COMMENTARIES ON EUROPEAN CONTRACT LAWS

EDITED BY
NILS JANSEN
REINHARD ZIMMERMANN



OXFORD

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Preface

The origin of the present book, the aims and ambitions pursued with it, and its specific format (as well as its title) are explained in the introductory essay under the heading 'European Contract Law: Foundations, Commentaries, Synthesis'. To put it very briefly, we want to trace the development of European contract law, as reflected in the model rules from PECL to CESL, and in the European consumer *acquis* (we refer to 'textual layers' in that respect); and we want to assess that development against its broadly conceived historical and comparative background. We thus hope that our book, by giving a comprehensive and balanced account of where we stand today, as well as suggestions as to where we might want to go in the future, can serve as a point both of orientation and of departure. In the introductory essay we have also stated the reasons why we have chosen the PECL as our principal point of reference.

It remains to express our gratitude to a great number of persons who have contributed to this project: in the first place, of course, the twenty authors—all of them colleagues with whom we are very closely associated—who have collected and evaluated the textual layers and have written the commentaries, and who have taken part in two meetings held in Münster and Hamburg, where our project was discussed and refined; in the second place all those who have assisted us with the editorial work in one way or another, ie Dirk Erdelkamp, Martin Fischer, François Jurgens, Lisa-Kristin Klapdor, Angelika Okotokro, and Wiaan Visser in Hamburg, and Kristin Boosfeld, Luise Eilers, Eric Grabis, David Kästle-Lamparter, Simon Kleuters, Clara Paul, Sarah Popp, and Christian Schmidt in Münster. A special word of thanks is due to Ilke Meissner, Münster/Stellenbosch, who has had an important part in co-ordinating the editorial work. Finally, we would like to thank the members of staff of Oxford University Press, who have seen our book through the various stages of its production, for their support and encouragement. In particular, we are grateful to Daniel Gill, the production editor assigned to our project, with whom we have been, from time to time, in almost daily contact.

The European Commission's plans to codify central parts of contract law have, for the time being, collapsed. As a result there is now, after many years of frantic activity, a period of respite. We thus sincerely hope that our book may render a meaningful contribution to the ongoing discourse on European and comparative contract law.

Nils Jansen and Reinhard Zimmermann
Münster and Hamburg
Autumn 2017

Summary of Contents

GENERAL INTRODUCTION 1

CHAPTER 1: GENERAL PROVISIONS 19
Section 1: Scope of the Principles 19
Section 2: General Duties 100
Section 3: Terminology and Other Provisions 167

CHAPTER 2: FORMATION OF CONTRACTS 230
Section 1: General Provisions 231
Section 2: Offer and Acceptance 294
Section 3: Liability for Negotiations 348
Section 4: Pre-contractual Information Duties 383
Section 5: Right of Withdrawal in Distance and Off-premises Contracts 505

CHAPTER 3: AUTHORITY OF AGENTS 587
Section 1: General Provisions 587
Section 2: Direct Representation 609
Section 3: Indirect Representation 637

CHAPTER 4: VALIDITY 649

CHAPTER 5: INTERPRETATION 740

CHAPTER 6: CONTENTS AND EFFECTS 786
Section 1: Contents and Effects in General 786
Section 2: Unfair Contract Terms 919

CHAPTER 7: PERFORMANCE 995

CHAPTER 8: NON-PERFORMANCE AND REMEDIES IN GENERAL 1074

CHAPTER 9: PARTICULAR REMEDIES FOR NON-PERFORMANCE 1185
Section 1: Right to Performance 1185
Section 2: Withholding Performance 1276
Section 3: Termination of the Contract 1285
Subsection 3-1: General Requirements 1285
Subsection 3-2: Effects of Termination and Restitution 1367

Section 4: Price Reduction 1422
Section 5: Damages and Interest 1432

CHAPTER 10: PLURALITY OF PARTIES 1557
Section 1: Plurality of Debtors 1557
Section 2: Plurality of Creditors 1603

CHAPTER 11: ASSIGNMENT OF CLAIMS 1626
Section 1: General Principles 1627
Section 2: Effects of Assignment as Between Assignor and Assignee 1665
Section 3: Effects of Assignment as Between Assignee and Debtor 1679
Section 4: Order of Priority Between Assignee and Competing Claimants 1725

CHAPTER 12: SUBSTITUTION OF NEW DEBTOR; TRANSFER OF CONTRACT 1728
Section 1: Substitution of New Debtor 1728
Section 2: Transfer of Contract 1750

CHAPTER 13: SET-OFF 1756

CHAPTER 14: PRESCRIPTION 1823
Section 1: General Provision 1823
Section 2: Periods of Prescription and their Commencement 1839
Section 3: Extension of Period 1847
Section 4: Renewal of Period 1870
Section 5: Effects of Prescription 1874
Section 6: Modification by Agreement 1883

CHAPTER 15: ILLEGALITY 1887

CHAPTER 16: CONDITIONS 1931

CHAPTER 17: CAPITALISATION OF INTEREST 1960

CHAPTER 18: SALE OF GOODS 1961
Section 1: Scope 1961
Section 2: Obligations of Buyer and Seller, Remedies 1973
Section 3: Passing of Risk 2022

CHAPTER 19: OBLIGATIONS OF THE PARTIES TO A (RELATED) SERVICE CONTRACT 2073
Section 1: Scope of Chapter 2073
Section 2: Obligations of the Service Provider 2088
Section 3: Obligations of the Customer 2109

Table of Contents

Preface v
Summary of Contents vi
Contributors xxi
European and International Sources of Law xxiii
List of Abbreviations xxvii
Principal Works Cited xxxv
Table of Cases (Common Law and International Courts) xli
Table of Historical Sources liii
Table of National Legislation lxi
Table of European Union Legislation xci
Table of International Instruments ciii

GENERAL INTRODUCTION 1

European Contract Laws: Foundations, Commentaries, Synthesis (Nils Jansen and Reinhard Zimmermann) 1

CHAPTER 1: GENERAL PROVISIONS 19

SECTION 1: SCOPE OF THE PRINCIPLES 19

Introduction before Art 1:101 (Reinhard Zimmermann) 20
Art 1:101: Application of the Principles (Nils Jansen) 27
Art 1:102: Freedom of Contract (Eike Hosemann) 30
Art 1:103: Mandatory Law (Nils Jansen) 52
Art 1:104: Application to Questions of Consent (Nils Jansen) 53
Art 1:105: Usages and Practices (Helge Dedek) 54
Art 1:106: Interpretation and Supplementation (Oliver Unger) 64
(1) General Provision 64
(2) Issues not Expressly Settled 75
Art 1:107: Application of the Principles by Way of Analogy (Jan Peter Schmidt) 81

SECTION 2: GENERAL DUTIES 100

Art 1:201: Good Faith and Fair Dealing (Jan Peter Schmidt) 101
Art 1:202: Duty to Co-operate (Jan Peter Schmidt) 157

