not perform this obligation shall compensate the other for any loss, and if the former has also drawn undue benefit from this confidential information he must indemnify the latter to the extent of said enrichment.

Art. 9.

Negotiations with consumers off commercial premises

1. The dealer who proposes a contract to a consumer off commercial premises is bound to inform him in writing of his right to withdraw from said contract in the manner and time period specified in Art. 159.

2. In this code the word consumer means an individual who acts for purposes which do not come within the scope of his professional activities.

3. Failure to inform a consumer of his right as indicated in para. 1 of this Article produces the consequences itemised in Art. 159 at the dealer's expense and in favour of the consumer.

Art. 10.

Negotiations in international-intercontinental dealings

1. Unless agreed to the contrary, parties to international-intercontinental contract negotiations are bound by generally accepted trade practice which they know or should know about regarding similar contracts in that same commercial field.

2. Whichever party does not fulfil the obligations of paragraph 1 of this Article is responsible to the other party as stated in the preceding Articles insofar as they are applicable.

Section 2

Conclusion of contract

Art. 11.

Oral offer and acceptance

1. The oral offer to form a contract, even if accompanied by a document delivered personally to the offeree at the same moment, must be accepted promptly unless it appears otherwise from the negotiations or the circumstances.

2. If the offer can be accepted subsequently or is made by telephone, the contract is concluded at the place where and moment when the offeror has or must be deemed to have knowledge of the other party's acceptance.

Art.12.

Written offer and acceptance

1. When one of the parties by whatever means sends the other an offer to conclude a contract, the contract is formed at the place and time when the offeror has or must be deemed to have knowledge of the acceptance of the other party.

2. If the offer is addressed to several specific persons the contract is concluded at the place and time when the offeror has or must be deemed to have knowledge of the acceptance of one of the other parties, unless specified in the offer or reasonably to be deduced therefrom or from the circumstances that the offer lapses unless accepted by all the offerees or a specific number thereof. In the latter case, the contract is concluded at the place and time when the offeror has or must be deemed to have knowledge of the last of the acceptances.

Art. 13.

Offer and invitation to make an offer

1. A statement aiming to form a contract amounts to an offer if it contains all terms of the said contract or sufficient information concerning its

content that such statement can be the object of an acceptance pure and simple, and if it states or at least implies the offeror's intention to be bound in case of acceptance.

2. A statement not fulfilling the conditions of the preceding paragraph or which, being addressed to no specific persons, is an advertising communication does not constitute an offer and cannot be accepted. It is an invitation to make an offer, unless it contains a promise in favour of a person carrying out a certain action or revealing the existence of a given situation; in such case it is a promise to the public according to Art. 23.

Art. 14.

Effectiveness of offer

1. The offer is not effective until it is received by the party to whom it is directed and may therefore be revoked until that moment by the offeror even if the latter has stated in writing that the offer is irrevocable or must be considered as such under Art. 17.

2. The offer is effective until it is revoked, rejected or lapses.

Art. 15.

Revocation, rejection or lapse of offer

1. The offer can be revoked until the person to whom it was directed has sent the acceptance.

2. The offer, even if irrevocable, ceases to be effective when a rejection reaches the offeror even if the rejection be accompanied by a counter-offer.

3. Except as provided for in Art. 11 para. 1 and Art. 16 para. 5, an offer, even if irrevocable, lapses:

a) by the expiry of the time set for its acceptance, unless said acceptance has taken place in the way and in the forms laid down in the offer or according to law or usage;

b) if no time is indicated, after the expiry of a period which can be deemed reasonable, taking account of the nature of the transaction, usage, and the speed of the means of communication which have been used.

4. The delay with which the offer reaches the person to whom it is addressed, if said delay is imputable to the offeror, reasonably postpones the lapse of the offer.

Art. 16.

Acceptance

1. Acceptance is a statement or conduct which expresses the clear intention to conclude the contract in accordance with the offer.

2. The acceptance is effective when the offeror has knowledge of it.

3. Silence and inactivity amount to acceptance only when:

a) this has been agreed by the parties or may be inferred from relations which have been established between the parties, circumstances or usage;

b) the offer is for the purpose of concluding a contract having binding effects solely on the offeror.

4. In the case of b) of the above para., the offeree can reject the offer within the time required by the nature of the transaction or usage. Without such rejection the contract is concluded.

5. If the offeror gives prompt confirmation to the other party, he can treat the contract as concluded though knowledge of the acceptance arrives after the time fixed in Art. 15 para. 3 or the acceptance be not in the terms and conditions or form required in the offer.

6. An acceptance that does not conform to the offer involves a rejection of the latter, and is a new offer except as provided for in the following paragraph.

7. If the acceptance contains clauses which are different from but do not materially alter the offer, in that they deal with aspects marginal to the relationship, and if the offeror does not promptly communicate his disagreement with such modifications, the contract is deemed to be formed according to the terms of acceptance.

8. The acceptance can be revoked provided that the revocation reaches the offeror before or at the same time as said acceptance.

Art. 17.

Irrevocable offer

1. The offer is irrevocable if the offeror has expressly bound himself to keep it open for a certain period or if, based on previous relations between the parties, negotiations, clause content or usage, it must be reasonably deemed as such. Except as stated in Art. 14 para. 1, any revocation of an irrevocable offer is without effect.

2. The same applies if the offer is irrevocable following an agreement between the parties.

Art. 18.

Death or incapacity

In the event of the death or supervening incapacity of either the offeror or the offeree, the offer or acceptance do not become ineffective unless so justified by the nature of the transaction, or the circumstances.

Art. 19.

Adhesion of other parties to contract

If other parties can adhere to a contract and the manner of adhesion has not been determined, said adhesion must be directed to such body as may have been constituted for the performance of the contract or, in the absence thereof, to all the original contracting parties.

Art. 20.

Unilateral acts

Declarations and unilateral acts which must be communicated to the addressee to be effective produce their effects according to law, usage and good faith as soon as they come to the knowledge of the party to whom they are

directed and can be revoked until that moment, even if their author declares them irrevocable.

Art. 21.

Presumption of knowledge

1. The offer, acceptance, their withdrawal and revocation as well as the withdrawal and revocation of any other declaration of intent, including the acts mentioned in the preceding Article, are deemed to be known at the moment they are communicated orally or, if written, delivered by hand to the addressee or reach his place of business or of work residence, postal address, habitual abode, or elected domicile.

2. The addressee can prove that, without his fault, it was impossible for him to have notice of said statements.

Art. 22.

Offer to public

1. An offer to the public, when it contains the essential terms of the contract towards whose formation it is directed, is effective as an offer, unless it appears otherwise from the circumstances or usage.

2. Revocation of the offer to public, if made in the same form as the offer or in equivalent form, is effective even as to one who has had no notice of it.

Art. 23.

Promise to public

1. A promise to the public, as in Art. 13 para. 2, is binding on the promisor as soon as it is made public and lapses after the date specified or implied by its nature or purpose or one year after its issue if the event contemplated in it has not occurred.

2. A promise made to the public can be revoked before the expiration of the times mentioned in the preceding paragraph in the same form as the promise. In such case the person revoking the promise must pay fair compensation to those who, in good faith, were induced by said promise to incur expenditure, unless he can prove that the expected outcome would not have been obtained.

Art. 24.

Conclusive behaviours

Except to the extent provided for in the preceding provisions, a contract is formed by means of conclusive acts when all the requisites of the contract result from such behaviours, considering also previous agreements and relations, publication, if any, of price catalogues, offers to the public, laws, regulations and usage.

TITLE III

CONTENT OF CONTRACT

Art. 25.

Requisites of content

The content of the contract must be useful, possible, lawful, determined or determinable.

Art. 26.

Useful content

The content of the contract is useful when it is in accord with even non patrimonial interests of one or more parties.

Art. 27.

Content possible

The content is possible when the contract can be performed without objective obstacles, of material or legal nature, which would absolutely prevent the aim being realised.

Art. 28.

Supervening possibility of content

In a contract subject to a suspensive condition or time limit the content is deemed possible which becomes so before fulfilment of the condition or expiration of the time limit.

Art. 29.

Future things

The contract can involve performance with respect to future things, except when forbidden by the present code or by Community or national laws.

Art. 30.

Lawful and not unfair content

1. The content of a contract is lawful and not unfair when it is not contrary to mandatory rules laid down in the present code, in Community or national laws, nor to public policy or morals.

2. The content of the contract is unlawful when it is the means of evading a mandatory rule.

3. As provided for in Article 156, any contract is rescindable through which one of the parties, abusing the situation of the other's danger, need, incapacity to understand or intend, inexperience, economic or moral subjection, gets the other to promise or deliver to the former or to a third party a

performance or other patrimonial advantages which are clearly disproportionate to what said party has given or promised in exchange.

4. In the general contract conditions provided for in Art. 33, those clauses are ineffective, unless specifically approved in writing, which create in favour of the person who has prepared them in advance limitations on liability, the power of withdrawing from the contract, or of suspending its performance, or which impose time limits involving forfeitures on the other party, limitations on the power to raise exceptions, restrictions on contractual freedom in relations with third parties, the extension or tacit renewal of the contract, arbitration clauses or derogations of the competence of the courts.

5. In contracts drawn up between a professional and a consumer, apart from Community rules, those terms are ineffective which have not been individually negotiated, if they create a significant imbalance, to the detriment of the consumer, between the rights and obligations arising under the contract, even if the professional is in good faith.

Art. 31.

Determination of content

1. The content of the contract is determined when the object and ways of performance as well as the relevant time limits can be implied from the agreement of the parties.

2. If determination of the content of a contract is referred to one of the contracting parties or to a third party, it must be deemed, if there is any doubt, that they shall proceed on an equitable basis.

3. If determination of the content of a contract referred to one of the contracting parties or to a third party is not made within a reasonable period of time or is manifestly inequitable or erroneous, the determination is made by the court.

4. A determination left to the sole discretion of the third party can be impugned, by proving his bad faith in order that said determination can then be requested from the court.

5. If the contract does not specify the quality of the performance nor how it should be determined, a party must tender performance of not less than average quality taking into account usages.

6. If neither the monetary amount of the debt nor the way in which its determination is to be made have been agreed, the amount to be paid shall be taken from the official price lists of the place where performance must be made or, failing that, from the price generally paid in that place.

Art. 32.

Implied terms

1. In addition to the express terms, the contract shall be deemed to include terms which

- a) are imposed by this code or by Community or national laws, even in place of different clauses introduced by the parties;
- b) stem from the obligation of good faith;

c) must be deemed tacitly intended by the parties on the basis of previous business dealings, negotiations, the circumstances, and general and local usage;

d) must be deemed necessary in order that the contract can produce the effects intended by the parties.

2. Unless otherwise provided by provisions concerning form, those statements made to each other by any of the contracting parties during negotiations or the forming of the contract with respect to a situation or expectation, of fact or law, concerning the subjects, contents or aims of the contract, shall be effective between the parties, if those statements correspond substantially to the contractual text and if they can have determined the agreement of said parties; availability of the remedies in Art. 151 and 157 is excepted.

3. In international-intercontinental contracts it is presumed, unless otherwise agreed, that the parties to the contract under consideration have implicitly considered applicable general usage regarding contracts of the same type and the same commercial area, which the parties know or are deemed to know or ought to know.

Art. 33.

Standard conditions of contract

Standard conditions of a contract drawn up by one of the parties in order to regulate numerous specified contractual relations in a uniform manner are effective as to the other party, if he has knowledge of said conditions or should have knowledge thereof by using normal due attention, excepting and unless the parties concerned have agreed to replace or not to apply those or any part of those conditions, or if said conditions must be deemed abusive under the provisions of the present code or of Community or national laws.

TITLE IV

FORM OF CONTRACT

Art. 34.

Special form required for validity

1. When a contract requires a special form in order to be valid, the contracting parties must adopt this form when they manifest, even through non-simultaneous acts where permissible, their intent to agree on all the elements of the contract.

2. A real contract is completed by delivery of the object of the contract, unless it is deemed, because of usage or agreement by the parties, that the parties intended to make an atypical consensual contract.

Art. 35.

Contracts invalid if not in writing

1. Contracts that transfer ownership or transfer or constitute other real rights in immovables must be made by public act or private writing, under penalty of nullity.

2. The preceding paragraph applies also to corresponding preliminary contracts, unless otherwise stated by the laws of the State in which the immovables are situated .

3. Community laws concerning immovables as well as those of the States in which the immovables are situated, which are the object of the contract, remain unaffected.

4. A gift shall be made by public act under penalty of nullity, even if its object is movables, unless their value is moderate given the economic condition of the donor.

Art. 36.

Special form for proof of contract

1. If a special form is required for proving a contract, the effected conclusion of the contract must appear from an act which has this form, even if no such form had been adopted when the parties concluded the contract.

2. For proving contracts whose value exceeds 5,000 Euros, said contracts must be in writing. To be set up against a third party the contract must be of certain date unless it is proved that the third party had knowledge of the contract.

3. Where a special form is required for proving the contract, Community laws and those of the member States of the European Union that admit proof by other means are unaffected.

Art. 37.

Form agreed upon for contract

Unless Community or national laws of the place where the contract is concluded provide otherwise, if the parties have agreed in writing to adopt a specific form for the future contract it is presumed that such form was intended for the validity of the contract.

Art. 38.

Contracts made using set forms or formularies

1. In contracts made by subscribing to forms or formularies printed or in any case prepared for the purpose of regulating certain contractual relationships in a uniform manner, clauses added to such forms or formularies prevail over the original clauses of said forms or formularies when they are incompatible with them, even though the latter have not been struck out.

2. The provisions of Art. 30 paragraph 4 must also be applied.

TITLE V

INTERPRETATION OF CONTRACT

Art. 39.

Analysis of contract and evaluation of extrinsic elements

1. When statements in the contract are of such a kind as to reveal clearly and univocally the intention of the contracting parties, the content of the contract must be deduced from the literal sense of the terms used, considering the contract as a whole and connecting the various clauses of the contract one with the other.

2. In place of the meaning commonly given to the words used, the meaning expressly declared by the contracting parties shall prevail or, failing that, the different technical meaning or that current according to commercial usage which is in accordance with the nature of the contract.

3. In case of doubts arising on examination of the text which cannot be resolved by a comprehensive evaluation of the text, whether said doubts be in connection with the behaviour of the contracting parties even after the conclusion of but compatible with the text of the contract, said contract shall be interpreted according to the common intent of the parties which can be ascertained by reference to extrinsic elements concerning the parties.

4. In any case, the interpretation of the contract shall in no way produce effects contrary to good faith or reasonableness.

Art. 40.

Ambiguous expressions

1. When, despite an evaluation made in accordance with Art. 39 para. 3, it is not possible to give a univocal meaning to the terms used by the contracting parties, the following provisions must be observed in order.

2. In case of doubt, the contract or the individual clauses shall be interpreted in the sense in which they can have some effect, rather than in that according to which they would have none.

3. Any clauses prepared by one of the contracting parties and which have not been the subject of negotiation, shall be interpreted in the case of doubt against the party who supplied them.

Art. 41.

Obscure expressions

When, notwithstanding the application of the preceding Articles, the contract remains obscure, it shall be understood in the sense least burdensome for the debtor, if it is gratuitous, and in the case of a non-gratuitous contract, in the sense which equitably reconciles the interests of the parties.

