

Art. 67 Usages and practices in contracts between traders. 1. In a contract between traders, the parties are bound by any usage which they have agreed should be applicable and by any practice they have established between themselves.

2. The parties are bound by a usage which would be considered generally applicable by traders in the same situation as the parties.

3. Usages and practices do not bind the parties to the extent to which they conflict with contract terms which have been individually negotiated or any mandatory rules of the Common European Sales Law.

Art. 68 Contract terms which may be implied. 1. Where it is necessary to provide for a matter which is not explicitly regulated by the agreement of the parties, any usage or practice or any rule of the Common European Sales Law, an additional contract term may be implied, having regard in particular to:

- (a) the nature and purpose of the contract;
- (b) the circumstances in which the contract was concluded; and
- (c) good faith and fair dealing.

2. Any contract term implied under paragraph 1 is, as far as possible, to be such as to give effect to what the parties would probably have agreed, had they provided for the matter.

3. Paragraph 1 does not apply if the parties have deliberately left a matter unregulated, accepting that one or other party would bear the risk.

Art. 69 Contract terms derived from certain pre-contractual statements. 1. Where the trader makes a statement before the contract is concluded, either to the other party or publicly, about the characteristics of what is to be supplied by that trader under the contract, the statement is incorporated as a term of the contract unless:

- (a) the other party was aware, or could be expected to have been aware when the contract was concluded that the statement was incorrect or could not otherwise be relied on as such a term; or
- (b) the other party's decision to conclude the contract could not have been influenced by the statement.

2. For the purposes of paragraph 1, a statement made by a person engaged in advertising or marketing for the trader is regarded as being made by the trader.

3. Where the other party is a consumer then, for the purposes of paragraph 1, a public statement made by or on behalf of a producer or other person in earlier links of the chain of transactions leading to the contract is regarded as being made by the trader unless the trader, at the time of conclusion of the contract, did not know and could not be expected to have known of it.

4. In relations between a trader and a consumer the parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

Art. 70 Duty to raise awareness of not individually negotiated contract terms. 1. Contract terms supplied by one party and not individually

negotiated within the meaning of Article 7 may be invoked against the other party only if the other party was aware of them, or if the party supplying them took reasonable steps to draw the other party's attention to them, before or when the contract was concluded.

2. For the purposes of this Article, in relations between a trader and a consumer contract terms are not sufficiently brought to the consumer's attention by a mere reference to them in a contract document, even if the consumer signs the document.

3. The parties may not exclude the application of this Article or derogate from or vary its effects.

Art. 71 Additional payments in contracts between a trader and a consumer.

1. ¹In a contract between a trader and a consumer, a contract term which obliges the consumer to make any payment in addition to the remuneration stated for the trader's main contractual obligation, in particular where it has been incorporated by the use of default options which the consumer is required to reject in order to avoid the additional payment, is not binding on the consumer unless, before the consumer is bound by the contract, the consumer has expressly consented to the additional payment. ²If the consumer has made the additional payment, the consumer may recover it.

2. The parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

Art. 72 Merger clauses. 1. Where a contract in writing includes a term stating that the document contains all contract terms (a merger clause), any prior statements, undertakings or agreements which are not contained in the document do not form part of the contract.

2. Unless the contract otherwise provides, a merger clause does not prevent the parties' prior statements from being used to interpret the contract.

3. In a contract between a trader and a consumer, the consumer is not bound by a merger clause.

4. The parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

Art. 73 Determination of price. Where the amount of the price payable under a contract cannot be otherwise determined, the price payable is, in the absence of any indication to the contrary, the price normally charged in comparable circumstances at the time of the conclusion of the contract or, if no such price is available, a reasonable price.

Art. 74 Unilateral determination by a party. 1. Where the price or any other contract term is to be determined by one party and that party's determination is grossly unreasonable then the price normally charged or term normally used in comparable circumstances at the time of the conclusion of the contract or, if no such price or term is available, a reasonable price or a reasonable term is substituted.