SECTION 3: TERMINOLOGY AND OTHER PROVISIONS 167

Art 1:301: Meaning of Terms (Nils Jansen) 167
Art 1:302: Reasonableness (Jan Peter Schmidt) 173

Art 1:303: Notice (Jan Peter Schmidt) 179
Art 1:304: Computation of Time (Oliver Unger) 200
(1) Period of Time Fixed in a Document 200
(2) Official Holidays and Non-working Days 208
(3) Beginning and End of a Period of Time 214
Art 1:305: Imputed Knowledge and Intention (Lukas Rademacher) 222

CHAPTER 2: FORMATION OF CONTRACTS 230

SECTION 1: GENERAL PROVISIONS 231

Introduction before Art 2:101 (Gregor Christandl) 231
Art 2:101: Conditions for the Conclusion of a Contract
(Gregor Christandl and Eike Hosemann) 236
(1) General 236
(2) Freedom of Form 249
Art 2:102: Intention (Gregor Christandl) 266
Art 2:103: Sufficient Agreement (Gregor Christandl) 268
Art 2:104: Terms not Individually Negotiated (Nils Jansen) 272
Art 2:105: Merger Clause (Gregor Christandl) 281
Art 2:106: Written Modification Only (Gregor Christandl) 285
Art 2:107: Promises Binding without Acceptance (Gregor Christandl) 289

SECTION 2: OFFER AND ACCEPTANCE 294

Art 2:201: Offer (Gregor Christandl) 294
Art 2:202: Revocation of an Offer (Gregor Christandl) 301
Art 2:203: Rejection (Gregor Christandl) 313
Art 2:204: Acceptance (Gregor Christandl) 316
Art 2:205: Time of Conclusion of the Contract (Gregor Christandl) 323
Art 2:206: Time Limit for Acceptance (Gregor Christandl) 328
Art 2:207: Late Acceptance (Gregor Christandl) 331
Art 2:208: Modified Acceptance (Gregor Christandl) 334
Art 2:209: Conflicting General Conditions (Gregor Christandl) 339
Art 2:210: Professional's Written Confirmation (Gregor Christandl) 343
Art 2:211: Contracts not Concluded through Offer and Acceptance
(Gregor Christandl) 346

SECTION 3: LIABILITY FOR NEGOTIATIONS 348

Introduction before Art 2:301 (Ulrike Babusiaux) 348
Art 2:301: Negotiations Contrary to Good Faith (Ulrike Babusiaux) 359
Art 2:302: Breach of Confidentiality (Ulrike Babusiaux) 374

SECTION 4: PRE-CONTRACTUAL INFORMATION DUTIES 383

Introduction before Art 2:401 (David Kästle-Lamparter) 384
Art 2:401: Duty to Disclose Information (David Kästle-Lamparter) 411
Art 2:402: Information Requirements for Consumer Contracts Other than Distance or Off-premises Contracts (David Kästle-Lamparter) 420
Art 2:403: Information Requirements for Distance and Off-premises Consumer Contracts (David Kästle-Lamparter) 446
Art 2:404: Formal Requirements for Off-premises Consumer Contracts (David Kästle-Lamparter) 470
Art 2:405: Formal and Additional Requirements for Distance Consumer Contracts (David Kästle-Lamparter) 478
Art 2:406: Remedies for Breach of Pre-contractual Information Duties (David Kästle-Lamparter) 492

SECTION 5: RIGHT OF WITHDRAWAL IN DISTANCE AND OFF-PREMISES CONTRACTS 505

Introduction before Art 2:501 (Phillip Hellwege) 505
Art 2:501: Right of Withdrawal (Phillip Hellwege) 522
(1) General 522
(2) Expiry of Withdrawal Period 525
Appendix I: Performance during Withdrawal Period 530
Appendix II: Definitions 531
Art 2:502: Omission of Information on the Right of Withdrawal (Phillip Hellwege) 544
Art 2:503: Exercise of the Right of Withdrawal (Phillip Hellwege) 548
Art 2:504: Effects of Withdrawal (Phillip Hellwege) 553
Appendix: Obligations of the Trader in the Event of Withdrawal 556
Art 2:505: Effects of the Exercise of the Right of Withdrawal on Ancillary Contracts (Phillip Hellwege) 567
Appendix: Exceptions to the Right of Withdrawal 571
Art 2:506: Mandatory Nature (Phillip Hellwege) 586

CHAPTER 3: AUTHORITY OF AGENTS 587

SECTION 1: GENERAL PROVISIONS 587

Introduction before Art 3:101 (Lukas Rademacher) 587
Art 3:101: Scope of the Chapter (Lukas Rademacher) 595
Art 3:102: Categories of Representation (Lukas Rademacher) 600

SECTION 2: DIRECT REPRESENTATION 609

Art 3:201: Express, Implied and Apparent Authority (Lukas Rademacher) 609
Art 3:202: Agent Acting in Exercise of its Authority (Lukas Rademacher) 616

Art 3:203: Unidentified Principal (Lukas Rademacher) 617
Art 3:204: Agent Acting without or outside its Authority (Lukas Rademacher) 618
Art 3:205: Conflict of Interest (Lukas Rademacher) 621
Art 3:206: Subagency (Lukas Rademacher) 626
Art 3:207: Ratification by Principal (Lukas Rademacher) 628
Art 3:208: Third Party's Right with Respect to Confirmation of Authority (Lukas Rademacher) 631
Art 3:209: Duration of Authority (Lukas Rademacher) 633

SECTION 3: INDIRECT REPRESENTATION 637

Art 3:301: Intermediaries not Acting in the Name of a Principal (Lukas Rademacher) 637
Art 3:302: Intermediary's Insolvency or Fundamental Non-performance to Principal (Lukas Rademacher) 638
Art 3:303: Intermediary's Insolvency or Fundamental Non-performance to Third Party (Lukas Rademacher) 645
Art 3:304: Requirement of Notice (Lukas Rademacher) 648

CHAPTER 4: VALIDITY 649

Introduction before Art 4:101 (Sebastian Lohsse) 649
Art 4:101: Matters not Covered (Sebastian Lohsse) 652
Art 4:102: Initial Impossibility (Sebastian Lohsse) 653
Art 4:103: Fundamental Mistake as to Facts or Law (Sebastian Lohsse) 657
Art 4:104: Inaccuracy in Communication (Sebastian Lohsse) 674
Art 4:105: Adaptation of Contract (Sebastian Lohsse) 681
Art 4:106: Incorrect Information (Sebastian Lohsse) 685
Art 4:107: Fraud (Sebastian Lohsse) 689
Art 4:108: Threats (Sebastian Lohsse) 695
Art 4:109: Excessive Benefit or Unfair Advantage (Sebastian Lohsse) 701
Art 4:110: Unfair Terms not Individually Negotiated (Nils Jansen) 707
Art 4:111: Third Persons (Sebastian Lohsse) 708
Art 4:112: Notice of Avoidance (Sebastian Lohsse) 714
Art 4:113: Time Limits (Sebastian Lohsse) 717
Art 4:114: Confirmation (Sebastian Lohsse) 720
Art 4:115: Effect of Avoidance (Phillip Hellwege) 724
Art 4:116: Partial Avoidance (Sebastian Lohsse) 726
Art 4:117: Damages (Sebastian Lohsse) 730
Art 4:118: Exclusion or Restriction of Remedies (Sebastian Lohsse) 734
Art 4:119: Remedies for Non-performance (Sebastian Lohsse) 737

