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# IMPLIKASI PENDAFTARAN INDIKASI GEOGRAFIS TERHADAP POTENSI PENINGKATAN PERTUMBUHAN EKONOMI MASYARAKAT

*Under Trade Related Intellectual Property Rights (TRIP's) Article 22, Geographical indications are, for the purposes of this agreement, terms used to identify territory, region, place or origin of a good or service. Products in form of good and service have quality, reputation or other characteristic linked to the natural and human factors of the place where the products come from. In the Article 22 of TRIP's respect of geographical Indications, Members shall provide the legal means for interested parties.*

*Geographical Indication rights are given by registration. Only the first registered Geographical Indication will have an exclusive rights; rights to commercialized Geographical Indication that will gives an economic advantages to the owner. "Batik Solo, Kopi Luwak, minyak kayu putih Ambon, pempek Palembang, Markisa Medan, and Tahu Sumedang" are few of geographic indication having high economy value. Since the registration system is first to file, registration application should submitted to the institution in charge as early as possible. Government regulation No. 51 year of 2007 has no firmly stated who being appointed as the representative group to apply the Geographical Indication registered. Unregistered Geographical Indication would caused infringement that caused the economic loss.*

TRIP's khususnya Pasal 22 menyatakan bahwa yang dimaksud Indikasi-geografis (*geographical indication*) berdasarkan persetujuan ini adalah istilah yang dipergunakan untuk menunjukkan wilayah, daerah, tempat, atau asal sebuah barang atau jasa atau produk. Produk berupa barang atau jasa tersebut memiliki kualitas, reputasi, atau karakteristik atau ciri khas lain yang terkait erat dengan faktor alam dan manusia dari tempat dimana produk dan jasa tersebut berasal. Negara anggota penandatanganan persetujuan ini memberikan perlindungan khusus untuk Indikasi-geografis.

Perlindungan hukum Indikasi-geografis didapat melalui pendaftaran. Hanya Indikasi-geografis yang pertama terdaftar di Dirjen HKI-lah yang memperoleh hak eksklusif, yaitu hak untuk mengkomersialisasikan Indikasi-geografis sehingga pemegang hak dapat menikmati keuntungan ekonomi. Batik Solo, Kopi Luwak, minyak kayu putih Ambon, pempek Palembang, Markisa Medan, hingga tahu Sumedang adalah beberapa contoh dari produk indikasi geografis yang memiliki nilai ekonomis tinggi. Sesuai dengan sifat sistem pendaftaran Indikasi-geografis yang menganut asas *first to file system*, aplikasi permohonan pendaftaran Indikasi-geografis harus segera dilakukan oleh pihak yang terkait Indikasi-geografis. Peraturan Pemerintah No. 51 Tahun 2007 tidak menjelaskan secara tegas siapa yang berhak ditunjuk menjadi perwakilan masyarakat mengajukan pendaftaran Indikasi-geografis. Indikasi-geografis yang tidak terdaftar menimbulkan peluang terjadinya pelanggaran-pelanggaran Indikasi-geografis yang dapat menimbulkan kerugian ekonomi.

## Pendahuluan

PP Nomor 51 Tahun 2007 tentang Indikasi Geografis dimaksudkan untuk mengatur secara menyeluruh ketentuan pelaksanaan Pasal 56 ayat (9) Undang-Undang Nomor 15 Tahun 2001 tentang Merek, terutama yang mengatur tata cara pendaftaran Indikasi-geografis. Indikasi-geografis adalah tanda yang menunjukkan daerah asal suatu barang, karena faktor geografis termasuk faktor alam, faktor manusia, atau kombinasi dari kedua faktor tersebut,

memberikan ciri dan kualitas tertentu pada barang yang dihasilkan.<sup>1</sup> Sebagaimana layaknya merek, perlindungan Indikasi-geografis adalah melindungi "tanda"/*sign* berupa "nama wilayah" yang akan digunakan dalam perdagangan produk hasil alam atau kerajinan, berfungsi untuk menjadi petunjuk akan suatu kualitas dan asal barang.

Melindungi tanda yang berupa nama wilayah tertentu penting, karena selain pihak konsumen dapat dijamin informasi suatu barang, juga memberikan kekuatan pada pembangunan ekonomi di

wilayah tersebut. Sebagai salah satu bagian dari HKI, Kamil Idris<sup>2</sup> mengemukakan bahwa Indikasi-geografis yang dilindungi merupakan "kekuatan untuk pembangunan ekonomi dan penciptaan kekayaan kreasi". Emawati Junus<sup>3</sup> menyatakan bahwa perlindungan Indikasi-geografis bermanfaat: 1) memberikan perlindungan hukum pada produk Indikasi-geografis di Indonesia; 2) Indikasi-geografis dapat digunakan sebagai strategi pemasaran produk Indikasi-geografis pada perdagangan dalam dan luar negeri; 3) memberikan nilai tambah pada produk berpotensi Indikasi-geografis di daerah dan meningkatkan kemampuan ekonomi daerah; 4) meningkatkan reputasi produk Indikasi-geografis pada perdagangan global; 5) adanya persamaan perlakuan atas perlindungan Indikasi-geografis dan promosi Indikasi-geografis di luar negeri; dan 6) sebagai salah satu alat untuk menghindari persaingan curang.

Menurut Chandra Manan Mangan,<sup>4</sup> produk Indikasi-geografis potensial untuk dikomersialkan. Artinya, produk Indikasi-geografis mempunyai kekuatan ekonomi tertentu (daya tarik, daya saing), apabila bisa dimanfaatkan oleh penghasil/perajin atau industri dan juga para pengusahanya untuk mendapatkan nilai tambah dari produk/barang yang punya ciri khas dan kualitas tertentu dari daerahnya.

Namun demikian, sampai saat ini Indikasi-geografis belum digunakan untuk memberikan hasil yang optimal, terutama di negara yang sedang berkembang seperti Indonesia. Sampai saat ini, belum satupun produk Indikasi-geografis didaftarkan di Dirjen HKI.<sup>5</sup> Padahal, sebagai negara tropis yang terletak di antara dua benua Asia dan Australia, Indonesia dinyatakan sebagai negara kepulauan terbesar di dunia.<sup>6</sup> Dengan letak geografis tersebut, Indonesia memiliki banyak wilayah yang menghasilkan barang hasil alamnya yang dapat diindikasikan sebagai produk Indikasi-geografis karena memiliki kualitas dan kekhasan tertentu. Kondisi ini didukung dengan banyaknya suku dan budaya dari penduduknya yang juga berpotensi menghasilkan makanan atau kerajinan manusia yang khas pula. Beberapa contoh produk baik hasil alam maupun kerajinan tangan yang berpotensi dilindungi dengan perlindungan Indikasi-geografis adalah Kopi Kintamani, Batik, Lada Bangka, Tembakau Deli, Coklat Bone, Pala Ternate, Beras Cianjur, Ubi Cilembu, Kayu Manis Bukit Tinggi, Markisa Medan, Salak Pondoh, Kayu Putih Ambon, Cengkeh Ternate, Lada Muntok, Mangga Indramayu, Ukiran Kayu Asmat.

Berdasarkan uraian di atas, dalam tulisan ini akan dikaji permasalahan: Mengapa pendaftaran sangat penting dalam perlindungan hukum Indi-

kasi-geografis? Bagaimana perlindungan hukum Indikasi-geografis dapat berimplikasi terhadap peningkatan pertumbuhan ekonomi masyarakat? Faktor apa yang menjadi penghambat dilakukannya pendaftaran Indikasi-geografis sehingga potensinya belum mampu meningkatkan pertumbuhan ekonomi masyarakat?

### **Pendaftaran sebagai Prasyarat Perlindungan Hukum Indikasi-geografis**

Indikasi-geografis seperti juga bidang-bidang HKI yang lain sangat berkaitan dengan upaya pencegahan persaingan curang. Hal ini dapat dilihat dari *Article 22.2 TRIP's*:

*In respect of geographical Indications, Members shall provide the legal means for interested parties to prevent:*

- a) *the use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin of the good;*
- b) *any use which constitutes an act of unfair competition within the meaning of article 10bis of the Paris Convention (1967)*

Pasal 22 TRIP's tersebut mensyaratkan anggotanya untuk menyediakan perlindungan khusus untuk Indikasi-geografis. Di samping itu, juga harus menyediakan cara untuk menghindari penggunaan Indikasi-geografis tanpa hak melalui cara apapun, dalam memberi tanda atau menampilkan barang yang dapat mengindikasikan atau mencitrakan bahwa barang yang diperdagangkan berasal dari suatu wilayah geografis yang bukan dari tempat asal yang sebenarnya. Setiap penggunaan Indikasi-geografis yang mengandung indikasi tindakan kompetisi curang, tunduk ke dalam ketentuan Pasal 10 b *Paris Convention*,<sup>8</sup> yaitu agar dilakukan perlindungan yang efektif bagi warga negara dari anggota-anggota *Union* terhadap persaingan curang.<sup>9</sup>

Indikasi-geografis (*geographical indication*) "*is a sign used on goods that have a specific geographical origin and process qualities or a reputation that are due to that place of origin*".<sup>10</sup> Indikasi-geografis adalah tanda yang dilekatkan pada barang/produk hasil alam atau kerajinan yang mempunyai kualitas, reputasi, dan ciri khas karena faktor geografis setempat.

Sebagai salah satu objek dalam HKI, Indikasi-geografis baru dapat dilindungi apabila "nama wilayah" yang akan digunakan sebagai tanda pada produk, telah terdaftar (*registered*) di Direktorat Jenderal HKI. Hal ini tertuang dalam Pasal 56 ayat (2) UU Merek jo Pasal 2 ayat (3) PP No. 51 Tahun 2007 tentang Indikasi Geografis, yang intinya me-

nyatakan bahwa "tanda" yang menunjukkan "nama wilayah" akan dilindungi sebagai Indikasi-geografis apabila telah terdaftar dalam Daftar Umum Indikasi-geografis di Direktorat Jenderal HKI.

Syarat terdaftar merupakan satu-satunya alternatif untuk mendapatkan perlindungan hukum bagi produk Indikasi-geografis berupa hak eksklusif. Sistem pendaftaran Indikasi-geografis diatur secara mutatis mutandis dengan sistem pendaftaran pada UU Merek. Sistem *first to file*/sistem konstitutif<sup>11</sup> merupakan sistem yang diatur dalam UU Merek. Sistem *first to file*/sistem konstitutif yang digunakan mengacu kepada *Model law for developing countries on Marks Trade names and acts of unfair competition, section 4* yang menyatakan bahwa "*The exclusive right to a mark conferred by this law shall be acquired, subject to the following provisions, by registration* atau hak eksklusif suatu Merek atau Indikasi-geografis akan diperoleh melalui pendaftaran".<sup>12</sup> Dalam *first to file system*/sistem konstitutif, merek yang terdaftar pertamalah yang berhak atas merek<sup>13</sup> dan pihak dialah yang secara eksklusif dapat memakai merek tersebut.

Khusus untuk Indikasi-geografis, sebagaimana yang diatur dalam Pasal 56 ayat (2) UU Merek jo Pasal 5 angka (3) PP Nomor 15 Tahun 2007 tentang Indikasi-Geografis, pendaftaran hanya dapat diajukan oleh lembaga yang sengaja dibentuk untuk mewakili sebagai pemegang hak eksklusif Indikasi-geografis. Pasal ini memberi satu syarat bahwa kepemilikan atas suatu Indikasi-geografis, sifatnya non-individual. Dalam pasal tersebut, dinyatakan bahwa Indikasi-geografis mendapat perlindungan setelah terdaftar atas dasar permohonan yang diajukan oleh:

- a. Lembaga yang mewakili masyarakat di daerah yang memproduksi barang yang bersangkutan, yang terdiri atas:
  - 1) pihak yang mengusahakan barang yang merupakan hasil alam atau kekayaan alam;
  - 2) produsen barang hasil pertanian;
  - 3) pembuat barang-barang kerajinan tangan atau hasil industri; atau
  - 4) pedagang yang menjual barang tersebut.
- b. Lembaga yang diberi kewenangan untuk itu, atau
- c. Kelompok konsumen barang tersebut

Secara yuridis, penentuan Pemohon dalam pasal di atas, memberikan konsekuensi bahwa yang dapat menjadi pihak Pemohon adalah lembaga seperti pada point a, atau lembaga pada point b, atau lembaga pada point c.

Perlindungan hukum Indikasi-geografis yang melekat setelah pendaftaran oleh pihak Pemohon

akan berlangsung selama ciri khas masih ada dan/atau kualitasnya dijaga secara terus menerus. Untuk mengetahui masih ada atau tidaknya ciri khas dan kualitas pada suatu produk Indikasi-geografis, PP mensyaratkan pengisian Buku Persyaratan oleh Pihak Pemohon pendaftar produk Indikasi-geografis. Buku Persyaratan ini berfungsi sebagai pedoman tentang ciri khas/ karakteristik dan kualitas barang. Buku Persyaratan dalam Pasal 1 angka 9 PP no. 51 Tahun 2007 tentang Indikasi Geografis, adalah suatu dokumen yang memuat informasi tentang kualitas dan karakteristik yang khas dari barang yang dapat digunakan untuk membedakan barang yang satu dengan barang lainnya yang memiliki kategori sama. Beberapa uraian dalam Buku Persyaratan yang harus diisi pihak Pemohon adalah:

- a. nama Indikasi-geografis yang dimohonkan pendaftarannya;
- b. nama barang yang dilindungi oleh Indikasi-geografis
- c. uraian mengenai karakteristik dan kualitas yang membedakan barang tertentu dengan barang lain yang memiliki kategori sama, dan menjelaskan tentang hubungannya dengan daerah tempat barang tersebut dihasilkan.
- d. uraian mengenai lingkungan geografis serta faktor alam dan faktor manusia yang merupakan satu kesatuan dalam memberikan pengaruh terhadap kualitas atau karakteristik dari barang yang dihasilkan;
- e. uraian tentang batas-batas daerah dan/atau peta wilayah yang dicakup oleh Indikasi-geografis;
- f. uraian mengenai sejarah dan tradisi yang berhubungan dengan pemakaian Indikasi-geografis untuk menandai barang yang dihasilkan di daerah tersebut, termasuk pengakuan dari masyarakat mengenai Indikasi-geografis tersebut;
- g. uraian yang menjelaskan tentang proses produksi, proses pengolahan, dan proses pembuatan yang digunakan sehingga memungkinkan setiap produsen di daerah tersebut untuk memproduksi, mengolah, atau membuat barang terkait;
- h. uraian mengenai metode yang digunakan untuk menguji kualitas barang yang dihasilkan; dan
- i. label yang digunakan pada barang dan memuat Indikasi-geografis

#### Implikasi Perlindungan Hukum Indikasi-geografis terhadap Peningkatan Pertumbuhan Ekonomi Masyarakat

Dalam sistem HKI, tercermin adanya jaminan terpeliharanya kepentingan perorangan dan kepentingan masyarakat. Sebagai cara untuk menyeimbangkan kepentingan antara peranan pribadi

individu dengan kepentingan masyarakat, maka sistem HKI berdasarkan pada prinsip keadilan, prinsip ekonomi, prinsip kebudayaan, dan prinsip sosial.<sup>14</sup> Sebagai bagian dari HKI, Indikasi-geografis melindungi kepentingan masyarakat/ komunal.

