

**EUROPEAN CONTRACT CODE**  
(ENGLISH VERSION)

**BOOK TWO**

Chapter I  
**SALE<sup>(\*)</sup>**

Section 1  
**PRELIMINARY PROVISIONS**

Art. 174

*Definition*

1. Sale is the contract by which the seller binds himself to transfer or does transfer ownership of something or a right over it to the buyer who in turn binds himself to pay or does pay the seller an equivalent in money subject to the usual terms as provided by Art. 86, para. 1 and 2<sup>1</sup>. There is also a sale when the seller by agreement with the buyer binds himself to transfer or does transfer the ownership of something to a third party.

2. Apart from the provisions of Art. 176, Arts. 35, para. 2<sup>2</sup> and 111, para. 2, e)<sup>3</sup>, apply to the preliminary contract of sale.

Art. 175

*Transfer of ownership*

1. The transfer of ownership of immovables and registered moveable goods, which are sold, continues to be governed in the member states of the

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<sup>(\*)</sup> Translated by Professor Peter Stein, University of Cambridge, and Professor Paolisa Nebbia, University of Naples – Suor Orsola Benincasa.

<sup>1</sup> “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”.

<sup>2</sup> “The preceding paragraph [“Contracts that transfer ownership ... in immovables must be made by public act or private writing, under penalty of nullity”] applies also to corresponding preliminary contracts, unless otherwise stated by the laws of the State in which the immovables are situated”.

<sup>3</sup> “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”.

European Union, as laid down in Art. 46, para. 3<sup>4</sup>, by the provisions in force at the time the present code comes into force.

2. Apart from the provisions of Art. 211 the transfer of ownership of moveable – goods which are sold, is given effect, in the absence of contrary agreement, according to Art. 46, para. 1<sup>5</sup>, on the delivery of the goods.

#### Art. 176

##### *Sale of immovables*

Apart from the provisions of Art. 35, para. 1<sup>6</sup> and Art. 46, para. 3<sup>7</sup> second sentence, and in conformity with the provision of Art. 35, para. 3<sup>8</sup>, sale of immovables will continue to be governed in the member states of the European Union by the provisions in force at the moment the present provisions of the code come into force until the Union itself achieves a common set of rules for the sale of immovables.

#### Section 2

### **SALE OF MOVEABLES**

#### First Head

### **GENERAL PROVISIONS**

#### Art. 177

##### *General*

1. The sale of moveables governs corporeal and incorporeal moveables.
2. It includes apart from the provision of Art. 174 further duties set out in the following rules.
3. There is a sale even if the thing to be sold has been made wholly or partially by the seller or has been modified by him at the specific request of the buyer.
4. There is no sale although a contract for services:
  - a) if the thing provided has been made, after the conclusion of the contract, by the party who delivers it according to the design and indications of the other party or mainly by using the material provided by the latter;
  - b) if the thing provided is mainly the result of the workmanship or other

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<sup>4</sup> “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.....”. Cf. fn. 7.

<sup>5</sup> “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”.

<sup>6</sup> “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”.

<sup>7</sup> “.... 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”.

<sup>8</sup> “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”.

services of the manufacturer.

Art. 178

*Moveables that can be sold*

1. All moveables may be the object of sale, unless community or national rules or those of this code prohibit their delivery, so long as the contract satisfies the requirement of Art. 25<sup>9</sup>.

2. If the rules mentioned impose such a prohibition, the sale is void.

3. Apart from penal sanctions imposed by the different sales, Art. 143, para. 1<sup>10</sup> applies to the sale of goods which can affect personal security of health.

4. If the rules of para. 1 of this article impose only quantitative limits on the sale, Art. 144<sup>11</sup> applies.

5. If the sale or transfer of a thing requires an authorisation by a public body, the party in possession, in the absence of contrary agreement, is bound to obtain it at his own expense. If the sale is concluded without such authorisation the provisions of Arts. 140, para. 1<sup>12</sup> and 153<sup>13</sup> apply.

Art. 179

*Special prohibitions on purchase*

1. Apart from the prohibitions imposed by the community and national law for reasons of law and public interest, acquisition of goods belonging to the states and public bodies carried out, even through an intermediary, by those appointed to look after them and acquisition of goods sold at judicial auctions by those appointed to look after them are void under Arts. 140, para. 1<sup>14</sup>, and 143, para. 1<sup>15</sup>.

2. Acquisitions of goods even through an intermediary, carried out by those charged with administering or acquiring or selling them in the interests of a

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<sup>9</sup> “The content of the contract must be useful, possible, lawful, determined or determinable”.

<sup>10</sup> “A contract null for the reasons stated in Art. 140, para. 1, 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”] cannot be validated, treated as partially null, converted or rectified in any way”.

<sup>11</sup> “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”.

<sup>12</sup> “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”.

<sup>13</sup> “A valid contract is ineffective .... either by agreement of the parties or by law... 4. Ineffectiveness by law..... 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....”.

<sup>14</sup> Cf. fn. 10.

<sup>15</sup> Cf. fn. 12.

third party are voidable under Art. 68<sup>16</sup>.

#### Art. 180

##### *Existence of a right of pre-emption*

1. If a right of pre-emption of a thing exists in favour of a beneficiary, whoever intends to sell it to another must communicate to the buyer in writing all the terms of the sale to a third party, inviting the beneficiary to state his intention in writing within a reasonable period of not less than fifteen days. He may sell the thing to the third party only after the said beneficiary has communicated within the fixed period that he does not intend to avail himself of the pre-emption or has given no reply.

2. If the beneficiary communicated that he intends to avail himself of the right of pre-emption, the sale is considered to be concluded with him.

3. If the seller of a thing under sub-section 1 fails to communicate to the beneficiary of the right of pre-emption before the expiry of the period allowed to him or communicated to the seller different conditions from those given to the third party, he is bound to compensate the beneficiary for the loss he has incurred under Art. 166, para. 3, a)<sup>17</sup>.

4. The beneficiary who learns or has good reason to believe that a third party has acquired the thing in bad faith can obtain on his own account an injunction under the terms of Art. 172<sup>18</sup> under which he intimates to the third party, or if the thing has not yet been delivered to the seller or to both, that he should not dispose of the thing. The aim is that he can then in the circumstances declare in writing that he wants to acquire the thing on the same conditions and effect a repayment and obtain delivery against payment of the due price, taking into account compensation for loss under Art. 166, para. 3, a)<sup>19</sup>.

5. If there exist reasons for urgency, the beneficiary can, citing the circumstances, claim an injunction under Art. 172<sup>20</sup>.

#### Art. 181

##### *Sale of non-physical things*

1. Non-physical things include intellectual property, industrial inventions, trade-marks, patents, ornamental designs and sole rights regarding

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<sup>16</sup> “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....”.

<sup>17</sup> “... 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”.

<sup>18</sup> “...in all cases where the rights or reasonably justified expectations of one of the parties ... are about to be or have been threatened, or are jeopardized or hindered ... the court ... may make the following enforceable orders ... a) prohibitive injunction, by which it orders the other party to cease an act ... b) mandatory injunction, by which he orders the other party specific performance of an obligation to deliver or to do something....” .

<sup>19</sup> Cf. fn. 17.

<sup>20</sup> Cf. fn. 18.

these legal and factual situations and non-physical things which can derive from scientific and technological progress and can constitute the object of rights and are capable of economic exploitation.

2. The seller of a non-physical thing must at his own expense obtain for the buyer unconditional entitlement and full use and provide him with the means of enjoyment, in the forms required for formal title.

3. If a non-physical thing is sold which is to be used or which presupposes the ownership and possession of one or more physical things, the seller is bound at his own expense to obtain them for the buyer in full.