CHAPTER 5: INTERPRETATION 740

Introduction before Art 5:101 (Stefan Vogenauer) 740
Art 5:101: General Rules of Interpretation (Stefan Vogenauer) 754
Art 5:102: Relevant Circumstances (Stefan Vogenauer) 765
Art 5:103: *Contra Proferentem* Rule (Stefan Vogenauer) 772
Art 5:104: Preference to Negotiated Terms (Stefan Vogenauer) 775
Art 5:105: Reference to Contract as a Whole (Stefan Vogenauer) 777
Art 5:106: Terms to Be Given Effect (Stefan Vogenauer) 781
Art 5:107: Linguistic Discrepancies (Stefan Vogenauer) 784

CHAPTER 6: CONTENTS AND EFFECTS 786

SECTION 1: CONTENTS AND EFFECTS IN GENERAL 786

Introduction before Art 6:101 (Helge Dedek) 787
Art 6:101: Statements Giving Rise to Contractual Obligations (Helge Dedek) 791
Art 6:102: Implied Terms (Helge Dedek) 801
Art 6:103: Simulation (Helge Dedek) 814
Art 6:104: Determination of Price (Helge Dedek) 820
Art 6:105: Unilateral Determination by a Party (Helge Dedek) 832
Art 6:106: Determination by a Third Person (Helge Dedek) 840
Art 6:107: Reference to a Non-existent Factor (Helge Dedek) 851
Art 6:108: Quality of Performance (Helge Dedek) 853
Art 6:109: Contract for an Indefinite Period (Helge Dedek) 859
Art 6:110: Stipulation in Favour of a Third Party (Stefan Vogenauer) 866
Art 6:111: Change of Circumstances (Thomas Rüfner) 899
Art 6:112: Right to Terminate for Compelling Reason (Walter Doralt) 912

SECTION 2: UNFAIR CONTRACT TERMS 919

Introduction before Art 6:201 (Nils Jansen) 920
Art 6:201: Unfairness of Terms (Nils Jansen) 933
Art 6:202: Indicative List of Unfair Terms (Nils Jansen) 949
Art 6:203: Terms not Individually Negotiated (Nils Jansen) 964
Art 6:204: Effects of Unfair Contract Terms (Nils Jansen) 971
Art 6:205: Exclusions from Unfairness Test (Nils Jansen) 978
Art 6:206: Transparency of Terms (Nils Jansen) 985
Art 6:207: Mandatory Nature (Nils Jansen) 994

CHAPTER 7: PERFORMANCE 995

Introduction before Art 7:101 (Sebastian Martens) 995
Art 7:101: Place of Performance (Sebastian Martens) 1006
Art 7:102: Time of Performance (Sebastian Martens) 1014

Art 7:102-1: Time of Performance in Consumer Contracts (Sebastian Martens) 1019
Art 7:103: Early Performance (Sebastian Martens) 1022
Art 7:104: Order of Performance (Sebastian Martens) 1025
Art 7:105: Alternative Performance (Sebastian Martens) 1029
Art 7:106: Performance by a Third Person (Sebastian Martens and Constantin Willems) 1033
Art 7:107: Form of Payment (Sebastian Martens) 1041
Art 7:108: Currency of Payment (Sebastian Martens) 1046
Art 7:109: Appropriation of Performance (Sebastian Martens) 1052
Art 7:110: Property not Accepted (Sebastian Martens) 1060
Art 7:111: Money not Accepted (Sebastian Martens) 1068
Art 7:112: Costs of Performance (Sebastian Martens) 1071

CHAPTER 8: NON-PERFORMANCE AND REMEDIES IN GENERAL 1074
Introduction before Art 8:101 (Jens Kleinschmidt) 1075
Art 8:101: Remedies Available (Jens Kleinschmidt) 1088
Art 8:102: Cumulation of Remedies (Jens Kleinschmidt) 1099
Art 8:103: Fundamental Non-performance (Thomas Rüfner) 1110
Art 8:104: Cure by Non-performing Party (Jens Kleinschmidt) 1121
Art 8:105: Assurance of Performance (Sebastian Martens) 1144
Art 8:106: Notice Fixing Additional Period for Performance (Jens Kleinschmidt) 1153
Art 8:107: Performance Entrusted to Another (Sebastian Martens and Constantin Willems) 1160
Art 8:108: Excuse Due to an Impediment (Thomas Rüfner) 1164
Art 8:109: Clause Excluding or Restricting Remedies (Sebastian Martens) 1178

CHAPTER 9: PARTICULAR REMEDIES FOR NON-PERFORMANCE 1185
SECTION 1: RIGHT TO PERFORMANCE 1185
Introduction before Art 9:101 (Jens Kleinschmidt) 1186
Art 9:101: Monetary Obligations (Jens Kleinschmidt) 1189
Art 9:102: Non-monetary Obligations (Jens Kleinschmidt) 1203
(1) Principle 1203
Appendix: Modalities of the Buyer's Remedy of Cure in Consumer Sales 1232
(2) and (3) Limitations 1240
Art 9:103: Damages not Precluded (Jens Kleinschmidt) 1273
SECTION 2: WITHHOLDING PERFORMANCE 1276
Art 9:201: Right to Withhold Performance (Kristin Boosfeld) 1276

SECTION 3: TERMINATION OF THE CONTRACT 1285
SUBSECTION 1: GENERAL REQUIREMENTS 1285
Introduction before Art 9:301 (Jens Kleinschmidt) 1285
Art 9:301: Right to Terminate the Contract (Jens Kleinschmidt) 1292
Art 9:302: Contract to Be Performed in Parts (Jens Kleinschmidt) 1327
Art 9:303: Notice of Termination (Jens Kleinschmidt) 1340
Art 9:304: Anticipatory Non-performance (Jens Kleinschmidt) 1358
SUBSECTION 2: EFFECTS OF TERMINATION AND RESTITUTION 1367
Introduction before Art 9:305 (Phillip Hellwege) 1367
Art 9:305: Effects of Termination in General (Phillip Hellwege) 1384
Art 9:306: Restitution (Phillip Hellwege) 1391
Appendix I: Benefit and Expenses 1417
Appendix II: Refining the Rules 1421
SECTION 4: PRICE REDUCTION 1422
Art 9:401: Right to Reduce Price (Kristin Boosfeld) 1422
SECTION 5: DAMAGES AND INTEREST 1432
Introduction before Art 9:501 (Reinhard Zimmermann) 1433
Art 9:501: Right to Damages (Reinhard Zimmermann) 1435
(1) General 1435
(2) Non-pecuniary and Future Loss 1447
Art 9:502: General Measure of Damages (Reinhard Zimmermann) 1455
Art 9:503: Foreseeability (Reinhard Zimmermann) 1467
Art 9:504: Loss Attributable to Aggrieved Party (Reinhard Zimmermann) 1475
Art 9:505: Reduction of Loss (Reinhard Zimmermann) 1476
Art 9:506: Substitute Transaction (Reinhard Zimmermann) 1488
Art 9:507: Current Price (Reinhard Zimmermann) 1492
Art 9:508: Delay in Payment of Money (Reinhard Zimmermann) 1498
Art 9:508-1: Interest when the Non-performing Party is a Consumer (Reinhard Zimmermann) 1508
Art 9:508-2: Delayed Payment of a Price by a Business (Reinhard Zimmermann) 1512
(1) Conditions 1512
(2) Accrual 1517
(3) Acceptance or Examination Procedure 1519
(4) Maximum Period 1521
(5) Interest Rates 1522
(6) Further Loss 1525
(7) Recovery Costs 1526