Menurut Frederick Abbott, *et.al.*, isu Indikasi-geografis memiliki dua fungsi. Pertama, fungsi promosi produk yang mempunyai karakter tertentu yang membawa manfaat ke wilayah tempat produk tersebut dibuat (*manufactured*) atau dipasarkan. Indikasi-geografis dengan demikian melindungi produsen di wilayah tersebut terhadap penggunaan yang tidak sah (*unauthorized*) dari *goodwill* yang diciptakan oleh kualitas produk itu oleh pesaingnya. Kedua, Indikasi-geografis adalah sumber informasi penting untuk konsumen pada pasar yang sangat beragam dalam kaitan dengan asal, kualitas serta reputasi produk yang bersangkutan.<sup>15</sup>

Menurut Emawati Junus, keuntungan bagi petani dari perlindungan Indikasi-geografis adalah meningkatkan profesionalisme petani (karena disyaratkan adanya buku spesifikasi untuk menjamin kualitas), meningkatkan dan memelihara kualitas produk Indikasi-geografis dan memperkuat daya saing petani, memperkuat hak petani melalui asosiasi produk Indikasi-geografis (contoh : AEKI), mendorong peningkatan pemerataan ekonomi yang lebih baik bagi para petani, dan meningkatkan dan menciptakan lapangan kerja bagi para petani di daerah yang memiliki potensi produk Indikasi-geografis.<sup>16</sup>

Perlindungan Indikasi-geografis memberikan hak ekonomi sebagai hak kebendaan yang dapat dinilai dengan uang.<sup>17</sup> Hak ekonomi tersebut, dapat berupa keuntungan sejumlah uang yang diperoleh karena penggunaan sendiri HKI, atau karena penggunaan oleh pihak lain berdasarkan lisensi yang dikembangkan dalam perindustrian atau perdagangan yang juga mendatangkan keuntungan finansial seperti yang telah disebutkan di atas. Hal ini disebabkan karena kepada pemegang HKI diberikan kekuasaan penuh/ monopoli untuk mengeksplorasi secara ekonomi haknya tersebut.<sup>18</sup>

Yang perlu masyarakat yakini, suatu perlindungan hukum Indikasi-geografis oleh suatu kelompok masyarakat, bukan berarti menutup kesempatan bagi pihak lain untuk menggunakan "nama wilayah" yang bersangkutan pada produk yang dapat diindikasikan sebagai produk Indikasi-geografis. Pihak ketiga siapapun tetap dapat mencantumkan "nama wilayah" pada merek dagangnya, sepanjang keaslian produk barang tetap dapat dijamin sesuai dengan keluarannya. Tentu saja pencantuman "nama wilayah" pada merek dagang melalui kebijakan mekanisme lisensi atau

ijin penggunaan dengan membayar sejumlah uang sebagai bentuk royalti kepada pemegang hak. Pemegang hak atas Indikasi-geografis dapat mengajukan gugatan terhadap pemakai Indikasi-geografi tanpa hak berupa permohonan ganti rugi dan penghentian penggunaan serta pemusnahan etiket Indikasi-geografis yang digunakan secara tanpa hak tersebut.

Dengan demikian, melalui perlindungan Indikasi-geografis, hanya produk asli yang dihasilkan dari daerah itu saja yang berhak mencantumkan "nama wilayah" pada merek dagangnya.

Ada beberapa contoh produk Indikasi-geografis berupa "tanda" menunjukkan "nama wilayah" yang telah terdaftar, dilindungi oleh negara dari penggunaan oleh pihak ke-3 secara tanpa hak.

Perkara Scotch Whisky adalah salah satu contoh produk Indikasi-geografis yang digunakan secara tanpa hak dan pihak pemegang hak dapat menuntut penggunaan "nama wilayah" secara tanpa hak tersebut. Pihak pemegang hak adalah the Skotch Whisky Association, suatu perusahaan perhimpunan menurut Undang-undang Negara Scotlandia dan berkedudukan di EDINBURGH. Di antara anggota pemohonnya yang memiliki pendaftaran merek di Indonesia untuk melindungi Scotch Whisky, yaitu Whisky yang berasal dari Scotlandia adalah John Walker and Sons Limited dengan merek Johny Walker, Matthew Gloag and Sons Limited dengan merek The Famous Grouse, dan William Sanderson Limited pemilik VAT 69. Kesemua merek tersebut untuk melindungi Scotch Whisky yaitu Whisky yang berasal dari Scotlandia. Permasalahan muncul ketika PT Golden Dragon telah mendaftarkan merek dagang untuk minuman anggur, minuman keras, dan likeur yang sesungguhnya esensial pada kata geografis yaitu "Scotch Buy", khas Scotlandia "Tartan" serta kepala lelaki memakai topi khas Scotlandia yaitu "Tam OSHANTER". Pemakaian merek oleh perusahaan ini memberi kesan pada khalayak ramai bahwa seakan-akan produk tersebut berasal dari Scotlandia atau mempunyai hubungan yang erat dengan Scotlandia. PT Golden Dragon diindikasikan ingin membonceng ketenaran kata geografis "Scotch" dan merugikan Pemohon dengan anggota-anggotanya sehingga pemohon merasa berkepentingan supaya merek "Scotch Buy" dibatalkan.<sup>19</sup>

Contoh lainnya adalah Beras Basmati asal India. India telah bertahun-tahun dikenal sebagai produsen beras beraroma dan berbutir panjang dari varietas lokal suatu daerah yang disebut "Basmati". Basmati telah digunakan dan diterima di seluruh dunia sebagai jenis beras yang tumbuh dan dihasilkan di Basmati. Bertahun-tahun beras Basmati telah menjadi komoditas ekspor yang mendatangkan devisa bagi India. Permasalahan muncul ketika

Ricetec perusahaan asal Amerika menggunakan kata *Texmati* dan/atau *Kasmati* untuk strain beras yang telah dikembangkan dari varietas lokal *Basmati*. Berdasarkan Pasal 22 TRIP's, penggunaan oleh anggota dengan cara apapun tanda atau tampilan barang berasal dari suatu wilayah geografis yang bukan benar-benar tempat asal, yang dapat mengelabui publik sebagai daerah asal adalah dilarang. Dengan adanya ketentuan tersebut, *Basmati* dapat dikategorikan merupakan arti suatu nama geografis. Kata *Basmati* telah diasosiasikan oleh konsumen di seluruh dunia sebagai beras beraroma dan berbutir panjang dengan rasa tertentu yang aslinya tumbuh di wilayah *Basmati*, India. Kepedulian konsumen terhadap kata *Basmati* dan asosiasi mereka atas kata *Basmati* terhadap beras berkualitas telah dengan jelas mendorong Ricetec untuk memperoleh reputasi (*goodwill*) *Basmati* dengan menjual beras hasil pengembangan varietas asli *Basmati* dengan nama *Texmati* dan/atau *Kasmati*. Penggunaan nama merek semacam ini dapat dengan mudah menyebabkan konsumen berpikir bahwa berasnya adalah tipe beras yang benar-benar tumbuh di *Basmati*, India. Jika saja "*Basmati*" ditemukan sebagai varietas generik beras, dan tidak sebagai nama geografis, maka India dapat kehilangan pasar ekspor yang ada dari beras *Basmati* mereka terhadap entitas bisnis lainnya yang menghasilkan varietas sejenis dari suatu tempat. Perlawanan India dalam masalah ini membuktikan bahwa *Basmati* bukan varietas generik beras, tetapi mewakili nama geografis. Dan oleh karena itu, bisa menggunakan WTO untuk menghentikan pelanggaran ini.<sup>20</sup>

Di Indonesia sendiri, sudah ada produk Indikasi-geografis yang tidak didaftarkan oleh komunitas masyarakat penghasil produk tersebut, dan didahului oleh pihak asing. Kasus tersebut adalah Kopi Toraja. Pendaftaran merek Kopi Toraja oleh *Key Coffee* di Jepang dan pengusaha di Amerika Serikat adalah salah satu bukti pemanfaatan tanda atau label Indikasi-geografis dari suatu produk, yang notabene bukan dari asal asli daerah yang memproduksi barang tersebut. Kondisi ini mengakibatkan eksportir Indonesia tidak bisa langsung menjual Kopi Toraja ke Jepang dan Amerika Serikat, kecuali lewat *Key Coffee* atau pengusaha Amerika Serikat karena jika mengekspor langsung, pihak Indonesia bisa dituding melanggar merek yang telah didaftar di sana.<sup>21</sup>

**Faktor-Faktor Penghambat dilakukannya Pendaftaran Indikasi Geografis dan Solusinya agar Berpotensi Meningkatkan Pertumbuhan Ekonomi Masyarakat.**

Penentuan menunjuk pihak yang akan menjadi

Pemohon pendaftaran Indikasi-geografis merupakan salah satu unsur penting sekaligus masalah yang pelik untuk dilaksanakan, ketika akan melakukan pendaftaran Indikasi-geografis. Pasal 5 ayat (1) PP Nomor 51 Tahun 2007 tentang Indikasi Geografis menyatakan bahwa permohonan diajukan secara tertulis dalam bahasa Indonesia oleh Pemohon atau melalui Kuasanya dengan mengisi formulir dalam rangkap tiga kepada Direktorat Jenderal HKI.

Pihak yang dapat menjadi Pemohon seperti yang telah disebutkan di atas adalah:

- a. Lembaga yang mewakili masyarakat di daerah yang memproduksi barang yang bersangkutan, yang terdiri atas:
  - 1) pihak yang mengusahakan barang yang merupakan hasil alam atau kekayaan alam;
  - 2) produsen barang hasil pertanian;
  - 3) pembuat barang-barang kerajinan tangan atau hasil industri; atau
  - 4) pedagang yang menjual barang tersebut.
- b. Lembaga yang diberi kewenangan untuk itu; atau
- c. Kelompok konsumen barang tersebut.

Menurut hemat penulis, menentukan pihak yang akan menjadi Pemohon ini dapat menyebabkan proses pendaftaran menjadi sulit untuk direalisasikan. Terlebih dengan adanya prasarat pengisian Buku Persyaratan oleh Pemohon, yaitu suatu dokumen yang di dalamnya memuat informasi tentang kualitas dan karakteristik yang khas dari barang yang dapat digunakan untuk membedakan barang yang satu dengan barang lainnya yang memiliki kategori sama. Adanya keharusan menguraikan hal-hal substantif dan administratif suatu Indikasi-geografis dalam Buku Persyaratan hanya dimungkinkan diisi oleh Pemohon yang memiliki kompetensi di bidangnya masing-masing.

Sangat tepat pendapat Lawrence M. Friedman<sup>22</sup> terkait masalah pendaftaran Indikasi-geografis yang berpotensi meningkatkan pertumbuhan ekonomi masyarakat. Menurut Friedman, ada tiga unsur sistem hukum (*Three Elements of Legal Sistem*) yaitu struktur (lembaga yang memiliki otoritas), substansi (peraturan perundang-undangan) dan kultur hukum (budaya masyarakat). Suatu peraturan dapat berlaku secara efektif memberikan perlindungan hukum bagi masyarakat apabila ketiga unsur hukum tersebut terpenuhi, karena apabila diibaratkan, struktur hukum seperti mesin, substansi adalah apa yang dihasilkan atau dikerjakan oleh mesin itu, dan budaya hukum adalah apa saja atau siapa saja yang memutuskan untuk menghidupkan dan memafikan mesin itu serta memutuskan bagaimana mesin itu digunakan.

Pendaftaran suatu produk yang potensial di-

lindungi sebagai produk Indikasi-geografis dalam PP Nomor 51 Tahun 2007 tentang Indikasi Geografis yang mengatur tentang tata cara pendaftaran Indikasi-geografis, dimaksudkan untuk melaksanakan secara menyeluruh ketentuan Pasal 56 ayat (9) UU Nomor 15 Tahun 2001 tentang Merek. PP yang disusun oleh Pemerintah tersebut diharapkan dapat memberikan kegunaan berupa perlindungan hukum yang mendatangkan manfaat ekonomi bagi masyarakat penghasil komoditas/ produk komoditas/barang di seluruh wilayah Indonesia yang memiliki kualitas dan karakteristik yang khas yang dapat digunakan untuk membedakan barang yang satu dengan barang lainnya yang memiliki kategori sama.

Faktor yang menjadi penghambat dilakukannya pendaftaran sehingga potensinya belum mampu meningkatkan pertumbuhan ekonomi masyarakat, terkait dengan struktur dan budaya hukum masyarakat. Dari semenjak dikeluarkannya PP tentang Indikasi-geografis Tahun 2007, belum ada masyarakat yang mendaftarkan "nama wilayahnya" sebagai tanda yang menunjukkan daerah asal suatu barang, yang karena faktor lingkungan geografis termasuk faktor alam, faktor manusia, atau kombinasi dari keduanya, memberikan ciri dan kualitas tertentu pada barang yang dihasilkan.

Hal tersebut menunjukkan, bahwa tingkat kesadaran masyarakat, baik masyarakat penghasil produk hasil alam dan kerajinan maupun masyarakat konsumen, untuk melindungi nama wilayah sebagai tanda yang menunjukkan daerah asal suatu barang masih rendah. Padahal, perlindungan hukum terhadap produk yang dapat diindikasikan sebagai produk Indikasi-geografis sangat tergantung dari tingkat kesadaran masyarakat akan pentingnya perlindungan hukum ini. Seperti yang diungkapkan Friedman, kesadaran masyarakat yang menentukan akan dilindungi atau tidaknya tanda yang menunjukkan nama wilayah penghasil produk yang memiliki ciri dan kualitas barang karena faktor geografis termasuk faktor alam, faktor manusia atau kombinasi keduanya. Masyarakat yang menentukan apakah ciri dan kualitas barang tersebut akan dipelihara dan dipertahankan dalam jangka waktu tertentu sehingga melahirkan reputasi (keterkenalan) atas barang tersebut, yang selanjutnya memungkinkan barang tersebut memiliki nilai ekonomi tinggi. Masyarakat pula lah sebagai Pemohon pendaftar Indikasi-geografis seperti tertuang dalam Pasal 5 ayat (3) PP Nomor 51 Tahun 2007 tentang Indikasi Geografis, yang menentukan apakah tanda yang menunjukkan nama wilayah penghasil produk Indikasi-geografis yang dihasilkan di wilayah mereka, harus didaftarkan atau tidak. Jadi, potensi Indikasi-geografis dalam

meningkatkan pertumbuhan ekonomi masyarakat sangat tergantung dari kesadaran masyarakat untuk melindungi tanda yang menunjukkan nama wilayah penghasil produk Indikasi-geografis yang dihasilkan di wilayah mereka melalui pendaftaran ke Dirjen HKI.

Rendahnya tingkat kesadaran masyarakat akan pentingnya perlindungan hukum Indikasi-geografis sedikit banyak dipengaruhi oleh rendahnya tingkat pendidikan masyarakat. Kenyataan ini menjadi lumrah karena masyarakat terutama penghasil produk hasil pertanian, produk olahan, dan hasil kerajinan tangan, yang memiliki ciri khas dan karakteristik tertentu, pada umumnya tinggal di wilayah pedesaan; sedangkan kelompok konsumen cenderung mengambil sikap tidak peduli dengan kerugian yang dialaminya karena memperoleh barang yang tidak dijamin keasliannya.

Faktor lain yang menyebabkan potensi Indikasi-geografis belum dapat dimanfaatkan secara maksimal untuk menunjang pertumbuhan ekonomi masyarakat, adalah terkait dengan struktur hukum. Lawrence M. Friedman mengibaratkan struktur hukum seperti mesin. Tanda yang mengandung ciri khas karena karakteristik geografis ini, di hampir semua wilayah yang berpotensi dilindungi sebagai produk Indikasi-geografis belum mendapatkan perhatian yang memadai dari pemerintah di daerah.