TITLE VI

EFFECTS OF CONTRACT

Section 1

General provisions

Art. 42.

Effects on parties and in favour of third parties

A contract has the force of law between the contracting parties and produces effects for the benefit of third parties as laid down in the rules contained in this title.

Art. 43.

Alteration, dissolution and withdrawal

1. The contract can be altered, renegotiated or dissolved by mutual consent, or in the situations stated in this code, or by national or Community laws.

2. Except as provided for in Art. 57, para. 2, the power of unilateral withdrawal may be granted to one of the contracting parties or to both by agreement between the parties within the limits stated in this code or in national or Community laws.

Art. 44.

Extra-agreement factors

The effects of a contract derive not only from agreements between the parties but also from the rules in this code, national and Community laws, usage, good faith and equity.

Art. 45.

Obligatory effects

1. A contract can oblige the contracting parties to give, do or not do something.

2. The obligation to deliver a specified thing includes the obligation to look after it until its delivery and to take all appropriate steps to keep it in the state in which it was when the contract was concluded, excepting performance of the obligations due from the party who is to receive it and excepting destruction of or damage to the thing due to act of God or force majeure.

3. Unless otherwise agreed, the obligation to deliver a thing includes delivery of the accessories and appurtenances considered as such when the contract was agreed, and also any non-severed fruits produced by the thing after the agreement, and all measures should be taken to bring this to effect.

4. When the object of the obligation is the delivery of things specified only as to kind, the debtor shall deliver things of the same kind and not below average in quality.

5. That party who has well grounded reason to fear that the behaviour of the other party not in conformity with the obligations explicitly or implicitly stated in the preceding paragraphs may affect his rights, can obtain, even before the expiry of time limit established for the performance, one of the measures provided for in Article 172.

6. One who has promised an act or an obligation of a third party is bound to indemnify the other contracting party if the third party refuses to bind himself or does not perform the promised act.

7. The same obligation to indemnify the other contracting party applies to one who has stated unequivocally in writing that a fact or situation has happened or was to happen when and if that situation has not or does not occur.

Art. 46.
Real effects

1. Unless explicitly agreed to the contrary, a contract, concluded to transfer ownership of a movable thing or to create or transfer a real right with respect to that thing, has real effects on the contracting parties and on third parties from the moment of delivery to the entitled person or to one charged by that person to receive it or to the carrier who, according to an agreement, must provide for delivery.

2. In the situation provided for in the preceding paragraph, if the one who transfers by contract a movable thing or a real right with respect to that thing is not the owner of the thing or entitled to the right thereof, the other party to the contract becomes the owner or entitled to the right in accordance with said contract at the moment of delivery, provided he is in good faith.

3. For registered movables and for immovables, the rules concerning real effects in force in the different States at the moment when this code is adopted shall continue to apply. In any case, for registered movables and for immovables real effects occur only when the rules concerning publicity existing in the area of the immovable thing or where the registered movable property is to be delivered to the entitled person have been fulfilled.

4. In the above situations, the destruction of or damage to the thing is at the risk of the entitled person from the moment when that person, or one charged by him to receive the thing or the carrier who is bound by contract to deliver it, has accepted delivery.

Art. 47.
Conveyance of the same movable thing or of the same real or personal right of enjoyment to several persons

1. If, by successive contracts, a person conveys ownership of a movable thing or a real right with respect to the same thing to more than one contracting party and in the contracts it is stated that real effects occur apart from delivery of the object, the one who in good faith has actually come into possession is preferred.

2. If successive contracts convey the personal right of enjoyment of the same thing to several contracting parties, the enjoyment belongs to the party who first obtained it. If none of the contracting parties has obtained enjoyment, the one who has the prior title of certain date is preferred.

Art. 48.

Undertaking not to alienate or to change price

1. An undertaking assumed by one party not to alienate the thing received from the other party is effective only between the contracting parties, independently of the good or bad faith of a third buyer. Such undertaking is not effective unless limited to an appropriate period of time and unless it responds to an actual interest of the alienating person.

2. The provisions of the above paragraph also apply if one of the parties has undertaken not to alienate the thing received at a price different from that determined in the agreement.

Section 2

Accessory clauses affecting the operation of the contract

Art. 49.

Suspensive condition

1. The parties can condition the effectiveness of the contract, or of any clause or clauses of the contract, upon a future and uncertain event happening or not happening.

2. In this case, the contract becomes effective when the condition is fulfilled, unless the contracting parties have expressly agreed that the contract shall take effect from the time when the contract was made and have agreed on the way said retroactive effects can operate in accordance with law and the interests of the parties.

3. Even if the parties have agreed on a retroactive effect of the condition, the fruits taken are only due from the day on which the condition is fulfilled.

Art. 50.

Resolutive condition

1. The parties can condition the dissolution of the contract, or of any clause or clauses in the contract, upon a future and uncertain event happening or not happening.

2. The effects of fulfilment of the condition retroact to the time when the contract was made only if the parties have so agreed, as provided for in para. 2 of Art. 49, subject to the application of para. 3 of the same Article.

Art. 51.
Pendent condition

During the pendency of a suspensive condition the contracting party who is under an obligation or has created or transferred a real right, shall act according to good faith in order to safeguard the interests of the other party, who can, if such is the case, judicially request one of the remedies provided for in Art. 172, without prejudice to the right to damages.

Art. 52.
Fulfilment of condition

1. If no date is fixed for the fulfilment of the condition, the condition is considered not fulfilled at the moment when fulfilment is shown as clearly impossible.

2. A condition is considered fulfilled or not fulfilled when the interested contracting party prevents or causes its fulfilment.

Art. 53.
Unlawful or impossible conditions

1. A contract to which a condition, whether suspensive or resolutive, is attached is null if such condition is contrary to mandatory rules, public policy, or morality.

2. An impossible condition makes the contract null if it is suspensive; if it is resolutive, it is treated as non-existent.

3. If an unlawful or impossible condition is attached to a single clause of the contract, the provisions of the preceding paragraphs apply as to the validity of such clause, without prejudice to the provisions of Art. 144 on partial nullity.

Art. 54.
Merely potestative condition

1. A contract subject to a suspensive condition whose fulfilment is dependent on the mere will of one of the parties is null.

2. A merely potestative suspensive condition attached to a single clause of a contract makes the whole contract null, without prejudice to the provisions of Art. 144.

Art. 55.
Condition referring to past or present

The contracting parties may agree that a contract, or one or several of its clauses, can be effective in the case of an event happening or not happening, in the past or the present, which the parties are unaware of at the time when the contract is made.

Art. 56.

Starting and concluding times

The contracting parties may agree that a contract, or one or several of its clauses, can be effective from a certain time and until a given time. The parties may also refer to events which are certain to occur in the future even if the precise moment is not certain.

Art. 57.

Beginning and end of contractual effect in the absence of specific times

1. In the absence of an initial time agreed between the parties, the contract becomes effective as soon as it is made, except and unless a different initial time can be inferred from the circumstances or usage.

2. In contracts for continuous or periodic performance and in the absence of a time limit agreed between the parties, either party can withdraw from the contract by giving notice to the other party within a time limit which conforms to the nature of the contract, usage, or good faith.

Art. 58.

Computation of time

1. If the parties have agreed an initial time or a time-limit without indicating a starting date or a future event but referring to a period of a certain number of days, months or years, the following provisions are to apply.

2. The first day of the period indicated by the parties shall not be counted.

3. Months are calculated disregarding the number of days in each month and referring to the day that corresponds to the day of the starting month.

4. If the period in question is in years, reference is made to the day and month corresponding to those of the starting year.

Art. 59.

Burden

1. Gifts, whether they are *inter vivos* or made in contemplation of death, can be encumbered by a burden. The beneficiary can be bound to perform the burden up to the limit of the value of his benefit.

2. Performance of a burden which is in the public interest, can be requested even by the public authority, after the death of the interested party.

3. The provisions of the above paragraphs also apply in the case of contracts in favour of third parties, with regard to the third party.

Section 3

Representation

Art. 60.

Contract entered into by representative

1. A contract made by a representative in the name and in the interest of the principal, within the limits of the powers conferred by the principal on the representative, produces effects directly as to the principal, provided that the third party to the contract is aware that he has contracted with a representative.

2. Unilateral declarations made by or to a representative duly authorised to make or receive them produce effects directly as to the principal.

3. Paragraphs 1 and 2 also apply when the power of representation is conferred by law or by the court.

Art. 61.

Apparent representative

If a person lacks authority to act in the name and in the interest of another, but this latter acts in such a way as to lead the third contracting party to believe reasonably that the apparent representative has been granted authority, the contract is concluded between the apparent principal and the third party.

Art. 62.

Grant of power of attorney

1. Power of attorney can be conferred by written or oral statement directly to the representative or to the third contracting party. In the first situation, the third party contracting with a representative can require that the representative presents proof of his authority, and if the power of representation has been conferred in written form, that he be given a copy of the authority signed by the representative as authentication.

2. Power of attorney must be conferred in the form prescribed for the contract which is to be made by the representative.

Art. 63.

Revocation of power of attorney

1. If the principal has expressly agreed that the power of attorney be irrevocable, the revocation of the power of attorney is not effective. The right to damages of the third party who, without fault, had no knowledge of the irrevocability is unaffected.

2. When a power of attorney is conferred also in favour of the representative or a third party, it cannot be revoked without the consent of the interested party, unless there is just cause.

3. When the power of representation is revoked or ceases for some other reason, the document evidencing said power must be returned to the principal.

4. Revocation of a power of attorney or modification in the powers of a representative shall not become effective if they were not made known to the third parties with whom the representative has or will come into contact, unless it

is proved that the third parties knew of them when the contract was made. Other grounds for termination of power of representation conferred by the principal cannot be set up against third parties who, without fault, had no knowledge of them.

Art. 64.

Representation without power

1. One who has contracted as a representative without having the power to do so, or in excess of the authority conferred on him, is liable for any damage suffered by the third contracting party, as a result of his having believed in good faith that he was concluding a valid contract with the presumed principal, unless said third party avails himself of the power to treat the contract as made with the unauthorised representative.

2. If the third party does not avail himself of the power to request performance of the representative without powers, compensation under the preceding paragraph is due, at the choice of the aggrieved party for the damage he would have avoided if the representative had had the authority or had not stated he had it.

Art. 65.

Ratification

1. A person can take upon himself the effects of a contract concluded in his name by a representative lacking authority, by addressing to the third party a ratification made with the formalities prescribed for the formation of such contract. The ratification must be made within a reasonable time and the third party can ask said interested person to make his intention clear as to ratification, setting a time limit at the expiration of which, in the event of silence, ratification is deemed to be denied.

2. The ratification has retroactive effect, but the rights of third parties in good faith are unaffected.

3. The power of ratification descends to the heirs.

Art. 66.

Capacity of representative and principal

When a power of representation is conferred by a principal, it is sufficient for the validity of a contract made by the representative that the mental faculties of the latter be not impaired by sickness, whereas the principal must be capable of contracting, as stated in Article 5 of the present code, and the contract must not be one into which he is forbidden to enter.

Art. 67.

Subjective conditions

1. A contract is annulable if the consent of the representative is defective. If such defect concerns matters predetermined by the principal, the contract is annulable only if the consent of the latter is defective.

2. In cases in which good or bad faith, knowledge or ignorance of certain circumstances are relevant, reference is made to the representative, unless the matters at stake were predetermined by the principal.

3. In no case can a principal who is in bad faith take advantage of the ignorance or good faith of the representative.

4. The rules of this Article and of Art. 66 do not apply to a person who is charged merely to transmit the will of another.

Art. 68.

Contract with oneself and conflict of interests

1. A contract which the representative makes with himself, whether acting on his own behalf or as the representative of another party, is annulable, unless specifically authorised by the principal, or unless the content of the contract is established in such a way as to preclude the possibility of a conflict of interests.

2. Such a contract can be attacked only by the principal.

3. A contract made by a representative in conflict with the interest of the principal can be annulled by the principal, if the conflict was known or ought to have been known by the third party.

Art. 69.

An entrepreneur's agents and servants

1. One who is permanently appointed for the operation of an enterprise or branch of it, and as such establishes contact with third parties, is deemed to be empowered to make the same contracts in the name and on behalf of the entrepreneur, concerning the enterprise's activity, as can be concluded by anyone exercising a similar function in the same area.

2. Servants of the persons mentioned in the above paragraph who are in contact with third parties are considered empowered to conclude contracts concerning goods they deliver directly and to collect payment on delivery, unless there is a cashier operating on the premises where they are working.

3. In the cases referred to in the preceding two paragraphs, a third party can always require that the entrepreneur's agent or his servants present proof of their authority.

Section 4

Contracts for persons to be named

Art. 70.

Nomination of contracting party reserved and manner of naming declaration

1. Until the contract is concluded, a party can reserve the power to subsequently name the person who is to acquire the rights and assume the obligations arising from said contract. This power does not apply to contracts which cannot be concluded by a representative or for which the identification of the actual contracting parties is required at the moment of stipulation.

2. The naming declaration of the person who is to replace the contracting party must be communicated to the other party within eight days from the making of the contract, unless the parties have established a different time limit. The provisions of Art. 21 of the present code apply.

3. The nomination contemplated in the preceding paragraph is not effective unless accompanied by the express acceptance of the person named or unless a power of attorney earlier than the contract exists.

4. If the contract is made in a particular form, even if such form is not prescribed by law, the naming declaration or the acceptance of the person named, and also the power of attorney, are without effect unless they follow the same form.

5. If national law of the place where the contract is made or is to be performed requires a particular form of publicity, said form applies to the acts in the preceding paragraph. For contracts concerning immovables or registered movables, Art. 46, para.3 of the present code must be applied with the effects contemplated therein.

Art. 71.

Effects of naming declaration and effects of lack of same

1. When the naming declaration has been validly made, the named person exclusively acquires the rights and assumes the obligations arising from the contract, with effect from the date when the contract was made.

2. The provisions of Art. 67 of the present code apply to the named person and to the contracting party who nominated him.

3. If the naming declaration is not validly made within the time limit set by law or by the parties, the contract definitively produces its effects between the original contracting parties.

Section 5

Contracts in favour of third parties

Art. 72.

Right attributed to third parties

1. Parties can make a contract in order to attribute a right to a third party, charging one of said parties to perform in favour of the third party.

2. The third party can be unidentified or not exist at the time the contract is made.

3. Unless otherwise agreed, the third party acquires the right against the promisor at the making of the contract without his acceptance being necessary. He can nonetheless refuse the right. In that case, the promisor is bound to performance, not in favour of the third party but of the stipulator, unless it appears otherwise from the intention of the parties or the nature of the relationship.

4. The parties can modify or dissolve the contract by mutual consent until such time as the third party has declared to them that he intends to avail himself of the stipulation in his favour.

Art. 73.

Powers attributed to third parties

1. The rights of the third party can be subject to the condition that the stipulator fulfils his contractual obligations to the promisor. The third party can take any action against the promisor, in the event of non-performance, delayed or defective performance, as if he himself had made the contract. He can also avail himself of any exemption or limitation of liability clause contained in the contract.

2. The promisor can raise against the third party defences based on the invalidity or ineffectiveness of the contract, non-performance, delayed or defective performance of said contract, but not defences based on other relationships between the promisor and the stipulator.

Art. 74.