Art 9:508-3: Unfair Contract Terms Relating to Interest for Late Payment (Reinhard Zimmermann) 1528
Art 9:508-4: Capitalisation of Interest (Reinhard Zimmermann) 1532
Appendix to Art 9:508: Refining the Rules (Reinhard Zimmermann) 1536
Art 9:509: Agreed Payment for Non-performance (Reinhard Zimmermann) 1539
Art 9:510: Currency by which Damages to Be Measured (Reinhard Zimmermann) 1555

CHAPTER 10: PLURALITY OF PARTIES 1557

SECTION 1: PLURALITY OF DEBTORS 1557

Introduction before Art 10:101 (Sonja Meier) 1557
Art 10:101: Solidary, Separate and Communal Obligations (Sonja Meier) 1564
Art 10:102: When Solidary Obligations Arise (Sonja Meier) 1571
Art 10:103: Liability under Separate Obligations (Sonja Meier) 1575
Art 10:104: Communal Obligations: Special Rule when Money Claimed for Non-performance (Sonja Meier) 1576
Art 10:105: Apportionment Between Solidary Debtors (Sonja Meier) 1577
Art 10:106: Recourse Between Solidary Debtors (Sonja Meier) 1580
Art 10:107: Performance, Set-off and Merger in Solidary Obligations (Sonja Meier) 1586
Art 10:108: Release or Settlement in Solidary Obligations (Sonja Meier) 1588
Art 10:109: Effect of Judgment in Solidary Obligations (Sonja Meier) 1593
Art 10:110: Prescription in Solidary Obligations (Sonja Meier) 1596
Art 10:111: Opposability of Other Defences in Solidary Obligations (Sonja Meier) 1599

SECTION 2: PLURALITY OF CREDITORS 1603

Introduction before Art 10:201 (Sonja Meier) 1603
Art 10:201: Solidary, Separate and Communal Claims (Sonja Meier) 1607
Art 10:202: Apportionment of Separate Claims (Sonja Meier) 1613
Art 10:203: Difficulties of Executing a Communal Claim (Sonja Meier) 1614
Art 10:204: Apportionment of Solidary Claims (Sonja Meier) 1616
Art 10:205: Regime of Solidary Claims (Sonja Meier) 1618

CHAPTER 11: ASSIGNMENT OF CLAIMS 1626

SECTION 1: GENERAL PRINCIPLES 1627

Introduction before Art 11:101 (Nils Jansen) 1627
Art 11:101: Scope of Chapter (Nils Jansen) 1640
Art 11:102: Contractual Claims Generally Assignable (Nils Jansen) 1649

Art 11:103: Partial Assignment (Nils Jansen) 1657
Art 11:104: Form of Assignment (Nils Jansen) 1662

SECTION 2: EFFECTS OF ASSIGNMENT AS BETWEEN ASSIGNOR AND ASSIGNEE 1665

Art 11:201: Rights Transferred to Assignee (Nils Jansen) 1665
Art 11:202: When Assignment Takes Effect (Nils Jansen) 1669
Art 11:203: Preservation of Assignee's Rights Against Assignor (Nils Jansen) 1670
Art 11:204: Undertakings by Assignor (Nils Jansen) 1674

SECTION 3: EFFECTS OF ASSIGNMENT AS BETWEEN ASSIGNEE AND DEBTOR 1679

Art 11:301: Contractual Prohibition of Assignment (Nils Jansen) 1679
Art 11:302: Other Ineffective Assignments (Nils Jansen) 1689
Art 11:303: Effect on Debtor's Obligation (Nils Jansen) 1693
Art 11:304: Protection of Debtor (Nils Jansen) 1707
Art 11:305: Competing Demands (Nils Jansen) 1708
Art 11:306: Place of Performance (Nils Jansen) 1713
Art 11:307: Defences and Rights of Set-off (Nils Jansen) 1718
Art 11:308: Unauthorised Modification not Binding on Assignee (Nils Jansen) 1723

SECTION 4: ORDER OF PRIORITY BETWEEN ASSIGNEE AND COMPETING CLAIMANTS 1725

Art 11:401: Priorities (Nils Jansen) 1725

CHAPTER 12: SUBSTITUTION OF NEW DEBTOR; TRANSFER OF CONTRACT 1728

SECTION 1: SUBSTITUTION OF NEW DEBTOR 1728

Introduction before Art 12:101 (Sarah Woyciechowski) 1728
Art 12:101: Substitution: General Rules (Sarah Woyciechowski) 1735
Art 12:102: Effects of Substitution on Defences and Securities (Sarah Woyciechowski) 1744

SECTION 2: TRANSFER OF CONTRACT 1750

Art 12:201: Transfer of Contract (Sarah Woyciechowski) 1750

CHAPTER 13: SET-OFF 1756

Introduction before Art 13:101 (Andreas Martin Fleckner) 1756
Art 13:101: Requirements for Set-off (Andreas Martin Fleckner) 1777
Art 13:102: Unascertained Claims (Andreas Martin Fleckner) 1793
Art 13:103: Foreign Currency Set-off (Andreas Martin Fleckner) 1797

Art 13:104: Set-off by Notice (Andreas Martin Fleckner) 1800
Art 13:105: Plurality of Claims and Obligations (Andreas Martin Fleckner) 1805
Art 13:106: Effect of Set-off (Andreas Martin Fleckner) 1808
Art 13:107: Exclusion of Right of Set-off (Andreas Martin Fleckner) 1813

CHAPTER 14: PRESCRIPTION 1823

SECTION 1: GENERAL PROVISION 1823

Introduction before Art 14:101 (Reinhard Zimmermann) 1823
Art 14:101: Claims Subject to Prescription (Reinhard Zimmermann) 1832

SECTION 2: PERIODS OF PRESCRIPTION AND THEIR COMMENCEMENT 1839

Art 14:201: General Period (Reinhard Zimmermann) 1839
Art 14:202: Period for a Claim Established by Legal Proceedings (Reinhard Zimmermann) 1841
Art 14:203: Commencement (Reinhard Zimmermann) 1843