Pemerintah Daerah seharusnya memberikan dukungan terwujudnya perlindungan akan hak Indikasi-geografis yang ada di daerahnya, sebagai bentuk kepedulian terhadap kekayaan daerah tersebut. Kebebasan daerah menggali potensi daerah yang dipandang potensial, dapat meningkatkan Pendapatan Domestik Bruto Regional (PDBR) masyarakat setempat.<sup>23</sup> Dengan berbagai potensi Indikasi-geografis dalam meningkatkan pertumbuhan ekonomi masyarakat, sudah seyogyanya pemerintah memberikan perlindungan, dengan maksud menyediakan cara untuk menghindari penggunaan Indikasi-geografis dengan cara apapun, dalam memberi tanda atau menampilkan barang yang dapat mengindikasikan atau mencitrakan bahwa barang yang diperdagangkan berasal dari suatu wilayah geografis yang bukan dari tempat asal yang sebenarnya. Bentuk perlindungan dari pemerintah bagi kepentingan masyarakat dapat dilakukan dengan mendukung usaha masyarakat kearah pendaftaran berupa misalnya melakukan pemetaan terhadap produk Indikasi-geografis di daerahnya, menyediakan fasilitas untuk melengkapi persyaratan-persyaratan teknis administratif untuk pendaftaran produk Indikasi-geografis, dan sebagai mediator terbentuknya Pemohon pendaftar. Akan tetapi, seperti yang telah dijelaskan sebelumnya,

sampai saat ini belum ada tindakan atau upaya yang dilakukan pemerintah daerah untuk mempersiapkan persyaratan teknis administratif dalam rangka pendaftaran produk Indikasi-geografis.

Salah satu langkah awal untuk mempersiapkan persyaratan teknis administratif adalah memfasilitasi terbentuknya lembaga Pemohon pendaftar Indikasi-geografis. Diperlukan koordinasi antara pemerintah dengan masyarakat terkait dengan pengisian Buku Persyaratan, termasuk di dalamnya masyarakat konsumen.

Agar tercipta sinergi yang memberikan peluang terealisasinya perlindungan hukum melalui pendaftaran Indikasi-geografis, penulis menyarankan perwakilan dari gabungan lembaga yang terdapat dalam poin a, poin b, dan poin c sebagai pihak Pemohon pendaftar Indikasi-geografis. Lembaga dalam point a yaitu lembaga yang mewakili masyarakat di daerah yang memproduksi barang yang bersangkutan, yang terdiri atas: pihak yang mengusahakan barang yang merupakan hasil alam atau kekayaan alam; produsen barang hasil pertanian; pembuat barang-barang kerajinan tangan atau hasil industri; atau pedagang yang menjual barang tersebut. Lembaga dalam poin b yaitu lembaga yang diberi kewenangan untuk itu, dalam hal ini pemerintah daerah dan lembaga pada poin c, yaitu kelompok konsumen barang yang dapat diindikasikan sebagai produk Indikasi-geografis.

Pemohon yang merupakan gabungan lembaga, diwajibkan mengisi Buku Persyaratan sebagai pedoman/patokan yang dapat dijadikan bukti kuat untuk menghindari penggunaan "nama wilayah" untuk produk yang bukan asli berasal dari daerah tersebut. Dengan terbentuknya pihak Pemohon pendaftar suatu produk Indikasi-geografis, diharapkan kasus-kasus seperti Kopi Toraja tidak akan terulang lagi karena keberadaan dokumen berupa Buku Persyaratan dapat dijadikan bukti kuat untuk membatalkan pendaftaran secara tanpa hak oleh pihak lain.

Buku Persyaratan yang merupakan prasyarat utama pendaftaran harus mengandung beberapa uraian yang hanya mungkin diisi gabungan lembaga tersebut. Dasar pertimbangan gabungan lembaga yang terdiri dari masyarakat, kelompok konsumen dan pemerintah untuk melaksanakan mekanisme pendaftaran Indikasi-geografis adalah:<sup>24</sup>

1. yang dapat memberikan uraian mengenai sejarah dan tradisi yang berhubungan dengan pemakaian Indikasi-geografis untuk menandai barang yang dihasilkan di daerah tersebut, adalah menjadi kompetensi masyarakat petani.
2. peran kelompok konsumen dalam memberikan pengakuan mengenai produk Indikasi-geografis

dan menjadi keuntungan konsumen apabila produk yang dikonsumsi dijamin keasliannya.

3. menjadi kompetensi Dinas Pertanian untuk memberikan uraian mengenai karakteristik khas dan kualitas yang membedakan barang tertentu dengan barang lain yang memiliki kategori sama, dan menjelaskan tentang hubungannya dengan daerah tempat barang tersebut dihasilkan; uraian mengenai pengaruh lingkungan geografis dan alam serta faktor manusia terhadap kualitas atau karakteristik barang tersebut; dan uraian tentang batas-batas wilayah dan/atau peta daerah yang dilindungi oleh Indikasi-geografis;
4. pedagang/pengusaha/bandar terkait dengan kompetensinya menjelaskan tentang proses produksi, proses pengolahan, proses pembuatan yang digunakan sehingga memungkinkan setiap produsen di daerah tersebut dapat memproduksi, mengolah, atau membuat barang terkait; dan
5. bagian Hukum pemerintah daerah dimana produk Indikasi-geografis tersebut berada untuk pengurusan birokrasi pemerintahan.

Penunjukan lembaga pemerintah untuk berkoordinasi dengan lembaga yang ada di masyarakat termasuk kelompok konsumen semata-mata ditujukan pada fungsinya sebagai pengayom, pelindung, dan pelaksana kesejahteraan masyarakat, dengan cara mengelola dan memberdayakan secara optimal manfaat ekonominya.<sup>25</sup> Dengan adanya koordinasi antara lembaga pemerintah dan lembaga masyarakat termasuk kelompok konsumen, sangat dimungkinkan peningkatan daya beli masyarakat di daerah penghasil produk Indikasi-geografis dapat terwujud.

#### Catatan Kaki

- \* Dosen Fakultas Hukum Unisba, meneliti masalah Indikasi-geografis Ubi Cilembu dari Tahun 2001-sekarang.
- 1 Pasal 1 angka 1 PP Nomor 51 Tahun 2007 tentang Indikasi Geografis.
  - 2 Kamil Idris, *Kekayaan Intelektual, Sebuah Kekuatan untuk Pertumbuhan Ekonomi*, World Intellectual Property, 2004.
  - 3 Emawati Junus, Direktur Merek Dirjen HKI, *Pentingnya Perlindungan Indikasi Geografis sebagai Bagian dari HKI dan Pelaksanaannya di Indonesia*, Makalah pada Seminar Nasional "Perlindungan Indikasi Geografis di Indonesia, Jakarta, 6-7 Desember 2004.
  - 4 Chandra Manan Mangan, Asisten Deputi Bidang Pendayagunaan HKI dan Standardisasi Indikasi Geografis, *Aset Daerah Yang Potensial Untuk Dikomersilkan*, Makalah pada Seminar "Indikasi Geografis", Sentra HKI Maziyya - BATON ICMI ORSAT Bandung, PUSDAI,

31 Agustus 2005.

- 5 Karena belum terdaftar, masih terdapat pemanfaatan tanda atau label Indikasi-geografis dari suatu produk, yang notabene bukan dari asal asli daerah yang memproduksi barang tersebut, seperti misalnya Ubi Cilembu. Ubi Cilembu dijual di berbagai daerah antara lain di Yogyakarta, Surabaya, Jakarta dan Bali, padahal Ubi Cilembu hanya dipanen setahun sekali. Sebagian besar ubi yang beredar di pasaran dengan label Ubi Cilembu, sejatinya berasal dari daerah lain, misalnya Cianjur, Rancakalong, Purwakarta, bahkan Lampung. Hal ini diperkuat dengan data, bahwa dari seluas 45 ha areal tanaman ubi dari Desa Cilembu hanya di daerah Sawah Lega, Sawah Lebak, Pangkalan dan Citali saja yang memiliki karakteristik khas dan dalam setahun paling banyak hanya menghasilkan 7 ton/ ha. Produk lain yang juga dimanfaatkan secara tidak sah adalah Beras Cianjur. Dalam Harian Umum Galamedia, Selasa 26 Juni 2007, beras karungan dengan label beras Pandanwangi Cianjur yang dijual sejumlah petani atau pedagang beras di pasaran sekarang, tidak murni lagi melainkan dioplos atau bahkan mungkin varietas lain yang disemprot essen pandan. Atau bahkan memang bukan varietas asli Pandanwangi Cianjur tapi varietas lain, yang kebetulan dikemas dengan kemasan (karung, atau Plastik) dengan merk dagang Beras Cianjur Pandanwangi, seperti terbukti dari temuan Dinas Pertanian (Distan) Kab. Bandung bahwa ternyata beras Pandanwangi Cianjur tersebut berasal dari Kab. Bandung.
- 6 Mochtar Kusumaatmadja, *Pengantar Hukum Internasional*, Alumni, Bandung, 1986.
- 7 Article 22.2. *Agreement on Trade Related Aspects of Intellectual Property Rights* ("TRIPs").
- 8 Lihat Helianti Hilman dan Ahdian Romadoni, *Pengelolaan dan Perlindungan Aset Kekayaan Intelektual*, The British Council-DFID-ITB, Jakarta, 2001, hlm. 127, Lihat juga Achmad Zen Umar Purba, *Hak Kekayaan Intelektual Pasca TRIPs*, Cet. Pertama, Alumni, Bandung, 2002, hlm.76-77.
- 9 Dalam Achmad Zen Umar Purba, *Ibid*, hlm. 43.
- 10 Geographical Indication, [www.wipo.com](http://www.wipo.com) tahun 2004.
- 11 Muhamad Djumhana, *Perkembangan Doktrin dan Teori Perlindungan Hak Kekayaan Intelektual*, Citra Aditya Bakti, 2006, Hlm. 74.
- 12 *Ibid*.
- 13 Perbedaannya, ada pada kepemilikan. Apabila merek dapat dimiliki oleh pribadi atau badan, sementara kepemilikan atas perlindungan Indikasi-geografis bersifat komunal, bukan individual, artinya terdapat prinsip-prinsip yang harus dipegang, yaitu bahwa komunitas masyarakat setempat memiliki hak untuk mendapatkan pengakuan, perlindungan, pembagian keuntungan, dan hak untuk berpartisipasi dalam pengambilan keputusan. Prinsip hak lainnya yang diakui sebagai hak komunitas masyarakat setempat, yaitu hak moral berupa hak informasi terawal atau lebih dahulu (*prior informed concern*). Muhamad Djumhana, *Ibid*, hlm. 19-20.
- 14 Afrillyanna Purba, at. al, *TRIP's - WTO & Hukum HKI Indonesia: Kajian Perlindungan Hak Cipta Seni Batik Tradisional Indonesia*, Rineka Cipta, Jakarta, 2005, hlm. 13-14. Berdasarkan prinsip keadilan, maka pencipta sebuah karya, atau orang lain yang bekerja membuah hasil dari kemampuan intelektualnya, wajar memperoleh imbalan. Dalam prinsip ekonomi, suatu kepemilikan adalah wajar karena sifat ekonomis manusia yang menjadikan hal itu satu keharusan untuk menunjang kehidupannya di dalam masyarakat. Dalam prinsip sosial, pemberian hak oleh hukum tidak boleh semata-mata untuk memenuhi kepentingan perseorangan, akan tetapi, harus memenuhi kepentingan seluruh masyarakat.
- 15 Achmad Zen Umar Purba, *Op. Cit.*, hlm. 76-77.
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- 18 Sunaryati Hartono dan Eli Ermawati, *Hukum Ekonomi*, Diktat Kuliah, Universitas Parahyangan, tanpa tahun.
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- 20 Helianti Hilman dan Ahdian Romadoni, *Op. Cit.* hlm. 130-132.
- 21 Muhamad Djumhana, *Op.Cit*, hlm. 74.
- 22 Lawrence M. Friedman, *American Law an Introduction, Hukum Amerika: Sebuah Pengantar*, Penerjemah: Wishnu Basuki, Tatanusa, Jakarta, 2001, hlm. 6-8.
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- 24 Taity A. Ramli, *et.al*, Laporan Akhir PKM dengan judul "Penyuluhan Hukum Tentang Tata Cara Pendaftaran Indikasi Geografis Bagi Pihak Petani Ubi Cilembu dan Pemerintah Kabupaten Sumedang, Jawa Barat Sebagai Wujud Sumbangsih Perguruan Tinggi Dalam Rangka Meningkatkan Indeks Pembangunan Manusia (IPM)", LPPM Unisba, 2007.
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## II. EXPLANATORY NOTE BY THE UNCITRAL SECRETARIAT ON THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

### INTRODUCTION

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##### I. United Nations Convention on Contracts for the International Sale of Goods

### PREAMBLE

*The States Parties to this Convention,*

*Bearing in mind* the broad objectives in the resolutions adopted by the sixth special session of the General Assembly of the United Nations on the establishment of a New International Economic Order,

*Considering* that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,

*Being of the opinion* that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade,

*Have agreed* as follows:

#### Part I. Sphere of application and general provisions

### CHAPTER 1. SPHERE OF APPLICATION

#### Article 1

- (1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:
  - (a) when the States are Contracting States; or
  - (b) when the rules of private international law lead to the application of the law of a Contracting State.
- (2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.
- (3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of

this Convention.

#### Article 2

**This Convention does not apply to sales:**

- (a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;
- (b) by auction;
- (c) on execution or otherwise by authority of law;
- (d) of stocks, shares, investment securities, negotiable instruments or money;
- (e) of ships, vessels, hovercraft or aircraft;
- (f) of electricity.

#### Article 3

- (1) Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.
- (2) This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services.

#### Article 4

This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:

- (a) the validity of the contract or of any of its provisions or of any usage;
- (b) the effect which the contract may have on the property in the goods sold.

#### Article 5

This Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person.

#### Article 6

The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.

### CHAPTER II. GENERAL PROVISIONS

#### Article 7

- (1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.
- (2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

#### Article 8

- (1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.
- (2) If the preceding paragraph is not applicable, statements

made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.

- (3) In determining the intent of a party or the understanding of a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

#### Article 9

- (1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.
- (2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

#### Article 10

For the purposes of this Convention:

- (a) if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract;
- (b) if a party does not have a place of business, reference is to be made to his habitual residence.

#### Article 11

A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.

#### Article 12

Any provision of article 11, article 29 or Part II of this Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article 96 of this Convention. The parties may not derogate from or vary the effect of this article.

#### Article 13

**For the purposes of this Convention "writing" includes telegram and telex.**

### Part II. Formation of the contract

#### Article 14

- (1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.
- (2) A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.

**Article 15**

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

**Article 16**

- (1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.
- (2) However, an offer cannot be revoked:
  - (a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or
  - (b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

**Article 17**

**An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror.**

**Article 18**

- (1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.
- (2) An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.
- (3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down in the preceding paragraph.

**Article 19**

- (1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counteroffer.
- (2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.
- (3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.

**Article 20**

- (1) A period of time of acceptance fixed by the offeror in a tele-

gram or a letter begins to run from the moment the telegram is handed in for dispatch or from the date shown on the letter or, if no such date is shown, from the date shown on the envelope. A period of time for acceptance fixed by the offeror by telephone, telex or other means of instantaneous communication, begins to run from the moment that the offer reaches the offeree.

- (2) Official holidays or non-business days occurring during the period for acceptance are included in calculating the period. However, if a notice of acceptance cannot be delivered at the address of the offeror on the last day of the period because that day falls on an official holiday or a non-business day at the place of business of the offeror, the period is extended until the first business day which follows.

**Article 21**

- (1) A late acceptance is nevertheless effective as an acceptance if without delay the offeror orally so informs the offeree or dispatches a notice to that effect.
- (2) If a letter or other writing containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without delay, the offeror orally informs the offeree that he considers his offer as having lapsed or dispatches a notice to that effect.

**Article 22**

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

**Article 23**

A contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of this Convention.

**Article 24**

For the purposes of this Part of the Convention, an offer, declaration of acceptance or any other indication of intention "reaches" the addressee when it is made orally to him or delivered by any other means to him personally, to his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence.