Applicable provisions

1. National rules remain in force regarding revocation of gifts for ingratitude or reduction of gifts for the reinstatement of the shares reserved when the right has been conferred on the third party gratuitously. In this last case, Art. 59 of the present code also applies.

2. If the contract has been concluded to transfer ownership of some thing or to attribute rights over that thing to a third party, the provisions of Art. 46 of this code shall apply.

TITLE VII

PERFORMANCE OF CONTRACT

Section 1

General provisions

Art. 75.

Modes of performance

1. Each of the parties is bound to perform exactly and completely all the obligations laid on him by the contract, without request from the entitled party being necessary. In rendering due performance the debtor must conform to what has been agreed by the parties, to good faith and the diligence required in each specific case in accordance with the agreements, circumstances and usage.

2. In the performance of obligations inherent in the exercise of a professional or entrepreneurial activity the degree of due diligence depends also on the nature of the due performance.

3. When a contract requires performance of an obligation to do by a professional, the obligation is fulfilled when the debtor has with due diligence set in motion all the acts necessary for the expected result unless according to the agreement between the parties, or the circumstances or usage, it must be deemed that performance is satisfied only when the final result is completely obtained.

4. The expenses of performance and receipt are charged to the debtor.

Art. 76.

Authorisation of creditor or third party

1. When performance of the obligation requires the availability, presence or co-operation of the entitled party, the debtor must first inform the latter of his readiness to perform and they must agree the method of performance according to contract provisions. If the entitled party fails to inform the debtor of his availability within a reasonable time, or they cannot agree on the matter, the debtor can formally offer performance in accordance with Art. 105.

2. If performance of the obligation requires the availability, presence, or co-operation of a third person or the authorisation of a public body, the debtor shall, unless otherwise stipulated, make the necessary contact with the third party or obtain the due authorisation.

Art. 77.

Partial performance

1. The creditor can reject partial performance, even though the performance is divisible, unless otherwise provided by the contract, law or usage.

2. However, if the debt is partly liquidated and partly non-liquidated, the debtor can make payment and the creditor can demand payment of the former part of the debt according to the terms of the contract or of the present code, without waiting for the latter to become liquidated.

Art. 78.

Performance different from that due and with property the debtor cannot dispose of

1. The debtor cannot free himself from the obligation by a performance different from that which is due, even if of equal or superior value, unless the creditor consents. In the latter case, the obligation is extinguished when the different performance is carried out.

2. When the different performance consists in the assignment of credit, the obligation is performed when said credit has been collected, unless the parties have expressed a different intention and except if collection failed because of the transferee's negligence.

3. If the debtor has paid with property of which he had no right to dispose, he cannot request the return of said property except by offering payment with property of which he has the right to dispose. The creditor who in good faith received payment with property the debtor had no right to dispose of can return said property and demand performance due, without prejudice to his right to damages, but he must so conduct himself as not to prejudice the rights of the property owner or of the person who can lawfully dispose of property used by the debtor.

Art. 79.

Performance by third party

1. Unless the contract stipulates that an obligation must be performed personally by the debtor or the nature of the performance requires it, the obligation can be performed by a person charged by the debtor or by a third party even without the debtor being aware, but the creditor can refuse such performance if it is prejudicial to himself or if the debtor has notified him of his objection.

2. The third party who has performed the obligation, if he had guaranteed it or if he had a direct interest in the performance, is subrogated to the rights of the creditor. The latter, however, can expressly subrogate the third party in his own right when said creditor receives payment, unless the third party has performed the obligation without the debtor knowing.

Art. 80.

Incapacity of debtor or creditor

1. Payment by a debtor lacking capacity cannot be annulled, unless performance was different from that due or consisted of an act of disposition of property of significant value, having regard to the economic situation of the debtor, and provided that the payment does not require the debtor's capacity to act or the debtor's legal representative to intervene. However, the creditor can object to a declaration of annulment by proving that the payment was not prejudicial to the debtor.

2. Payment to a creditor not legally capable of receiving it discharges the debtor only in so far as it benefits the creditor. The burden of proof lies with the debtor.

Art. 81.

Person to whom payment must be made

1. Payment must be made to the creditor or his representative specified for the purpose, or to the person designated by the creditor, even if not mentioned in the contract, or authorised to receive it by law or by the court. Payment made to a third party not entitled to receive it discharges the debtor if the creditor ratifies it or in so far as the latter has benefited thereby.

2. The debtor who makes payment to a person who, on the basis of unequivocal circumstances, seems entitled, even if as an apparent representative, to receive it, is discharged if he proves he was in good faith. The person who receives the payment is bound to restore it to the true creditor.

3. Payment to a creditor not entitled to receive it because of the pendency of sequestration, expropriation or similar proceedings against him is ineffective.

Art. 82.

Place of performance

1. Performance of contractual obligations shall be carried out at the place specified or implied in the contract, or, failing such provision, according to usage and circumstances, given the nature of the performance required. If the place in which the performance is to be carried out is not specified in the contract, or cannot be inferred, from the aforesaid criteria, the following rules apply.

2. The obligation to deliver a certain and specified thing shall be performed at the place where the thing was situated when the obligation arose. If said obligation concerns goods produced by the debtor, they shall be delivered at the business premises of the debtor at the time the obligation matures.

3. The obligation having as its subject matter a sum of money shall be performed, at the debtor's risk, at the residence of the creditor, or if he is an entrepreneur, at the creditor's business premises, at the time the obligation matures. If the residence or business premises are different from those when the obligation arose, and if this fact makes performance more burdensome, the debtor, by informing the creditor in advance, has the right to make payment at his own residence.

4. In all other cases, the obligation shall be performed at the residence of the debtor at the time the obligation matures.

Art. 83.

Time of performance

1. Contractual obligations shall be performed at the time indicated or implied in the contract or, failing such provision, according to usage and circumstances, given the nature of the performance required and the manner and place of performance. If no time of performance has been specified in the contract or cannot be determined on the basis of these criteria, and it is not reasonable to allow the debtor adequate time to prepare and render due performance, the obligation must be carried out immediately.

2. Unless otherwise agreed, performance must be made at a reasonable time and, if the creditor is an entrepreneur, during normal business hours.

3. If, in the contract, a time limit for performance is established or such can be determined on the basis of the above criteria, it is presumed to be in favour of the debtor who can carry out performance even before the expiry of the term, unless said term appears to have been established in favour of the creditor or of both. If the time limit is set for the benefit of the creditor, he can refuse performance before the term, unless it is not prejudicial to his interests.

4. If the time limit has not been fixed for the benefit of the creditor, he can demand performance before the expiry of the term, only if the debtor has become insolvent or, by his own act, has reduced the security he had furnished or has failed to furnish the security promised.

5. The debtor cannot seek reimbursement for payments made in advance due to not knowing the time limit.

6. Computation of the time limit for performance shall be made according to the provisions of Art. 58. Unless otherwise agreed, if the term

expires on a non-working day, it is extended to the next working day, except where usage dictates otherwise.

Art. 84.

Imputation of payment

1. A person who owes several debts of money or of the same kind of things to the same person can declare at the time of payment which debt he intends to satisfy. The imputation can also concern obligations stemming from annullable and unenforceable contracts. It is binding on the creditor, in the absence of his refusal within reasonable time.

2. If the debtor does not indicate his intention, even by implication, to the creditor, the latter can, by issuing a receipt or later, declare to which debt he intends to impute the payment, provided the obligation is valid and enforceable; the creditor cannot subsequently change the imputation. The debtor cannot object to said imputation, unless the creditor, for his own advantage, has resorted to subterfuges or unfairly availed himself of the circumstances.

3. If neither the debtor nor the creditor have expressed an imputation, the payment shall be imputed to the matured debt; among several matured debts, to that which has the least security; among equally secured debts, to the one which is the most burdensome to the debtor; among equally burdensome debts, to the oldest. If these criteria do not help, imputation is made proportionally to the various debts.

Art. 85.

Issue of receipt and release of securities

1. The creditor who receives payment shall, upon request from the debtor, issue a receipt in a form which the latter can legitimately claim. The expenses of issuing said receipt are, unless otherwise agreed, charged to the debtor.

2. The creditor shall make a notation on the instrument establishing the debt that the debt has been paid, even if the instrument is returned to the debtor, who is entitled to request it. If the creditor declares that he cannot return said document, the debtor is entitled to demand that a statement to that effect be added to the form of receipt.

3. The creditor who has received payment shall return the movable property given as security, shall permit the release of other property from the real guarantees given for the credit and from any other encumbrance which may in any way restrict the right to dispose of the property.

Section 2

Performance of certain contractual obligations

Art. 86.

Performance of monetary obligations

1. Monetary debts are discharged upon the debtor putting at the disposal

of the creditor in the normally practised ways the total sum due, in money which is legal tender at the time and place of payment. Payments made via a bank or in similar form extinguish the debt without the creditor having to accept them, or, failing this, without their tender in accordance with Art. 105.

2. If the sum due was indicated in money which is no longer legal tender or which is no longer acceptable or cannot be used at the moment of payment, the debt must be discharged in money which is legal tender, equal in value to the original money.

3. If a monetary debt is to be paid at some period after it was created the debtor shall, unless otherwise agreed, pay the creditor compensatory interest on the sum at the rate agreed in writing by the parties concerned; in the absence of an agreement, the provisions of Art. 169, para. 3, shall be applied. If, at the time of payment, the money has undergone over 50% depreciation in real value since the obligation was assumed, the debtor, unless otherwise agreed, shall pay the creditor, who is not delaying performance of the obligation, a supplementary amount over and above the nominal value of the debt. This re-evaluation shall be calculated according to Art. 169, para. 4.

4. Voluntary payment of interest at a higher rate than that indicated in the preceding paragraph, provided the rate is not usurious, does not give the right to reclaim the excess.

5. Unless otherwise agreed, the debtor who delays the payment of a monetary debt is responsible for any loss incurred by the creditor as a result of devaluation, even if the amount is inferior to that in paragraph 3 of this Article, and following the provisions of Art. 169, para. 4.

Art. 87.

Performance of cumulative and alternative obligations

1. When a contractual obligation requires two or more performances, the debtor shall make all of them unless it results otherwise from the agreement of the contracting parties, the circumstances or usage.

2. The debtor of an alternative obligation is discharged by making one of the two or more performances contemplated in the obligation but cannot make part of one and part of the other or others.

3. Unless otherwise agreed by the parties, the election is for the debtor and becomes irrevocable either upon declaration of his option or at the beginning of one of the performances.

4. If the party who is entitled to the election does not exercise his option within the stated time limit, election passes to the other party unless the latter intends to dissolve the contract and claim damages.

5. If one of the two performances becomes impossible, for a reason imputable to neither of the parties, the obligation is considered pure and simple. If the impossibility can be imputed to one party, the other can consider that the former is not fulfilling his obligation.

Art. 88.

Performance of indivisible and in solido obligations

1. Unless otherwise agreed and subject to the law not providing

otherwise, when a contract requires performance of the same obligation from two or more debtors, the creditor can, at his choice, require of any one of the several debtors performance of the entire obligation; performance by any co-debtor extinguishes the debt.

2. The co-debtor who has totally or partially performed the obligation can claim from each of the other co-debtors that portion of the debt paid for which each was responsible. The shares of each are, unless otherwise agreed, presumed equal.

3. If a performance is due from one debtor to several creditors, each creditor can demand performance of the entire obligation only if the obligation is indivisible, or it has been so agreed, or the law so states; in such a case, the performance obtained by one creditor extinguishes the obligation towards all the others. In relations *inter se* the *in solido* obligation is divided among the various creditors in equal parts, unless otherwise agreed and unless it was contracted solely in the interest of one or some of them.

4. In the case at para. 1 of this Article, unless otherwise agreed, notice to perform and any other communication or declaration concerning the debt, even if intended to interrupt the limitation or to waive the credit, must be addressed to all the co-debtors, on pain of inefficacy, unless said communications are to be effective only as to one co-debtor for his share of the obligation. In the case mentioned at para. 3 of this Article, any communication made to the debtor by one of the creditors is effective only for the communicator, unless otherwise agreed.

5. The provisions of this Article are applicable to obligations which are indivisible by law, by agreement or their nature.

TITLE VIII

NON-PERFORMANCE OF CONTRACT

Section 1

General Provisions

Art. 89.

Non-performance

Subject to the following provisions, a contractual obligation is deemed not performed when one of the parties, his representatives or servants, behave differently than as provided by the contract or there occurs a situation, of law or fact, different from what may be considered to have been promised.

Art. 90.

Debtor who declares in writing that he does not intend to perform

1. When the debtor has declared, in writing, to the creditor that he does not intend to perform the obligation, the latter may, in writing and without delay, and in any case within eight days, inform the former that, because of said

declaration, he considers the obligation not performed. In the absence of such communication, the creditor cannot refuse a subsequent performance.

2. Within eight days of receipt of the communication provided for in the preceding paragraph, the debtor can in writing contest the creditor's declaration according to which the obligation is non-performed and, unless the creditor, within the subsequent eight days revises his position in writing, the debtor must apply to the court having jurisdiction within the subsequent 30 days. Failing this on the part of the debtor, the non-performance is deemed definitively ascertained.

3. Subject to a different agreement between the parties, the time limits indicated above and below are suspended by holidays and non-working days, and calculated according to Art. 58.

Art. 91.

Debtor unable to perform

1. If, before the expiration of the time-limit there are reasonable grounds for believing that the debtor is not or has not been able to put himself in a position to perform the obligation or to perform it without significant defects, and this situation is not due to an act or omission by the creditor, the latter can invite the former in writing to give adequate guarantee, within a reasonable time, which shall be not less than fifteen days, that performance will follow and can declare that, failing guarantee, non-performance shall be deemed definitively ascertained.

2. A debtor who fails to give the requested guarantee can, in writing within eight days, contest in writing the creditor's request and unless said creditor, within the subsequent eight days revises his position in writing, the debtor must apply to the court within the subsequent 30 days. Failing this on the part of the debtor, the non-performance is deemed definitively ascertained.

Art. 92.

Failure to deliver a specific thing

An obligation to deliver a certain specific thing is deemed not performed if the thing is not delivered within the time limit or in the manner provided for or is delivered with defects or a thing is delivered which is or can be deemed different, unless, and without prejudice to compensation for loss,

a) the debtor obtains from the creditor an extension of the time or the court grants it on reasonable grounds;

b) the defects can be repaired and the creditor accepts repair at the debtor's expense, within reasonable time, or the court authorises repair;

c) the thing to be delivered is lost or has deteriorated without the debtor being responsible or the creditor accepts the delivery of a different thing or the court declares that on reasonable grounds it can be deemed that performance has taken place in such a way;

d) the creditor exercises his power of only making a payment in proportion to the lesser value of the thing received, the amount of which is to be fixed by the court failing prior agreement.

Art. 93.

Non-delivery of a quantity of things specified only as to kind

The obligation to deliver a quantity of things specified only as to kind is deemed not performed if the things are not delivered within the time limit or in the manner provided for or are delivered in quantity or quality inferior or superior to that due or of different type, unless, without prejudice to compensation for loss,

a) the debtor obtains from the creditor an extension of the time for delivery of all the items or of those not yet delivered or a delay is granted by the court on reasonable grounds;

b) the creditor returns the surplus to the debtor or he does not return it and pays for it according to the price in the contract;

c) the creditor accepts the goods of inferior quality or quantity by paying proportionately less, the amount being fixed by the court failing agreement.

d) some or all of the goods due are lost or have deteriorated without the debtor being responsible, and the creditor accepts delivery of different goods or the replacement of some goods or the repair of those with defects or the court has reasonable grounds to consider the obligation performed by reason of the delivery of different or partially replaced or repaired goods.