2. The parties may not exclude the application of this Article or derogate from or vary its effects.

Art. 75 Determination by a third party. 1. Where a third party is to determine the price or any other contract term and cannot or will not do so, a court may, unless this is inconsistent with the contract terms, appoint another person to determine it.

2. Where a price or other contract term determined by a third party is grossly unreasonable, the price normally charged or term normally used in comparable circumstances at the time of the conclusion of the contract or, if no such price is available, a reasonable price, or a reasonable term is substituted.

3. For the purpose of paragraph 1 a “court” includes an arbitral tribunal.

4. In relations between a trader and a consumer the parties may not to the detriment of the consumer exclude the application of paragraph 2 or derogate from or vary its effects.

Art. 76 Language. Where the language to be used for communications relating to the contract or the rights or obligations arising from it cannot be otherwise determined, the language to be used is that used for the conclusion of the contract.

Art. 77 Contracts of indeterminate duration. 1. Where, in a case involving continuous or repeated performance of a contractual obligation, the contract terms do not stipulate when the contractual relationship is to end or provide for it to be terminated upon giving notice to that effect, it may be terminated by either party by giving a reasonable period of notice not exceeding two months.

2. In relations between a trader and a consumer the parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

Art. 78 Contract terms in favour of third parties. 1. ¹The contracting parties may, by the contract, confer a right on a third party. ²The third party need not be in existence or identified at the time the contract is concluded but needs to be identifiable.

2. ¹The nature and content of the third party’s right are determined by the contract. ²The right may take the form of an exclusion or limitation of the third party’s liability to one of the contracting parties.

3. When one of the contracting parties is bound to render a performance to the third party under the contract, then:

- (a) the third party has the same rights to performance and remedies for non-performance as if the contracting party was bound to render the performance under a contract with the third party; and
- (b) the contracting party who is bound may assert against the third party all defences which the contracting party could assert against the other party to the contract.

4. ¹The third party may reject a right conferred upon them by notice to either of the contracting parties, if that is done before it has been expressly or impliedly accepted. ²On such rejection, the right is treated as never having accrued to the third party.

5. The contracting parties may remove or modify the contract term conferring the right if this is done before either of them has given the third party notice that the right has been conferred.

Chapter 8. Unfair contract terms

Section 1. General provisions

Art. 79 Effects of unfair contract terms. 1. A contract term which is supplied by one party and which is unfair under Sections 2 and 3 of this Chapter is not binding on the other party.

2. Where the contract can be maintained without the unfair contract term, the other contract terms remain binding.

Art. 80 Exclusions from unfairness test. 1. Sections 2 and 3 do not apply to contract terms which reflect rules of the Common European Sales Law which would apply if the terms did not regulate the matter.

2. Section 2 does not apply to the definition of the main subject matter of the contract, or to the appropriateness of the price to be paid in so far as the trader has complied with the duty of transparency set out in Article 82.

3. Section 3 does not apply to the definition of the main subject matter of the contract or to the appropriateness of the price to be paid.

Art. 81 Mandatory nature. The parties may not exclude the application of this Chapter or derogate from or vary its effects.

Section 2. Unfair contract terms in contracts between a trader and a consumer

Art. 82 Duty of transparency in contract terms not individually negotiated. Where a trader supplies contract terms which have not been individually negotiated with the consumer within the meaning of Article 7, it has a duty to ensure that they are drafted and communicated in plain, intelligible language.

Art. 83 Meaning of “unfair” in contracts between a trader and a consumer. 1. In a contract between a trader and a consumer, a contract term supplied by the trader which has not been individually negotiated within the meaning of Article 7 is unfair for the purposes of this Section if it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer, contrary to good faith and fair dealing.

2. When assessing the unfairness of a contract term for the purposes of this Section, regard is to be had to:

- (a) whether the trader complied with the duty of transparency set out in Article 82;
- (b) the nature of what is to be provided under the contract;
- (c) the circumstances prevailing during the conclusion of the contract;
- (d) to the other contract terms; and
- (e) to the terms of any other contract on which the contract depends.