**Part III. Sale of goods**

**CHAPTER I. GENERAL PROVISIONS**

**Article 25**

A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.

**Article 26**

**A declaration of avoidance of the contract is effective only if made by notice to the other party.**

**Article 27**

Unless otherwise expressly provided in this Part of the Conven-

tion, if any notice, request or other communication is given or made by a party in accordance with this Part and by means appropriate in the circumstances, a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication.

#### Article 28

If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.

#### Article 29

- (1) A contract may be modified or terminated by the mere agreement of the parties.
- (2) A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.

### CHAPTER II. OBLIGATIONS OF THE SELLER

#### Article 30

The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention.

#### Section I.

#### Delivery of the goods and handing over of documents

#### Article 31

If the seller is not bound to deliver the goods at any other particular place, his obligation to deliver consists:

- (a) if the contract of sale involves carriage of the goods--in handing the goods over to the first carrier for transmission to the buyer;
- (b) if, in cases not within the preceding subparagraph, the contract relates to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular place--in placing the goods at the buyer's disposal at that place;
- (c) in other cases--in placing the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract.

#### Article 32

- (1) If the seller, in accordance with the contract or this Convention, hands the goods over to a carrier and if the goods are not clearly identified to the contract by markings on the goods, by shipping documents or otherwise, the seller must give the buyer notice of the consignment specifying the goods.
- (2) If the seller is bound to arrange for carriage of the goods, he must make such contracts as are necessary for carriage to the place fixed by means of transportation appropriate in the circumstances and according to the usual terms for such transportation.

- (3) If the seller is not bound to effect insurance in respect of the carriage of the goods, he must, at the buyer's request, provide him with all available information necessary to enable him to effect such insurance.

#### Article 33

#### The seller must deliver the goods:

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

#### Article 34

If the seller is bound to hand over documents relating to the goods, he must hand them over at the time and place and in the form required by the contract. If the seller has handed over documents before that time, he may, up to that time, cure any lack of conformity in the documents, if the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.

### Section II.

#### Conformity of the goods and third party claims

#### Article 35

- (1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.
- (2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:
  - (a) are fit for the purposes for which goods of the same description would ordinarily be used;
  - (b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;
  - (c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;
  - (d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.
- (3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.

#### Article 36

- (1) The seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time.
- (2) The seller is also liable for any lack of conformity which occurs after the time indicated in the preceding paragraph and which is due to a breach of any of his obligations, including a breach of any guarantee that for a period of time the goods will remain fit for their ordinary purpose or for some particular purpose or will retain specified qualities or

characteristics.

#### Article 37

If the seller has delivered goods before the date for delivery, he may, up to that date, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any non-conforming goods delivered or remedy any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.

#### Article 38

- (1) The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.
- (2) If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.
- (3) If the goods are redirected in transit or redispached by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redirection or redispach, examination may be deferred until after the goods have arrived at the new destination.

#### Article 39

- (1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.
- (2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee.

#### Article 40

The seller is not entitled to rely on the provisions of articles 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer.

#### Article 41

The seller must deliver goods which are free from any right or claim of a third party, unless the buyer agreed to take the goods subject to that right or claim. However, if such right or claim is based on industrial property or other intellectual property, the seller's obligation is governed by article 42.

#### Article 42

- (1) The seller must deliver goods which are free from any right or claim of a third party based on industrial property or other intellectual property, of which at the time of the conclusion of the contract the seller knew or could not have been unaware, provided that the right or claim is based on industrial property or other intellectual property:
  - (a) under the law of the State where the goods will be resold or otherwise used, if it was contemplated by the parties at the time of the conclusion of the contract that the goods would be resold or otherwise used in that State; or
  - (b) in any other case, under the law of the State where the

buyer has his place of business.

- (2) The obligation of the seller under the preceding paragraph does not extend to cases where:
  - (a) at the time of the conclusion of the contract the buyer knew or could not have been unaware of the right or claim; or
  - (b) the right or claim results from the seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer.

#### Article 43

- (1) The buyer loses the right to rely on the provisions of article 41 or article 42 if he does not give notice to the seller specifying the nature of the right or claim of the third party within a reasonable time after he has become aware or ought to have become aware of the right or claim.
- (2) The seller is not entitled to rely on the provisions of the preceding paragraph if he knew of the right or claim of the third party and the nature of it.

#### Article 44

Notwithstanding the provisions of paragraph (1) of article 39 and paragraph (1) of article 43, the buyer may reduce the price in accordance with article 50 or claim damages, except for loss of profit, if he has a reasonable excuse for his failure to give the required notice.

### Section III.

#### Remedies for breach of contract by the seller

#### Article 45

- (1) If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may:
  - (a) exercise the rights provided in articles 46 to 52;
  - (b) claim damages as provided in articles 74 to 77.
- (2) The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies.
- (3) No period of grace may be granted to the seller by a court or arbitral tribunal when the buyer resorts to a remedy for breach of contract.

#### Article 46

- (1) The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement.
- (2) If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made either in conjunction with notice given under article 39 or within a reasonable time thereafter.
- (3) If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. A request for repair must be made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

#### Article 47

- (1) The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations.
- (2) Unless the buyer has received notice from the seller that he will not perform within the period so fixed, the buyer may not, during that period, resort to any remedy for breach

of contract. However, the buyer is not deprived thereby of any right he may have to claim damages for delay in performance.

#### Article 48

- (1) Subject to article 49, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. However, the buyer retains any right to claim damages as provided for in this Convention.
- (2) If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time, the seller may perform within the time indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller.
- (3) A notice by the seller that he will perform within a specified period of time is assumed to include a request, under the preceding paragraph, that the buyer make known his decision.
- (4) A request or notice by the seller under paragraph (2) or (3) of this article is not effective unless received by the buyer.

#### Article 49

- (1) The buyer may declare the contract avoided:
  - (a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or
  - (b) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 47 or declares that he will not deliver within the period so fixed.
- (2) However, in cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so:
  - (a) in respect of late delivery, within a reasonable time after he has become aware that delivery has been made;
  - (b) in respect of any breach other than late delivery, within a reasonable time:
    - (i) after he knew or ought to have known of the breach;
    - (ii) after the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of article 47, or after the seller has declared that he will not perform his obligations within such an additional period; or
    - (iii) after the expiration of any additional period of time indicated by the seller in accordance with paragraph (2) of article 48, or after the buyer has declared that he will not accept performances.

#### Article 50

If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time. However, if the seller remedies any failure to perform his obligations in accordance with article 37 or article 48 or if the buyer refuses to accept performance by the seller in accordance with those articles, the buyer may not reduce the price.

#### Article 51

- (1) If the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract, articles 46 to 50 apply in respect of the part which is missing or which does not conform.
- (2) The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract.

#### Article 52

- (1) If the seller delivers the goods before the date fixed, the buyer may take delivery or refuse to take delivery.
- (2) If the seller delivers a quantity of goods greater than that provided for in the contract, the buyer may take delivery or refuse to take delivery of the excess quantity. If the buyer takes delivery of all or part of the excess quantity, he must pay for it at the contract rate.

### CHAPTER III. OBLIGATIONS OF THE BUYER

#### Article 53

The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention.

#### Section I.

#### Payment of the price

#### Article 54

The buyer's obligation to pay the price includes taking such steps and complying with such formalities as may be required under the contract or any laws and regulations to enable payment to be made.

#### Article 55

Where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned.

#### Article 56

If the price is fixed according to the weight of the goods, in case of doubt it is to be determined by the net weight.

#### Article 57

- (1) If the buyer is not bound to pay the price at any other particular place, he must pay it to the seller:
  - (a) at the seller's place of business; or
  - (b) if the payment is to be made against the handing over of the goods or of documents, at the place where the handing over takes place.

- (2) The seller must bear any increase in the expenses incidental to payment which is caused by a change in his place of business subsequent to the conclusion of the contract.

#### Article 58

- (1) If the buyer is not bound to pay the price at any other specific time, he must pay it when the seller places either the goods or documents controlling their disposition at the buyer's disposal in accordance with the contract and this Convention. The seller may make such payment a condition for handing over the goods or documents.
- (2) If the contract involves carriage of the goods, the seller may



dispatch the goods on terms whereby the goods, or documents controlling their disposition, will not be handed over to the buyer except against payment of the price.

- (3) The buyer is not bound to pay the price until he has had an opportunity to examine the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with his having such an opportunity.

**Article 59**

The buyer must pay the price on the date fixed by or determinable from the contract and this Convention without the need for any request or compliance with any formality on the part of the seller.

**Section II. Taking delivery**

**Article 60**

The buyer's obligation to take delivery consists:

- (a) in doing all the acts which could reasonably be expected of him in order to enable the seller to make delivery; and
- (b) in taking over the goods.

**Section III.**

**Remedies for breach of contract by the buyer**

**Article 61**

- (1) If the buyer fails to perform any of his obligations under the contract or this Convention, the seller may:
  - (a) exercise the rights provided in articles 62 to 65;
  - (b) claim damages as provided in articles 74 to 77.
- (2) The seller is not deprived of any right he may have to claim damages by exercising his right to other remedies.
- (3) No period of grace may be granted to the buyer by a court or arbitral tribunal when the seller resorts to a remedy for breach of contract.

**Article 62**

The seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with this requirement.

**Article 63**

- (1) The seller may fix an additional period of time of reasonable length for performance by the buyer of his obligations.
- (2) Unless the seller has received notice from the buyer that he will not perform within the period so fixed, the seller may not, during that period, resort to any remedy for breach of contract. However, the seller is not deprived thereby of any right he may have to claim damages for delay in performance.

**Article 64**

- (1) The seller may declare the contract avoided:
  - (a) if the failure by the buyer to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or
  - (b) if the buyer does not, within the additional period of time fixed by the seller in accordance with paragraph (1) of article 63, perform his obligation to pay the price or take delivery of the goods, or if he declares that he will not do so within the period so fixed;
- (2) However, in cases where the buyer has paid the price, the seller loses the right to declare the contract avoided unless

he does so:

- (a) in respect of late performance by the buyer, before the seller has become aware that performance has been rendered; or
- (b) in respect of any breach other than late performance by the buyer, within a reasonable time:
  - (i) after the seller knew or ought to have known of the breach; or
  - (ii) after the expiration of any additional period of time fixed by the seller in accordance with paragraph (1) of article 63, or after the buyer has declared that he will not perform his obligations within such an additional period.

**Article 65**

- (1) If under the contract the buyer is to specify the form, measurement or other features of the goods and he fails to make such specification either on the date agreed upon or within a reasonable time after receipt of a request from the seller, the seller may, without prejudice to any other rights he may have, make the specification himself in accordance with the requirements of the buyer that may be known to him.
- (2) If the seller makes the specification himself, he must inform the buyer of the details thereof and must fix a reasonable time within which the buyer may make a different specification. If, after receipt of such a communication, the buyer fails to do so within the time so fixed, the specification made by the seller is binding.

**CHAPTER IV. PASSING OF RISK**

**Article 66**

Loss of or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price, unless the loss or damage is due to an act or omission of the seller.

**Article 67**

- (1) If the contract of sale involves carriage of the goods and the seller is not bound to hand them over at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract of sale. If the seller is bound to hand the goods over to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place. The fact that the seller is authorized to retain documents controlling the disposition of the goods does not affect the passage of the risk.
- (2) Nevertheless, the risk does not pass to the buyer until the goods are clearly identified to the contract, whether by markings on the goods, by shipping documents, by notice given to the buyer or otherwise.

**Article 68**

The risk in respect of goods sold in transit passes to the buyer from the time of the conclusion of the contract. However, if the circumstances so indicate, the risk is assumed by the buyer from the time the goods were handed over to the carrier who issued the documents embodying the contract of carriage. Nevertheless, if at the time of the conclusion of the contract of sale the seller knew or ought to have known that the goods had been lost or damaged and did not disclose this to the buyer, the loss or damage is at the risk of the seller.

**Article 69**

- (1) In cases not within articles 67 and 68, the risk passes to the

buyer when he takes over the goods or, if he does not do so in due time, from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery.

- (2) However, if the buyer is bound to take over the goods at a place other than a place of business of the seller, the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place.
- (3) If the contract relates to goods not then identified, the goods are considered not to be placed at the disposal of the buyer until they are clearly identified to the contract.

#### Article 70

If the seller has committed a fundamental breach of contract, articles 67, 68 and 69 do not impair the remedies available to the buyer on account of the breach.

### CHAPTER V. PROVISIONS COMMON TO THE OBLIGATIONS OF THE SELLER AND OF THE BUYER

#### Section I.

#### Anticipatory breach and instalment contracts

#### Article 71

- (1) A party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of:
  - (a) a serious deficiency in his ability to perform or in his creditworthiness; or
  - (b) his conduct in preparing to perform or in performing the contract.
- (2) If the seller has already dispatched the goods before the grounds described in the preceding paragraph become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them. The present paragraph relates only to the rights in the goods as between the buyer and the seller.
- (3) A party suspending performance, whether before or after dispatch of the goods, must immediately give notice of the suspension to the other party and must continue with performance if the other party provides adequate assurance of his performance.

#### Article 72

- (1) If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided.
- (2) If time allows, the party intending to declare the contract avoided must give reasonable notice to the other party in order to permit him to provide adequate assurance of his performance.
- (3) The requirements of the preceding paragraph do not apply if the other party has declared that he will not perform his obligations.

#### Article 73

- (1) In the case of a contract for delivery of goods by instalments, if the failure of one party to perform any of his obligations in respect of any instalment constitutes a fundamental breach of contract with respect to that instalment, the other

party may declare the contract avoided with respect to that instalment.

- (2) If one party's failure to perform any of his obligations in respect of any instalment gives the other party good grounds to conclude that a fundamental breach of contract will occur with respect to future instalments, he may declare the contract avoided for the future, provided that he does so within a reasonable time.
- (3) A buyer who declares the contract avoided in respect of any delivery may, at the same time, declare it avoided in respect of deliveries already made or of future deliveries if, by reason of their interdependence, those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract.

#### Section II.

#### Damages

#### Article 74

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

#### Article 75

If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under article 74.

#### Article 76

- (1) If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under article 75, recover the difference between the price fixed by the contract and the current price at the time of avoidance as well as any further damages recoverable under article 74. If, however, the party claiming damages has avoided the contract after taking over the goods, the current price at the time of such taking over shall be applied instead of the current price at the time of avoidance.
- (2) For the purposes of the preceding paragraph, the current price is the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at such other place as serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods.

#### Article 77

A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.

#### Section III. Interest

#### Article 78

If a party fails to pay the price or any other sum that is in arrears,

the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article 74.

#### Section IV. Exemption

##### Article 79

- (1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.
- (2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:
  - (a) he is exempt under the preceding paragraph; and
  - (b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.
- (3) The exemption provided by this article has effect for the period during which the impediment exists.
- (4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such nonreceipt.
- (5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.

##### Article 80

A party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission.

#### Section V. Effects of avoidance

##### Article 81

- (1) Avoidance of the contract releases both parties from their obligations under it, subject to any damages which may be due. Avoidance does not affect any provision of the contract for the settlement of disputes or any other provision of the contract governing the rights and obligations of the parties consequent upon the avoidance of the contract.
- (2) A party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party has supplied or paid under the contract. If both parties are bound to make restitution, they must do so concurrently.

##### Article 82

- (1) The buyer loses the right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them.
- (2) The preceding paragraph does not apply:
  - (a) if the impossibility of making restitution of the goods or of making restitution of the goods substantially in the condition in which the buyer received them is not due to his actor omission;
  - (b) the goods or part of the goods have perished or deteriorated as a result of the examination provided for in article 38; or

- (c) if the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before he discovered or ought to have discovered the lack of conformity.