Art. 94.

Non-performance of an obligation to do

1. An obligation to do something is considered not performed when the work is not done within the contracted time limit, or it is partially or defectively done, or unsuitable things or materials are used, unless, in these cases, and without prejudice to compensation for loss, the creditor or court grants the debtor a period of time to finish the works or eliminate the defects or repair the damage or replace the inappropriate things and materials used, provided such repairs or replacements can be considered reasonable having regard to the contract, usage or good faith.

2. There is no non-performance if the debtor, without it being his responsibility, is unable to perform a personal obligation to do something, and the creditor or the court allows the debtor to have himself replaced by another competent person, all responsibility for the performance remaining with the debtor.

3. If the obligation is of the type provided for in Art. 75, para. 3, it is deemed not performed if the result is not satisfactory, unless the debtor can prove, that he is professionally qualified, when that is required, and that he has made timely use of the necessary techniques, means, tools, places and has had recourse to appropriate servants according to the circumstances.

Art. 95.

Non-performance of an obligation not to do

The obligation not to do something shall be deemed not performed every time an act is done in breach of it, unless said act is performed by an auxiliary or an employee who did not know of the agreement not to do it and

said agreement was included in a wider contractual context and the creditor or the court allows the debtor a time limit for demolition, or reinstatement, and that this demolition or reinstatement duly occurs, in good time, without prejudice to compensation for loss.

Art. 96.
Default of debtor

1. The debtor shall not be considered in default if
 - a) no final date, nor time expressed in a period of days, months or years has been stipulated for performance, and the creditor has not, in advance, given the debtor notice in writing of performance being required within a reasonable time;
 - b) the creditor or the court have, in advance, extended the debtor's time limit for performance;
 - c) in bilateral contracts, the creditor is delaying his performance and the term for it has already expired;
 - d) the debtor has tendered in due time the entire performance to the creditor, requesting him to accept it, the effects of a possible default of the creditor remaining unaffected.
2. If the terms at subpara. a) and b) of the preceding paragraph have expired and in the absence of the situations at subpara. c) and d) of the same paragraph, the debtor is deemed in default. Consequently he is not discharged and is responsible – according to the provisions of Art. 162 ff. – for the damages, even if the loss of the due thing or the impossibility of performance cannot be imputed to the debtor, except when he proves that the thing or the matter of performance would also have failed if it had been in the care of the creditor. In this latter case, the debtor must give the creditor the sum obtained from the insurer or from the person responsible for the destruction or withdrawal of the thing due or for the non-performance of the work.

Art. 97.
Obligations which cannot be considered non-performed

1. Even if the debtor delays in performing the obligation due or only renders it partially, said obligation cannot be considered not performed if unforeseen extraordinary events have previously happened which made performance excessively onerous and which therefore give the debtor – as laid down by Art. 157 – the right to a re-negotiation of the contract. The debtor must, however, have served notice on the creditor of his intention to avail himself of this right, before the expiry of the term fixed for performance, or before the creditor has addressed to the debtor the notice provided for in Art. 96, subpara. a) above.
2. If after the contract is made the performance becomes objectively impossible, for reasons not imputable to the debtor, the obligation cannot be considered not performed; but if it can be deemed that the contract states or implies a guarantee that performance is possible, the debtor shall compensate the creditor for the damage incurred through the latter's belief in the possibility of performance.

Art. 98.

Subsequent better offer

Non-performance occurs when the debtor fails to render due performance and alleges that he has received a better offer for the same performance from elsewhere, unless such possibility of withdrawal is stated or implied in the contract.

Art. 99.

Non-performance of protection duties

In carrying out the due performance, the debtor must take all precautions necessary to ensure no damage occurs to the person of the creditor, his employees and property; in the event of failure to respect this duty, the obligation is considered not performed if damage occurs during or because of the performance and is an immediate, direct consequence thereof. Otherwise the debtor is liable in tort.

Art. 100.

Non-performance due to the non-realisation of promised situations

1. The contractual obligation is non-performed if a certain event or state of fact or law which one of the contracting parties promised or assured – even without reward – would occur, does or did not happen.

2. If in a declaration, which is not in the contract and is not the object of a promise or assurance, it is stated that an event has happened or not, or will happen or not, and that declaration is not in accordance with fact, the person who made the declaration can be responsible in tort to the one who suffered damage as a result of said declaration.

Art. 101.

Early performance or in greater quantity than due

The creditor may receive performance by the debtor in advance of the time fixed or in greater quantity than due. In this latter case, he shall pay a proportionally higher amount, though if he refuses he shall not be considered in default.

Art. 102.

Performance without interest to creditor

A creditor cannot refuse an offered performance by claiming it is no longer useful to him and is of no benefit because of supervened circumstances, unless such right of refusal can be deduced, even implicitly, from the contract and the creditor has warned the debtor in due time of the supervening occurrence of said circumstances and in any case before the debtor has started preparing or undertaking performance.

Section 2

Default of creditor

Art. 103.

Notion

The creditor is in default if, for no valid reason, he does not accept, or refuses, or prevents, or obstructs performance on the part of the debtor, or does not exercise the option provided for in Art. 87, para. 2, for an alternative credit if the other party does not intend to make the election himself, or does not obtain – when he is obliged – the presence of a third person or the permit or licence from the public authority prescribed in Art. 76, para. 2, or in any case, by action or inaction, he prevents the debtor from performing.

Art. 104.

Default of creditor which results in non-performance

1. In the situation of the preceding Article, the debtor can serve a written notice to the creditor to desist from his behaviour specifying, which acts of commission or omission have prevented or hindered performance and indicating which acts or omissions must cease or which must be performed by the creditor, within an appropriate time having regard to the nature of the obligation, usage and good faith. In any case such time cannot be less than 15 days.

2. When the time limit expires, unless the behaviour has ceased, the creditor shall be considered responsible for non-performance.

Art. 105.

Actions required for discharge of debtor

1. In the situation of Art. 103, instead of establishing the creditor's non-performance, the debtor intending to release himself by performing the obligation due, must make to the creditor, in the appropriate place for performance, actual tender or tender by notice of the entire due performance including accessories, fruits and interest, in the appropriate form as prescribed, on application of the debtor, by the court of first instance having jurisdiction in the place where the tender must be made.

2. If it is impossible for the debtor to know the precise quantity of money or things due, he can, with the leave of the court, offer an amount or quantity based on his knowledge, promising to pay or provide the difference.

3. If the creditor accepts the tender and receives performance, the debtor is discharged. In the situation of para. 2 of this Article, discharge is subject to the debtor paying what is still due in accordance with a well-founded request of the creditor.

4. If the creditor refuses the offer of performance of an obligation to give, the debtor, in order to obtain discharge, must deliver what is due in the form prescribed by the court mentioned in para. 1 of this Article, to which the debtor can make the pertinent request in the same application contemplated in

the preceding para 1. The regularity of the delivery and the discharge are determined by the court. If the obligation is one of doing, the debtor must perform as prescribed by the court which subsequently determines the correctness of the debtor's performance and his discharge.

5. The tender alone is sufficient – and delivery or performance is unnecessary – when the performance cannot be made because of the absence or incapacity to receive it of the creditor or of his representative or there is doubt, without the debtor's responsibility, as to the person to whom performance must be made, or several people claim the right to the performance, or the document establishing said right has been lost, and these circumstances have been specified in the application contemplated in para. 1 of this Article.

Section 3

Effects of non-performance

Art 106.

Exemption and limitation of liability clauses

1. Any agreement in advance excluding or limiting the debtor's liability for fraud or gross negligence is null.

2. Any agreement that one of the contracting parties can not raise exceptions in order to avoid or delay due performance is without effect as to exceptions for nullity, annullability and rescission of the contract. However, even in cases in which the agreement is effective, the court, recognising that there are serious reasons, can suspend judgment and, if that is the case, require security.

3. Except as provided for in Article 30 on unfair terms, an agreement limiting or excluding the debtor's liability for slight fault is without effect if the creditor made it while he was in the service of the debtor or the liability arises during professional or entrepreneurial activity exercised in a monopolistic regime under a licence from the authority.

4. The parties can make valid agreements concerning margins of tolerance in the performance or franchise in the compensation for loss which must be in accordance with usage or good faith, considering the status of the parties and the nature of the performance.

5. The parties can validly make agreements on mere presumptions of the fortuitousness of events which, in the situations contemplated, are normally due to fortuitous events.

Art. 107.

Substantial non-performance

1. For the purposes of the following rules, non-performance is substantial if it concerns one of the main (not secondary) obligations in the contract, and also when, taking into account the qualities of the persons and the nature of the performance, non-performance inflicts harm on the creditor depriving him substantially of what he was entitled to expect under the contract.

2. Non-performance is considered substantial when
a) it is total;

b) it is partial but the creditor has objectively no further interest in complete performance.

3. Secondary obligations are those whose performance has slight importance with respect to the economics of the contractual relationship and the creditor's interest.

Art. 108.

Creditor's right to suspend performance of bilateral contracts

1. In contracts providing for mutual counter-performance, if one of the parties fails to perform or offer to perform his obligation, regardless of the gravity of the non-performance, the creditor can suspend his own performance which is due at the same time or subsequently, unless such refusal to perform is contrary to good faith.

2. The refusal is deemed, in particular, contrary to good faith when:

- a) it creates excessively onerous consequences for the other party;
- b) the non-performance is not substantial and the creditor's refusal causes the extinguishing of his obligation;
- c) the refusal prejudices a basic right of the person.

Art. 109.

Early performance or in greater quantity or after the expiry of the essential time limit

1. Subject to the provisions of Art. 101, the creditor has the right to refuse performance offered or made before the time limit, or in greater quantity than that due, provided his refusal is not contrary to good faith as understood in the preceding Article as far as it is applicable.

2. In any case the creditor has the right to refuse performance offered or made after the expiry of a time limit which has been agreed as essential.

Art. 110.

Extension of time and allowance of instalment

1. If an extension of time is granted by the creditor or the court to the debtor before the commencement of performance or when the contract is only partially performed, the creditor cannot have recourse to the remedies provided for in the following Articles until expiry of said term, but he can take precautionary measures or apply to the court for an injunction, without prejudice to the right to compensation for loss.

2. If the creditor or the court have granted the debtor an instalment payment of the debt, the debtor loses this benefit in case of default in the payment of any instalment which exceeds one-eighth of the total debt.

Art. 111.

Specific performance

1. The debtor not having yet performed the obligation, whatever the importance of non-performance may be, the creditor can obtain performance or

completion in specific form, if this is objectively possible and, in any case subject to compensation for loss.

2. In particular, the creditor can:

a) judicially obtain delivery of the due certain and specified thing or the quantity of things specified only as to kind, and which the debtor can dispose of or has transferred to a third party in bad faith or by a simulated act;

b) obtain the court's authorisation to acquire where possible and at the debtor's charge, the certain and specified thing or quantity of things specified only as to kind which are due and of which third persons have power to dispose;

c) obtain that where possible, the debtor be ordered to carry out or complete the due obligation; the creditor can also obtain judicial authorisation to carry out or complete himself said performance or to get a third party to do so at the expense of the debtor;

d) obtain that the debtor be ordered to destroy what he has done in violation of an obligation not to do, or the creditor can obtain judicial authorisation personally to destroy what has been done in violation of an obligation not to do or to get a third party to destroy it, at the expense of the debtor;

e) obtain a judgment producing the same legal effect of the contract which the debtor was bound to conclude by a preliminary contract he has not performed.

3. In order to induce the non-performing debtor to comply with the judgment requiring objectively possible, specific performance of the obligation, the court can also fine the debtor who does not comply or complies late, up to three times the value of the performance due. This sum shall be divided between creditor and the State in the respective ratio of seventy percent to thirty percent. Said fine can be either a fixed sum producing interest in the amount fixed by the court or a sum for each day of delay, which shall be divided as stated above.

Art. 112

Substitutions in specific form, and repairs

1. If the debtor has not fulfilled the obligation in whole or in part, the creditor is entitled to obtain where objectively and subjectively possible and subject to compensation for loss, that the debtor:

a) shall deliver a different thing of which he can completely dispose or make a different performance – which can adequately satisfy the creditor's interest – against payment of an additional sum or the return of part of the sum already paid; in the absence of agreement between the parties the court shall fix the sums for the cases of greater or lesser value of the thing or performance;

b) shall provide for the repairs necessary to eliminate the defects or imperfections in the things delivered or in the work done;

c) shall, in the event of problems arising during installation or first functioning of the thing delivered and due to a defect thereof, arrange for its correct installation and first functioning and provide for technicians to explain its use and, where necessary, to be responsible for the maintenance required for its proper operation for a certain period;

2. The creditor can also obtain authorisation from the court to carry out or have carried out by a third party any necessary repairs at the expense of the debtor.

3. The creditor intending to exercise any of the above rights must, on discovery of the defects, promptly notify the debtor.

4. Before the creditor sends the notice provided for in para. 3, the debtor, upon previous notice to the creditor, can provide replacement, elimination of defects or completion of delivery at his own expense.

Art. 113.

Reduction in price

1. The creditor who intends to accept delivery of a different thing of lower value or with imperfections, or a smaller quantity than due, or performance of an obligation to do something different from that agreed or with imperfections, has the right, after promptly giving notice to the debtor, to pay a lower price than that agreed. If that is the case, he can obtain the return of part of the sum paid in proportion fixed, in the absence of agreement between the parties, by the court.

2. If the performance offered or made is of superior value to that due, Art. 101 shall apply.

Art. 114.

Right to dissolve the contract

1. Substantial non-performance as understood in Art. 107 above gives the creditor the right to dissolve the contract by serving notice on the debtor to perform within a reasonable time, which shall be not less than fifteen days, and declaring that, if the time limit expires without performance, the contract shall be deemed automatically dissolved.

2. If the contract contains a clause providing that one party has the right to dissolve the contract upon non-performance of a specified obligation by the other party, non-performance shall be considered in any case substantial according to Art. 107, and the contract shall be deemed dissolved when the interested party gives notice to the other that he intends to avail himself of the dissolution clause.

3. After expiry of the time indicated in para. 1 of this Article or when the debtor has received the notice provided for in para. 2, the creditor cannot demand any more and can refuse performance of the contract and the debtor is not bound any more to perform it. In addition the creditor can exercise the rights provided for in Art. 115 and Art.116.

4. Partial dissolution of a contract is also possible if the creditor decides to accept what he has received, although the debtor has not performed the entire obligation, the creditor having the right to make a proportionally lesser payment as provided for in Art. 92 and Art. 93.

5. If non-performance occurs during the course of a contract for periodic or continuous performance, the effect of dissolution does not extend to performance already made.

6. The creditor has no right to dissolve a contract whose non-performance only depends on action or omission attributable to him, without prejudice to the application of Art. 103 and Art. 104. Neither has the creditor this right if he has made the other party convinced that dissolution would not be sought even in the case of substantial non-performance.

Art. 115.

Obligation to return

Subject to Art. 114, para. 5, in consequence of the dissolution of the contract, the creditor has the right to the return from the non-performing debtor of what said creditor has already given for performance due, or, in any case, because of the contract, saving the right to compensation for loss and the obligation to return what he has already received according to Art. 160.