#### Art. 182

##### *Sale of future things*

1. The sale of a future thing physical or non-physical is allowed under Art. 29<sup>21</sup>.

2. If the thing does not exist at the moment of the conclusion of the contract nor comes into being later and the parties have not intended to conclude a wagering contract, the sale is void and the buyer has the right to restitution of the price paid under Art. 160<sup>22</sup>.

3. In the case envisaged by the preceding sub-section the seller who has not informed the buyer in good faith of the foreseeable risk that the thing does not come into existence, is bound to compensate him for the loss that he incurs to the extent governed by Art. 166, para. 3, b)<sup>23</sup> and must compensate him for his loss if he has guaranteed the present or future existence of the thing.

4. There is no sale of a future thing in the case envisaged by Art. 177, para. 4.

#### Art. 183

##### *Sale of another's thing*

1. The sale of another's thing is valid and creates in the seller a duty to obtain ownership and possession of it for the buyer.

2. If it is not a case of food or more generally of fungible things but of something with a specific character and the seller has not been charged by the owner with selling it as his representative and does not have a right of pre-emption, he must, before the conclusion of the contract, inform the other party that the thing does not belong to him. If he fails to do so, once the contract is concluded, the buyer who learns of it can within a reasonable period, rescind from the contract, informing the seller in writing. The seller is bound to compensate the buyer for the loss at his choice to his positive/negative interest, as indicated in

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<sup>21</sup> "The contract can involve performance with respect to future things, except when forbidden by the present code or by Community or national laws".

<sup>22</sup> "...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...".

<sup>23</sup> "... the result of reparation must provide the creditor or, in the cases provided for, the third party ..... b) satisfaction of his interest (negative) in that the contract had not been made or the precontractual negotiation had not taken place, ..... and particularly when damage comes from the non-existence, nullity, annulment, ineffectiveness, rescission, non-conclusion of the contract and in similar case".

Art. 116, para. 3<sup>24</sup>.

3. If the seller, before becoming owner of another's thing, delivers it to the buyer, the latter if he is in good faith acquires ownership and possession of it according to Art. 46, para. 2<sup>25</sup>.

#### Art. 184

##### *Sale of a collectivity*

1. A written record is required, on pain of nullity of the sale:  
 a) of a collection of physical moveables;  
 b) of a complex made up of corporeal and incorporeal moveables including active and passive legal relationships which, constitute a collectivity being goods and relationships unified in a functional sense by sharing a common aim.

2. Even if supplied with an analytical description or inventory, as provided by Art. 192, para. 3, the single elements of the whole must be evaluated for the purposes of the application of the rules of the present chapter, not individually, but as elements in a whole and with reference to the common function they perform in relation to the purpose which they seek to achieve.

3. The rule of para. 2 above does not apply to the complex whole where all the component parts are agreed to the present.

4. Following the sale of a complex whole used for production or exchange of goods or services, the parties may agree that the seller is bound to abstain from carrying out a similar activity in a fixed area or over a period of time following the sale. Such limits of space and time, apart from the provisions of community and national law, cannot be such as to exclude the seller from all his professional work.

5. The community and national rules covering the sale of a business apply so long as they are compatible with the provisions of this article.

6. The sale of an inheritance is governed by the national provisions applicable.

#### Art. 185

##### *Form of contract*

1. Apart from the provisions of Art. 37<sup>26</sup> and the rules of the present chapter no special form is required for the sale of moveables.

2. Art. 36<sup>27</sup> applies to the proof of the contract.

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<sup>24</sup> Cf. fn. 17 and 23.

<sup>25</sup> "... 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".

<sup>26</sup> "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".

<sup>27</sup> "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...".

## Art. 186

*Expenses of the sale and of delivery of the thing*

1. In the absence of contrary agreement the expenses of the conclusion of the contract must be borne by the buyer. The expenses are understood to comprise those concerning the valuation and identifying the characteristics of the thing and the fixing of the price assigned to a third party, the drafting of the contract and fiscal duties.

2. In the absence of contrary agreement the expenses of transporting the thing sold for its delivery fall to the seller who provides for it from his own resources. They are the responsibility of the buyer who makes provision for return to him or if the delivery is carried out by a contractor.

## Second Head

**SELLERS DUTIES**

## Art. 187

*Principal duties of the seller*

1. The duties of whoever offers a thing for sale and of the seller, apart from those indicated in particular provisions and from what is foreseen in the case of failure to perform are the following:

- a) to give in advance all necessary information to the potential buyer;
- b) to deliver the thing sold which must conform completely to the contract, must possess all the required attributes and be accompanied by all the information needed for its use;
- c) to transfer ownership and possession;
- d) to guarantee the buyer against third party claims to the thing;
- e) to provide for the installation of the thing;
- f) to grant the buyer a guarantee of correct working for several years;
- g) to provide for the periodic maintenance of the thing.

## § 1

**Duties of information**

## Art. 188

*Sale to the public: preliminary information*

1. Apart from community and national provisions on the production and sale of medicinal and food products, the offer for sale of moveables which occurs in places dedicated to sales to the public, even if they adjoin the places for manufacture or production is subject to the following rules.

2. Whoever offers a thing for sale has a duty to indicate clearly the price and to adopt a correct presentation in any publicity material such as will not lead the client into error. Further the seller has a duty to provide in advance to the public and in particular to any potential client all information about the specific

type and correct details of the thing according to Art. 7, para. 1<sup>28</sup> its maker or producer the place the date and the method of manufacture, the qualities and the materials used and the use to which it can be put and for how long the methods of installation and of cleaning and preservation and the relative periods. In relation to the type and quality of the thing – and these can be laid down by local administrative authorities. Other specific data can be required to be provided.

3. If the thing is displayed for sale, the essential information must be indicated on a card firmly attached to the thing and clearly visible. If the thing is kept in inside the place of sale the information must be furnished through the delivery of an illustrative booklet as well as verbally by the seller if that be the case.

4. All the details and information indicated in the previous sections must be expressed clearly in a readily comprehensible way in the language of the place where the sale occurs.

5. Whoever offers a thing for sale has the duty to allow potential buyers to examine or have examined the thing with all due care, as laid down by Art. 203.

#### Art. 189

##### *Sales to the public: contextual information*

1. The seller has a duty in respect of manufactured goods in cans, and bottles, accompanied by labels printed material or containing instructions for the use and maintenance to provide with them details of the manufacturer or producer, their distinctive marks, their address and both telephone numbers and electronic details, the type, quality and exact description of the goods the place and date of manufacture or production the materials and the procedures used in the manufacture or production and as a result, the essential characteristics; the possible presence in them of dangerous materials or substances harmful for humans or for the environment and the precautions to be adopted for their installation, the use preservation and cleaning and the bodies, with their full addresses to which the buyer should turn for maintenance and repairs etc. In relation to the type and quality of the goods it can be necessary and further can be laid down by local administrative authorities – which can provide other specific material.

2. The timeframe within which the consumption or use is possible must be indicated particularly clearly for all goods with therapeutic aims or intended for consumption or for the cleaning and aesthetic application to the face and body or whose use can nevertheless imply contracts with them.

3. The matters to which paras. 1, 2 preceding must be provided apply also to the making and labelling of goods which are sold in the internal spaces of the business, associations etc. and further of goods obtainable from the apparatuses of automatic distribution. On the latter an indication of the seller and his address, both telephonic and electronic, is obligatory.

4. If goods are exposed for sale without labelling the essential material indicated in para. 1 of the present article must, in relation to the nature of the goods, be contained in notices clearly visible placed alongside the goods

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<sup>28</sup> “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”.

themselves; and further in documents specified in para. 5, indicating the provenance of the goods and the date within which they must be utilised.