##### Article 83

A buyer who has lost the right to declare the contract avoided or to require the seller to deliver substitute goods in accordance with article 82 retains all other remedies under the contract and this Convention.

##### Article 84

- (1) If the seller is bound to refund the price, he must also pay interest on it, from the date on which the price was paid.
- (2) The buyer must account to the seller for all benefits which he has derived from the goods or part of them:
  - (a) if he must make restitution of the goods or part of them; or
  - (b) if it is impossible for him to make restitution of all or part of the goods or to make restitution of all or part of the goods substantially in the condition in which he received them, but he has nevertheless declared the contract avoided or required the seller to deliver substitute goods.

#### Section VI. Preservation of the goods

##### Article 85

If the buyer is in delay in taking delivery of the goods or, where payment of the price and delivery of the goods are to be made concurrently, if he fails to pay the price, and the seller is either in possession of the goods or otherwise able to control their disposition, the seller must take such steps as are reasonable in the circumstances to preserve them. He is entitled to retain them until he has been reimbursed his reasonable expenses by the buyer.

##### Article 86

- (1) If the buyer has received the goods and intends to exercise any right under the contract or this Convention to reject them, he must take such steps to preserve them as are reasonable in the circumstances. He is entitled to retain them until he has been reimbursed his reasonable expenses by the seller.
- (2) If goods dispatched to the buyer have been placed at his disposal at their destination and he exercises the right to reject them, he must take possession of them on behalf of the seller, provided that this can be done without payment of the price and without unreasonable inconvenience or unreasonable expense. This provision does not apply if the seller or a person authorized to take charge of the goods on his behalf is present at the destination. If the buyer takes possession of the goods under this paragraph, his rights and obligations are governed by the preceding paragraph.

##### Article 87

A party who is bound to take steps to preserve the goods may deposit them in a warehouse of a third person at the expense of the other party provided that the expense incurred is not unreasonable.

##### Article 88

- (1) A party who is bound to preserve the goods in accordance

with article 85 or 86 may sell them by any appropriate means if there has been an unreasonable delay by the other party in taking possession of the goods or in taking them back or in paying the price or the cost of preservation, provided that reasonable notice of the intention to sell has been given to the other party.

- (2) If the goods are subject to rapid deterioration or their preservation would involve unreasonable expense, a party who is bound to preserve the goods in accordance with article 85 or 86 must take reasonable measures to sell them. To the extent possible he must give notice to the other party of his intention to sell.
- (3) A party selling the goods has the right to retain out of the proceeds of sale an amount equal to the reasonable expenses of preserving the goods and of selling them. He must account to the other party for the balance.

#### Part IV. Final provisions

**Article 89** The Secretary-General of the United Nations is hereby designated as the depositary for this Convention.

#### Article 90

This Convention does not prevail over any international agreement which has already been or may be entered into and which contains provisions concerning the matters governed by this Convention, provided that the parties have their places of business in States parties, to such agreement.

#### Article 91

- (1) This Convention is open for signature at the concluding meeting of the United Nations Conference on Contracts for the International Sale of Goods and will remain open for signature by all States at the Headquarters of the United Nations, New York until 30 September 1981.
- (2) This Convention is subject to ratification, acceptance or approval by the signatory States.
- (3) This Convention is open for accession by all States which are not signatory States as from the date it is open for signature.
- (4) Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

#### Article 92

- (1) A Contracting State may declare at the time of signature, ratification, acceptance, approval or accession that it will not be bound by Part II of this Convention or that it will not be bound by Part III of this Convention.
- (2) A Contracting State which makes a declaration in accordance with the preceding paragraph in respect of Part II or Part III of this Convention is not to be considered a Contracting State within paragraph (1) of article 1 of this Convention in respect of matters governed by the Part to which the declaration applies.

#### Article 93

- (1) If a Contracting State has two or more territorial units in which, according to its constitution, different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or

more of them, and may amend its declaration by submitting another declaration at any time.

- (2) These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.
- (3) If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, and if the place of business of a party is located in that State, this place of business, for the purposes of this Convention, is considered not to be in a Contracting State, unless it is in a territorial unit to which the Convention extends.
- (4) If a Contracting State makes no declaration under paragraph (1) of this article, the Convention is to extend to all territorial units of that State.

#### Article 94

- (1) Two or more Contracting States which have the same or closely related legal rules on matters governed by this Convention may at any time declare that the Convention is not to apply to contracts of sale or to their formation where the parties have their places of business in those States. Such declarations may be made jointly or by reciprocal unilateral declarations.
- (2) A Contracting State which has the same or closely related legal rules on matters governed by this Convention as one or more non-Contracting States may at any time declare that the Convention is not to apply to contracts of sale or to their formation where the parties have their places of business in those States.
- (3) If a State which is the object of a declaration under the preceding paragraph subsequently becomes a Contracting State, the declaration made will, as from the date on which the Convention enters into force in respect of the new Contracting State, have the effect of a declaration made under paragraph (1), provided that the new Contracting State joins in such declaration or makes a reciprocal unilateral declaration.

#### Article 95

Any State may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph (1) (b) of article 1 of this Convention.

#### Article 96

A Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing may at any time make a declaration in accordance with article 12 that any provision of article 11, article 29, or Part II of this Convention, that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in that State.

#### Article 97

- (1) Declarations made under this Convention at the time of signature are subject to confirmation upon ratification, acceptance or approval.
- (2) Declarations and confirmations of declarations are to be in writing and be formally notified to the depositary.
- (3) A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned.

However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary. Reciprocal unilateral declarations under article 94 take effect on the first day of the month following the expiration of six months after the receipt of the latest declaration by the depositary.

- (4) Any State which makes a declaration under this Convention may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal is to take effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.
- (5) A withdrawal of a declaration made under article 94 renders inoperative, as from the date on which the withdrawal takes effect, any reciprocal declaration made by another State under that article.

#### Article 98

No reservations are permitted except those expressly authorized in this Convention.

#### Article 99

- (1) This Convention enters into force, subject to the provisions of paragraph (6) of this article, on the first day of the month following the expiration of twelve months after the date of deposit of the tenth instrument of ratification, acceptance, approval or accession, including an instrument which contains a declaration made under article 92.
- (2) When a State ratifies, accepts, approves or accedes to this Convention after the deposit of the tenth instrument of ratification, acceptance, approval or accession, this Convention, with the exception of the Part excluded, enters into force in respect of that State, subject to the provisions of paragraph (6) of this article, on the first day of the month following the expiration of twelve months after the date of the deposit of its instrument of ratification, acceptance, approval or accession.
- (3) A State which ratifies, accepts, approves or accedes to this Convention and is a party to either or both the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods done at The Hague on 1 July 1964 (1964 Hague Formation Convention) and the Convention relating to a Uniform Law on the International Sale of Goods done at The Hague on 1 July 1964 (1964 Hague Sales Convention) shall at the same time denounce, as the case may be, either or both the 1964 Hague Sales Convention and the 1964 Hague Formation Convention by notifying the Government of the Netherlands to that effect.
- (4) A State party to the 1964 Hague Sales Convention which ratifies, accepts, approves or accedes to the present Convention and declares or has declared under article 92 that it will not be bound by Part II of this Convention shall at the time of ratification, acceptance, approval or accession denounce the 1964 Hague Sales Convention by notifying the Government of the Netherlands to that effect.
- (5) A State party to the 1964 Hague Formation Convention which ratifies, accepts, approves or accedes to the present Convention and declares or has declared under article 92 that it will not be bound by Part III of this Convention shall

at the time of ratification, acceptance, approval or accession denounce the 1964 Hague Formation Convention by notifying the Government of the Netherlands to that effect.

- (6) For the purpose of this article, ratifications, acceptances, approvals and accessions in respect of this Convention by States parties to the 1964 Hague Formation Convention or to the 1964 Hague Sales Convention shall not be effective until such denunciations as may be required on the part of those States in respect of the latter two Conventions have themselves become effective. The depositary of this Convention shall consult with the Government of the Netherlands, as the depositary of the 1964 Conventions, so as to ensure necessary coordination in this respect.

#### Article 100

- (1) This Convention applies to the formation of a contract only when the proposal for concluding the contract is made on or after the date when the Convention enters into force in respect of the Contracting States referred to in subparagraph
  - (1) (a) or the Contracting State referred to in subparagraph (1) (b) of article 1.
  - (2) This Convention applies only to contracts concluded on or after the date when the Convention enters into force in respect of the Contracting States referred to in subparagraph (1) (a) or the Contracting State referred to in subparagraph (1)(b) of article 1.

#### Article 101

- (1) A Contracting State may denounce this Convention, or Part II or Part III of the Convention, by a formal notification in writing addressed to the depositary.
  - (2) The denunciation takes effect on the first day of the month following the expiration of twelve months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.
- DONE at Vienna, this day of eleventh day of April, one thousand nine hundred and eighty, in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.
- IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed this Convention.

## II. EXPLANATORY NOTE BY THE UNCITRAL SECRETARIAT

### ON THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS\*

#### INTRODUCTION

1. The United Nations Convention on Contracts for the International Sale of Goods provides a uniform text of law for international sales of goods. The Convention was prepared by the United Nations Commission on International Trade Law (UNCITRAL) and adopted by a diplomatic conference on 11 April 1980.
- \* This note has been prepared by the Secretariat of the United Nations Commission on International Trade Law for informational purposes; it is not an official commentary on the Convention.

2. Preparation of a uniform law for the international sale of goods began in 1930 at the International Institute for the Unification of Private Law (UNIDROIT) in Rome. After a long interruption in the work as a result of the Second World War, the draft was submitted to a diplomatic conference in The Hague in 1964, which adopted two conventions, one on the international sale of goods and the other on the formation of contracts for the international sale of goods.
3. Almost immediately upon the adoption of the two conventions there was wide-spread criticism of their provisions as reflecting primarily the legal traditions and economic realities of continental Western Europe, which was the region that had most actively contributed to their preparation. As a result, one of the first tasks undertaken by UNCITRAL on its organization in 1968 was to enquire of States whether or not they intended to adhere to those conventions and the reasons for their positions. In the light of the responses received, UNCITRAL decided to study the two conventions to ascertain which modifications might render them capable of wider acceptance by countries of different legal, social and economic systems. The result of this study was the adoption by diplomatic conference on 11 April 1980 of the United Nations Convention on Contracts for the International Sale of Goods, which combines the subject matter of the two prior conventions.
4. UNCITRAL's success in preparing a Convention with wider acceptability is evidenced by the fact that the original eleven States for which the Convention came into force on 1 January 1988 included States from every geographical region, every stage of economic development and every major legal, social and economic system. The original eleven States were: Argentina, China, Egypt, France, Hungary, Italy, Lesotho, Syria, United States, Yugoslavia and Zambia.
5. As of 31 January 1988, an additional four States, Austria, Finland, Mexico and Sweden, had become a party to the Convention.
6. The Convention is divided into four parts. Part One deals with the scope of application of the Convention and the general provisions. Part Two contains the rules governing the formation of contracts for the international sale of goods. Part Three deals with the substantive rights and obligations of buyer and seller arising from the contract. Part Four contains the final clauses of the Convention concerning such matters as how and when it comes into force, the reservations and declarations that are permitted and the application of the Convention to international sales where both States concerned have the same or similar law on the subject.

#### Part One.

##### Scope of application and general provisions

###### A. Scope of application

7. The articles on scope of application state both what is included in the coverage of the Convention and what is excluded from it. The provisions on inclusion are the most important. The Convention applies to contracts of sale of goods between parties whose places of business are in different States and either both of those States are Contracting States or the rules of private international law lead to the law of a Contracting State. A few States have availed themselves of the authorization in article 95 to declare that they would apply the Convention only in the former and

not in the latter of these two situations. As the Convention becomes more widely adopted, the practical significance of such a declaration will diminish.

8. The final clauses make two additional restrictions on the territorial scope of application that will be relevant to a few States. One applies only if a State is a party to another international agreement that contains provisions concerning matters governed by this Convention; the other permits States that have the same or similar domestic law of sales to declare that the Convention does not apply between them.
9. Contracts of sale are distinguished from contracts for services in two respects by article 3. A contract for the supply of goods to be manufactured or produced is considered to be a sale unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for their manufacture or production. When the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services, the Convention does not apply.
10. The Convention contains a list of types of sales that are excluded from the Convention, either because of the purpose of the sale (goods bought for personal, family or household use), the nature of the sale (sales by auction, on execution or otherwise by law) or the nature of the goods (stocks, shares, investment securities, negotiable instruments, money, ships, vessels, hovercraft, aircraft or electricity). In many States some or all of such sales are governed by special rules reflecting their special nature.
11. Several articles make clear that the subject matter of the Convention is restricted to the formation of the contract and the rights and duties of the buyer and seller arising from such a contract. In particular, the Convention is not concerned with the validity of the contract, the effect which the contract may have on the property in the goods sold or the liability of the seller for death or personal injury caused by the goods to any person.

###### B. Party autonomy

12. The basic principle of contractual freedom in the international sale of goods is recognized by the provision that permits the parties to exclude the application of this Convention or derogate from or vary the effect of any of its provisions. The exclusion of the Convention would most often result from the choice by the parties of the law of a non-contracting State or of the domestic law of a contracting State to be the law applicable to the contract. Derogation from the Convention would occur whenever a provision in the contract provided a different rule from that found in the Convention.

###### C. Interpretation of the Convention

13. This Convention for the unification of the law governing the international sale of goods will better fulfill its purpose if it is interpreted in a consistent manner in all legal systems. Great care was taken in its preparation to make it as clear and easy to understand as possible. Nevertheless, disputes will arise as to its meaning and application. When this occurs, all parties, including domestic courts and arbitral tribunals, are admonished to observe its international character and to promote uniformity in its application and the observance of good faith in international trade. In particular, when a question concerning a matter governed by this Convention

is not expressly settled in it, the question is to be settled in conformity with the general principles on which the Convention is based. Only in the absence of such principles should the matter be settled in conformity with the law applicable by virtue of the rules of private international law.

#### D. Interpretation of the contract; usages

14. The Convention contains provisions on the manner in which statements and conduct of a party are to be interpreted in the context of the formation of the contract or its implementation. Usages agreed to by the parties, practices they have established between themselves and usages of which the parties knew or ought to have known and which are widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned may all be binding on the parties to the contract of sale.

#### E. Form of the contract

15. The Convention does not subject the contract of sale to any requirement as to form. In particular, article 11 provides that no written agreement is necessary for the conclusion of the contract. However, if the contract is in writing and it contains a provision requiring any modification or termination by agreement to be in writing, article 29 provides that the contract may not be otherwise modified or terminated by agreement. The only exception is that a party may be precluded by his conduct from asserting such a provision to the extent that the other person has relied on that conduct.
16. In order to accommodate those States whose legislation requires contracts of sale to be concluded in or evidenced by writing, article 96 entitles those States to declare that neither article 11 nor the exception to article 29 applies where any party to the contract has his place of business in that State.

#### Part Two. Formation of the contract

17. Part Two of the Convention deals with a number of questions that arise in the formation of the contract by the exchange of an offer and an acceptance. When the formation of the contract takes place in this manner, the contract is concluded when the acceptance of the offer becomes effective.
18. In order for a proposal for concluding a contract to constitute an offer, it must be addressed to one or more specific persons and it must be sufficiently definite. For the proposal to be sufficiently definite, it must indicate the goods and expressly or implicitly fix or make provision for determining the quantity and the price.
19. The Convention takes a middle position between the doctrine of the revocability of the offer until acceptance and its general irrevocability for some period of time. The general rule is that an offer may be revoked. However, the revocation must reach the offeree before he has dispatched an acceptance. Moreover, an offer cannot be revoked if it indicates that it is irrevocable, which it may do by stating a fixed time for acceptance or otherwise. Furthermore, an offer may not be revoked if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.
20. Acceptance of an offer may be made by means of a statement or other conduct of the offeree indicating assent to the offer that is communicated to the offerer. However, in some cases the acceptance may consist of performing an

act, such as dispatch of the goods or payment of the price. Such an act would normally be effective as an acceptance the moment the act was performed.