Art. 116.

Damages

1. Subject to the provisions of the above Articles, in the event of non-performance, independently of its importance the creditor is entitled to compensation for loss according to Art. 162 ff.

2. This right can be exercised in addition to those provided for in the above Articles and as provided for in Art. 171.

Art. 117.

Rights of third party in good faith

The exercise of the above rights by the creditor does not prejudice the rights acquired by third parties in good faith over the property of the creditor or over what is due to him, before said creditor, justifiably fearing non-performance, has warned the third parties in writing or, in the case of immovable or registered movable property, before the transcription of his judicial applications in public records, according to the laws of the State where the records are provided. This applies except for the provisions of Art. 161.

TITLE IX

ASSIGNMENT OF CONTRACT AND OF RELATIONSHIPS ARISING THEREFROM

Section 1

Assignment of contract

Art. 118.

Notion

1. In the relationships arising from a contract which has not exhausted its effect, each party can assign his position totally or partially, gratuitously or non-gratuitously to third party or parties, if the actual relationship permits.

2. In such an event the parties can alter the content of the contract assigned and can also agree and compromise on the rights and obligations already derived or which can derive from the contract or from its performance or non-performance.

3. Unless otherwise agreed, the arbitration clause in said contract is also transferred.

4. If the transfer of contractual position occurs not by agreement of the parties but by operation of law and between living persons or by succession on death, the rules of this section shall not apply but those existing in each of the Member States of the European Union, save for the application of the principles of private international law if necessary.

Art. 119.

Modes of assignment

1. A contract can be transferred by agreement between the assignor and the assignee and the assignment becomes effective when notice is given to the original contracting party if this latter has previously consented or when said party gives notice of acceptance to the assignor and the assignee.

2. Assignment can also take place by means of a trilateral agreement between the assignor, the original contracting party and the assignee and must be made thus in the case considered in para. 2 of Art. 118. The agreement must define the position of all contracting parties, their respective rights and obligations and any time limits.

3. When the assignment requires the authorisation of a judicial or administrative body or of a third party, the transfer is effective after said authorisation.

4. If the clause “to the order” or equivalent is inserted in a document containing all the elements of the contract, endorsement of the document causes the endorsee to take the place of the endorser in the contract.

5. For the assignment to be valid it must take the form required for the contract assigned. Only if the notice to the original contracting party, his acceptance, or the trilateral contract are of certain date, the assignment can be opposed to third parties, unless it is proved that said persons had full knowledge thereof.

6. Rules in force in the member States of the European Union are unaffected which provide for particular forms for the contract establishing assignment, and the intervention therein of certain persons or bodies.

Art. 120.

Rights and duties of parties

1. The assignor is released from his obligations to the original contracting party and the assignee becomes responsible for them from the time when the assignment becomes effective. However, the original contracting party when he in advance, simultaneously or subsequently consents to the substitution can declare that he does not release the assignor. In this case, he can sue the assignor if the assignee fails to perform the obligations assumed, provided the original contracting party has given notice to the assignor of the non-performance

within fifteen days of discovery of said non-performance. In the absence of such notice the original contracting party is liable for compensation for loss.

2. The assignor must give the assignee all information and documents necessary for him to exercise the rights and perform the obligations arising from the contract. Failure to carry out these obligations shall cause the application of Art. 7 para. 2 of this code.

3. If there are well-grounded doubts about the validity or effectiveness of a contract of assignment, each debtor can apply to the court in order to be authorised to make a deposit as to performance due, as per Art. 105.

4. The original contracting party can raise against the assignee all defences arising out of the contract but not those based on other relationships with the assignor, unless he expressly reserved a right thereto when in advance, simultaneously, or subsequently consenting to the substitution.

5. The responsibility of the assignor both as to the validity of the contract assigned and as to its performance depends on the nature of the contract of assignment and, in any case, on the agreement of the parties concerned.

6. However, if the parties in making the assignment have not referred to any type of contract and this cannot be deduced from the content of the agreement by interpretation, the following rules apply, unless otherwise agreed. If the assignment is not gratuitous the assignor is responsible for the invalidity or ineffectiveness of the contract assigned. The assignor is equally responsible and as a guarantor, within the limits of what he received if in good faith, for the obligations of the original contracting party which already exist, unless the non-performance of these obligations depends on the assignee. If the assignment is gratuitous, the assignor guarantees only the validity of the contract assigned and is responsible for its performance only if he has so promised and is in good faith.

Section 2

Assignment of claims

Art. 121.

Assignability of claims

1. A claim arising from a contract or from its performance or non-performance can be assigned in totality or partially to a third party or parties even though a future claim or not yet recoverable, provided that the claim does not have a strictly personal character and that the assignment is not excluded by law, by agreement between the parties, or by the nature of the contract.

2. If the claim is partially assigned, the court can, if necessary, decide that the assignor and assignee must act jointly against the original debtor.

3. A future claim can be assigned if it is determined or able to be determined according to Art. 31 of this code. In such case the assignment becomes effective when the claim comes into being on the assignor.

4. Assignment can be forbidden by contract but the agreement is effective against the assignee if the original contracting party proves that the assignee knew of it at the moment of transfer; in this case the assignee is prevented from acquiring the right over the original contracting party but not as regards the assignor.

5. A claim is not assignable if for the nature of the contract the assignment would substantially alter the obligation which was due from the original contracting party.

6. Apart from the provisions of Art. 118, the assignor can agree with the assignee that the latter shall be responsible for the performance of certain obligations.

Art. 122.

Modes and effects of assignment

1. To be valid, an assignment does not require the agreement of the debtor – except in the case of a contract which expressly or by its nature excludes said assignment – and can be made as provided for in the following paragraphs.

2. An assignor can make a contract with the assignee, gratuitously or non-gratuitously, which obliges the former to transfer his claim to the latter. In this case assignment occurs by means of a second, abstract contract of assignment between said parties which enables the original contracting party to oppose the invalidity or ineffectiveness of this latter contract but not of the previous causal contract.

3. The assignor can also make a gratuitous or non gratuitous contract with the assignee, through which a claim due to the former passes to the latter, so that assignment occurs on mere agreement. If there is doubt as to the mode adopted for the assignment, this paragraph shall apply.

4. In the cases of paras. 2 and 3 of this Art., the assignment becomes effective as to the debtor of the original contract when he is notified of it or accepts it. Before such notice or acceptance the original debtor who pays the assignor is not discharged if the assignee proves that said debtor had knowledge that the assignment had been made. The notice to the debtor can be concomitant with the demand for performance.

5. For the contracts, declarations and acts of notice and acceptance mentioned above, para. 2 of Art. 36 of this code shall apply as to the value of the transferred claim.

6. In the above two cases (paras. 2 and 3 of this Article), assignment can be raised against a third party when the contracts, subsequent notice and acceptance are in documents of certain date, unless it is proved that said third party had knowledge of the assignment. If the same claim has been the subject of more than one assignment to different persons, the first assignment notified to or accepted by the debtor, by an instrument bearing a certain date, shall prevail.

7. Unless otherwise agreed, assignment of a claim also transfers all accessories except those which are strictly personal.

8. Claims assigned to banks or factoring enterprises are not covered by the above Articles; they are governed by the current laws or uniform rules of the pertinent economic sectors or, in the absence of such laws and rules, by usage.

Art. 123.

Duties of parties

1. The assignor shall deliver to the assignee the documents evidencing the claim that are in his possession, or an authentic copy thereof if only part of

the claim is assigned, and provide all information necessary to enforce the claim.

2. If the assignment is not gratuitous, the assignor in good faith, within the limits of what he has received, is bound to guarantee the existence of the claim at the time of assignment and must also guarantee the present – and future if specifically promised – solvency of the original debtor, unless non-performance by the latter is due to negligence by the assignee. If these guarantees are excluded by agreement, the assignor remains liable if, as a result of his own act, the claim fails.

3. If the assignment is gratuitous, the assignor in good faith is responsible for the existence of the claim and the solvency of the original debtor only if and within the limits in which he has undertaken to guarantee them.

4. The grantor in bad faith is in any case liable for loss which the assignee suffers, provided that non-performance is not due to the negligence of the latter.

5. The original debtor has the same obligations to the assignee as he had to the assignor.

Art. 124.

Rights of parties

1. The assignee acquires the same rights as the assignor had.

2. The original debtor can raise all the defences against the assignee which he could have raised to the assignor before assignment; but if he has unreservedly accepted the assignment, compensation cannot be opposed. Apart from the provisions of Art. 122, para. 2, he can also raise defences regarding the invalidity of the assignment and, unless he has agreed thereto, those based on the agreement excluding assignment, within the limits laid down in Art. 121, para. 4.

3. If well-founded doubts exist as to whether performance is due to the assignee or the assignor, the original debtor can obtain court authorisation that he shall make deposit or provide as ordered by said court, according to Art. 105 above.

4. When the assignment of a claim occurs by operation of the law, in the absence of specific provisions those of this present title shall be applied. In any case, the person who has performed succeeds in the rights of the creditor in proportion to his payment, if the payment is of a debt for which he was responsible; if on the other hand, the debt paid was not his responsibility, he can, until the moment of payment, demand to be replaced and succeeds to the rights of the creditor within the limits of what he has paid by means of a unilateral simultaneous declaration from the creditor following the provisions of Art. 36, para. 2 above.

Section 3

Assignment of debt

Art. 125.

Assignment by succession or novation

1. There are two modes of assigning a debt:

a) by succession, when the obligation is transferred objectively intact to a third party who is joined to the original debtor or replaces the latter as indicated in Article 126 below;

b) by conventional extinction of the original debt and the simultaneous setting-up of a new obligation with a different debtor.

2. In the first of the cases in para. 1, the new debtor is bound *in solido* with the original debtor unless the creditor expressly releases the latter.

3. A novation occurs only if expressly and unambiguously agreed by the parties in their trilateral agreement. In case of doubt the assignment is presumed to be made by succession.

4. Apart from the provisions of paras. 2 and 3 of this Article, the parties can make the assignment of debt in the manner they consider most suited to their interests, for example as in Art. 126 below.

5. The debt can be assigned to one or more new debtors.

6. When the assignment occurs by operation of law or as an accessory of the transfer of goods or set of goods, the assignment is subject to the provisions of this section, as far as applicable, failing other specific rules.

Art. 126.

Modes of assignment

1. By an agreement between the debtor and a third party, this latter can promise to extinguish the original debt and can perform within the limits of Article 79 para. 1. Such agreement has effect only between the original debtor and the third party.

2. A debtor can make an agreement with a third party which obliges the latter to extinguish the original debt to the creditor thus binding the third party with the original debtor *in solido*, unless the creditor expressly releases the latter.

3. A third party on his own initiative can make an agreement with the creditor by which the former binds himself to perform the obligation and becomes bound *in solido* with the original debtor unless the creditor expressly releases said debtor. By expressing opposition when coming to knowledge of the agreement, the original debtor can make said agreement ineffective.

4. Transfer of a debt can also occur by means of a preliminary agreement followed by a subsequent act of transfer of the claim. The agreement and the subsequent act are made by the creditor (agreeing with the third party) or by the original debtor (agreeing with the third party) even though said debtor is not entitled thereto; the operation becomes effective if the creditor gives his consent. In these cases the third party cannot set up against the creditor any defences based on the preliminary agreement which is the basis for the subsequent act of transfer, unless what invalidates the former is also an obstacle to the validity of the latter. Once the third party has paid, he can be indemnified by the original debtor up to the limits within which said debtor benefitted. In the event of doubt as to the mode adopted for the transfer, that appearing in para. 3 of this Article shall apply.

5. In the above situations the third party may or may not be in debt to the original debtor; if not, he is entitled to be repaid or indemnified by the latter in proportion to what he has really paid, unless otherwise agreed, but the original

debtor can set up against the third party the defences which might have been set up against the creditor.

6. In a trilateral agreement setting up a subjective novation, the parties can agree that in order to request performance the creditor shall make or at least offer a counter performance.

7. For all agreements and declarations contemplated in this Article, Art. 36, para. 2 of this code shall apply, with regard to the value of the debt transferred.

Art. 127.

Rights and duties of parties

1. Excepting as at Art. 126, para. 4, unless the transfer occurs by means of a novation, the new debtor can set up against the creditor the defences of the original debtor. In addition, if the latter has been released by the creditor, all guarantees attached to the claim are extinguished, unless the guarantors expressly agree to continue them.

2. In the case of para. 1 of this Article, a creditor who has accepted the obligation of a third party cannot pursue the original debtor without having previously requested performance from the third party, and if the creditor has released the original debtor, he has no action against the latter if the third party becomes insolvent unless said creditor has made an express reservation of it.

3. If the assignment is made by means of a novation, the creditor and the new debtor can respectively exercise only those rights and raise only those defences which arise from the novation, except as in the following paragraph.

4. If the obligation assumed by the new debtor, according to Art. 125, para. 1 a), is null or is annulled, the creditor who had released the original debtor, can require performance from the latter, but cannot avail himself of the guarantees furnished by third parties. If the assignment occurs through a novation, according to Art. 125, para. 1 b), the provisions of Art. 130, para. 5, shall apply.

5. If relevant, the rule in Art. 79, para. 2, shall be applied.

TITLE X

EXTINCTION OF CONTRACT AND DERIVED RELATIONSHIPS

Section 1

Extinctive facts and facts leading to foreclosure

Art. 128.

Extinctive facts and facts producing ineffectiveness

1. A contract is discharged or is devoid of effect:

- a) by performance – or actual tender or tender by notice – of all the obligations in the contract, in the modes provided for in title VII and VIII of this book, and by the realisation of the aims of both contracting parties;
- b) by fulfilment of a resolutive condition;

- c) at the expiry of a time limit;
- d) by death or supervening incapacity, in the cases indicated by the law;
- e) by novation;
- f) by dissolution by mutual consent;
- g) by unilateral withdrawal;
- h) by total dissolution;
- i) by nullity;
- j) by annulment;
- k) by rescission;
- l) by any other cause indicated by the law.

2. If a contract is definitively discharged or is devoid of effect the parties cannot make claims based on said contract apart from derogation in multilateral contracts in favour of the other contracting parties and for the protection of third parties; also except for the effects of validation, conversion and ratification, and apart from claims for return of what was given in performance and for compensation for loss resulting from unlawful acts, contractual or extra-contractual, during the formation, performance or non-performance of the contract.

3. Contractual obligations are discharged:

- a) by performance – or actual tender or tender by notice – as laid down in titles VII and VIII of this code, as well as enforcement proceedings against the debtor;
- b) by novation;
- c) by remission;
- d) by tacit waiver;
- e) by compensation;
- f) by merger;
- g) by loss or serious deterioration of the thing due or supervening impossibility of performance which must not be imputable to the debtor, except as provided for in Article 162 below;
- h) for any other cause indicated by the law.

4. The extinguishing of an obligation – if definitive – prevents the creditor from laying any claims in relation to it, except for due restitutions and damages for unlawful acts occurred on the occasion of the performance or non-performance of said obligation.

5. This present title covers the cases which are not covered by other rules in this code. To said rules reference is made for cases not contemplated here.

Art. 129.

Facts leading to foreclosure

- 1. Limitation leads to foreclosure of all rights deriving from a contract.
- 2. Forfeiture leads to foreclosure on the issue of a declaration or the performance of an act.