5. The seller has further the duty to deliver to the buyer the bill, receipt or cash slip on non-degradable paper, mentioning the amount and the telephonic and electronic details from which are clearly indicated the denomination and type of things sold as well as the date of sale and the price paid, with the aim of giving the buyer the possibility of the rights laid down in the following rules.

6. In sales at a distance the details required by para. 1 of the present article must also be contained in the letters of offer and acceptance and in any case in the correspondence between the parties, as well as in any written contract .

7. The details required by the preceding paras. must be expressed clearly and in the language of the place of sale as well as in other languages. The most common details may be provided by means of figures or symbols, provided these are of frequent use and of widely accepted meaning.

8. This provision shall not affect the application of Community and national rules covering information to be supplied for contracts concluded outside the trader's business premises or at a distance, where they provide that a specific document or any other durable support must be delivered to the consumer.

#### Art. 190

##### *Business to business sales*

In the absence of contrary agreement, the provisions of Arts. 188 and 189 also apply to business to business sales. In this case, the details required may be contained in a letter or similar written communication, drafted by the party offering for sale or selling, also in the language of the buyer.

#### Art. 191

##### *Sales between private consumers*

In the absence of contrary agreement, the provisions of Arts. 188 and 189 also apply to sales between private consumers, but the details there required may also be supplied orally by the party offering for sale or selling, as long as the other party does not require them in written form.

#### Art. 192

##### *Sale of second hand goods*

1. Apart from the provisions of Arts. 219 and 220 concerning sales by auction, the seller of a second hand thing must, before the conclusion of the contract and save as otherwise agreed, supply in written form to the buyer who requests them the following details: the specific name and type of the thing, the time of manufacture, its functioning, characteristics and the defects the buyer is, or should be aware of: he must allow the buyer to inspect the thing, or to have it inspected by an expert.

2. In case of motor vehicles or any other used machines, the seller must state in writing to the buyer the date of manufacture and the use that has been made of the thing, any accidents, repairs to the vehicle which the buyer is, or

should be aware of, and must allow the buyer to inspect the thing, or to have it inspected by an expert using reasonable care.

3. In the absence of contrary agreement, if a collectivity is offered for sale pursuant to Art. 184, and this is being used, the seller must beforehand inform the buyer in a complete manner of the actual and potential amount of the collectivity, of its likeliness of being increased, by providing an analytical description or an accurate list of the things and their level of wear and tear and of the relationships making up the collectivity, and must allow the buyer to inspect the thing, or to have it inspected by an expert using reasonable care.

4. In the case of a sale of a business the inspection under para. 3 must be made with utmost confidentiality, or the provision of Art. 8, para. 2<sup>29</sup>, shall apply.

5. If the collectivity is likely to increase, the sale must include the documents that constitute title to the acquisition.

## § 2

### Duties relating to delivery

#### Art. 193

##### *Preliminary duties*

1. If the moveable thing is not displayed for sale or in the sale premises, ready to be delivered, but the seller must manufacture it or modify it or acquire it he must do so in good time, so as to be able to deliver it within the period provided for by Art. 83<sup>30</sup>.

2. If the seller does not do so in good time, the seller who becomes aware of it and who has not yet paid the price may give a written notice asking the seller to deliver the thing within a period no shorter, taking the circumstances into due account, than fifteen days and state its intention to withdraw from the contract in case of failure to deliver. After the expiry of that term and in the absence of contrary agreement, the buyer will be deemed to have withdrawn from the contract. This provision shall not affect the rights provided by Art. 91<sup>31</sup> and in any case the right to damages under Art. 166, para. 3, a)<sup>32</sup>.

3. If the buyer has already paid the price, he can act in accordance with Art. 91<sup>33</sup>, while his right to damages under Art. 166, para. 3, a)<sup>34</sup>, shall remain unaffected.

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<sup>29</sup> “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”.

<sup>30</sup> “1. ... 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. ...”.

<sup>31</sup> “... the creditor, ... can invite him 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”.

<sup>32</sup> Cf. fn. 17.

<sup>33</sup> Cf. fn. 31.

<sup>34</sup> Cf. fn. 17.

## Art. 194

*Delivery of the thing sold*

1. The seller has the duty to deliver the thing sold within the terms of Art. 83<sup>35</sup> and in accordance with Arts. 81<sup>36</sup> and 82<sup>37</sup>. He must therefore perform all acts that are necessary to transfer to the buyer the property and, if necessary, possession of the good sold.

2. In the sale of goods by documents, delivery must take place by placing at the other party's disposal the title representing the goods as well as the other documents as provided by the contract or, in the absence, by customs.

## Art. 195

*Claims of third parties over the sold thing.*

1. Except for the provisions of Arts. 180 and 183, para. 3, the delivery of the good sold to the buyer entails for the seller the duty to indemnify the buyer for any claim that third parties may have on the good itself. The seller must therefore defend the buyer or take measures to satisfy third parties or deliver to the buyer an identical or equivalent good, save the right of the buyer to damages under Art. 166, para. 3, a)<sup>38</sup>. The parties may otherwise agree, so long as the sale is not between a business and a consumer.

2. In order to avail himself of the guarantee under the para. above, the buyer must notify the seller in writing of the claims raised by the third party as soon as possible and not beyond the expiry of thirty days from whenever he was notified; in the absence of such communication, he only has a right to recover damages under Art. 166, para. 3, a)<sup>39</sup>.

## Art. 196

*Required qualities of the delivered thing*

1. The thing delivered must conform to the prescriptions of Arts. 188 and 189. In the case of inconsistencies in the prescriptions, the representations contained in written contracts shall prevail, and in any case the written representations prevail over the oral ones, and, among the written ones, the most recent shall prevail.

2. The seller has a duty to deliver a thing which conforms completely to the contract and must in any case have the necessary qualities for the intended purpose and be exempt from defects that are hidden at the time of sale and do not appear from the documents and declarations of para. 1 of the present article.

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<sup>35</sup> Cf. fn. 30.

<sup>36</sup> "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..."

<sup>37</sup> "Performance of contractual obligations shall be carried out at the place specified or implied in the contract, or, failing such provision ..... 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..."

<sup>38</sup> Cf. fn. 17.

<sup>39</sup> Cf. fn. 17.

Art. 197  
*Means of delivery*

1. Depending on the type and nature, the thing must be delivered by the seller in a package or container suitable for the intended transport; and, if the thing is to be entrusted to him or by the seller to a carrier for delivery at a different place, it must be properly placed and packaged by the seller. Apart from the provisions of Art. 186, para. 2, the expenses of the package or the wrapping or the container fall, unless otherwise agreed, to the seller.

2. If delivery is to be made at a distance, save as otherwise agreed, the seller must take care, at the buyers' expense, of the transport of the thing and entrust it to a suitable carrier which he selects. This shall be so unless the carrier is selected by the buyer.

3. As provided for by Art. 46, para. 4<sup>40</sup>, in the first case of the above para., delivery is deemed to take place at the time when the seller puts at the disposal of the buyer, who receives it, and after this time the risk of thing's perishing or damage passes to the buyer. In the second case of the above para., i.e. if the carrier is selected and indicated by the buyer, delivery is deemed to take place at the time when the buyer entrusts the thing to the carrier and at this time the risk passes to the buyer.

Art. 198  
*Installation of the thing*

1. If the thing sold is a machine or mechanical, electronic or similar equipment, the installation of which requires technical skills that are uncommon and, if made by an inexperienced person, can cause damage or danger for persons or things, installation must be made, at the buyer's expense, by the seller or by an enterprise indicated by the latter and under his responsibility.

2. In the absence of the difficulties or the risks described at the preceding para., installation must be made, if the buyer so requests, and at his expense, by the seller or by an enterprise indicated by the latter and under his responsibility.

3. In the absence of contrary agreement, this article shall not apply if the thing under para. 1 is sold by an enterprise which is suitably equipped for a correct installation.