21. A frequent problem in contract formation, perhaps especially in regard to contracts of sale of goods, arises out of a reply to an offer that purports to be an acceptance but contains additional or different terms. Under the Convention, if the additional or different terms do not materially alter the terms of the offer, the reply constitutes an acceptance, unless the offeror without undue delay objects to those terms. If he does not object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.
22. If the additional or different terms do materially alter the terms of the contract, the reply constitutes a counter-offer that must in turn be accepted for a contract to be concluded. Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or settlement of disputes are considered to alter the terms of the offer materially.

### Part Three. Sale of goods

#### A. Obligations of the seller

23. The general obligations of the seller are to deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention. The Convention provides supplementary rules for use in the absence of contractual agreement as to when, where and how the seller must perform these obligations.
24. The Convention provides a number of rules that implement the seller's obligations in respect of the quality of the goods. In general, the seller must deliver goods that are of the quantity, quality and description required by the contract and that are contained or packaged in the manner required by the contract. One set of rules of particular importance in international sales of goods involves the seller's obligation to deliver goods that are free from any right or claim of a third party, including rights based on industrial property or other intellectual property.
25. In connection with the seller's obligations in regard to the quality of the goods, the Convention contains provisions on the buyer's obligation to inspect the goods. He must give notice of any lack of their conformity with the contract within a reasonable time after he has discovered it or ought to have discovered it, and at the latest two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee.

#### B. Obligations of the buyer

26. Compared to the obligations of the seller, the general obligations of the buyer are less extensive and relatively simple; they are to pay the price for the goods and take delivery of them as required by the contract and the Convention. The Convention provides supplementary rules for use in the absence of contractual agreement as to how the price is to be determined and where and when the buyer should perform his obligation to pay the price.

#### C. Remedies for breach of contract

27. The remedies of the buyer for breach of contract by the seller are set forth in connection with the obligations of the

seller and the remedies of the seller are set forth in connection with the obligations of the buyer. This makes it easier to use and understand the Convention.

28. The general pattern of remedies is the same in both cases. If all the required conditions are fulfilled, the aggrieved party may require performance of the other party's obligations, claim damages or avoid the contract. The buyer also has the right to reduce the price where the goods delivered do not conform with the contract.
29. Among the more important limitations on the right of an aggrieved party to claim a remedy is the concept of fundamental breach. For a breach of contract to be fundamental, it must result in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the result was neither foreseen by the party in breach nor foreseeable by a reasonable person of the same kind in the same circumstances. A buyer can require the delivery of substitute goods only if the goods delivered were not in conformity with the contract and the lack of conformity constituted a fundamental breach of contract. The existence of a fundamental breach is one of the two circumstances that justifies a declaration of avoidance of a contract by the aggrieved party; the other circumstance being that, in the case of non-delivery of the goods by the seller or non-payment of the price or failure to take delivery by the buyer, the party in breach fails to perform within a reasonable period of time fixed by the aggrieved party.
30. Other remedies may be restricted by special circumstances. For example, if the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. A party cannot recover damages that he could have mitigated by taking the proper measures. A party may be exempted from paying damages by virtue of an impediment beyond his control.

#### D. Passing of risk

31. Determining the exact moment when the risk of loss or damage to the goods passes from the seller to the buyer is of great importance in contracts for the international sale of goods. Parties may regulate that issue in their contract either by an express provision or by the use of a trade term. However, for the frequent case where the contract does not contain such a provision, the Convention sets forth a complete set of rules.
32. The two special situations contemplated by the Convention are when the contract of sale involves carriage of the goods and when the goods are sold while in transit. In all other cases the risk passes to the buyer when he takes over the goods or from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery, whichever comes first. In the frequent case when the contract relates to goods that are not then identified, they must be identified to the contract before they can be considered to be placed at the disposal of the buyer and the risk of their loss can be considered to have passed to him.

#### E. Suspension of performance and anticipatory breach

33. The Convention contains special rules for the situation in which, prior to the date on which performance is due, it becomes apparent that one of the parties will not perform a

substantial part of his obligations or will commit a fundamental breach of contract. A distinction is drawn between those cases in which the other party may suspend his own performance of the contract but the contract remains in existence awaiting future events and those cases in which he may declare the contract avoided.

#### F. Exemption from liability to pay damages

34. When a party fails to perform any of his obligations due to an impediment beyond his control that he could not reasonably have been expected to take into account at the time of the conclusion of the contract and that he could not have avoided or overcome, he is exempted from paying damages. This exemption may also apply if the failure is due to the failure of a third person whom he has engaged to perform the whole or a part of the contract. However, he is subject to any other remedy, including reduction of the price, if the goods were defective in some way.

#### G. Preservation of the goods

35. The Convention imposes on both parties the duty to preserve any goods in their possession belonging to the other party. Such a duty is of even greater importance in an international sale of goods where the other party is from a foreign country and may not have agents in the country where the goods are located. Under certain circumstances the party in possession of the goods may sell them, or may even be required to sell them. A party selling the goods has the right to retain out of the proceeds of sale an amount equal to the reasonable expenses of preserving the goods and of selling them and must account to the other party for the balance.

#### Part Four. Final clauses

36. The final clauses contain the usual provisions relating to the Secretary-General as depositary and providing that the Convention is subject to ratification, acceptance or approval by those States that signed it by 30 September 1981, that it is open to accession by all States that are not signatory States and that the text is equally authentic in Arabic, Chinese, English, French, Russian and Spanish.
37. The Convention permits a certain number of declarations. Those relative to scope of application and the requirement as to a written contract have been mentioned above. There is a special declaration for States that have different systems of law governing contracts of sale in different parts of their territory. Finally, a State may declare that it will not be bound by Part II on formation of contracts or Part III on the rights and obligations of the buyer and seller. This latter declaration was included as part of the decision to combine into one convention the subject matter of the two 1964 Hague Conventions.

Further information may be obtained from  
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# The UNIDROIT Principles (2004 edition).

## Preamble (Purpose of the Principles)

These Principles set forth general rules for international commercial contracts. They shall be applied when the parties have agreed that their contract be governed by them. (\*) They may be applied when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like. They may be applied when the parties have not chosen any law to govern their contract. They may be used to interpret or supplement international uniform law instruments. They may be used to interpret or supplement domestic law. They may serve as a model for national and international legislators. (\*) Parties wishing to provide that their agreement be governed by the Principles might use the following words, adding any desired exceptions and modifications: "This contract shall be governed by the UNIDROIT Principles (2004) [except as to the Articles...]". Parties wishing to provide in addition for the application of the law of a particular jurisdiction might use the following words: "This contract shall be governed by the UNIDROIT Principles (2004) [except as to Articles...], supplemented when necessary by the law of [jurisdiction X]".

### Article 1.1

#### (Freedom of contract)

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

### Article 1.2

#### (No form required)

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

### Article 1.3

#### (Binding character of contract)

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

### Article 1.4

#### (Mandatory rules)

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

### Article 1.5

#### (Exclusion or modification by the parties)

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

### Article 1.6

#### (Interpretation and supplementation of the Principles)

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

### Article 1.7

#### (Good faith and fair dealing)

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

### Article 1.8

#### (Inconsistent behaviour)

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

### Article 1.9

#### (Usages and practices)

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

### Article 1.10

#### (Notice)

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

### Article 1.11

#### (Definitions)

In these Principles

- "court" includes an arbitral tribunal;
- where a party has more than one place of business the

relevant "place of business" is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract;

- "obligor" refers to the party who is to perform an obligation and "obligee" refers to the party who is entitled to performance of that obligation.
- "writing" means any mode of communication that preserves a record of the information contained therein and is capable of being reproduced in tangible form.

#### Article 1.12

##### (Computation of time set by the parties)

- (1) Official holidays or non-business days occurring during a period set by parties for an act to be performed are included in calculating the period.
- (2) However, if the last day of the period is an official holiday or a non-business day at the place of business of the party to perform the act, the period is extended until the first business day which follows, unless the circumstances indicate otherwise.
- (3) The relevant time zone is that of the place of business of the party setting the time, unless the circumstances indicate otherwise.

#### Article 2.1.1

##### (Manner of formation)

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

#### Article 2.1.2

##### (Definition of offer)

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

#### Article 2.1.3

##### (Withdrawal of offer)

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

#### Article 2.1.4

##### (Revocation of offer)

- (1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before it has dispatched an acceptance.
- (2) However, an offer cannot be revoked
  - (a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or
  - (b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

#### Article 2.1.5

##### (Rejection of offer)

An offer is terminated when a rejection reaches the offeror.

#### Article 2.1.6

##### (Mode of acceptance)

- (1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.
- (2) An acceptance of an offer becomes effective when the indication of assent reaches the offeror.
- (3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act without notice to the offeror, the acceptance is effective when the act is performed.

#### Article 2.1.7

##### (Time of acceptance)

An offer must be accepted within the time the offeror has fixed, if no time is fixed, within a reasonable time having regard to the circumstances, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.

#### Article 2.1.8

##### (Acceptance within a fixed period of time)

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

#### Article 2.1.9

##### (Late acceptance. Delay in transmission)

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

#### Article 2.1.10

##### (Withdrawal of acceptance)

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

#### Article 2.1.11

##### (Modified acceptance)

- (1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.
- (2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects to the discrepancy. If the offeror does not object, the terms of the contract are the terms of the offer with the modifica-

tions contained in the acceptance.

**Article 2.1.12**  
**(Writings in confirmation)**

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

**Article 2.1.13**  
**(Conclusion of contract dependent on agreement on specific matters or in a particular form)**

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

**Article 2.1.14**  
**(Contract with terms deliberately left open)**

- (1) If the parties intend to conclude a contract, the fact that they intentionally leave a term to be agreed upon in further negotiations or to be determined by a third person does not prevent a contract from coming into existence.
- (2) The existence of the contract is not affected by the fact that subsequently
  - (a) the parties reach no agreement on the term; or
  - (b) the third person does not determine the term, provided that there is an alternative means of rendering the term definite that is reasonable in the circumstances, having regard to the intention of the parties.

**Article 2.1.15**  
**(Negotiations in bad faith)**

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

**Article 2.1.16**  
**(Duty of confidentiality)**

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

**Article 2.1.17**  
**(Merger clauses)**

A contract in writing which contains a clause indicating that

the writing completely embodies the terms on which the parties have agreed cannot be contradicted or supplemented by evidence of prior statements or agreements. However, such statements or agreements may be used to interpret the writing.

**Article 2.1.18**  
**(Written modification clauses)**

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

**Article 2.1.19**  
**(Contracting under standard terms)**

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

**Article 2.1.20**  
**(Surprising terms)**

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

**Article 2.1.21**  
**(Conflict between standard terms and non-standard terms)**

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

**Article 2.1.22**  
**(Battle of forms)**

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

**Article 2.2.1**  
**(Scope of the Section)**

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

- agent on the one hand, and the third party on the other.
- (3) It does not govern an agent's authority conferred by law or the authority of an agent appointed by a public or judicial authority.

#### Article 2.2.2

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

- (1) The principal's grant of authority to an agent may be express or implied.
- (2) The agent has authority to perform all acts necessary in the circumstances to achieve the purposes for which the authority was granted.

#### Article 2.2.3

##### (Agency disclosed)

- (1) Where an agent acts within the scope of its authority and the third party knew or ought to have known that the agent was acting as an agent, the acts of the agent shall directly affect the relations between the principal and the third party and no legal relation is created between the agent and the third party.
- (2) However, the acts of the agent shall affect only the relations between the agent and the third party, where the agent with the consent of the principal undertakes to become the party to the contract

#### Article 2.2.4

##### (Agent undisclosed)

- (1) Where an agent acts within the scope of its authority and the third party neither knew nor ought to have known that the agent was acting as an agent, the acts of the agent shall affect only the relations between the agent and the third party.
- (2) However, where such an agent, when contracting with the third party on behalf of a business, represents itself to be the owner of that business, the third party, upon discovery of the real owner of the business, may exercise also against the latter the rights it has against the agent.

#### Article 2.2.5

##### (Agent acting without or exceeding its authority)

- (1) Where an agent acts without authority or exceeds its authority, its acts do not affect the legal relations between the principal and the third party.
- (2) However, where the principal causes the third party reasonably to believe that the agent has authority to act on behalf of the principal and that the agent is acting within the scope of that authority, the principal may not invoke against the third party the lack of authority of the agent.

#### Article 2.2.6

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

- (1) An agent that acts without authority or exceeding its authority is, failing ratification by the principal, liable for damages that will place the third party in the same position as if the agent had acted with authority and not exceeded its authority.

- (2) However, the agent is not liable if the third party knew or ought to have known that the agent had no authority or was exceeding its authority.

#### Article 2.2.7

##### (Conflict of interest)

- (1) If a contract concluded by an agent involves the agent in a conflict of interests with the principal of which the third party knew or ought to have known, the principal may avoid the contract. The right to avoid is subject to Articles 3.12 and 3.14 to 3.17.
- (2) However, the principal may not avoid the contract (a) if the principal had consented to, or knew or ought to have known of, the agent's involvement in the conflict of interests; or (b) if the agent had disclosed the conflict of interests to the principal and the latter had not objected within a reasonable time.

#### Article 2.2.8.

##### (Sub-agency)

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

#### Article 2.2.9

##### (Ratification)

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

#### Article 2.2.10

##### (Termination of authority)

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

#### Article 3.1

##### (Matters not covered)

These Principles do not deal with invalidity arising from

- (a) lack of capacity;  
(b) immorality or illegality.

#### Article 3.2

##### (Validity of mere agreement)

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

**Article 3.3**  
**(Initial impossibility)**

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

**Article 3.4**  
**(Definition of mistake)**

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

**Article 3.5**  
**(Relevant mistake)**

- (1) A party may only avoid the contract for mistake if, when the contract was concluded, the mistake was of such importance that a reasonable person in the same situation as the party in error would only have concluded the contract on materially different terms or would not have concluded it at all if the true state of affairs had been known, and
  - (a) the other party made the same mistake, or caused the mistake, or knew or ought to have known of the mistake and it was contrary to reasonable commercial standards of fair dealing to leave the mistaken party in error; or
  - (b) the other party had not at the time of avoidance acted in reliance on the contract.
- (2) However, a party may not avoid the contract if
  - (a) it was grossly negligent in committing the mistake; or
  - (b) the mistake relates to a matter in regard to which the risk of mistake was assumed or, having regard to the circumstances, should be borne by the mistaken party.

**Article 3.6**  
**(Error in expression or transmission)**

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

**Article 3.7**  
**(Remedies for non-performance)**

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

**Article 3.8**  
**(Fraud)**

A party may avoid the contract when it has been led to conclude the contract by the other party's fraudulent representation, including language or practices, or fraudulent non-disclosure of circumstances which, according to reasonable commercial standards of fair dealing, the latter party

should have disclosed.

**Article 3.9**  
**(Threat)**

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

**Article 3.10**  
**(Gross disparity)**

- (1) A party may avoid the contract or an individual term of it if, at the time of the conclusion of the contract, the contract or term unjustifiably gave the other party an excessive advantage. Regard is to be had, among other factors, to
  - (a) the fact that the other party has taken unfair advantage of the first party's dependence, economic distress or urgent needs, or of its improvidence, ignorance, inexperience or lack of bargaining skill; and
  - (b) the nature and purpose of the contract.
- (2) Upon the request of the party entitled to avoidance, a court may adapt the contract or term in order to make it accord with reasonable commercial standards of fair dealing.
- (3) A court may also adapt the contract or term upon the request of the party receiving notice of avoidance, provided that that party informs the other party of its request promptly after receiving such notice and before the other party has reasonably acted in reliance on it. The provisions of Article 3.13(2) apply accordingly.