Art. 84 Contract terms which are always unfair. A contract term is always unfair for the purposes of this Section if its object or effect is to:

- (a) exclude or limit the liability of the trader for death or personal injury caused to the consumer through an act or omission of the trader or of someone acting on behalf of the trader;
- (b) exclude or limit the liability of the trader for any loss or damage to the consumer caused deliberately or as a result of gross negligence;
- (c) limit the trader's obligation to be bound by commitments undertaken by its authorised agents or make its commitments subject to compliance with a particular condition the fulfilment of which depends exclusively on the trader;
- (d) exclude or hinder the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to an arbitration system not foreseen generally in legal provisions that apply to contracts between a trader and a consumer;
- (e) confer exclusive jurisdiction for all disputes arising under the contract to a court for the place where the trader is domiciled unless the chosen court is also the court for the place where the consumer is domiciled;
- (f) give the trader the exclusive right to determine whether the goods, digital content or related services supplied are in conformity with the contract or gives the trader the exclusive right to interpret any contract term;
- (g) provide that the consumer is bound by the contract when the trader is not;
- (h) require the consumer to use a more formal method for terminating the contract within the meaning of Article 8 than was used for conclusion of the contract;
- (i) grant the trader a shorter notice period to terminate the contract than the one required of the consumer;
- (j) oblige the consumer to pay for goods, digital content or related services not actually delivered, supplied or rendered;
- (k) determine that non-individually negotiated contract terms within the meaning of Article 7 prevail or have preference over contract terms which have been individually negotiated.

Art. 85 Contract terms which are presumed to be unfair. A contract term is presumed to be unfair for the purposes of this Section if its object or effect is to:

- (a) restrict the evidence available to the consumer or impose on the consumer a burden of proof which should legally lie with the trader;
- (b) inappropriately exclude or limit the remedies available to the consumer against the trader or a third party for non-performance by the trader of obligations under the contract;
- (c) inappropriately exclude or limit the right to set-off claims that the consumer may have against the trader against what the consumer may owe to the trader;
- (d) permit a trader to keep money paid by the consumer if the latter decides not to conclude the contract, or perform obligations under it, without

providing for the consumer to receive compensation of an equivalent amount from the trader in the reverse situation;

- (e) require a consumer who fails to perform obligations under the contract to pay a disproportionately high amount by way of damages or a stipulated payment for non-performance;
- (f) entitle a trader to withdraw from or terminate the contract within the meaning of Article 8 on a discretionary basis without giving the same right to the consumer, or entitle a trader to keep money paid for related services not yet supplied in the case where the trader withdraws from or terminates the contract;
- (g) enable a trader to terminate a contract of indeterminate duration without reasonable notice, except where there are serious grounds for doing so;
- (h) automatically extend a contract of fixed duration unless the consumer indicates otherwise, in cases where contract terms provide for an unreasonably early deadline for giving notice;
- (i) enable a trader to alter contract terms unilaterally without a valid reason which is specified in the contract; this does not affect contract terms under which a trader reserves the right to alter unilaterally the terms of a contract of indeterminate duration, provided that the trader is required to inform the consumer with reasonable notice, and that the consumer is free to terminate the contract at no cost to the consumer;
- (j) enable a trader to alter unilaterally without a valid reason any characteristics of the goods, digital content or related services to be provided or any other features of performance;
- (k) provide that the price of goods, digital content or related services is to be determined at the time of delivery or supply, or allow a trader to increase the price without giving the consumer the right to withdraw if the increased price is too high in relation to the price agreed at the conclusion of the contract; this does not affect price-indexation clauses, where lawful, provided that the method by which prices vary is explicitly described;
- (l) oblige a consumer to perform all their obligations under the contract where the trader fails to perform its own;
- (m) allow a trader to transfer its rights and obligations under the contract without the consumer's consent, unless it is to a subsidiary controlled by the trader, or as a result of a merger or a similar lawful company transaction, and such transfer is not likely to negatively affect any right of the consumer;
- (n) allow a trader, where what has been ordered is unavailable, to supply an equivalent without having expressly informed the consumer of this possibility and of the fact that the trader must bear the cost of returning what the consumer has received under the contract if the consumer exercises a right to reject performance;
- (o) allow a trader to reserve an unreasonably long or inadequately specified period to accept or refuse an offer;
- (p) allow a trader to reserve an unreasonably long or inadequately specified period to perform the obligations under the contract;