4. The seller who does not provide correct installation is responsible for the loss suffered by the buyer for the non correct installation as a consequence of the insufficient instructions accompanying the goods and concerning its installation.

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<sup>40</sup> "In the above situation ["contracts concluded to transfer ownership of a movable thing"], 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. 199  
*Guarantee of good functioning*

1. Apart from the provisions of Arts. 205 and 206, the sale of a new, i.e. unused, thing and intended for prolonged use, gives rise to a duty on the seller, at his expense, to supply and repair the thing pursuant to Art.e 207 and to do whatever else is necessary for the regular use and normal conservation of the thing, so long as measures have not been rendered necessary by intentional misuse or an incorrect use by the buyer.

2. The guarantee of the preceding para. has a minimum duration of two years; at the buyer's request this may be extended for an equivalent period against payment of the sum indicated in the documents or in the support of the following para.

3. The seller has a duty to make the buyer aware of such a guarantee, and of its ability to extend duration, by handing to him a document or a durable support which clearly indicates the place where he may require assistance.

4. In order to avail himself of the guarantee the buyer may, within two months from the discovery of the defect or assistance becomes necessary, entrust the thing bought to the seller or to the places of the preceding provision or, taking into account the nature and dimension of the thing, may require the seller or the above enterprises to collect it or to replace or repair it in the place where it has been installed. If appropriate, the buyer may make the seller aware in writing of his intention to avail himself of the guarantee.

5. In the case where the seller, or the enterprises indicated by him, omits or refuses to intervene, after a reasonable delay of no less than fifteen days from the above notification, and possible after having required to intervention of the office or clerk mentioned at Art. 203, the buyer may resort to the arbitration procedure provided for by Art. 173<sup>41</sup>, or otherwise require, in the case of urgency, an injunction in accordance with Art. 172<sup>42</sup>. If the refusal or inertia of the seller constitutes a serious non performance within the meaning of Art. 114, para. 1<sup>43</sup>, the buyer may rescind the contract, saving his right to damages.

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<sup>41</sup> "... in the situations where this code provides for judicial intervention, either party can apply for arbitration by three arbitrators.... 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 ... 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 .... The third arbitrator is chosen by agreement of the two chosen arbitrators or, failing agreement, by the above-mentioned court ... If the attempted conciliation of the parties does not succeed, the controversy must be settled ... 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 ["A contract has the force of law between the parties..."] and, as soon as issued, enables the orders in Art. 172 [cf. fn. 42] to be made.

<sup>42</sup> "... in all cases where the rights or reasonably justified expectations of one of the parties .... are about to be or have been threatened, or are jeopardized or hindered ... the court, at said party's instance, may make the following enforceable orders ... a) prohibitive injunction, by which it orders the other party to cease an act or omission undertaken or feared. ... b) mandatory injunction, by which he orders the other party specific performance of an obligation to deliver or to do something, ...".

<sup>43</sup> "Substantial non-performance as understood in Art. 107 ["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

6. A similar, renewable, two years guarantee may be supplied to the buyer also by the seller of a second hand thing, upon terms that must be clearly specified in a document or durable support as indicated in para. 3 of the present article. If the second hand thing is sold by a business to a consumer, the provisions of the preceding article may apply, save the possibility for the parties to reduce the duration of the guarantee to twelve months.

Art. 200

*Maintenance and periodic checks on the thing*

1. Apart from the existence of defects indicated in the preceding article, if the thing sold is intended for prolonged use, such as machines, equipment, furniture or similar things, the seller, in the absence of contrary agreement, must for at least five years carry out or entrust to a reliable enterprise and under his responsibility and at the buyer's expense the maintenance and periodic checks that are necessary to ensure a lasting use, in accordance with the nature of the thing and the prolonged user's needs.

2. In the absence of contrary agreement, the seller must deliver to the buyer a written document or a durable support with an indication of the periods within which maintenance or periodic checks must be carried out, and in what offices or companies.

Third Head

**BUYER'S DUTIES AND OBLIGATIONS**

Art. 201

*Duty (and right) to inspect the thing*

1. The buyer has the duty, and the right, to inspect and have inspected with due diligence and due caution the thing offered for sale before acquiring it.

2. If the thing has been delivered to a buyer who has been unable to inspect it or have it inspected, such an inspection must take place within a reasonable period after the delivery. The buyer must with no delay notify the seller in writing of the result of the inspection, if unfavourable, so as to exercise his rights under Art. 207.

3. The buyer cannot rely on lack of conformity, lack of qualities, manufacturing defects, vices, in accordance with Art. 188 ff. unless he should have become aware of such matters by inspecting the thing, or have it inspected with due diligence before buying it, or within a reasonable period since it was delivered, unless the seller acted fraudulently.

Art. 202

*Payment of the price*

1. In the absence of contrary agreement, the buyer must pay the price as follows:

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contract"] 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".

a) by paying the entire amount to the seller if the thing is delivered at the seller's premises;

b) if the thing must be manufactured, modified or sent, by paying a deposit at the time of conclusion of the contract while the rest is paid at delivery save where, by party's agreement or in accordance with customs, the buyer withholds part of the price until the thing is tested;

c) in business to business sales in accordance with parties' agreement, even relating to previous transactions, or in the absence, in accordance with customs in the relevant trade.

2. If the price has not been agreed, Art. 31<sup>44</sup> applies. Similar steps are to be taken where the price is agreed by reference to a certain and determined thing. The expenses that are necessary for the price to be determined by a third-party are due as per Art. 186, para. 1.

3. If the payment of the price does not occur at delivery, it must take place, in the absence of contrary agreement, as per Art. 82, para. 3<sup>45</sup>.

4. In the absence of contrary agreement, if the price is to be paid after delivery and the thing sold produces fruits or other revenues, the buyer must pay to the seller the interest on the price paid as per Art. 86, para. 3<sup>46</sup>.

#### Four Head Remedies

##### Art. 203

##### *Office in charge of parties' assistance*

1. A purpose-designated office or clerk in every city Council is in charge of supplying to consumers, and to parties in general, clarification on their rights and duties and of receiving complaints with requests for intervention between the parties, so as to resolve in a timely and friendly manner any dispute that may arise before or after the conclusion of the contract.

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<sup>44</sup> "... 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. ... 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".

<sup>45</sup> "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...".

<sup>46</sup> "...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 ["...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"]. 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 ... according to Art. 169, para. 4 ["... this re-evaluation shall be calculated on the basis of the most recent Cost of Living Index, periodically published by Eurostat"]".

2. The Council authority may require that the request for intervention is supported by a reasonable deposit, to be returned or retained if the request is manifestly unfounded.

3. The office or clerks above, in accordance with the law, shall inform the bodies and authorities that are competent for disputes remaining unresolved for non-compliance with the provisions of the present section: this should be both for statistical and research purposes, in consideration of possible amendments of such provisions, and for the purposes of the adoption, in the most serious cases, of the administrative sanctions provided for by the law of the place where the sale occurs.

Art. 204  
*Consumer sales*

1. Arts. 9<sup>47</sup>, 30, para. 5<sup>48</sup>, 134, para. 5<sup>49</sup>, 159<sup>50</sup> shall apply to sales to consumers, as defined in Art. 9, para. 2<sup>51</sup>:

- outside business premises

and, hence,

- directly to the consumer's domicile or in premises not intended for sales, where the consumer finds himself for any reason;

- at a distance, by means of the exclusive use by the seller of a system of distance communication.

2. The consumer also has the right to damages in accordance with Art. 166, para. 3, b)<sup>52</sup> if the sale has been facilitated by the use, by the seller, intermediary or producer, of any form of advertising that can be considered misleading in accordance with the Community provisions.