**Article 3.11**  
**(Third persons)**

- (1) Where fraud, threat, gross disparity or a party's mistake is imputable to, or is known or ought to be known by, a third person for whose acts the other party is responsible, the contract may be avoided under the same conditions as if the behaviour or knowledge had been that of the party itself.
- (2) Where fraud, threat or gross disparity is imputable to a third person for whose acts the other party is not responsible, the contract may be avoided if that party knew or ought to have known of the fraud, threat or disparity, or has not at the time of avoidance reasonably acted in reliance on the contract.

**Article 3.12**  
**(Confirmation)**

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

the contract is excluded.

**Article 3.13**  
**(Loss of right to avoid)**

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

**Article 3.14**  
**(Notice of avoidance)**

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

**Article 3.15**  
**(Time limits)**

- (1) Notice of avoidance shall be given within a reasonable time, having regard to the circumstances, after the avoiding party knew or could not have been unaware of the relevant facts or became capable of acting freely.
- (2) Where an individual term of the contract may be avoided by a party under Article 3.10, the period of time for giving notice of avoidance begins to run when that term is asserted by the other party.

**Article 3.16**  
**(Partial avoidance)**

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

**Article 3.17**  
**(Retroactive effect of avoidance)**

- (1) Avoidance takes effect retroactively.
- (2) On avoidance either party may claim restitution of whatever it has supplied under the contract or the part of it avoided, provided that it concurrently makes restitution of whatever it has received under the contract or the part of it avoided or, if it cannot make restitution in kind, it makes an allowance for what it has received.

**Article 3.18**  
**(Damages)**

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

**Article 3.19**

**(Mandatory character of the provisions)**

The provisions of this Chapter are mandatory, except insofar as they relate to the binding force of mere agreement, initial impossibility or mistake.

**Article 3.20**  
**(Unilateral declarations)**

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

**Article 4.1**  
**(Intention of the parties)**

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

**Article 4.2**  
**(Interpretation of statements and other conduct)**

- (1) The statements and other conduct of a party shall be interpreted according to that party's intention if the other party knew or could not have been unaware of that intention.
- (2) If the preceding paragraph is not applicable, such statements and other conduct shall be interpreted according to the meaning that a reasonable person of the same kind as the other party would give to it in the same circumstances.

**Article 4.3**  
**(Relevant circumstances)**

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

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

**Article 4.4**  
**(Reference to contract or statement as a whole)**

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

**Article 4.5**  
**(All terms to be given effect)**

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

**Article 4.6**  
**(Contra proferentem rule)**

If contract terms supplied by one party are unclear, an in-

interpretation against that party is preferred.

**Article 4.7**  
**(Linguistic discrepancies)**

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

**Article 4.8**  
**(Supplying an omitted term)**

- (1) Where the parties to a contract have not agreed with respect to a term which is important for a determination of their rights and duties, a term which is appropriate in the circumstances shall be supplied.
- (2) In determining what is an appropriate term regard shall be had, among other factors, to
  - (a) the intention of the parties;
  - (b) the nature and purpose of the contract;
  - (c) good faith and fair dealing;
  - (d) reasonableness.

**Article 5.1.1**  
**(Express and implied obligations)**

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

**Article 5.1.2**  
**(Implied obligations)**

Implied obligations stem from

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

**Article 5.1.3**  
**(Co-operation between the parties)**

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

**Article 5.1.4**  
**(Duty to achieve a specific result**  
**Duty of best efforts)**

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

**Article 5.1.5**  
**(Determination of kind of duty involved)**

In determining the extent to which an obligation of a party involves a duty of best efforts in the performance of an

activity or a duty to achieve a specific result, regard shall be had, among other factors, to

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

**Article 5.1.6**  
**(Determination of quality of performance)**

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

**Article 5.1.7**  
**(Price determination)**

- (1) Where a contract does not fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have made reference to the price generally charged at the time of the conclusion of the contract for such performance in comparable circumstances in the trade concerned or, if no such price is available, to a reasonable price.
- (2) Where the price is to be determined by one party and that determination is manifestly unreasonable, a reasonable price shall be substituted notwithstanding any contract term to the contrary.
- (3) Where the price is to be fixed by a third person, and that person cannot or will not do so, the price shall be a reasonable price.
- (4) Where the price is to be fixed by reference to factors which do not exist or have ceased to exist or to be accessible, the nearest equivalent factor shall be treated as a substitute.

**Article 5.1.8**  
**(Contract for an indefinite period)**

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

**Article 5.1.9**  
**(Release by agreement)**

- (1) An obligee may release its right by agreement with the obligor.
- (2) An offer to release a right gratuitously shall be deemed accepted if the obligor does not reject the offer without delay after having become aware of it.

**Article 5.2.1**  
**(Contracts in favour of third parties)**

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

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

**Article 5.2.2**

**(Third party identifiable)**

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

**Article 5.2.3**

**(Exclusion and limitation clauses)**

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

**Article 5.2.4**

**(Defences)**

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

**Article 5.2.5**

**(Revocation)**

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

**Article 5.2.6**

**(Renunciation)**

The beneficiary may renounce a right conferred on it.

**Article 6.1.1**

**(Time of performance)**

A party must perform its obligations:

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

**Article 6.1.2**

**(Performance at one time or in instalments)**

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

**Article 6.1.3**

**(Partial performance)**

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

formance are to be borne by the obligor without prejudice to any other remedy.

**Article 6.1.4**

**(Order of performance)**

- (1) To the extent that the performances of the parties can be rendered simultaneously, the parties are bound to render them simultaneously unless the circumstances indicate otherwise.
- (2) To the extent that the performance of only one party requires a period of time, that party is bound to render its performance first, unless the circumstances indicate otherwise.

**Article 6.1.5**

**(Earlier performance)**

- (1) The obligee may reject an earlier performance unless it has no legitimate interest in so doing.
- (2) Acceptance by a party of an earlier performance does not affect the time for the performance of its own obligations if that time has been fixed irrespective of the performance of the other party's obligations.
- (3) Additional expenses caused to the obligee by earlier performance are to be borne by the obligor, without prejudice to any other remedy.

**Article 6.1.6**

**(Place of performance)**

- (1) If the place of performance is neither fixed by, nor determinable from, the contract, a party is to perform:
  - (a) a monetary obligation, at the obligee's place of business;
  - (b) any other obligation, at its own place of business.
- (2) A party must bear any increase in the expenses incidental to performance which is caused by a change in its place of business subsequent to the conclusion of the contract.

**Article 6.1.7**

**(Payment by cheque or other instrument)**

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

**Article 6.1.8**

**(Payment by funds transfer)**

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



**Article 6.1.9****(Currency of payment)**

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

**Article 6.1.10****(Currency not expressed)**

Where a monetary obligation is not expressed in a particular currency, payment must be made in the currency of the place where payment is to be made.

**Article 6.1.11****(Costs of performance)**

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

**Article 6.1.12****(Imputation of payments)**

- (1) An obligor owing several monetary obligations to the same obligee may specify at the time of payment the debt to which it intends the payment to be applied. However, the payment discharges first any expenses, then interest due and finally the principal.
- (2) If the obligor makes no such specification, the obligee may, within a reasonable time after payment, declare to the obligor the obligation to which it imputes the payment, provided that the obligation is due and undisputed.
- (3) In the absence of imputation under paragraphs (1) or (2), payment is imputed to that obligation which satisfies one of the following criteria and in the order indicated:
  - (a) an obligation which is due or which is the first to fall due;
  - (b) the obligation for which the obligee has least security;
  - (c) the obligation which is the most burdensome for the obligor;
  - (d) the obligation which has arisen first. If none of the preceding criteria applies, payment is imputed to all the obligations proportionally.

**Article 6.1.13****(Imputation of non-monetary obligations)**

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

**Article 6.1.14****(Application for public permission)**

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

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

**Article 6.1.15****(Procedure in applying for permission)**

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

**Article 6.1.16****(Permission neither granted nor refused)**

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

**Article 6.1.17****(Permission refused)**

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

**Article 6.2.1****(Contract to be observed)**

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

**Article 6.2.2****(Definition of hardship)**

There is hardship where the occurrence of events fun-

damentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and

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

#### Article 6.2.3

##### (Effects of hardship)

- (1) In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based.
- (2) The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance.
- (3) Upon failure to reach agreement within a reasonable time either party may resort to the court.
- (4) If the court finds hardship it may, if reasonable,
  - (a) terminate the contract at a date and on terms to be fixed; or
  - (b) adapt the contract with a view to restoring its equilibrium.

#### Article 7.1.1

##### (Non-performance defined)

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

#### Article 7.1.2

##### (Interference by the other party)

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

#### Article 7.1.3

##### (Withholding performance)

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

#### Article 7.1.4

##### (Cure by non-performing party)

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

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

(2) The right to cure is not precluded by notice of termination.

(3) Upon effective notice of cure, rights of the aggrieved party that are inconsistent with the non-performing party's performance are suspended until the time for cure has expired.

(4) The aggrieved party may withhold performance pending cure.

(5) Notwithstanding cure, the aggrieved party retains the right to claim damages for delay as well as for any harm caused or not prevented by the cure.

#### Article 7.1.5

##### (Additional period for performance)

(1) In a case of non-performance the aggrieved party may by notice to the other party allow an additional period of time for performance.

(2) During the additional period the aggrieved party may withhold performance of its own reciprocal obligations and may claim damages but may not resort to any other remedy. If it receives notice from the other party that the latter will not perform within that period, or if upon expiry of that period performance has not been made, the aggrieved party may resort to any of the remedies that may be available under this Chapter.

(3) Where in a case of delay in performance which is not fundamental the aggrieved party has given notice allowing an additional period of time of reasonable length, it may terminate the contract at the end of that period. If the additional period allowed is not of reasonable length it shall be extended to a reasonable length. The aggrieved party may in its notice provide that if the other party fails to perform within the period allowed by the notice the contract shall automatically terminate.

(4) Paragraph (3) does not apply where the obligation which has not been performed is only a minor part of the contractual obligation of the non-performing party.

#### Article 7.1.6

##### (Exemption clauses)

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

**Article 7.1.7**  
(Force majeure)

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

**Article 7.2.1**  
(Performance of monetary obligation)

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

**Article 7.2.2**  
(Performance of non-monetary obligation)

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

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

**Article 7.2.3**  
(Repair and replacement of defective performance)

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

**Article 7.2.4**  
(Judicial penalty)

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

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

**Article 7.2.5**  
(Change of remedy)

- (1) An aggrieved party who has required performance of a non-monetary obligation and who has not received performance within a period fixed or otherwise within a reasonable period of time may invoke any other remedy.
- (2) Where the decision of a court for performance of a non-monetary obligation cannot be enforced, the aggrieved party may invoke any other remedy.

**Article 7.3.1**  
(Right to terminate the contract)

- (1) A party may terminate the contract where the failure of the other party to perform an obligation under the contract amounts to a fundamental non-performance.
- (2) In determining whether a failure to perform an obligation amounts to a fundamental non-performance regard shall be had, in particular, to whether
  - (a) the non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract unless the other party did not foresee and could not reasonably have foreseen such result;
  - (b) strict compliance with the obligation which has not been performed is of essence under the contract;
  - (c) the non-performance is intentional or reckless;
  - (d) the non-performance gives the aggrieved party reason to believe that it cannot rely on the other party's future performance;
  - (e) the non-performing party will suffer disproportionate loss as a result of the preparation or performance if the contract is terminated.
- (3) In the case of delay the aggrieved party may also terminate the contract if the other party fails to perform before the time allowed under Article 7.1.5 has expired.

**Article 7.3.2**  
(Notice of termination)

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

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

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

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

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

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

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

**Article 7.3.6****(Restitution)**

- (1) On termination of the contract either party may claim restitution of whatever it has supplied, provided that such party concurrently makes restitution of whatever it has received. If restitution in kind is not possible or appropriate allowance should be made in money whenever reasonable.
- (2) However, if performance of the contract has extended over a period of time and the contract is divisible, such restitution can only be claimed for the period after termination has taken effect.

**Article 7.4.1****(Right to damages)**

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

**Article 7.4.2****(Full compensation)**

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

**Article 7.4.3****(Certainty of harm)**

- (1) Compensation is due only for harm, including future harm, that is established with a reasonable degree of certainty.
- (2) Compensation may be due for the loss of a chance in proportion to the probability of its occurrence.
- (3) Where the amount of damages cannot be established with

a sufficient degree of certainty, the assessment is at the discretion of the court.

**Article 7.4.4****(Foreseeability of harm)**

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

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

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

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

- (1) Where the aggrieved party has terminated the contract and has not made a replacement transaction but there is a current price for the performance contracted for, it may recover the difference between the contract price and the price current at the time the contract is terminated as well as damages for any further harm.
- (2) Current price is the price generally charged for goods delivered or services rendered in comparable circumstances at the place where the contract should have been performed or, if there is no current price at that place, the current price at such other place that appears reasonable to take as a reference.

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

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

**Article 7.4.8****(Mitigation of harm)**

- (1) The non-performing party is not liable for harm suffered by the aggrieved party to the extent that the harm could have been reduced by the latter party's taking reasonable steps.
- (2) The aggrieved party is entitled to recover any expenses reasonably incurred in attempting to reduce the harm.

**Article 7.4.9****(Interest for failure to pay money)**

- (1) If a party does not pay a sum of money when it falls due the aggrieved party is entitled to interest upon that sum from the time when payment is due to the time of payment whether or not the non-payment is excused.
- (2) The rate of interest shall be the average bank short-term lending rate to prime borrowers prevailing for the cur-

rency of payment at the place for payment, or where no such rate exists at that place, then the same rate in the State of the currency of payment. In the absence of such a rate at either place the rate of interest shall be the appropriate rate fixed by the law of the State of the currency of payment.

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

**Article 7.4.10**  
(Interest on damages)

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

**Article 7.4.11**  
(Manner of monetary redress)

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

**Article 7.4.12**  
(Currency in which to assess damages)

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

**Article 7.4.13**  
(Agreed payment for non-performance)

- (1) Where the contract provides that a party who does not perform is to pay a specified sum to the aggrieved party for such non-performance, the aggrieved party is entitled to that sum irrespective of its actual harm.
- (2) However, notwithstanding any agreement to the contrary the specified sum may be reduced to a reasonable amount where it is grossly excessive in relation to the harm resulting from the non-performance and to the other circumstances.

**Article 8.1**  
(Conditions of set-off)

- (1) Where two parties owe each other money or other performances of the same kind, either of them ("the first party") may set off its obligation against that of its obligee ("the other party") if at the time of set-off,
- (a) the first party is entitled to perform its obligation;
- (b) the other party's obligation is ascertained as to its existence and amount and performance is due.
- (2) If the obligations of both parties arise from the same contract, the first party may also set off its obligation against an obligation of the other party which is not ascertained as to its existence or to its amount.

**Article 8.2**  
(Foreign currency set-off)

Where the obligations are to pay money in different cur-

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

**Article 8.3**  
(Set-off by notice)

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

**Article 8.4**  
(Content of notice)

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

**Article 8.5**  
(Effect of set-off)

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

**Article 9.1.1**  
(Definitions)

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

**Article 9.1.2**  
(Exclusions)

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

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

**Article 9.1.3**  
(Assignability of non-monetary rights)

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

**Article 9.1.4**  
(Partial assignment)

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

**Article 9.1.5**  
(Future rights)

A future right is deemed to be transferred at the time of the agreement, provided the right, when it comes into

existence, can be identified as the right to which the assignment relates.