Section 2

Ways of extinguishing besides performance

Art. 130.

Novation

1. The novation is objective when the parties agree to replace the previous contract by a new one materially different from the former which has not been completely performed and is thereby extinguished. The novation also extinguishes all guarantees of the original contract and its accessory terms, including payment facilities unless they are expressly confirmed in the new contract.

2. The intention to create a novation must be expressed by both parties, in an unequivocal manner and can also result from the objective incompatibility of the first contract with the second.

3. If the two contracts are not objectively incompatible, their co-existence must result from the unequivocal agreement of each contracting party.

4. In the event of doubt, it must be deemed that the original contract survives modified.

5. Invalidity of the original contract does not affect the validity of the new one, nor the invalidity of the novative or of the second contract can reinstate the validity of the old one; but the party who is not in good faith is responsible for the loss incurred by the other party.

6. The reproduction or the repetition or the writing of a contract do not constitute novation unless the conditions of paras. 1 and 2 of this Article are fulfilled. If there is discrepancy between the original form of expression and the subsequent one, the latter prevails in the event of doubt.

7. The novation can concern, with similar effects, one clause of a contract or a resulting obligation.

8. Agreements provided for under paras. 1 and 7 of this Article are subject to Art. 36 para. 2 of this code as concerns the amount of the new contract or the new obligation.

Art. 131.

Remission

1. The creditor can extinguish the obligation already arisen or which can arise from a contract by renouncing it in one of the following ways.

2. The creditor can unequivocally communicate his release of debt to the debtor, who can within a reasonable time, declare he does not intend to avail himself of it. Voluntary restitution, by the creditor to the debtor, of the original instrument, even after partial payment of the sum owed, has the same effect as the creditor's declaration to release the debt. The remission granted to the principal debtor discharges the guarantors. The creditor's waiver of the guarantees of the obligation does not raise a presumption of remission of the debt.

3. The creditor can renounce his claim by a contract made with the debtor.

4. The creditor can also undertake to renounce his claim by means of a contract having obligatory effect followed by an abstract act renouncing the claim. In this case the nullity of the first contract does not affect the subsequent contract.

5. The contracting parties can extinguish a unilateral or bi-lateral contract by making a subsequent contract in which they mutually renounce all the rights they had or might have had from the previous contract.

6. As concerns the amount of the debt remitted, Art. 36, para. 2 of this code shall apply to all the acts provided for in the preceding paragraphs, even if remission of the debt is not due to a compromise. If the remission is gratuitous or intended gratuitously, the form of gift is not required.

Art. 132.

Compensation

1. A claim deriving from contract is extinguished by compensation when the creditor, for whatever reason, is also bound to perform an obligation to the other party. The compensation, which can also be claimed by a guarantor, must occur as follows.

2. The reciprocal debts, both being liquidated and collectable, must co-exist at the same date. They must have as object a sum of money or a quantity of fungible things of the same kind or quality. They are extinguished to the extent of their corresponding amounts.

3. Compensation takes place when a creditor claims it by a declaration which cannot be subject to a condition or a time limit. Such declaration must be communicated to the other party or made in court before the end of the first oral hearing of the case. Said declaration takes effect from the moment it is communicated to the other party or delivered in court. The other party can raise objection within reasonable time, according to the following paragraphs.

4. Compensation does not take place, and it can be refused towards the person claiming it, if either claim derives from a tort, or has been previously and with reasonable grounds contested by one party, or if the claim concerns the restitution of things deposited or loaned for use, or in case of waiver of compensation in advance, or in any other case contemplated by the law. Current accounts connected with commercial relationships are governed by usage. Consumer laws existing in the European Union and its Member States are unaffected.

5. When two reciprocal debts are contracted as payable in two different places the expenses connected with transportation to the place of payment shall be taken into account, unless the creditor opposes compensation, having a reasonable interest that performance be made at the place fixed.

6. If the conditions envisaged by para. 2 of this Article are not fulfilled, the creditor has only the right of retention towards the other party, according to Art. 108 above. If one of the credits is not liquidated, but is susceptible of easy and prompt liquidation, the court, at the creditor's instance, can suspend judgment against this latter for the debt he is responsible for, until the amount of the credit claimed in compensation is ascertained. Compensation can take place by agreement of the two parties, even if the above conditions are not fulfilled.

7. Art. 36 para. 2 applies to the declarations covered by this Article regarding the amount of the credit claimed by compensation.

Art. 133.

Merger

1. A contract-based claim is not enforceable if and during such time as the attributes of debtor and creditor are united in the same person.

2. If the attributes of creditor and debtor *in solido* are united in the same person, para.1 of this Article takes effect, to the extent of the amount due by said debtor, in respect to the other debtors. If the attributes of creditor *in solido* and debtor are united in the same person, para.1 of this Article takes effect to the extent of the amount due to said creditor. The same rules apply to indivisible obligations.

3. Merger does not operate to the prejudice of third parties and in any cases where laws in force in the European Union and its Member States exclude it in the interest of third parties.

Section 3

Limitation and forfeiture

Art. 134.

Limitation

1. In the absence of a legal prohibition, the elapsing of the time limit produces a definitive foreclosure on an inactive creditor as to the exercise of a disposable right derived from a contract, as provided by the following rules.

2. Limitation begins to run from the moment when the creditor can enforce his credit whose amount must be certain.

3. Limitation occurs when the debtor, one of his creditors or anybody who has a legitimate interest, expressly declares to the holder of the right, in court or extra-judicially, his intention to avail himself of said limitation. If this declaration is not made in court para. 2, Art. 36 above shall apply.

4. All the rights arising from a contract are extinguished by limitation after the lapse of ten years unless a different time limit is provided for as regards certain types of contract or particular legal institutions. If there has been a judgment for plaintiff, ten years is the limitation period in every case, even if a different period is provided for in this code for the right recognised by the judgment.

5. The parties can by agreement reduce the limitation period of ten years indicated in para. 4 but not the periods established for different types of contract, except for relationships involving a consumer and then only in the consumer's favour. Any other agreement intended to modify the legal regulation of limitation is null. Community rules prevail in any case.

6. Limitation is interrupted if a creditor initiates legal proceedings to enforce his rights or if he issues an extra-judicial notice for the same purpose or if the debtor acknowledges in any case his own debt. A new limitation period begins as a result of interruption.

7. Limitation is suspended: between husband and wife; between the persons subject to parental authority, guardianship or similar forms of protection and assistance, like those in the various systems, and the persons in charge thereof; between persons whose property is subject to the administration of others and those who exercise such administration until final approval of the account; and in any other situation covered by the law. Suspension can also occur by an agreement between creditor and debtor who have decided to negotiate with a view to an amicable settlement, and for the whole negotiating period. When the suspension ceases, the time of limitation begins to run again joining the time already elapsed before suspension.

8. Any other right or action provided for in this code is subject to limitation of ten years, unless a different time-limit is indicated for certain situations.

Art. 135.

Forfeiture

1. The rules on interruption and suspension of limitation do not apply to forfeiture unless otherwise provided by the rules relating to different types of contract.

2. The time limits relating to forfeiture for the issue of a declaration or the performance of an act established for different types of contract can be altered by agreement of the parties, only to the extent that said performance is not rendered excessively difficult.

Art. 136.

Computation of time limits

Time limits of limitation and forfeiture are computed according to Art. 58 above.

TITLE XI

OTHER CONTRACTUAL ANOMALIES AND REMEDIES

Section 1

Anomalies

Art. 137.

Non-existence

1. In the absence of a fact, an act, a declaration, a situation which can be externally recognized and referred to the social notion of agreement, no contract shall exist.

2. Specifically no contract exists

a) unless and until such time as there is an addressee or person capable of accepting the offer or declaration which is intended to qualify as an act of private autonomy or unless there exists a potential future person such as a

conceived child or a company before registration;

b) unless there exists an object of the offer or declaration made in order to carry out an act of private autonomy;

c) if the acceptance – apart from what is stated in Art. 16 paras. 6 and 7 – does not correspond with the offer because of the equivocal nature of the latter;

d) if the fact, act, declaration, or situation, while existing, are incomplete to such a point that they cannot be legally valid either as a different and reduced contractual scheme or in expectation of other elements that may possibly supervene.

3. If there is doubt, the contract shall be considered null rather than non-existent.

Art. 138.

Consequences of non-existence

1. Non-existence produces the absolute lack of any contractual effect apart from the obligations to restitution in Art. 160 and responsibility in tort according to Art. 161.

2. The situation envisaged in paras. 1 and 2 of Art. 137 above occurs in the mere presence of the relevant conditions. No regularisation nor corrective is possible and any one who has an interest can take account of this without any limitation running. In order to avail himself of this situation, said person can also make known to the other party the situation of non-existence, by sending the latter a declaration containing all the necessary indications with regard to such situation; he can also apply for a judicial finding. This action cannot be brought until six (three) months after receipt of said declaration, to enable the parties to settle the question out of court. The right of applying to the court for the urgent reliefs of Art. 172 below is unaffected.

Art. 139.

Terms deemed unwritten

The provisions of Art. 138 paras. 1 and 2 shall apply even when a rule states that a clause or expression in a contract is deemed not written.

Art. 140.

Nullity

1. Unless the law states otherwise, a contract is null

a) if it is contrary to public policy or morals or a mandatory rule adopted for the protection of general interest or situations of primary importance for society;

b) if it is contrary to any other applicable mandatory rule;

c) if any of the essential elements indicated in Art. 5, paras. 3 and 4 above are lacking;

d) in the other cases indicated in this code and in the applicable European Union and Member States' legislation;

e) in all other cases where this code or an applicable law states that some element is necessary under penalty of nullity or for an act to be valid or when equivalent expressions exist.

2. Para. 1 of this Article also applies to the single clause of a contract which can be deemed valid as to the remaining part, in accordance with Art. 144.

3. If there is conflict between European Union rules and those of its Member States, the latter shall prevail if they are of national social utility and especially if they are in accordance with basic constitutional rules of any of the States and concerning equality, social solidarity and protection of human rights.

4. In the case of a penal prohibition concerning the contract as such, i.e. punishing the behaviour of both parties, in relation to it the contract is null. Therefore the contract is null whose conclusion is forbidden in the absence of a previous specific authorization to said conclusion by a public body.

5. If performance of a valid contract forms part of an illegal activity, the contract is not deemed null for the party not involved in said activity. This party can request performance of the obligation due to him and have recourse to the remedies provided for non-performance, defective performance, or delay.

6. Subject to Art. 137, para. 2, d), a contract lacking one or other required element is not null if the law permits the formation of the contract through a succession of acts and if the already subsisting elements are legally sufficient with reference to the supervening of the others which are necessary for completion of the contract.

Art. 141.

Effects of nullity of contract

1. Except the provisions of the following Articles, nullity renders a contract totally without contractual effect *ab initio*, apart from the obligation to restitution under Art. 160 and possible responsibility in tort under Art. 161.

2. For nullity to occur it is sufficient that the conditions for it be present but the party who intends to avail himself of it must let the other person know said nullity by sending him a declaration, before the expiry of ten years after the contract was made, giving all necessary indications. To this declaration Art. 21 and Art. 36 para. 2 shall apply. Before the matured time limit, said party can apply for judicial finding on the subject, but action can be brought only after six (three) months after receipt of the notice, in order to enable the parties to settle the question out of court. If the contract has not yet been carried out, limitation concerning a plea of nullity occurs at the same time as for the action for specific performance of the contract.

3. If the situation is urgent, the right to request the court for the measures of Art. 172 is unaffected.

Art. 142.

Supervening nullity

1. If independently of the will of the parties and because of some event subsequent to the making of the contract an essential element to its validity goes missing, the ensuing nullity is not retroactive.

2. Except as provided for in the preceding paragraph, all rules regarding nullity apply to supervening nullity.

Art. 143.

Validation of null contract

1. A contract null for the reasons stated in Art. 140, para. 1, a) cannot be validated, treated as partially null, converted or rectified in any way.

2. Contracts null for reasons other than those indicated in para. 1 of this Article can be validated. Validation is made by an act of the contracting parties who reproduce the null contract but remove the cause of nullity and undertake to make due restitutions and perform their respective obligations, as would have been the case if the contract had been valid *ab initio*. This act is subject to Art. 36, para. 2.

3. In order to make this validation the parties can proceed according to Art. 12 ff.

4. The provisions of this Article apply also to single clauses of an otherwise valid contract, as provided for in Art. 144 below.

Art. 144.

Partial nullity

1. Excepting as provided for in Art. 143, para. 1, if a single clause or part of a contract is null, the rest of the contract remains valid, provided this part can autonomously exist and reasonably realize the purpose of the parties.

2. In connected or multilateral contracts, when the nullity affects only one contract or the obligation of only one of the parties, the principle of the preceding paragraph shall apply, unless the null contract or the obligation of one party is considered essential to the bargain as a whole.

3. The rule of para. 1 does not apply if a different intention emerges from the contract or the circumstances.

4. For partial nullity to occur it is sufficient that the conditions for it be present; but the party who intends to avail himself of said nullity must send a written declaration to the other party before the expiry of limitation of three years after the contract was made, giving all necessary indications. Art. 21 and Art. 36 para. 2 shall apply. Before the matured time limit, said party can apply for judicial finding on the subject; but action can be brought only after six (three) months after receipt of said declaration, in order to enable the parties to settle the question out of court. If the situation is urgent, the right nevertheless of requesting the court for the measures of Art. 172 below is unaffected.

5. Partial nullity does not occur if, applying mandatory rule or in virtue of a conversion as in Art. 145, the null clause or part is substituted, by a different clause or part.

Art. 145.

Conversion of null contract

1. Apart from the provisions of Art. 40, para. 2 and Art. 143, para 1, a null contract produces the effects of a different valid contract, of which it has the

requisites of substance and form, whenever the latter enables the objective sought by the parties to be reasonably realized.

2. This rule in para. 1 applies also to single clauses of a contract.

3. Conversion cannot take place if the contract or the circumstances reveal a different intention of the parties.

4. For conversion to occur it is sufficient that the conditions for it be present; but the party who intends to avail himself of the conversion must convey a written declaration to the other person before the expiry of limitation of three years after the contract was made, giving all necessary indications. Art. 21 and Art. 36 para. 2 shall apply. Before the matured time limit, said party can apply for judicial finding on the subject; but action can be brought only after six (three) months after receipt of said declaration, in order to enable the parties to settle the question out of court. If the situation is urgent, the right to apply to the court for the measures of Art. 172 is unaffected.

5. The rules in this Article apply also to an annulled contract. As to an ineffective contract, the provisions of Art. 153, para. 5 shall be applied.

Art 146.

Annulability

1. Annulability occurs in the cases indicated in para. 2 and only the party legally entitled can avail himself of it.

2. The contract is annulable

a) in the case of incapacity of one of the parties, as in Art. 150;

b) in the case of defects of consent (Art. 151, 152);

c) in the cases covered by Articles 67 and 68;

d) in any other case expressly covered by the law.

3. The present Article also applies to single clauses of the contract or to engagement of single parties to a multilateral contract when that clause or that engagement can autonomously exist as regards the bargain as a whole.

Art. 147.

Effects of annulment

1. Annulment has retroactive effect destroying the contract from the moment of its conclusion and the parties are bound to make reciprocal restitutions according to Art. 160.