3. It is forbidden, and the sale is void, according to Art. 140, para. 1, a)<sup>53</sup> and 143, para. 1<sup>54</sup>, to sell a thing which, upon an inspection after the sale, turns out to be able to affect health or safety in accordance with Community law. The buyer has a right to damages in accordance with Art. 166, para. 3, b)<sup>55</sup>.

4. This shall not affect any Community measure yet to be adopted.

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<sup>47</sup> "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 ["by sending to the other party ... written notice in which the consumer can merely express his intention to withdraw from the contract or offer"]".

<sup>48</sup> "In contracts drawn up between a professional and a consumer, 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".

<sup>49</sup> "The parties can by agreement reduce the limitation period of ten years ..... but not the periods established for different types of contract, except for relationships involving a consumer and then only in the consumer's favour....".

<sup>50</sup> Cf. fn. 47.

<sup>51</sup> "In this code the word consumer means an individual who acts for purposes which do not come within the scope of his professional activities".

<sup>52</sup> Cf. fn. 23.

<sup>53</sup> "...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".

<sup>54</sup> "A contract null for the reasons stated in Art. 140, para. 1, a) [cf. fn. 53] cannot be validated, treated as partially null, converted or rectified in any way".

<sup>55</sup> Cf. fn. 23.

5. Administrative authorities may provide that for certain things, of common and specific use, or for quantities or amounts above a certain size or weight limit, the buyer does not qualify as a consumer, unless he so declares, under his responsibility, at the time of purchase, and such declaration is reproduced on the invoice or receipt or bill, or, in any case, in the sale documents and the seller may request proof of identity indicating the buyer's activity.

#### Art. 205

##### *Non-conformity of the thing to the details supplied*

1. The buyer who, after completing the purchase and with no fault of his own, becomes aware that the thing delivered is not in conformity with the details previously or simultaneously provided by the seller as per Art. 188 ff., can, within thirty days from the date of the purchase, withdraw from the contract as below described so long as, in the case of a packaged or wrapped thing, he has merely unpacked the thing and has handled it only for the purpose of ascertaining its identity.

2. In order to withdraw from the contract the buyer must send to the seller, within the period indicated at para. 1, a written notice succinctly indicating the lack of conformity and inviting the seller to deliver a thing that conforms to the details previously supplied within a reasonable period that is no less than 10 days. Once the period has expired, the withdrawal is deemed to have occurred, and parties are under a duty to make mutual returns, save of the duty on the buyer to compensate the seller for any use of the thing he may have made, even for the sole purpose of verifying the identity. In any case, the buyer may ask for a remedy in accordance with Art. 172<sup>56</sup>.

3. For things of immediate consumption or perishable goods, the claim must be made within a reasonable period and the delivery of another thing in conformity with the details must occur at the time of the request. Withdrawal may be exercised immediately after the seller's refusal.

4. The seller may avail himself of the other remedies envisaged by this section, and dissolve the contract in accordance with Arts. 114<sup>57</sup> and 158<sup>58</sup>, save the right to damages in accordance with Art. 166, para. 3, a)<sup>59</sup>.

#### Art. 206

##### *Irrelevant, inadequate or unusable information*

1. If the buyer ascertains, after the purchase and with no fault of his own, that on the label of the thing delivered or on the attached brochure, within

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<sup>56</sup> Cf. fn. 42.

<sup>57</sup> Cf. fn. 43.

<sup>58</sup> "3. ...If the right to dissolution of a contract is to be examined by the court, this latter can exercise ..... confirm dissolution ..... deny dissolution..... 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 ..... 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.

<sup>59</sup> Cf. fn. 17.

the package, there are details that do not conform to the characteristics of the goods or are not easily understandable or in a language which is not that of the place of purchase, so that he is unable to use the thing in a correct manner, he may withdraw from the contract within fifteen days from the purchase by notifying the seller in writing of the matter and inviting him to supply the details within a reasonable period of no less than 15 days. Once the period has expired, and in the absence of contrary agreement, withdrawal is deemed to have effect and the parties are under a duty to make mutual returns.

2. The buyer's right to damages under Art. 166, para. 3, b)<sup>60</sup> shall not be affected and he may also apply for a measure under Art. 172<sup>61</sup>.

3. For things of immediate consumption or perishable goods the communication under para. 1 must be sent immediately, the details must be supplied to the buyer at the time when he requests them and withdrawal may be exercised immediately after the seller's refusal.

#### Art. 207

##### *Lack of conformity, lack of qualities or defects*

1. The buyer, if the thing delivered is different from the one sold (*'aliud pro alio'*) or is not in any case in conformity with the contract or does not have the qualities for the intended use or has defects that were not evident at the time of sale or were not apparent from the details and declarations supplied or that appeared later – so long as this is not due to an incorrect use of the thing sold or if the measures under Art. 197 have not been followed, has the right to remedies under paras. 3, 4 and 5 of the present article so long as he notifies in writing, all orally in the case of a consumer, of the lack of qualities or the defects within two months after their discovery. This communication is not necessary if the seller has recognised such matters or has concealed them.

2. This right, if the above matters have not been fraudulently concealed by the seller, shall expire within 24 months (26 in the case of a consumer) after the delivery of the thing. In any case, the buyer who has been sued for the payment of the price can avail himself of such right even later, so long as he notifies the seller of the matters within 2 months after their discovery and within 24 months (26 in the case of a consumer) after delivery.

3. The seller, in the case of lack of conformity or a lack of qualities necessary for the intended use, is under a duty to supply to the buyer another thing in conformity with the contract with the needed qualities, or, in the case this is impossible, a similar thing with the necessary qualities and such as to realise in a satisfactory manner the interest of the buyer, save in any case the right to damages under Art. 166, para. 3, a)<sup>62</sup>.

4. The seller, in the case of manufacturing defects or vices that affect the consistency or the usability of the thing sold is under a duty to take the steps provided for by para. 3, save in any case the right to damages under Art. 166, para. 3, a)<sup>63</sup>.

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<sup>60</sup> Cf. fn. 23.

<sup>61</sup> Cf. fn. 42.

<sup>62</sup> Cf. fn. 17.

<sup>63</sup> Cf. fn. 17.

5. The seller, in the case of defects, even those that are due to delivery, which can be removed without affecting the consistency or usability and without an excessive burden on his behalf, is under a duty to remove them: or, if the defects do not significantly reduce the usability of the thing, must accept an equitable reduction of price, as provided for by Art. 113<sup>64</sup>, saved in any case the right to damages under Art. 166, para. 3, a)<sup>65</sup>.

6. The buyer, if the seller does not take the steps above described, may be authorised by a judge to acquire to the possible extent and at the seller's expense, a thing in conformity with the contract or a similar thing to the one bought, as provided for by Art. 111, para. 3, b)<sup>66</sup>.

7. The buyer, in case of urgency, may request a measure as per Art. 172<sup>67</sup>.

8. If reparation or replacement as above provided are objectively not possible the buyer who does not wish to accept a reduction of the price may act in accordance with Arts. 114<sup>68</sup> and 158<sup>69</sup>, save the right to damages under Art. 166, para. 3, a)<sup>70</sup>.

9. The buyer who has received a second hand thing may request the seller to act in accordance with the preceding paras. if the defects are not a normal consequence of the use to which the thing has been put, but, given the type and characteristics of the thing, on the basis of the current value and of the price paid the defects must instead be considered such as to prevent a satisfactory use of the thing the buyer relied on at the time of purchase. This shall not affect the right to damages under Art. 166, para. 3, a)<sup>71</sup>.

#### Art. 208

##### *Other cases of non-performance by the seller*

1. In case of delay in delivery of the thing sold, the buyer has the right to act as provided for by Art. 111, para. 2, b)<sup>72</sup>.