- (q) inappropriately exclude or limit the remedies available to the consumer against the trader or the defences available to the consumer against claims by the trader;
- (r) subject performance of obligations under the contract by the trader, or subject other beneficial effects of the contract for the consumer, to particular formalities that are not legally required and are unreasonable;
- (s) require from the consumer excessive advance payments or excessive guarantees of performance of obligations;
- (t) unjustifiably prevent the consumer from obtaining supplies or repairs from third party sources;
- (u) unjustifiably bundle the contract with another one with the trader, a subsidiary of the trader, or a third party, in a way that cannot be expected by the consumer;
- (v) impose an excessive burden on the consumer in order to terminate a contract of indeterminate duration;
- (w) make the initial contract period, or any renewal period, of a contract for the protracted provision of goods, digital content or related services longer than one year, unless the consumer may terminate the contract at any time with a termination period of no more than 30 days.

Section 3. Unfair contract terms in contracts between traders

Art. 86 Meaning of “unfair” in contracts between traders. 1. In a contract between traders, a contract term is unfair for the purposes of this Section only if:

- (a) it forms part of not individually negotiated terms within the meaning of Article 7; and
- (b) it is of such a nature that its use grossly deviates from good commercial practice, contrary to good faith and fair dealing.

2. When assessing the unfairness of a contract term for the purposes of this Section, regard is to be had to:

- (a) the nature of what is to be provided under the contract;
- (b) the circumstances prevailing during the conclusion of the contract;
- (c) the other contract terms; and
- (d) the terms of any other contract on which the contract depends.

Part IV. Obligations and remedies of the parties to a sales contract or a contract for the supply of digital content

Chapter 9. General provisions

Art. 87 Non-performance and fundamental non-performance.

1. Non-performance of an obligation is any failure to perform that obligation, whether or not the failure is excused, and includes:

- (a) non-delivery or delayed delivery of the goods;
- (b) non-supply or delayed supply of the digital content;

- (c) delivery of goods which are not in conformity with the contract;
- (d) supply of digital content which is not in conformity with the contract;
- (e) non-payment or late payment of the price; and
- (f) any other purported performance which is not in conformity with the contract.

2. Non-performance of an obligation by one party is fundamental if:

- (a) it substantially deprives the other party of what that party was entitled to expect under the contract, unless at the time of conclusion of the contract the non-performing party did not foresee and could not be expected to have foreseen that result; or
- (b) it is of such a nature as to make it clear that the non-performing party's future performance cannot be relied on.

Art. 88 Excused non-performance. 1. A party's non-performance of an obligation is excused if it is due to an impediment beyond that party's control and if that party could not be expected to have taken the impediment into account at the time of the conclusion of the contract, or to have avoided or overcome the impediment or its consequences.

2. ¹Where the impediment is only temporary the non-performance is excused for the period during which the impediment exists. ²However, if the delay amounts to a fundamental non-performance, the other party may treat it as such.

3. ¹The party who is unable to perform has a duty to ensure that notice of the impediment and of its effect on the ability to perform reaches the other party without undue delay after the first party becomes, or could be expected to have become, aware of these circumstances. ²The other party is entitled to damages for any loss resulting from the breach of this duty.

Art. 89 Change of circumstances. 1. A party must perform its obligations even if performance has become more onerous, whether because the cost of performance has increased or because the value of what is to be received in return has diminished.

Where performance becomes excessively onerous because of an exceptional change of circumstances, the parties have a duty to enter into negotiations with a view to adapting or terminating the contract.

2. If the parties fail to reach an agreement within a reasonable time, then, upon request by either party a court may:

- (a) adapt the contract in order to bring it into accordance with what the parties would reasonably have agreed at the time of contracting if they had taken the change of circumstances into account; or
- (b) terminate the contract within the meaning of Article 8 at a date and on terms to be determined by the court.

3. Paragraphs 1 and 2 apply only if:

- (a) the change of circumstances occurred after the time when the contract was concluded;