2. The provision of para. 1 does not apply if restitution is impossible or too onerous for the party bound to make it. In this case the annulment takes effect from the moment when the declaration is received according to Art. 148, and the rule at Art. 160 para. 4 shall be applied.

3. Annulment of the contract enables the aggrieved party to recover damages according to Art. 162 within the limits fixed by Art. 6 para. 4 for the loss caused by the party who by his act caused annulment, according to Art. 162.

Art. 148.

Modes and time limits of annulment

1. In order to annul a contract the entitled party – or if incapable, his legal representative – must address a declaration to the other party giving all necessary indications. Art. 21 and Art. 36 para. 2 shall be applied to said declaration.

2. No action can be brought until six (three) months after receipt of the declaration in order to enable the parties to settle the question out of court. If the situation is urgent, the right to apply for measures prescribed by Art. 172 is unaffected.

3. A party unable to make the restitution required by Art. 147 paras. 1 and 2 cannot annul the contract, except to the extent provided for in Art. 150, para. 4 for the benefit of persons incapable.

4. The other party or anyone having an interest can give notice to the entitled party - or if incapable, his legal representative - to declare within a period of not less than sixty days whether or not he intends to annul the contract. After the expiry in vain of this time limit the entitled party or the legal representative are deemed to have abandoned annulment. The notice is covered by the provisions of Articles 21 and 36, para. 2.

5. Annulment of the contract is subject to a three-year limitation starting from the day in which incapacity or threats ceased or from when the mistake was discovered; in all other cases the limitation runs from making the contract. However, the declaration of para. 1 of this Article can be made and raised as a defence by the person requested to perform the contract even after said period of three years.

Art. 149.

Preservation and validation of annullable contract

1. Annulment of contract shall not occur if, within the time limit indicated in the declaration of the party proceeding to it (or within reasonable time if the limit is not stated), the other party binds himself either to perform in a manner which conforms to the substance and characteristics of the contract the first contracting party intended to conclude or to perform obligations agreed by the parties, so that a substantially similar result or acceptable to the interested party can be assured.

2. An annullable contract can be validated and thus remains confirmed in all its effects if the entitled contracting party or his legal representative declares, respecting the provision of Art. 36, para. 2, his intention not to proceed with annulment or voluntarily perform the contract. Validation requires that said contracting party – or if incapable his legal representative – is in a condition to validly conclude a contract and is fully aware of the reason for annullability.

Art. 150.

Contract made by incapable person

1. As indicated in Art. 5, para. 2, a contract made by
 - a) an unemancipated minor;

b) a person declared legally incapable of contracting (and in the absence of his representative or of a person charged with his legal assistance);

c) a person who is, even temporarily, incapable of understanding or intending;

d) a person whose physical incapacity prevents communication of his will, such as a deaf mute who cannot write,

is annulable, as provided for by Art. 146 ff., unless said contract has only produced benefits for the person lacking capacity.

2. The contract is not annulable if a minor, by subterfuge, has concealed his minority or if the other contracting party was in good faith because the mental state of incapacity was not recognizable or the declared incapacity was not easily ascertainable.

3. Furthermore a contract made by an incapable person is not annulable, in the case contemplated by Art. 5, para. 1, if he has obtained the permits required by his national law and if the act is one of normal daily life involving small expense and performed with money or means deriving from work open to the incapable person or put lawfully at his free disposition.

4. If the contract is annulled, the incapable person is bound to make restitution of what he has received, according to Art. 160, para. 8, to the extent to which it has benefited him.

5. Third party guarantors of the contract made by an incapable person are liable to the other contracting party under the terms of the contract even if it is annulled, while maintaining their right to claim, if that is the case, against the incapable person or his legal representative.

Art. 151.

Contract defective by mistake

1. Unilateral mistake is cause for annulment of a contract under the following conditions

a) when the mistake concerns a basic economic or legal element or aspect of the contract and is decisive of consent;

b) when the mistake arises through the fraudulent representation or unjustified reticence of the other party or in any case, if said party realises the existence of mistake and its importance in determining the contract or should have realised it by using ordinary care.

2. If the fraudulent representation originates from a third person and is known to the party who took advantage therefrom, the contract is annulable.

3. If the conditions of para. 1 do not occur, and the mistake does not depend on the gross negligence of the mistaken party, said person can annul the contract only if he has no interest whatever in it and if he indemnifies the other party for the loss suffered for believing in the validity of the contract and in its punctual performance.

4. If the conditions of para. 1 b), occur, mistake does not render the contract annulable but permits the mistaken party to claim a rectification of the extent of performance due or compensation for loss when

a) the mistake was merely one of calculation, unless its magnitude indicates that it was decisive of consent,

b) the mistake concerns a secondary element or has had no decisive effect on consent, i.e. the contract would have been nevertheless made but with different terms.

5. The mistaken party cannot annul the contract if this is contrary to good faith. If said party nevertheless insists on annulment, even after a reasoned reply from the other party, the court, after evaluation of the circumstances, can order the mistaken party to pay to the other party an equitable compensation.

6. The above provisions apply even if the mistake occurs in the declaration or when such declaration is transmitted inexactly to the other party by the person or office charged with it.

7. Either party can annul the contract if both parties have made the same mistake, concerning: determining circumstances, though not expressly mentioned, which both parties deemed existent when making the contract; or the objective impossibility of performance; or the forecast as to the realisation of a certain event, though not expressly mentioned, which is of decisive importance in the contractual context.

Art. 152.

Contract defective by threats

1. Apart from what is provided for in Article 30, para. 3, a contract is annullable if it is made under intimidation or serious threats - which would impress any normal person - directed at the contracting party or his relatives by the other party, or also by a third person if it was known by the other party who took benefit from it.

2. A threat to enforce a right can be cause for annulment only when it is aimed at obtaining unjust benefits.

3. Excepting the provisions in Art. 156, reverential fear is cause for annulment of a contract only if it results from the circumstances that the person who exerted his influence on the other party knew of its decisive effect and took unjust benefits from it.

Art. 153.

Ineffectiveness

1. A valid contract is ineffective – i.e. it temporarily or permanently fails to have the legal effects at which it was aimed - either by agreement of the parties or by law, according to the following paragraphs.

2. Ineffectiveness by agreement of the parties, occurs in:

a) a simulated contract according to Art. 155, excepted what is provided for therein,

b) a contract with suspensive or resolutive conditions or time limits as to the beginning or the end, according to Art. 49 ff.,

c) a contract whose effects the parties have decided must be dependent on authorisation by a public authority, the approval or co-operation of a third party, or a similar condition, before their occurrence.

3. A contract which is ineffective by agreement of the parties becomes immediately effective on the agreed revocation of the simulated agreement or of

the conditions or of time-limits or of the preliminary conditions indicated at preceding para. c).

4. Ineffectiveness by law, apart from what is provided for in Art. 140, paras. 1, 4, and 6, occurs in the cases of:

a) a contract or declaration made in good faith without the parties being aware that it is an act with legal effects,

b) a contract for which the law requires, for it to be effective and under penalty of nullity, the issue of a permit from a public authority or approval from an individual or any similar preliminary condition before the permission, approval or condition obtain,

c) a contract, regarding which this code or the laws of the Community or European Union Member States provide that it is to be “without effect”, “or has no effect”, or use other expressions with similar meaning.

5. A contract which is definitively ineffective, according to para. 4, b) and c) of this Article, can be validated, considered only partially ineffective, or converted, according to Arts. 143, 144 and 145.

6. For ineffectiveness to exist it is sufficient that the conditions for it are present; but in the case of para. 4, a) and c), of this Article anyone who has an interest in it and intends to avail himself of said ineffectiveness must address a declaration to the person who must take account of it before the expiry of limitation of three years, giving all necessary indications. Before the matured time limit, said party can also apply for judicial finding on the subject; but action can be brought only after six (three) months after receipt of said declaration in order to enable the parties to settle the question out of court. The right to apply to the court, if the situation is urgent, for the measures of Art. 172, is unaffected.

Art. 154.

Non-opposability

1. The following cannot be opposed to third parties or certain third parties:

a) the underlying contract in case of simulation as contemplated in Art. 155, except for what is provided therein;

b) apart from the provisions of Art. 140, para. 1, a), contracts concluded either in violation of a ban aimed at protecting certain people or failing to observe provisions about form or publicity made to protect third parties,

c) contracts drawn up between two persons with the intent - known to both parties - to defraud a creditor of one of them; in which case the creditor can retroactively assert said non-opposability by conveying notice to the two contracting parties before the expiry of limitation of three years after the contract was made.

d) the situations and fact relationships underlying null contracts or created in order to put them into effect;

e) contracts or acts referred to in this code or in the applicable laws of the Community or European Union Member States in terms which state that they are not opposable to third parties or certain third parties or using any analogous expressions.

2. For non-opposability to exist it is sufficient that the conditions for it are present; but any interested party to avail himself of it must convey a

declaration giving all necessary indications to the person who must take note of it before the expiry of limitation of three years after the contract was made. Before that time limit, said party can apply for judicial determination on the subject; but action can be brought only after six (three) months after receipt of said notice, in order to enable the parties to settle the question out of court. If the situation is urgent, the power nevertheless remains unaffected to apply to the court for the measures of Art. 172.

Art. 155.

Simulation and mental reserve

1. Unless otherwise provided by any applicable laws of the Community or the Member States of the European Union, if the parties conclude a simulated contract, i.e. one which is such only in appearance, said contract is without effect; and if the parties agree to make a different, underlying contract, this latter is effective between them provided all the necessary requisites of substance and form are present and provided the simulation was not made in fraud of a creditor or of the law. In the last case, the simulated and the underlying contract are both null.

2. Third parties, in addition to objecting the non-opposability of the underlying contract, can declare they avail themselves of it according to their legitimate interests and there is no limit to proofs adducible for this purpose.

3. In order to avail themselves of an underlying contract, after having given proper written notice with the necessary indications, to which notice the provisions of Articles 21 and 36, para. 2, apply, neither party can have recourse to testimonial evidence but only to documentary evidence. Testimonial evidence is admissible only to prove that the underlying contract is illegal or in any case null.

4. If one party provides the other with a declaration which differs from the intent of the former, the declaration binds the issuer as far as the receiver can understand it in good faith, unless the receiver is aware of mental reserve on the part of the other party; in which case the declaration has on the receiver and third parties the effects of a simulated act, in accordance with the above paras.

Section 2

Remedies

Art. 156.

Rescission for lesion

1. Apart from the provisions on usury in the applicable laws of the Community or European Union Member States, in the case provided for at Art. 30, para. 3, the party who intends to rescind the contract must convey written notice to the other party giving all necessary indications, to which declaration Art. 21 and Art. 36, para. 2, shall apply.

2. No action can be brought until after six (three) months have elapsed from receipt of said notice, in order to enable the parties to settle the question out of court. The power nevertheless remains unaffected to apply to the court for the urgent measures of Art. 172.

3. The other party or anyone concerned can intimate to the entitled party – or if incapable his legal representative – to declare within a period of not less than sixty days whether he intends to proceed with rescission of the contract. This time limit having elapsed in vain, the entitled party or his legal representative are deemed to all purposes to have abandoned rescission. The above declaration is covered by the provisions of Articles 21 and 36, para. 2.

4. Rescission of the contract is subject to limitation of one year from the formation of the contract. The defence of rescindability is subject to the same limitation.

5. One party's intentional or in any case conscious profiting from the other party's inferiority or inexperience can result from the circumstances; but said intention or consciousness must be excluded in aleatory contracts and when the other party has expressed his intention to pay a high price because of his affection for the object of the contract or when relationships between the parties lead to the deduction that they intended to form a mixed contract, both gratuitous and remunerative.

6. A rescindable contract cannot be validated but rescission does not occur if an equitable basis is restored by agreement between the parties or, by judicial ruling at the request of one of them.

Art. 157.

Re-negotiation of contract

1. If extraordinary unforeseeable events occur, such as those in Art. 97 para. 1, the party who intends to avail himself of the right provided for therein must communicate to the other party a declaration with all necessary information specifying – under penalty of nullity – the different conditions that he proposes in order to keep the contract alive. The declaration is covered by the provisions of Articles 21 and 36, para. 2.

2. No action can be brought until after six (three) months have elapsed from receipt of said declaration, in order to enable the parties to settle the question out of court. If the situation is urgent, the right nevertheless is unaffected to apply to the court for the measures of Art. 172.

3. If the event covered by para. 1 occurs, the other party can intimate, to the party entitled to exercise the power there set out, notice to declare within a period of not less than sixty days whether he intends to claim renegotiation of the contract. After this time limit has elapsed in vain the party entitled is deemed to have abandoned renegotiation. The intimation is covered by the provisions of Articles 21 and 36, para. 2.

4. If the parties are unable to agree within the time limit at para. 2, the person entitled must – within the subsequent sixty days on pain of forfeiture – present said request to the court according to the procedure applicable in the place where the contract is to be performed.

5. After evaluating the circumstances and taking into consideration the interests and requests of the parties, the court, with possible expert assistance, can alter or dissolve the contract as a whole or in its non-performed part and, if required, and it is the case, order restitution and award damages for loss.

Art. 158.

Judicial upholding or denial of contract dissolution

1. The notices provided for in Art. 114, paras. 1 and 2, can also be given to the other party by means of an application to the court in proceedings in which restitution and damages can be claimed.

2. Apart from the case in the preceding paragraph, no action can be brought until after six (three) months have elapsed from receipt of the notices mentioned in Art. 114, paras. 1 and 2, in order to enable the parties to settle the controversy out of court. If the situation is urgent, the right nevertheless remains unaffected to apply to the court for the provisions of Art. 172.

3. If the right to dissolution of a contract is to be examined by the court, this latter can exercise the power to evaluate and decide according to Art. 92 ff. In particular, the court can:

a) simply confirm dissolution following the creditor's declaration and it can also order the other party to return what he has received and to pay compensation for loss as provided for in Art. 162 ff.;

b) deny dissolution of the contract if the conditions in title VIII are not met, and declare, if that is the case, that the debtor can perform the obligation and the creditor must accept performance,

c) in accordance with the above rules, grant the debtor delay of the time of performance, staggering of payments, reasonable time to eliminate defects in the thing delivered or to demolish and restore to its former state what was done unlawfully, or to deliver a different thing or to make a different performance, or to substitute things or materials used, or to repair damage done, or to send technicians to ensure correct functioning of the thing delivered, or to grant the debtor other benefits and it can also evaluate under the above provisions and declare that the contract is deemed dissolved only if the debtor fails to avail himself of these benefits within the time limit or fails to do so adequately. In all the above cases the court can award damages for loss.

d) In addition, after full evaluation of the circumstances, taking into account the reasons for non-performance and the interests of the parties and applying the principle of good faith, the court can declare partial dissolution or specify that the debtor is not liable to pay any damages for loss, or order the debtor to pay damages without declaring the contract dissolved, in the interest of the creditor.

Art. 159.

Withdrawal by consumer

1. In the case at Art. 9, the unsatisfied consumer or one who has changed his mind has the right to withdraw from repudiate the contract or his contractual offer by sending to the other party or the person who negotiated the contract written notice in which the consumer can merely express his intention to withdraw from the contract or offer.

2. Said notice, covered by Art. 21, must be sent in the required manner and particularly within the time limits laid down in Community provisions according to whether the consumer has or has not been fully informed of his

right to withdraw. The time limits run from the dates indicated in said Community provisions.