2. In any other case of non-performance of the seller, the buyer has in any case the right to act as provided for by Arts. 111<sup>73</sup>, 112<sup>74</sup>, 113<sup>75</sup>, 114<sup>76</sup>, 115<sup>77</sup>, 116<sup>78</sup>, 158<sup>79</sup>, 160<sup>80</sup>, and from 162 to 169<sup>81</sup>.

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<sup>64</sup> "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...".

<sup>65</sup> Cf. fn. 17.

<sup>66</sup> "The creditor can:...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".

<sup>67</sup> Cf. fn. 42.

<sup>68</sup> Cf. fn. 43.

<sup>69</sup> Cf. fn. 58.

<sup>70</sup> Cf. fn. 17.

<sup>71</sup> Cf. fn. 17.

<sup>72</sup> Cf. fn. 66.

<sup>73</sup> "...the creditor can obtain performance or completion in specific form, if this is objectively possible and, in any case subject to compensation for loss...".

<sup>74</sup> "... the creditor is entitled to obtain .... that the debtor: a) shall deliver a different thing of which he can completely dispose or make a different performance ...".

3. In the case of urgency, the buyer may apply for the measures provided for under Art. 172<sup>82</sup>.

#### Art. 209

##### *Non-performance by the buyer*

1. If the buyer does not collect or does not receive the thing sold, the seller may act in accordance with Arts. 104<sup>83</sup> and 105<sup>84</sup>.

2. If the buyer does not pay the agreed price within the agreed period, the seller may give advance written notice and, within 10 days since its expiry or a

<sup>75</sup> “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, ..... to pay a lower price than that agreed....”.

<sup>76</sup> “Substantial non-performance as understood in Art. 107 above gives the creditor the right to dissolve the contract.....”.

<sup>77</sup> “.... 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”.

<sup>78</sup> “....in the event of non-performance, independently of its importance the creditor is entitled to compensation ....”.

<sup>79</sup> Cf. fn. 58.

<sup>80</sup> “.....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....”.

<sup>81</sup> Art. 162: “ 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... 3. In the case contemplated in Art. 75, para. 3, first part [“obligation to do by a professional”], the debtor is not liable for damages if he proves he acted with appropriate care in the specific case...”. Art. 163: 1. Damages are recoverable for: a) the loss sustained, b) the profits lost ....”. Art. 164. 1. Damages are recoverable in cases of: a) serious psychic disturbance or emotional shock ..... b) physical pain as a condition of bodily suffering...”. Art. 165: “Future damage is reparable .... if it is reasonably certain that the non-performance or delay have not exhausted their consequences ...”. Art. 166: “... reparation must specifically aim to eliminate the harmful consequences of non-performance ... Said reparation shall create, as a rule, the fact situation which would have existed if the afore-mentioned situations had not occurred.”. Art. 167: “ 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....”. Art. 168: “1. If loss is proved ... but it is impossible or exceptionally difficult to assess its precise amount, ... the court can equitably limit the amount of damages: a) if complete compensation produces disproportionate results and ... b) in case of the debtor’s minor negligence, particularly in contracts where no reward for the debtor’s performance is provided”. Art. 169: “... 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 ...”.

<sup>82</sup> Cf. fn. 42.

<sup>83</sup> “... the debtor can serve a written notice to the creditor to desist from his behaviour ... 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. ....When the time limit expires, unless the behaviour has ceased, the creditor shall be considered responsible for non-performance”.

<sup>84</sup> “ ... instead of establishing the creditor’s non-performance, the debtor intending to release himself by performing the obligation due, must make to the creditor ... actual tender or tender by notice of the entire due performance ..... If the creditor accepts the tender and receives performance, the debtor is discharged. ... 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 ... ”.

shorter term in the case of perishable goods, have the undelivered thing sold by auction in the forms provided for by the law of the place where the sale occurs and recover the revenue, save the right to damages under Art. 166, para. 3, a)<sup>85</sup>.

### Section 3

## **SPECIFIC TYPES OF SALE**

### Art. 210

#### *Sale on approval, on trial and by sample*

1. A sale on approval is not concluded until buyer's acceptance is communicated within the agreed deadline and until then the buyer must restrain himself to simply examining the thing but cannot use the other than within the limits that are strictly necessary to verify compliance with his needs and the absence of any apparent defects. If he does not inspect the thing within the term agreed and the thing is with the seller the sale is deemed not to have taken place. If the thing has been delivered to the buyer and he does not react within the agreed deadline the thing is deemed to have been accepted.

2. In the sale of non-consumable things where the buyer has the right to return the thing if unsatisfied or the buyer shall acquire ownership of the thing by delivery and may use it with due caution without reducing its value, so as to exercise his right to communicate to the seller his withdrawal, without justifying it, within the period indicated by the seller, which cannot be less than eight days. If the period indicated by the seller is less than eight days, this is in all respects understood as being eight days. Following the above communication, and eight days after it, the buyer may request reimbursement of the price paid, as against returning the thing bought.

3. Sale on trial is subject to a suspensive condition whereby the conformity of the thing sold in accordance with article 196 is ascertained by a specific test. The result of the test, to be carried out in accordance with the contract or with customs, must be adequately motivated. If the result is favourable, the buyer may later complain only for lack of qualities or defects or vices that became apparent later and could not be ascertained at the time of the test. If the test has given an unfavourable result the buyer may claim damages in accordance with Art. 6, para. 2<sup>86</sup>, when the seller has acted contrary to good faith.

4. In the sale by sample the seller is under a duty to deliver to the buyer thing that complies with all details Art. 196 but which is also in conformity with the sample that the parties have chosen together, as a binding element for the identification of the subject matter of the sale and which must be safeguarded with all due caution. The thing sold and delivered must be strictly in conformity with the sample, save those margins of tolerance that the parties have expressly agreed upon, given the nature of the thing, as per Art. 106, para. 4<sup>87</sup>. In case of nonconformity, the buyer may act as provided for by Art. 205, para. 2.

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<sup>85</sup> Cf. fn. 17.

<sup>86</sup> "...To enter into or continue negotiations with no real intention of concluding a contract is contrary to good faith..."

<sup>87</sup> "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".

Art. 211  
*Sale with delayed transfer of property*

1. In the sale with delayed transfer of property, the buyer acquires ownership of the movable thing only with the payment of the last instalment of the price, but the risk of perishing or damage to the thing passes to him at the time of delivery.

2. Apart from what is specially provided for by Community or national law concerning certain things or procedures concerning insolvency, such an agreement may be opposed to third parties if contained in a document, signed by both parties, having certain date preceding the time when a third party started specific performance on the sold thing.

3. If non-performance by the buyer exceeds the limits indicated by Art. 110, para. 2<sup>88</sup>, the seller may dissolve the contract by acting as provided for by Art. 114<sup>89</sup>, saving the case were the debtor is granted an extension under Art. 92, a)<sup>90</sup>.

4. In the case of dissolution of the contract, the sold thing must be returned to the seller who in turn must return the instalments received, but has a right to an equitable compensation for the use that the party has made of the thing, in addition to damages. If it has been agreed that the paid instalments belong to the seller as an indemnity and their amount is manifestly excessive, the buyer may obtain an equitable reduction in accordance with the criteria provided by Art. 170, para. 4, last part<sup>91</sup>.

Art. 212  
*Leasing*

1. With this contract the lessor confers on the lessee the right to use, against payment of periodic instalments, a thing which the latter has freely chosen as manufactured or resold by a supplier. The thing has been sold, by agreement with the user and in connection with the preceding contract, by the supplier to the lessor who has acquired property.

2. At the time of conclusion of the contract, or at a later time if so agreed, the lessee may be granted the option to purchase the thing, at the end of the contract, so as to become the owner, as against payment of an agreed amount.