SECTION 3: EXTENSION OF PERIOD 1847

Introduction before Art 14:301 (Reinhard Zimmermann) 1847
Art 14:301: Suspension in Case of Ignorance (Reinhard Zimmermann) 1848
Art 14:302: Suspension in Case of Judicial and Other Proceedings (Reinhard Zimmermann) 1848
(1) and (2) Judicial Proceedings 1851
(3) Other Proceedings 1854
Art 14:303: Suspension in Case of Impediment Beyond Creditor's Control (Reinhard Zimmermann) 1857
Art 14:304: Postponement of Expiry in Case of Negotiations (Reinhard Zimmermann) 1860
Art 14:305: Postponement of Expiry in Case of Incapacity (Reinhard Zimmermann) 1863
Art 14:306: Postponement of Expiry: Deceased's Estate (Reinhard Zimmermann) 1866
Art 14:307: Maximum Length of Period (Reinhard Zimmermann) 1867

SECTION 4: RENEWAL OF PERIOD 1870

Art 14:401: Renewal by Acknowledgement (Reinhard Zimmermann) 1870
Art 14:402: Renewal by Attempted Execution (Reinhard Zimmermann) 1873

SECTION 5: EFFECTS OF PRESCRIPTION 1874

Art 14:501: General Effect (Reinhard Zimmermann) 1874
Art 14:502: Effect on Ancillary Claims (Reinhard Zimmermann) 1880
Art 14:503: Effect on Set-off (Reinhard Zimmermann) 1881

SECTION 6: MODIFICATION BY AGREEMENT 1883
Art 14:601: Agreements Concerning Prescription (Reinhard Zimmermann) 1883

CHAPTER 15: ILLEGALITY 1887
Introduction before Art 15:101 (Sonja Meier) 1887
Art 15:101: Contracts Contrary to Fundamental Principles (Sonja Meier) 1890
Art 15:102: Contracts Infringing Mandatory Rules (Sonja Meier) 1898
Art 15:103: Partial Ineffectiveness (Sonja Meier) 1914
Art 15:104: Restitution (Sonja Meier) 1921
Art 15:105: Damages (Sonja Meier) 1928

CHAPTER 16: CONDITIONS 1931
Introduction before Art 16:101 (Ulrike Babusiaux) 1931
Art 16:101: Types of Condition (Ulrike Babusiaux) 1942
Art 16:102: Interference with Conditions (Ulrike Babusiaux) 1947
Art 16:103: Effect of Conditions (Ulrike Babusiaux) 1952
Art 16:104: Duty to Preserve Rights (Ulrike Babusiaux) 1955
Art 16:105: Restitution in Case of Fulfilment of a Resolutive Condition (Ulrike Babusiaux) 1957

CHAPTER 17: CAPITALISATION OF INTEREST 1960
Art 17:101: When Interest to Be Added to Capital (Reinhard Zimmermann) 1960

CHAPTER 18: SALE OF GOODS 1961

SECTION 1: SCOPE 1961
Art 18:101: Contracts Covered (Thomas Rüfner) 1961

SECTION 2: OBLIGATIONS OF BUYER AND SELLER, REMEDIES 1973
Introduction before Art 18:201 (Sebastian Martens) 1973
Art 18:201: Main Obligations of the Buyer (Sebastian Martens) 1979
Art 18:202: Main Obligations of the Seller (Sebastian Martens) 1985
Art 18:203: Conformity with the Contract (Sebastian Martens) 1989
(1) General 1989
(2) Criteria 1996
(3) Buyer's Knowledge of Lack of Conformity 2005
(4) Pre-contractual Statements 2011
(5) Incorrect Installations 2012
Art 18:204: Overview of Buyer's Remedies for Lack of Conformity (Thomas Rüfner) 2015

SECTION 3: PASSING OF RISK 2022

Art 18:301: Effect of Passing of Risk (Thomas Rüfner) 2022
Art 18:302: Identification of Goods to Contract (Thomas Rüfner) 2030
Art 18:303: Time when Risk Passes (Thomas Rüfner) 2036
Art 18:304: Goods Placed at Buyer's Disposal (Thomas Rüfner) 2049
Art 18:305: Carriage of the Goods (Thomas Rüfner) 2053
Art 18:306: Goods Sold in Transit (Thomas Rüfner) 2060
Art 18:307: Passing of Risk in a Consumer Sales Contract (Thomas Rüfner) 2065

CHAPTER 19: OBLIGATIONS OF THE PARTIES TO A (RELATED) SERVICE CONTRACT 2073

SECTION 1: SCOPE OF CHAPTER 2073

Introduction before Art 19:101 (Constantin Willems) 2073
Art 19:101: Scope of Chapter (Constantin Willems) 2075

SECTION 2: OBLIGATIONS OF THE SERVICE PROVIDER 2088

Art 19:201: Obligation to Achieve Result and Obligation of Care and Skill (Constantin Willems) 2088
Art 19:202: Obligation to Prevent Damage (Constantin Willems) 2095
Art 19:203: Obligation to Provide Invoice (Constantin Willems) 2100
Art 19:204: Obligation to Warn of Unexpected or Uneconomic Cost (Constantin Willems) 2103

SECTION 3: OBLIGATIONS OF THE CUSTOMER 2109

Art 19:301: Payment of the Price (Constantin Willems) 2109
Art 19:302: Duty to Co-operate (Constantin Willems) 2116

Index 2121

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European and International Sources of Law

ACQP	Acquis Principles: Contract II
ACQP[2007]	Acquis Principles: Contract I
Brussels I Regulation	Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I)
Brussels Ia Regulation	Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Ia)
CAISG	Convention on Agency in the International Sale of Goods of 17 February 1983 (Geneva)
CARIT	United Nations Convention on the Assignment of Receivables in International Trade of 12 December 2001 (New York)
CESL	Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law (COM(2011) 635 final), Annex I (Common European Sales Law)
CESL-ELI	Common European Sales Law, as revised by a Working Party of the European Law Institute (see in the list of Principal Works Cited under European Law Institute)
CISG	United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980 (Vienna)
Commercial Agents Directive	Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents
Computation of Time Regulation	Regulation (EEC, Euratom) No 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits
Consumer Credit Directive	Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC
Consumer Credit Directive[1987]	Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit
Consumer Rights Directive	Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European

	Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council
Consumer Sales Directive	Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees
DCFR	Draft Common Frame of Reference (see in the list of Principal Works Cited under von Bar and Clive)
DCFR$^{\text{Interim}}$	Draft Common Frame of Reference, Interim Outline Edition (see in the list of Principal Works Cited under von Bar, Clive, and Schulte-Nölke)
DCFR$^{\text{Outline}}$	Draft Common Frame of Reference, Outline Edition (see in the list of Principal Works Cited under von Bar, Clive, and Schulte-Nölke)
Distance Selling Directive	Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts
Doorstep Selling Directive	Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises
ECHR	(European) Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950
E-Commerce Directive	Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market
Financial Services Distance Marketing Directive	Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC
FS	A European contract law for consumers and businesses: Publication of the results of the feasibility study carried out by the Expert Group on European contract law for stakeholders' and legal practitioners' feedback, 3 May 2011 ('Feasibility Study')
FS$^{\text{2nd}}$	Revised version of the FS, published as a working document of the European Commission on 6 September 2011 and entitled 'Contract Law, Work in Progress, Version of 19 August 2011'
Late Payment Directive	Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions
Late Payment Directive$^{\text{2000}}$	Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions

Life Assurance Directive	Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance
Life Assurance Directive[1990]	Council Directive 90/619/EEC of 8 November 1990 on the coordination of laws, regulations and administrative provisions relating to direct life assurance, laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 79/267/EEC
Package Travel Directive	Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC
Package Travel Directive[1990]	Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours
PCC	*Principes Contractuels Communs* (see in the list of Principal Works Cited under Association Henri Capitant, and Fauvarque-Cosson and Mazeaud)
PECL	Principles of European Contract Law (see in the list of Principal Works Cited under Lando and Beale, and Lando, Clive, Prüm, and Zimmermann)
PEL SC	Principles of European Law, Service Contracts (see in the list of Principal Works Cited under Barendrecht, Jansen, Loos, Pinna, Cascão, and van Gulijk)
PETL	Principles of European Tort Law (see in the list of Principal Works Cited under European Group on Tort Law)
PICC	UNIDROIT Principles of International Commercial Contracts (see in the list of Principal Works Cited under UNIDROIT)
Product Liability Directive	Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products
Proposal Consumer Rights Directive	Proposal for a Directive of the European Parliament and of the Council on consumer rights (COM(2008) 614 final)
Proposed Digital Content Directive	Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content (COM(2015) 634 final)
Proposed Online Sales Directive	Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sale of goods (COM(2015) 635 final)
RegCESL	Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law (COM(2011) 635 final)

Rome I Regulation	Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)
Rome II Regulation	Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)
Services Directive	Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market
Solvency II Directive	Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking up and pursuit of the business of Insurance and Reinsurance (Solvency II)
TFEU	Treaty on the Functioning of the European Union (Official Journal 2012/C 326/01 of 26 October 2012)
Timeshare Directive	Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts
Timeshare Directive[1994]	Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis
ULF	Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (1 July 1964, The Hague)
ULIS	Convention relating to a Uniform Law on the International Sale of Goods (1 July 1964, The Hague)
Unfair Commercial Practices Directive	Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council
Unfair Contract Terms Directive	Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts

List of Abbreviations

ABGB	*Allgemeines Bürgerliches Gesetzbuch* (Austrian Civil Code)
AC	Law Reports, Appeal Cases (England and Wales)
AcP	*Archiv für die civilistische Praxis*
ACQP	Acquis Principles: Contract II
ACQP[2007]	Acquis Principles: Contract I
AD	South African Law Reports, Appellate Division; *anno Domini*
Afr	Africanus
AJCL	*American Journal of Comparative Law*
Aleyn	Aleyn's Reports, King's Bench (England and Wales)
All ER	All England Law Reports (England and Wales)
All ER (Comm)	All England Law Reports (Commercial Cases) (England and Wales)
All ER Rep	All England Law Reports, Reprint (England and Wales)
App Cas	Law Reports, Appeal Cases (England and Wales)
Art	article(s)
art	*articulus*
Ass plén	*Assemblé plénière de la Cour de cassation* (France)
B & Ald	Barnewall & Alderson's King's Bench Reports (England and Wales)
B & C	Barnewall & Cresswell's King's Bench Reports (England and Wales)
B & S	Best and Smith's Queen's Bench Reports (England and Wales)
BBl	*Bundesblatt* (Federal Law Gazette, Switzerland)
BC	before Christ
BCLC	Butterworths Company Law Cases (United Kingdom)
Beav	Beavan's Reports (England and Wales)
BGB	*Bürgerliches Gesetzbuch* (German Civil Code)
BGBl	*Bundesgesetzblatt* (Federal Law Gazette, Austria, Germany)
BGH	*Bundesgerichtshof* (German Federal Supreme Court)
BGHZ	*Sammlung der Entscheidungen des Bundesgerichtshofs in Zivilsachen* (Decisions of the German Federal Supreme Court in Private Law Matters)
BGE	*Amtliche Sammlung von Entscheiden des schweizerischen Bundesgerichts* (Decisions of the Swiss Federal Tribunal)
Bing	Bingham's Common Pleas Reports (England and Wales)
BLR	Building Law Reports (England and Wales)
Bull civ	*Bulletin des arrêts de la Cour de cassation, chambres civiles* (France)
BVerfG	*Bundesverfassungsgericht* (German Federal Constitutional Court)
BVerfGE	*Entscheidungen des Bundesverfassungsgerichts* (Decisions of the German Federal Constitutional Court)
BW	*Burgerlijk Wetboek* (Dutch Civil Code)

C	Justinian's *Codex*
CA	Court of Appeal (England and Wales)
CAISG	Convention on Agency in the International Sale of Goods
Camp	Campbell's Nisi Prius Cases (England and Wales)
CARIT	United Nations Convention on the Assignment of Receivables in International Trade
cap	*caput, capitulum*
Cass civ	*Arrêts de d'une chambre civile de la Cour de Cassation* (France)
Cass com	*Arrêts de la Cour de cassation, chambre commerciale* (France)
Cass soc	*Arrêts de la Cour de cassation, chambre sociale* (France)
Cass req	*Arrêts de la Cour de cassation, chambre des requêtes* (France)
Cassazione civ	*Corte di Cassazione, sezione civili* (Italy)
CB	Common Bench Reports (England and Wales)
CB (NS)	Common Bench Reports (New Series) (England and Wales)
CESL	Common European Sales Law
CESL-ELI	Common European Sales Law, as revised by a Working Party of the European Law Institute (see in the list of Principal Works Cited under European Law Institute)
ch(s)	chapter(s)
Ch	Chancery Law Reports (England and Wales)
Ch D	Chancery Division Law Reports (England and Wales)
CISG	Convention on Contracts for the International Sale of Goods
cit	cited
CJ	Chief Justice
Cl & Fin	Clark & Finnelly's House of Lords Cases (United Kingdom)
CLC	Commercial Law Cases (England and Wales)
CLR	Commonwealth Law Reports (Australia)
CMLR	*Common Market Law Review*
col(s)	column(s)
const	*constitutio*
Co Rep	Coke's King's Bench Reports (England and Wales)
Cowp	Cowper's King's Bench Reports
D	Justinian's Digest
Dalloz	*Recueil Dalloz de doctrine, de jurisprudence et de législation* (1945–1964); *Recueil Dalloz et Sirey de doctrine, de jurisprudence et de législation* (from 1965)
DCFR	Draft Common Frame of Reference
$DCFR^{Interim}$	Draft Common Frame of Reference, Interim Outline Edition
$DCFR^{Outline}$	Draft Common Frame of Reference, Outline Edition
De G J & S	De Gex, Jones & Smith's Chancery Reports (England and Wales)
De G M & G	De Gex, Macnaghten & Gordon's Chancery Reports (England and Wales)
def	*definitio*
Diocl	Diocletian
disp	*disputatio*
Doc	Document
Doug KB	Douglas' King's Bench Reports (England and Wales)