#### Article 9.1.6

##### (Rights assigned without individual specification)

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

#### Article 9.1.7

##### (Agreement between assignor and assignee sufficient)

- (1) A right is assigned by mere agreement between the assignor and the assignee, without notice to the obligor.
- (2) The consent of the obligor is not required unless the obligation in the circumstances is of an essentially personal character.

#### Article 9.1.8

##### (Obligor's additional costs)

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

#### Article 9.1.9

##### (Non-assignment clauses)

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

#### Article 9.1.10

##### (Notice to the obligor)

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

#### Article 9.1.11

##### (Successive assignments)

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

#### Article 9.1.12

##### (Adequate proof of assignment)

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

- (2) Until adequate proof is provided, the obligor may withhold payment.
- (3) Unless adequate proof is provided, notice is not effective.
- (4) Adequate proof includes, but is not limited to, any writing emanating from the assignor and indicating that the assignment has taken place.

#### Article 9.1.13

##### (Defences and rights of set-off)

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

#### Article 9.1.14

##### (Rights related to the right assigned)

The assignment of a right transfers to the assignee:

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

#### Article 9.1.15

##### (Undertakings of the assignor)

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

- (a) the assigned right exists at the time of the assignment, unless the right is a future right;
- (b) the assignor is entitled to assign the right;
- (c) the right has not been previously assigned to another assignee, and it is free from any right or claim from a third party;
- (d) the obligor does not have any defences;
- (e) neither the obligor nor the assignor has given notice of set-off concerning the assigned right and will not give any such notice;
- (f) the assignor will reimburse the assignee for any payment received from the obligor before notice of the assignment was given.

#### Article 9.2.1

##### (Modes of transfer)

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

- a) by an agreement between the original obligor and the new obligor subject to Article 9.2.3, or
- b) by an agreement between the obligee and the new obligor, by which the new obligor assumes the obligation.

#### Article 9.2.2

##### (Exclusion)

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

**Article 9.2.3****(Requirement of obligee's consent to transfer)**

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

**Article 9.2.4****(Advance consent of obligee)**

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

**Article 9.2.5****(Discharge of original obligor)**

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

**Article 9.2.6****(Third party performance)**

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

**Article 9.2.7****(Defences and rights of set-off)**

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

**Article 9.2.8****(Rights related to the obligation transferred)**

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

**Article 9.3.1****(Definitions)**

"Assignment of a contract" means the transfer by agreement

from one person (the "assignor") to another person (the "assignee") of the assignor's rights and obligations arising out of a contract with another person (the "other party").

**Article 9.3.2****(Exclusion)**

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

**Article 9.3.3****(Requirement of consent of the other party)**

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

**Article 9.3.4****(Advance consent of the other party)**

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

**Article 9.3.5****(Discharge of the assignor)**

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

**Article 9.3.6****(Defences and rights of set-off)**

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

**Article 9.3.7****(Rights transferred with the contract)**

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

**Article 10.1****(Scope of the Chapter)**

- (1) The exercise of rights governed by these Principles is barred by the expiration of a period of time, referred to as "limitation period", according to the rules of this Chapter.
- (2) This Chapter does not govern the time within which one party is required under these Principles, as a condition for the acquisition or exercise of its right, to give notice

to the other party or to perform any act other than the institution of legal proceedings.

**Article 10.2**  
**(Limitation periods)**

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

**Article 10.3**  
**(Modification of limitation periods by the parties)**

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

**Article 10.4**  
**(New limitation period by acknowledgement)**

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

**Article 10.5**  
**(Suspension by judicial proceedings)**

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

**Article 10.6**  
**(Suspension by arbitral proceedings)**

- (1) The running of the limitation period is suspended when

the obligee performs any act, by commencing arbitral proceedings or in arbitral proceedings already instituted, that is recognised by the law of the arbitral tribunal as asserting the obligee's right against the obligor. In the absence of regulations for arbitral proceedings or provisions determining the exact date of the commencement of arbitral proceedings, the proceedings are deemed to commence on the date on which a request that the right in dispute should be adjudicated reaches the obligor.

- (2) Suspension lasts until a binding decision has been issued or until the proceedings have been otherwise terminated.

**Article 10.7**  
**(Alternative dispute resolution)**

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

**Article 10.8**  
**(Suspension in case of force majeure, death or incapacity)**

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

**Article 10.9**  
**(The effects of expiration of limitation period)**

- (1) The expiration of the limitation period does not extinguish the right.
- (2) For the expiration of the limitation period to have effect, the obligor must assert it as a defence.
- (3) A right may still be relied on as a defence even though the expiration of the limitation period for that right has been asserted.

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

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

**Article 10.11**  
**(Restitution)**

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



## KETERANGAN TENTANG PENULIS & NARASUMBER

### Prof. Dr. Agus Sardjono, SH, MH

Agus Sardjono adalah seorang Guru Besar (Profesor) dan dosen Fakultas Hukum Universitas Indonesia, Jakarta. Bidang Hukum Dagang dan Hak Kekayaan Intelektual adalah spesialisasinya. Sejak 1989 menekuni bidang penelitian Hukum Bisnis Indonesia dan Hak Kekayaan Intelektual. Lulusan training / kursus dari *WIPO Worldwide Academy* (Swis) dan *Turin University* (Itali) untuk studi lanjutan bidang kekayaan intelektual. Bersamaan pula menjadi peneliti tamu di *American University, New York University, Cambridge University, North Carolina University, Brown University, Social Science Research Council, New York* dan *LSM Indonesia*, ia melakukan penelitian mengenai hak kekayaan intelektual dan Karya Budaya Tradisional di berbagai daerah di Indonesia. Buku yang telah diterbitkan antara lain, *Hukum Kekayaan Intelektual dan Kekayaan Tradisional dan copy right di bidang Desain Grafis*. Menulis berbagai makalah di bidang Hukum Dagang dan Kekayaan Intelektual. Menjadi penguji pada program doktor (PhD) di University of Technology, Sidney, Australia serta beliau adalah seorang komponis (penggubah lagu).

### Dr. Gunawan Widjaja, SH, MH, MM

Gunawan Widjaja, dilahirkan di Medan, tanggal 12 Mei 1969. Gelar Sarjana Hukum, Magister Hukum, dan Doktor dalam Ilmu Hukum diperoleh dari Fakultas Hukum *Universitas Indonesia*, masing-masing di tahun 1990, 2002, dan 2007. Selain itu juga menyanggah gelar Magister Manajemen, yang diperolehnya di tahun 2001 dari Universitas Bhayangkara. Selain rajin menulis untuk berbagai jurnal, dan majalah, Beliau telah menghasilkan lebih dari 30 judul buku dalam bidang hukum, khususnya Hukum Korporasi dan Hukum Bisnis. Pengasuh *Ruang Hukum Buletin Business News* dari tahun 1993 hingga sekarang ini, adalah juga Lektor dan Sekertaris Pusat Pengkajian Hukum Perusahaan dan Pasar Modal pada Fakultas Hukum Universitas Pelita Harapan. Di samping sebagai Praktisi yang memegang izin Advokat, Kurator, Penerjemah Tersumpah, dan Konsultan Hukum Pasar Modal, Beliau juga menjadi dosen tidak tetap pada Universitas Tarumanegara dan Swiss-German University, menjadi Instruktur dalam berbagai Pelatihan, Workshops dan Seminar tentang Hukum Korporasi, dan Hukum Bisnis, baik yang diselenggarakan untuk umum, maupun dalam bentuk *in-house training*.

### Dr. Mahmud Siregar, SH, MHum

Mahmud Siregar, dilahirkan di Tanjungbalai pada tanggal 20 Februari 1973, lulus Sarjana Hukum (S.H.) dari Universitas Sumatera Utara, Medan, tahun 1997, memperoleh gelar S2 (M.Hum) tahun 1999 dan gelar S3 (Dr.) tahun 2005 masih dari almamaternya USU. Sejak tahun 2003 hingga kini sebagai staf pengajar pada Universitas Sumatera Utara dan beberapa Universitas swasta di Medan, selain menjadi konsultan hukum di beberapa perusahaan. Sejak tahun 2006 – sekarang menjadi Anggota Majelis Pengawas Jabatan Notaris Daerah Deli Serdang; serta menjadi Sekretaris Dewan Audit Universitas Sumatera Utara (2007).

### Prof. Dr. Hata, SH, MH

Hata, lahir tanggal 1 Oktober 1946 di Banjar, Jawa Barat; dosen Kopertis Wilayah IV Jabar dan Banten; menyelesaikan S1 di Sekolah Tinggi Hukum Bandung, S2 dan S3 di UNPAD; jabatan sekarang adalah Guru Besar Hukum Ekonomi Internasional, dan Ketua Sekolah Tinggi Hukum Bandung

### Ricardo Simanjuntak, SH, LL.M, ANZIIIF.CIP

Ricardo Simanjuntak, lulus S1 (S.H) dari Universitas Sumatera Utara (USU) dan lulus S2 (LL.M) dari The University of Nottingham, Inggris. Mengikuti training, a.l.: Certificate in Private International Law the Academy of Private International Law, Den-Haag, Belanda; Sertifikat Pasar Modal; Sertifikat Profesi dari The Australian and New Zealand Institute of Insurance and Finance (ANZIIIF), Australia. Pengalaman kerja, a.l.: Partner (Founder) di Kantor Pengacara Ricardo Simanjuntak & Partners; Advokat (Partner) di Kantor Pengacara Gani Djemat & Partners (2003); Dosen Honorer Pasca Sarjana Bidang Ilmu Administrasi Niaga (MM), UI; Ketua III Association of Anti Trust Lawyers, Indonesia; Kurator dan Administrator pada Pengadilan Niaga; Authorised Mediator pada Pusat Mediasi Nasional (PMN) Jakarta; Penasehat Hukum Dewan Asuransi Indonesia (DAI); Anggota Tim Perumus Dewan Asuransi Indonesia (DAI) untuk Usulan Perubahan Undang-Undang Kepailitan Tahun 1998; Ketua Tim Analisa dan Evaluasi Hukum Peraturan Perundang-undangan mengenai "Pengadilan Niaga (Commercial Court)"

Badan Pembinaan Hukum Nasional (BPHN) tahun 2001; Anggota Tim Tujuh Evaluasi Puanas Pengadilan Niaga IMF-BAPPENAS – 2003; Ketua Bidang Departemen Luar Negeri DPP-AAI (2005-2010); Tim Kerja Pendirian Biro Mediasi Asuransi, Direktorat Asuransi, Dep.Keu; Anggota Tim Pengarah Mahkamah Agung dalam kerja sama dengan USAID dalam Program IN-ACCE (Peningkatan Pengadilan Tindak Pidana Korupsi dan Pengadilan Niaga Indonesia); Vice President of INSOL Indonesia; Wakil Ketua Dewan Kehormatan LBH DPP Kosgoro; Ketua Umum Asosiasi Kurator dan Pengurus Indonesia (AKPI); Fokus penelitiannya meliputi Hukum Kepailitan, Hukum Pengangkutan Laut, Hukum Anti Monopoli, Hukum Kontrak, Hukum Asuransi, Hukum Perusahaan dan Hukum Perbankan; Pembicara berbagai seminar, workshop, a.l: KONTAN, Pelatihan PLN, Pertamina, Bank BNI, Info Bank, Bank Niaga, Bank DBS, Bank BRI, Bank BCA dan MCP selain aktif menulis (kolumnis) di berbagai Media Nasional. e-mail : ricardo@rsnpilawyers.com dan rsnp@rsnpilawyers.com

### Tatty A. Ramli, SH, MH

Tatty A. Ramli, lahir di Bandung tanggal 26 Desember 1957, memperoleh S1 (Sarjana Hukum) dari Universitas Padjadjaran, Bandung tahun 1984 dan S2 (MH) dari Universitas Parahyangan, Bandung tahun 2002 bidang kajian Hukum Bisnis. Mengikuti *Course on Intellectual Property Rights* diselenggarakan oleh Asian Law dan Direktorat HKI Departemen Kehakiman tentang IPR (1999); *Advance Course on Intellectual Property Rights by AUS – AID* oleh University of Technology Sydney, Australia (2000); Seminar tentang Indikasi Geografis oleh Departemen Kehakiman dan Kedutaan Besar Prancis di Jakarta 2002. Karya tulis, a.l.: *Perlindungan Indikasi Geografis dan Permasalahannya: UU No. 15 Tahun 2001 tentang Merek*; *Kajian Yuridis Sosiologis Pengaturan Hak Indikasi Geografis Ubi Cilembu sebagai Sumber Pendapatan Asli Daerah dalam Peraturan Daerah (2007)*; *Model Integrasi Pendaftaran Indikasi Geografis sebagai Alternatif Perlindungan Hukum Bagi Masyarakat Petani Ubi Cilembu (2008)*. Pengalaman kerja: Dosen Mata Kuliah HKI di Fakultas Hukum UNISBA sejak 1995 – sekarang ; Membimbing Tugas Akhir/skripsi mahasiswa dengan kajian HKI; Anggota Penyusunan kurikulum mata kuliah HKI di Perguruan Tinggi bagi mahasiswa.

### Yeti Sumiyati, SH, MH

Yeti Sumiyati, lahir di Bandung tanggal 1 Mei 1974, memperoleh gelar S1 (Sarjana Hukum) dari Universitas Padjadjaran/ Bandung tahun 1996 dan S2 (M.H) dari Universitas Indonesia, Jakarta tahun 2004. Jabatan saat ini sebagai dosen UNISBA Bandung. Karya tulis, a.l: *Kajian Yuridis Sosiologis Pengaturan Hak Indikasi Geografis Ubi Cilembu sebagai Sumber Pendapatan Asli Daerah dalam Peraturan Daerah (2007)*; *Penyuluhan Hukum tentang Tata Cara Pendaftaran Indikasi Geografis bagi Petani Ubi Cilembu Kabupaten Sumedang, Jawa Barat sebagai Wujud Sumbangsih Perguruan Tinggi dalam Meningkatkan Indeks Pembangunan Manusia (2007)*; *Model Integrasi Pendaftaran Indikasi Geografis sebagai Alternatif Perlindungan Hukum Bagi Masyarakat Petani Ubi Cilembu (2008)*; *Pengaruh Privatisasi Dalam Pembangunan Ekonomi. (2003)*

### Prof. Huala Adolf SH, LL.M, Ph.D

Huala Adolf adalah Guru Besar Hukum Internasional pada Fakultas Hukum Universitas Padjadjaran, Bandung

### Dr. Ridwan Khairandy, SH, MH

Pria kelahiran Banjarmasin, 12 Februari 1962 ini menyelesaikan Sarjana Hukumnya dari Universitas Islam Indonesia, Yogyakarta tahun 1986, kemudian melanjutkan program Magister Hukum dari UNPAD Bandung lulus tahun 1995, lulus S3 (Doktor) dari Program Pasca Sarjana Fakultas Hukum Universitas Indonesia, tahun 2003, fasih berbahasa Inggris dan Belanda. Dosen Fakultas Hukum UII sejak 1987-sekarang, dengan posisi yang pernah diembannya sebagai Kepala Bidang Non-Litigasi Lembaga Konsultasi dan Bantuan Hukum, FH UII Yogyakarta (1988-1990); Pembantu Dekan III FH UII Yogyakarta (1994-1998), serta Kepala Pusat Studi Hukum FH UII Yogyakarta (1998-2000). Sedangkan jabatan di luar Universitas, beliau sebagai partner pada Kantor Hukum FIB, Jakarta (1996-1998) dan Firma Hukum ISSARI, Jakarta (1998), sejak September 2001 – sekarang adalah Wakil Koordinator Dewan Pakar *Jurnal Hukum Bisnis*, Jakarta.