3. The instalments due by the lessee to the lessor must be calculated in accordance with the depreciation of the thing in relation to the duration of the contract, as well as the use made. If the instalments are not paid in accordance with the provision of Art. 110, para. 2<sup>92</sup>, the lessor, save otherwise agreed, may request advance payment of the instalments that are not yet due, if this is

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<sup>88</sup> “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”.

<sup>89</sup> Cf. fn. 57.

<sup>90</sup> “An obligation ... is deemed not performed ... unless ... a) the debtor obtains from the creditor an extension of the time or the court grants it on reasonable grounds”.

<sup>91</sup> “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”.

<sup>92</sup> Cf. fn. 88.

provided by the contract, or dissolve the contract and demand that the thing is returned, as well as claim damages in accordance with Art. 166, para.3, a)<sup>93</sup>.

4. The user must use and keep the thing with due care, may transfer the right to use it with the consent of the lessor, and, in case of defects of the thing, may enforce the rights arising out of Art. 205, 206 and 207 directly as against the supplier, save for the need for the lessor to intervene in case of withdrawal or dissolution.

5. At the end of the relationship, the lessee by taking up the option of para. 2 and by paying the agreed amount acquires the ownership of the thing at all effects.

6. This shall not affect EC and conventional provisions.

#### Art. 213

##### *Sale with return clause*

1. At the time of conclusion of the contract the seller may reserve the right to regain property of the sold thing, within an agreed period of no more than three years, as against return to the buyer of the price paid, which if necessary shall be increased in relation to the increase in value of the thing itself, to the expenses incurred by the buyer and to the currency devaluation as per Art. 86, para. 3<sup>94</sup>.

2. The buyer is under a duty to return the thing within one month from the request of the seller who is ready to pay the sum due, and save what is provided for by Art. 108, para. 1<sup>95</sup>. If the seller is no longer in possession of the thing and cannot recover it, if it has deteriorated because of negligent use, the seller has the right to damages under Art. 166, para. 3, a)<sup>96</sup>.

3. The seller's right expires if he does not exercise it within the set period. If the other party refuses to comply with the request, the seller may act in accordance with Art. 111<sup>97</sup> or, in any case, claim damages under Art. 166, para. 3, a)<sup>98</sup>.

#### Art. 214

##### *Goods on sale and return*

1. Under this contract the seller delivers physical moveable things to the buyer, who acquires ownership and possession and is under an obligation to pay the agreed price within the agreed period, save for the possibility to return, within

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<sup>93</sup> Cf. fn. 17.

<sup>94</sup> "If a monetary debt is to be paid at some period after it was created ..." and "... if at the time of payment, the money has undergone over 50% depreciation in real value since the obligation was assumed, the debtor ... shall pay the creditor, who is not delaying performance of the obligation, a supplementary amount over and above the nominal value of the debt".

<sup>95</sup> "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".

<sup>96</sup> Cf. fn. 17.

<sup>97</sup> "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".

<sup>98</sup> Cf. fn. 17.

said delay, all or some of the bought things or, upon express agreement, of their agents.

2. If all or some of the things delivered are destroyed, deteriorated or taken away from the buyer, even for a reason which is not fault of his, he must in any case pay the price to the seller.

3. If within the agreed period the buyer does not pay the price due and still has possession of the things delivered, the seller may act against him for the restitution of the things or the payment of the price in accordance with Art. 111<sup>99</sup>.

#### Art. 215

##### *Supply*

1. If the buyer undertakes, against payment of the price, ongoing or periodic deliveries of moveable things the amount and time schedule for each delivery, if not agreed upon at the time of conclusion of the contract, may be from time to time indicated with due previous notice by the buyer in accordance with the agreed limits.

2. In the absence of an agreement, the price must be paid at the time of expiry of the delay for ongoing deliveries, and at the time of a single supply for periodic deliveries.

3. If significant (within the meaning of Art. 107<sup>100</sup>) non-performance by one party causes the other party to dissolve the contract, Art. 114, para. 5<sup>101</sup> applies to whatever was previously performed.

4. If the contract is of undetermined duration Art. 57, para. 2<sup>102</sup> applies.

#### Art. 216

##### *Sale with exclusivity clause*

1. A sale with an exclusivity clause, in favour of the seller or the buyer, is allowed within the limits of Community and national law, and only where it does not have the aim or effect of creating a dominant position, also by means of a connection with similar contracts. In this case, the contract being void, the party who in good faith ignored the existence of such connection may claim damages from the other party in accordance with Art. 166, para. 3, b)<sup>103</sup>.

2. If the exclusivity clause is in favour of the seller, the buyer may not acquire from third parties things of the same nature and, in the absence of a contrary agreement, manufacture itself the relevant goods. If the buyer infringes

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<sup>99</sup> Cf. fn. 97.

<sup>100</sup> "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".

<sup>101</sup> "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".

<sup>102</sup> "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".

<sup>103</sup> Cf. fn. 23.

those prohibitions the seller may dissolve the contract and claim damages in accordance with Art. 166, para. 3, a)<sup>104</sup>.

3. If the exclusivity clause is in favour of the buyer, the seller may not, directly or indirectly, sell the goods subject matter of the clause in the area covered by the exclusivity clause. The seller is liable for the conduct of third parties, who he knowingly allows to enter the area reserved to the buyer, who may accordingly claim damages.

4. In the case of the preceding para., if the buyer undertakes the obligation to resell the supplied goods under an exclusivity clause, Art. 217, para. 2 applies.

#### Art. 217

##### *Sale license*

1. Under this contract a manufacturer-seller undertakes to supply at an agreed price the goods he manufactures in the agreed quantity to a licensee-reseller in the agreed quantity between a maximum and a minimum level; the latter undertakes to receive such goods in the quantity he has requested, not below an agreed minimum, to resell them under his name and at his risk in the agreed area and by applying the forms, conditions and prices indicated in the contract. The contract must comply with Community competition rules, adopted and to be adopted in relation to article 85 (82) TEU.

2. The licensee-reseller must undertake the resale of the goods, which are the subject matter of the contract, with all due commitment, or else he may have to pay damages to the seller, even if the quantity of resold goods is within the minimum limit indicated in the contract.

3. The licensee-reseller is under a duty to assist customers at the time of purchase and afterwards, by taking the steps agreed with the other party. He is also under a duty, by using the trademark and signs of the latter to equip as agreed his resale and maintenance premises in order to receive customers in the best way carry out the assistance provided for by para. 1 of this article.

4. The seller-manufacturer must deliver in due time to the reseller the thing, which must possess all details required by Art. 196 in the quantity that he required within the agreed limits, as well as any accessories, spare parts, and similar goods that are necessary for the maintenance that he has to carry out, and supply all data, information and details that he needs to perform whatever is provided for by the contract.

5. In the absence of a different agreement, a sale license is meant to be concluded with an exclusivity clause in favor of both parties. In this case either of them may bring an action against the defaulting party in accordance with Artt. 114<sup>105</sup> and 158<sup>106</sup>, save the right to claim damages in accordance with Art. 166, para.3, a)<sup>107</sup>.

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<sup>104</sup> Cf. fn. 17.

<sup>105</sup> Cf. fn. 57.

<sup>106</sup> Cf. fn. 58.

<sup>107</sup> Cf. fn. 17.

Art. 218  
*Franchising*

1. A medium sized enterprise (franchisor), for sale on a large scale by means of a distribution network of the goods it produces, concludes this contract with a smaller enterprise (franchisee) that enters into the network as franchisee in order to sell, in its own name, the goods in the area allocated to it. This contract and the organisation it requires may be used for the sale of goods and other economic activities, not only in the area of services, within the limits and in compliance with Community competition law adopt and to be adopted in relation to article 85 (82).