DP	Discussion Paper
DP	*Recueil periodique et critique Dalloz*
Drew	Drewry's Vice Chancellor's Reports *tempore* Kindersley (England and Wales)
dub	*dubium, dubitatio*
E & B	Ellis & Blackburn's Queen's Bench Reports (England and Wales)
East	East's Term Reports, King's Bench (England and Wales)
EC	European Community
ECHR	(European) Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECR	European Court of Justice Reports
ECtHR	European Court of Human Rights
ed(s)	editor(s)
edn	edition
EG	Estates Gazette (England and Wales)
EGBGB	*Einführungsgesetz zum Bürgerlichen Gesetzbuch* (Introductory Act to the German Civil Code)
ELI	European Law Institute
Eq	Law Reports, Equity Cases (England and Wales)
ER	English Reports
ERCL	*European Review of Contract Law*
ERPL	*European Review of Private Law*
EU	European Union
EWCA Civ	England and Wales Court of Appeal, Civil Division
EWHC (Ch)	England and Wales High Court, Chancery Division
EWHC (Comm)	England and Wales High Court, Commercial Court
EWHC (QB)	England and Wales High Court, Queen's Bench Division
Ex/Exch	Exchequer Reports (England and Wales)
Ex D	Law Reports, Exchequer Division (England and Wales)
exerc	*exercitatio*
f	following (page/article)
F	Fraser's Session Cases (Scotland)
F.2d	Federal Reporter, Second Series (United States)
F Supp	Federal Supplement (United States)
fn	footnote
fol	*folio*
Foro it	*Il Foro Italiano* (Italy)
FS	Feasibility Study
FS^{2nd}	Revised version of the FS
FSR	Fleet Street Reports (England and Wales)
Gai	Gaius
Giust civ	*Giustizia civile* (Italy)
Gl	*glossa*
H Bl	Henry Blackstone's Common Pleas Reports (England and Wales)
HGB	*Handelsgesetzbuch* (German Commercial Code)
HKK	*Historisch-kritischer Kommentar zum BGB* (Germany)

HL	House of Lords (United Kingdom)
HLC	Clark and Finelly's House of Lords Reports, New Series
HR	*Hoge Raad* (Netherlands)
ICLQ	*International and Comparative Law Quarterly*
id	*idem/eadem/iidem/eaedem* (the same)
IECL	*International Encyclopedia of Comparative Law*
IEHC	High Court of Ireland Decisions
Inst	Justinian's Institutes
Intro	Introduction
IR	Irish Reports
Iul	Julian
J	Judge
Jac & W	Jacob & Walker's Chancery Reports (England and Wales)
JCL	*Journal of Contract Law*
JCP	*Juris-Classeur périodique, La Semaine juridique*
Just	Justinian
JZ	*JuristenZeitung*
KAGG	*Gesetz über Kapitalanlagegesellschaften* (Investment Companies Act, Germany)
KB	Law Reports, King's Bench (England and Wales)
Keny	Kenyon's Notes of Cases, King's Bench (England and Wales)
Lab	Labeo
lib	*liber*
lit	*littera*
liv	*livre*
LJ	*Law Journal*
LJ	Lord Justice
LJ QB	Law Journal Reports, Queen's Bench, New Series (England and Wales)
Lloyd's Rep	Lloyd's Law Reports (England and Wales)
Lloyd's Rep Med	Lloyd's Law Reports Medical (United Kingdom)
LMCLQ	*Lloyd's Maritime and Commercial Law Quarterly*
LQR	*Law Quarterly Review*
LR	*Law Review*
LR App Cas	Law Reports, Appeal Cases (England and Wales)
LR Ch App	Law Reports, Chancery Appeal Cases (England and Wales)
LR Ch D	Law Reports, Chancery Division (England and Wales)
LR CP	Law Reports, Common Pleas (England and Wales)
LR Eq	Law Reports, Equity Cases (England and Wales)
LR Ex	Law Reports, Exchequer Cases (England and Wales)
LR HL	Law Reports, English and Irish Appeals (England and Ireland)
LT	Law Times Reports (England and Wales)
LT NS	Law Times Reports, New Series (England and Wales)
M	Macpherson's Session Cases (Scotland)
M & S	Maule & Selwyn's King's Bench Reports (England and Wales)
M & W	Meeson & Welsby's Exchequer Reports (England and Wales)
Marci	Marcianus

Max	Maximian
MaxEuP	*Max Planck Encyclopedia of European Private Law*
Md App	Maryland Appeal Reports (United States)
Misc	Miscellaneous documents issued by UNIDROIT
MLR	*Modern Law Review*
Mod	Modestinus
Mod Rep	Modern Reports (England and Wales)
Mor	Morison's Dictionary of Decisions, Court of Session (Scotland)
n	note(s), *nota*
NJ	*Nederlandse Jurisprudentie* (the Netherlands)
NJW	*Neue Juristische Wochenschrift* (Germany)
no(s)	number(s)
NY	New York Reports (United States)
OGH	*Oberster Gerichtshof* (Austrian Supreme Court)
OJ	Official Journal (European Union)
OLG	*Oberlandesgericht* (Regional Court of Appeal, Germany)
OR	*Obligationenrecht* (Swiss Code of Obligations)
Oxford JLS	*Oxford Journal of Legal Studies*
p	page(s), *pagina*
P & CR	Property, Planning & Compensation Reports (England and Wales)
P Wms	Peere Williams' Chancery & King's Bench Cases (England and Wales)
Pa	Pennsylvania State Reports (United States)
Pap	Papinian
Paul	Paulus
PC	Privy Council
PCC	*Principes Contractuels Communs*
PECL	Principles of European Contract Law
PEL S	Principles of European Law: Sales Contracts
PEL SC	Principles of European Law: Service Contracts
pen	*penultimus*
PETL	Principles of European Tort Law
PICC	UNIDROIT Principles of International Commercial Contracts
Plow	Plowden's Commentaries or Reports (England and Wales)
PM	Policy Memorandum
Pomp	Pomponius
pr	*principium*
PrALR	*Allgemeines Landrecht für die preußischen Staaten* (General Code of Law for the Prussian Territories)
Proc	Proculus
QB	Law Reports, Queen's Bench (England and Wales)
QBD	Law Reports, Queen's Bench Division (England and Wales)
R	Rettie's Session Cases (Scotland)
ra/rb	*recto* (front side) left/right column
RabelsZ	*Rabels Zeitschrift für ausländisches und internationales Privatrecht* (Germany)