3. As soon as the notice at para. 1 has been or is deemed to have been known by the addressee, the parties are discharged from their respective obligations, except as provided for in para. 4 of this Article, and always saving the consumer's right to be compensated for the damage caused by the thing delivered according to Art. 162 ff. Other Community rules or those existing in Member States of the European Union are unaffected providing specific sanctions on the dealer who fails to inform the consumer completely and precisely about his right to withdraw from the contract.

4. The consumer must return to the other party the things delivered in fulfilment of the contract from which he has withdrawn, as provided for in Community rules. The other party must follow Community rules on time limits and modes of returning to the consumer any moneys paid.

5. A consumer cannot waive his right to withdraw from the contract or his contractual offer and any agreement contrary to the provisions of this Article and Art. 9 is null according to Art. 140, para 1, a).

Art. 160.

Restitution

1. Apart from the provisions of para. 9 below, the parties benefiting from performance of a non-existent, null, annulled, ineffective, dissolved, rescinded contract, or one withdrawn from, are bound mutually to return what they have received, as stated in this Article and a party can refuse to do so if the other party is unable or does not offer to return as above.

2. The request for restitution shall be conveyed to the bound party by serving notice, with necessary indications according to Art. 21 and Art. 36, para. 2. No action can be brought until six (three) months after receipt of the notice, in order to enable the parties to settle the controversy out of court. The right of applying to the court for the urgent reliefs of Art. 172 is unaffected.

3. The restitution must normally be in kind unless this is materially or legally impossible or excessively onerous for the party who is to perform, taking into account the interest of the other party, or unless specific restitution is not convenient for the latter because of the state of conservation of the thing to be returned. In these cases, restitution shall be made by payment to the other party of a reasonably equivalent sum, the amount of which, failing agreement between the parties, shall be fixed by the court, the possibility also being given of an equitable compensation between the obligations to return to which the parties are reciprocally bound.

4. Even if restitution in kind is possible, the party entitled to it still has the right to choose between that form of restitution and a sum of money, calculated according to para. 3 above, unless the option is contrary to good faith.

5. If money is to be returned, interest must be added and, if that is the case, an additional sum for revaluation, calculating from the day when the payment was made, if the receiving party was in bad faith, or from the day restitution was requested, if in good faith. If a thing is to be returned, also a sum of money shall be paid for its use and depreciation – to which a sum shall be

added for interest and, if suitable, an additional sum for revaluation – which, failing agreement between the parties, shall be fixed by the court.

6. Interest is due according to Art. 169, para. 3. Revaluation shall be calculated according to Art. 169, para. 4.

7. If performance originally made was a lawful activity from which the other party benefitted, the party who performed has the right to equitable remuneration which, failing agreement between the parties, shall be fixed by the court, the possibility being given of an equitable compensation as provided for in para. 3 above.

8. The incapable person is bound to return what he has received within the limits indicated in Art. 150, para. 4.

9. Parties who have performed contractual duties which constitute offences liable to prosecution or which are against morality or public policy – but not against economic public policy – and the party who has made performance for a purpose which even only as to himself presents those characteristics, have no right to any restitution under this Article. This rule shall not apply to performance by incapable persons, by persons who without fault were unaware of committing an immoral act or one with the above characteristics, or by persons who performed under threat. Community provisions and those of European Member States, which provide in the above cases for confiscation of what has been delivered or made in order to perform the contract, are unaffected.

Art. 161.

Protection of third parties

1. In all cases of non-existence, nullity, annulment, ineffectiveness, non-opposability, rescission, withdrawal and dissolution, each party is liable for any damage caused through his conduct to third parties who have in good faith relied on the appearance of the contract, if this latter produces a different effect or no effect.

2. Compensation for loss is governed by the provisions of Art. 162 ff., to the extent compatible.

Art. 162.

Contractual liability: conditions

1. The debtor who does not exactly render performance is liable for that loss which must be reasonably deemed the consequence of the omitted, delayed or defective performance. Excepting what is provided for at para. 3 of this Article, the debtor is exempted from liability if he proves that the non-performance, defective performance or delay was not attributable to his conduct but to an external unforeseeable and irresistible cause.

2. The principle enunciated in the preceding paragraph also applies to any other fact or situation considered a source of liability for damages in the provisions of this code.

3. In the case contemplated in Art. 75, para. 3, first part, the debtor is not liable for damages if he proves he acted with appropriate care in the specific case, as indicated in the said provision, and if he provides the proof required by Art. 94, para. 3. The person who has rendered a professional performance – with

the informed consent of the aggrieved party, or his relatives, or the person charged with his legal representation or assistance – in a field of scientific experimentation which has not yet reached conclusive results is liable only if his conduct was grossly negligent.

4. Unless the debtor acted with fraud or negligence, compensation is limited to the loss for which – according to the text of the contract, the circumstances, good faith, and usage – it must be reasonably expected that a normally prudent person would have accepted responsibility at the time the obligation arose.

5. Unless otherwise agreed, the debtor is responsible in accordance with para. 1 of this Article, even if he has availed himself of the services of auxiliaries or third persons in performing the contract, always safeguarding, if that is the case, his right to claim from these latter.

6. Unless otherwise agreed, in the event of defective performance, non-performance or delay in a contract with several debtors, Art. 88 shall apply with regard to compensation of the resulting loss.

7. The existence of loss must be proved and its amount assessed or else quantifiable according to Art. 168, para. 1.

Art. 163.

Patrimonial loss: recoverable damages

1. Damages are recoverable for:

a) the loss sustained, and

b) the profits lost which the creditor could reasonably have expected in the normal course of events given the particular circumstances and measures taken by him. Profits lost shall include loss of the chance of a gain which it can be deemed with reasonable certainty would occur and which must be evaluated with regard to the time of non-performance or delay.

2. Indirect patrimonial loss sustained by anybody in credit with the victim of the damage can be compensated only in case of death or grievous bodily harm suffered by this latter.

Art. 164.

Non-patrimonial loss: recoverable damages

1. Damages are recoverable in cases of:

a) serious psychic disturbance or emotional shock caused by bodily harm or injury to the feelings, also of a legal person, or to the memory of a deceased relative;

b) physical pain as a condition of bodily suffering, even if without pathological, organic or functional change,

c) injuries to health and in the other cases indicated in the relevant provisions.

2. Indirect non-patrimonial loss can be compensated only if suffered by the close relatives of the victim.

Art. 165.

Future and possible damage

1. Future damage is reparable and calculable according to the provisions of Art. 168, para. 1, if it is reasonably certain that the non-performance or delay have not exhausted their consequences unless the victim of the prejudice reserves the right to make a claim, even separately, after the future damage occurs.

2. Possible damage, i.e. which is feared likely to occur in the future does not give right to compensation before the event but the court can take precautionary measures according to Art. 172.

Art. 166.

Function and modes of reparation

1. Apart from the subsequent mitigating provisions, reparation must specifically aim to eliminate the harmful consequences of non-performance, defective performance, delay, or other situations in which, according to the provisions of the present code, reparation is due. Said reparation shall create, as a rule, the fact situation which would have existed if the afore-mentioned situations had not occurred.

2. Thus, if possible, reparation shall take the form of specific performance or specific redress supplemented, if necessary, by a monetary indemnity. If the entire or partial restoring to the former state is not possible or is too onerous for the debtor, considering the interest of the creditor, and in any case if the creditor so demands, suitable monetary compensation shall be paid.

3. Specifically, if not otherwise provided for in another rule of this code or if not otherwise required by the actual situation, the result of reparation must provide the creditor or, in the cases provided for, the third party, with

a) satisfaction of his interest (positive) in that the contract be punctually and exactly performed, also taking into account the expenses and costs incurred by him and which would have been covered by performance if the prejudice comes from non-performance, delayed or defective performance;

b) satisfaction of his interest (negative) in that the contract had not been made or the precontractual negotiation had not taken place, in the other cases, and particularly when damage comes from the non-existence, nullity, annulment, ineffectiveness, rescission, non-conclusion of the contract and in similar cases.

4. The amount of damages however must be calculated considering the benefits which in consequence of the contract have already been provided without reward by the debtor for the creditor who cannot nor intends to disclaim said benefits.

5. All provisions in this code which provide for specific manners of reparation in particular circumstances are unaffected.

Art. 167.

Contributory conduct of creditor

1. No compensation is due for damage which would not have occurred if the creditor had adopted the necessary measures he should have taken before the damage occurred.

2. After the occurrence of the damage, no compensation is due for *post hoc* increase in damage which the creditor could have prevented by adopting necessary measures.

3. If an act or an omission of the creditor has contributed to causing the damage, compensation is reduced according to the extent of the resulting consequences.

4. Failure by the creditor to warn the debtor of specific risks, inherent in performance, which the former knew or should have known can be valued according to para. 3.

Art. 168.

Equitable measure of damages

1. If loss is proved or, in any case, not disputed but it is impossible or exceptionally difficult even with expert help to assess its precise amount, the loss can be equitably estimated on the basis of partial proofs and reliable elements supplied by the parties, considering all the circumstances of the case having recourse to presumptions and to criteria of probability and likelihood to be applied with particular care.

2. Considering the behaviour, interest and economic situation of the creditor, the court can equitably limit the amount of damages:

a) if complete compensation produces disproportionate results or creates manifestly unsustainable consequences for the debtor in view of his economic situation, and if the non-performance, defective or delayed performance was not due to bad faith,

b) in case of the debtor's minor negligence, particularly in contracts where no reward for the debtor's performance is provided.

Art. 169.

Damages in monetary obligations

1. Except for particular rules concerning commercial or insurance relationships, the debtor of a monetary obligation in cases of non-performance, defective or delayed performance, shall compensate the creditor without the latter having to prove the existence of damage, and the former cannot invoke the exemption from liability provided for in Art. 162, para.1.

2. Such compensation is by payment of interest due in the amount at para 3 of this Article, increased, where appropriate, by a sum for revaluation according to Art. 86, para. 5.

3. Unless otherwise agreed, interest is due at the official rate, published periodically by the European Central Bank, and relative to the average return rate of money for private individuals and the average cost of borrowing for businesses.

4. Unless otherwise agreed, revaluation shall be calculated on the basis of the most recent Cost of Living Index, periodically published by Eurostat.

5. All the above sums of money produce in their turn additional interest and can be revalued using the same criteria.

6. Any different agreement controls.

Art. 170.

Penal clause

1. Apart from the provision in para. 5, if the parties, when drawing up the contract, have agreed that in the event of non-performance, inexact or delayed performance, a specified penalty shall be due from the debtor, this shall be considered the reparation due from the debtor in the above situations, unless compensation was agreed on for additional loss.

2. The above penalty is due without the creditor having to prove the existence and amount of damage.

3. The creditor can demand both the principal performance and the penalty only if the latter has been stipulated for mere delay.

4. The penalty can be equitably reduced by the court, if the debtor has made partial performance which has not been refused by the creditor or if the amount of the penalty is clearly excessive, always taking into account the interest that the creditor had in the performance.

5. In all consumer contracts, penal clauses charged to the consumer in the standard conditions are without effect.

Art. 171.

Actionable remedies and their joinder

1. After requesting compensation, giving necessary indications, and after the six (three) months (for the same reasons given in para. 2 of Art. 160), counting from receipt of said request, have elapsed – whilst retaining the right to apply to the court for the urgent measures contemplated in Art. 172 – the aggrieved creditor has the right to establish judicial or arbitration proceedings for the ascertainment and the assessment of recoverable loss suffered by him, in order to recover, if such is the case, damages from the debtor. The creditor equally has the right to request such ascertainment, regardless of the possibility or suitability of obtaining compensation, provided this is for lawful purposes, among which the availability of said findings in accordance with Art. 132, and as indicators for the evaluation of the size of his estate, not only for tax purposes.

2. Not only in the case covered by Art. 165, para. 1, can the aggrieved creditor apply to the court or arbitrators in order to have the mere existence of loss ascertained, leaving its assessment to a later judgement or arbitration.

3. In addition to the specific redress provided for in Art. 166, para. 2, the various remedies are cumulative so that the reparation shall entirely fulfil its purpose, provided the cumulation does not benefit the victim beyond the prejudice suffered nor disadvantage the debtor beyond what he can bear.

Art. 172.

Conservation measures and summary remedies

1. In the situations specified in this code and in all cases where the rights or reasonably justified expectations of one of the parties, without his responsibility, are about to be or have been threatened, or are jeopardized or hindered by acts, omissions or harmful facts which have already occurred or may reasonably be expected to occur, the court, at said party's instance, may make the

following enforceable orders, in accordance with procedural rules of the place where such orders are made:

a) prohibitive injunction, by which it orders the other party to cease an act or omission undertaken or feared. The court can, should the case arise, also order said party to provide adequate security for the damage already caused or feared, and fix a time limit within which the order shall be carried out; it can in addition, if necessary, subordinate compliance with the order to the furnishing of a guarantee by the applicant,

b) mandatory injunction, by which he orders the other party specific performance of an obligation to deliver or to do something. The court can, should the case arise, also order said party to provide adequate security for the damage already caused or feared, and fix a time limit within which the order shall be carried out; it can in addition, if necessary, subordinate compliance with the order to the furnishing of a guarantee by the applicant.

2. Saving compliance with the applicable Community and national provisions, the application must be made to the competent court for urgent remedies at the place where the injunctions are to be carried out.

Art. 173.

Arbitration

1. Apart from the provisions of para. 4 below, in the situations where this code provides for judicial intervention, either party can apply for arbitration by three arbitrators, as provided for in this Article, the expenses of which arbitration shall be governed by provisions in force in the place where said procedure occurs.

2. Apart from the applicable Community and national rules, and unless otherwise agreed by the parties, arbitration shall occur in the place where the court sits who would otherwise handle the case, and in order to establish it, the party taking the initiative shall convey written notice to the other party giving all necessary indications and stating that he intends to submit the controversy – already raised as provided for in the relevant provisions – to arbitration, giving the name of his arbitrator and inviting the other party to give him written notice of the name of the other party's arbitrator within a time-limit of not less than thirty days. If the other party fails to nominate his arbitrator within said time limit, the first party can apply to the court having jurisdiction, for the appointment of an arbitrator for the other party, following the law of the European Member State in which arbitration is to take place. In the absence of specific provisions on the subject, application can be made to the president of the court of second instance sitting in the place where arbitration is to occur. The third arbitrator is chosen by agreement of the two chosen arbitrators or, failing agreement, by the above-mentioned court, on application of said arbitrators or one of the parties. The provisions of Art. 21 and Art. 36, para 2, shall apply to the notices mentioned in this paragraph.

3. If the attempted conciliation of the parties does not succeed, the controversy must be settled, unless otherwise agreed by the parties, on the basis of the provisions of this code and any others applicable, by a written majority award issued by the arbitrators not more than six months after nomination of the

last arbitrator. The award is effective under Art. 42 and, as soon as issued, enables the orders in Art. 172 to be made.

4. This Article does not apply:

a) if mandatory provisions state that the controversy cannot be settled by arbitration;

b) if it is not a matter of deciding a controversy, but of granting prohibitive or mandatory injunction, fixing or extending a time limit, authorizing a deposit or adopting similar measures. In all these cases Art. 172 shall apply;

c) if arbitration procedure is excluded by the contract, or a different arbitration procedure is provided for;

d) when the controversy has already been brought before a court.