2. Before the conclusion of the contract parties are under a duty to supply all necessary information, as provided for by Art. 7<sup>108</sup>. The franchisor must indicate in writing, in the draft contract that he submits to the other party, details concerning: its activity and the relevant results, trademarks and other signs used by the network created by him, the composition of the latter and its changes, all circumstances of economic, accounting and judicial nature of the last three years or since its origin, the condition offered to the franchisee concerning the commitment required from him for the creation of an operational structure and for ensuring a minimum amount of sales, to the allocated area, to assistance and know-how that he is committed to supply, the amounts of the fees required of him, concerning other data that the other party may request and that must not remain confidential. The franchisee must indicate *inter alia* in writing and with documents, if the other party so requests, all details concerning: his experience in that sector, his current activity and the goodwill and all circumstance of economic, accounting and judicial nature, the consistency of its enterprise as far as employees and offices are concerned, and other data that the other party may request and that must not remain confidential. Both parties are bound by confidentiality in relation to the data they receive as provided for by Art. 8<sup>109</sup>.

3. The contract must be concluded in writing or will be void and for a duration that shall allow the franchisee to set off the cost the expenses incurred for the equipment and to be admitted to the network. The duration cannot be less than three years. If the contract is of undetermined duration Art. 57, para. 2<sup>110</sup> may apply. After the end of the contract parties may agree not to sell in competition with the franchisor for a period which is no longer than one year for the area that was allocated to him.

4. The franchisor is under a duty to supply in good time to the other party the goods, within the agreed quantity, as well as any accessories, spare parts, advertising and information material and whatever is necessary for the franchisee's sales and maintenance. The franchisor is also under a duty to enable the franchisee to avail himself of all necessary means to carry out his activity, such as: trademarks, patents, know-how, and to supply to him all information that may

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<sup>108</sup> “ 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...”.

<sup>109</sup> “The parties are bound to handle with reserve any confidential information obtained during negotiations...”.

<sup>110</sup> “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”.

be of some use; to supply all due assistance and do anything that shall facilitate the carrying out of his activities.

5. The franchisee is under a duty to resell the goods, that are the subject matter of the contract, with all due care and, if not, to compensate for any loss that the franchisee may suffer, even if the quantity of resold goods is above the agreed minimum as indicated in the contract. He is also under a duty to comply with the franchisor's directions:

- in equipping the sale and maintenance premises, which he cannot transfer without the franchisor's consent;
- in training and updating his staff;
- in contracts with customers, towards which he shall present himself as an independent trader in all documents, including advertisements, and towards which he must apply the prices imposed by the franchisor, without selling the goods outside the allocated territory or in competition with the franchisor himself;
- in the operating modalities;
- in using trademarks and industrial and commercial secrets acquired by the know-how of the franchisor and concerning which he must observe, and ensure that his staff observes the strictest confidence, also as far as the activity as a whole is concerned.

6. The franchisee is under a duty, at the time of conclusion of the contract, to pay to the franchisor the sums agreed as franchising fee; and during the contract in relation to the amount of business, he shall pay periodic royalties to the franchisor, as agreed.

Art. 219  
*Sales by auction*

1. This type of sale, made by a private party, takes place by means of a competition open to the public where the seller invites anyone to bid for the purchase of the goods for sale, the property of which is assigned by auction either to whoever makes the highest bid or to whoever declares forthwith that he will purchase the offered thing at the indicated price.

2. Apart for the Community and national rules on goods of historic or artistic interest and on export, as well as the Community and national rules that prohibit or authorise within certain limits that sale by auction by private individuals of certain goods, this type of sale is regulated by the provisions of the present article and of Art. 220.

3. The seller must comply with specific information duties such as:

- a) notices previously available to the public must indicate exactly, even in a synthetic manner and as a whole, the goods that shall be sold by auction;
- b) any catalogue which is distributed in the place where goods will be on display and where they will be sold must contain for every thing, and in the language of the place where the auction takes place, the exact name, date or time of manufacture or production or origin, the main characteristics, any possible defaults, as well as the starting price for the auction;
- c) the details described at the preceding lett. b) must also be contained in any notices affixed on the goods in the place where they are on display;

d) in any case the details described at the preceding lett. b) are not necessary for the single item that is for sale expressly and clearly with no starting price or at a trivial price and with the notice “sold as seen”, which means that the seller does not accept any liability as to the consistency and the value of the thing, but it is forbidden to place for sale any goods that may threaten the health or safety of the users;

e) in the case where agricultural products, fish, food, other items are sold and no previous notice is affixed concerning the subject matter of the sale, the exact name, the quality and origin of the goods must be clearly indicated by the auctioneer in a loud voice or on prominent screens, at the time of the auction.

Art. 220

*Sales by auction: procedure*

1. The seller must conduct the auction in accordance with a procedure whose steps must be made known to the public, in a clear and complete manner, on notices affixed in the display rooms and in the sale rooms, as well as in any catalogues to be distributed; the relevant steps must be taken with utmost transparency, so as that there are no catches for the public and the development of the auction is not unduly influenced.

2. In the notices, concerning the procedure to be followed, there must be a clear indication of:

a) the sale price, inclusive of the auction fee and, if this is due separately, its amount;

b) in auctions by ascending price every bid must be from to 10% higher compared to the auction price and the previous bid; and if the type of value of the things suggests increases that are below 5% or above 10%, this must be previously declared by the auctioneer in a loud voice or on a prominent screen at the time of the auction;

c) whether the bid, containing the indication of the maximum sum, may be effected also by recorded mail, by telephone or by electronic means, and in the latter two cases, accompanied by recorded letter with receipt, where the relevant date is the one of the envelope and on the receipt, in order to establish priority in the case of identical offers: and whether in these cases a deposit may be required to take part in the auction, the amount of which cannot be higher than 5% of the maximum available sum, and that must be inferred from the price due in case of adjudication or immediately returned in case of no adjudication;

d) whether, immediately after the adjudication, the buyer is under a duty to underwrite the act of purchase of the thing and to pay the amount due at the end of the auction and within what term he can collect the thing and whether, once that term has expired, the seller may entrust it, at the buyer's expense, to a trustee, who shall keep it as a guarantee of the credit for the custody.

3. If the notices concerning the procedures do not contain different details, the following shall be followed:

a) during the auction the auctioneer must, when offering the single items for sale, show it or indicate it to the public if possible or in any case declare at a loud voice or on a prominent screen the exact name and the characteristics, as well as the relevant catalogue number;

b) if a bid has been made in accordance with para. 2, c) of the present article, the sender becomes buyer if his written offer is above the last one made in the room, and at a price increased by the due percentage; but the auctioneer must declare it in a loud voice or on the screen, in order to allow others to bid;

c) the auctioneer, if the silence or the inertia of the public it appears that the last offer is the highest possible one, must declare so at a loud voice or on a prominent screen, and at the falling of the hammer or whatever tool he uses for three times he shall say “one, two, three” and declaring forthwith “adjudicated”, while ensuring that between the declaration and the adjudication the lapse of time is at least thirty seconds;

d) the auctioneer, if two or more bids are made simultaneously, must ask whether any of the bidders intends to withdraw, and, if not, must undertake a draw.

4. If the buyer ascertains, after the adjudication and with no fault of his own, that the adjudicated thing is significantly different from the details or declarations provided, may notify to the seller of his intention to withdraw from the purchase. If within fifteen days from the delivery of the communication parties do not come to an agreement the buyer may demand restitution of the price paid, as against return of the adjudicated good, save the right to damages in accordance with Art. 166, para. 3, a)<sup>111</sup>.

5. If a new item has been sold to him, the buyer may avail himself of the remedies under Art. 217, paras. 1 to 8. If a second hand thing has been sold to him, he may avail himself of the remedy under Art. 207, para. 9.

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<sup>111</sup> Cf. fn. 17.