RegCESL	Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law
Req	*Chambre des Requêtes* (France)
RG	*Reichsgericht* (German Imperial Supreme Court)
RGBl	*Reichsgesetzblatt* (Imperial Law Gazette, Germany)
RGZ	*Sammlung der Entscheidungen des Reichsgerichts in Zivilsachen* (Decisions of the German Imperial Supreme Court in Private Law Matters)
RIDC	*Revue internationale de droit comparé*
rst	restated on the basis of
Russ	Russel's Chancery Reports *tempore* Eldon (England and Wales)
s(s)	section(s)
S	*Recueil Sirey* (France)
SC	Session Cases (Scotland)
SCC	Supreme Court of Canada
sect	*sectio*
sent(s)	sentence(s)
Sim & St	Simons & Stuart's Vice Chancellor's Reports (England and Wales)
So	Southern Reporter (United States)
SP	Scottish Parliament
Study L	Documents issued in connection with UNIDROIT's work on the PICC (www.unidroit.org/work-in-progress-studies/studies/contracts-in-general/1363-study-l-principles-of-international-commercial-contracts)
Study LVIII	Documents issued in connection with UNIDROIT's work on the Convention on International Factoring (https://www.unidroit.org/work-in-progress-studies/studies/387-study-lviii-the-contract-of-factoring)
SZ	*Entscheidungen des Österreichischen Obersten Gerichtshofs in Zivil- und Justizverwaltungssachen* (Decisions of the Austrian Court in Matters of Private Law and the Administration of Justice, Austria)
Taunt	Taunton's Common Pleas Reports (England and Wales)
TEC	Treaty establishing the European Community
Term Rep	Durnford & East's Term Reports, King's Bench (England and Wales)
TFEU	Treaty on the Functioning of the European Union
tit	*titulus*
TLR	Times Law Reports (England and Wales)
tract	*tractatus*
UCC	Uniform Commercial Code (United States)
ULF	Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods
ULIS	Convention relating to a Uniform Law on the International Sale of Goods
Ulp	Ulpian
UGB	*Unternehmensgesetzbuch* (Austrian Commercial Code)
UKHL	United Kingdom House of Lords (United Kingdom)
UKPC	United Kingdom Privy Council (Commonwealth)

UKSC	United Kingdom Supreme Court (United Kingdom)
UNCITRAL	United Nations Commission on International Trade Law
va/vb	*verso* (back side) left/right column
Vern	Vernon's Chancery Reports (England and Wales)
Ves Jun	Vesey Junior's Chancery Reports (England and Wales)
vol(s)	volume(s)
WD Pa	Western District of Pennsylvania (United States)
WLR	Weekly Law Reports (England and Wales)
ZEuP	*Zeitschrift für Europäisches Privatrecht* (Germany)
ZGB	*Zivilgesetzbuch* (Swiss Civil Code)
ZPO	*Zivilprozessordnung* (Code of Civil Procedure, Germany, Austria)
ZSS (GA)	*Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Germanistische Abteilung*
ZSS (RA)	*Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung*

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ECJ, 21.12.2016—C-119/15, *Biuro podróży „Partner" sp z oo Sp k w Dąbrowie Górniczej/Prezes Urzędu Ochrony Konkurencji i Konsumentów* . . . . . **Intro before Art 6:201** [5]; **6:201** [10]
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IRELAND

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British Waggon Co v Lea & Co (1880) 5 QBD 149 . . . . . **7:106** [4]
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Cavendish Square Holding BV v Talal El Makdessi; ParkingEye Limited v Beavis [2015] UKSC 67 . . . . . **9:509** [4]–[5], [7], [9], [16], [21]
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Chamber Colliery Co Ltd v Twyerould (Note) (1893) [1915] 1 Ch 268 (HL) . . . . . **5:105** [5]
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Collier v Mason (1853) 25 Beav 200 (53 ER 613) . . . . . **6:106** [9]
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Conlon v Simms [2006] EWCA Civ 1749 . . . . . **4:107** [4]
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Dimmock v Hammett (1866) LR 2 Ch App 21 . . . . . **6:101** [8]
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Forrer v Nash (1865) 35 Beav 167 (55 ER 858) . . . . . **9:102 (2)—(3)** 2
Forsikringsaktieselskapet Vesta v Butcher [1989] AC 852 (CA) . . . . . **9:504** [2]
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Glynn v Margetson [1893] AC 351 . . . . . **5:104** [1]
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Holman v Johnson (1775) 1 Cowp 341 (98 ER 1120) . . . . . **15:104** [3]
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Johnson v Agnew [1980] AC 367 . . . . . **8:102** [8], [13]
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Laing v Fidgeon (1814) 4 Camp 169 (171 ER 55) . . . . . **6:108** [5]
Laing v Fidgeon (1815) 6 Taunt 108 (128 ER 974) . . . . . **6:108** [5]
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Lincoln College's Case (1595) 3 Co Rep 58b (76 ER 764) . . . . . **5:105** [5]
Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd [1994] 1 AC 85 (HL) . . . . . **11:301** [4]
Lingclater v Boswell (1711) Mor 10068 . . . . . **18:301** [8]
Lipkin Gorman v Karpnale Ltd [1991] 2 AC 548 . . . . . **Intro before Art 2:301** [12]
Lister v Romford Ice and Cold Storage Co Ltd [1957] AC 555 . . . . . **6:108** [6]
Little v Courage [1995] 70 P & CR 469, [1995] CLC 164 . . . . . **Intro before Art 2:301** [12]; **2:301** [11]
Livingstone v Rawyards Coal Co (1880) 5 App Cas 25 . . . . . **9:502** [3]
Llanelly Railway and Dock Co v London and North Western Railway Co LR 7 HL 550 . . . . . **6:109** [7]
Logicrose Ltd v Southend United Football Club Ltd [1988] 1 WLR 1256 . . . . . **3:205** [4]
Lombard Tricity Finance Ltd v Paton [1989] 1 All ER 918 (CA) . . . . . **6:105** [4]–[5]
London Borough of Southwark v IBM UK Ltd [2011] EWHC (TCC) 549 . . . . . **18:101** [17]
London and Regional Investments Ltd v TBI plc, Belfast International Airport Ltd [2002] EWCA Civ 355 . . . . . **Intro before Art 2:301** [12]; **2:301** [11]
Lordsvale Finance plc v Bank of Zambia [1996] QB 752 . . . . . **9:509** [5]
Lumley v Wagner (1852) 1 De G M & G 604 (42 ER 687) . . . . . **9:102 (2)—(3)** [28]
Luxor (Eastbourne) Ltd v Cooper [1941] AC 108 . . . . . **6:102** [5]

Macdonald v Hutcheson (1744) Mor 10070 . . . . . **18:301** [8]
Macro and others v Thompson and others (No 3) [1997] 2 BCLC 36 . . . . . **6:106** [9]
Mamidoil-Jetoil Greek Petroleum Company SA v Okta Crude Oil Refinery AD [2001] 2 Lloyd's Rep 76 . . . . . **19:301** [4]
Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd [2015] UKSC 72, [2016] AC 742 . . . . . **Intro before Art 5:101** [16]; **6:102** [5]
Martineau v Kitching (1872) LR 7 QB 436 . . . . . **18:303** [10]; **18:304** [5]
Mason v Provident Clothing and Supply Co Ltd [1913] AC 724 . . . . . **15:103** [10]
May and Butcher Ltd v Regem [1929] All ER Rep 679 . . . . . **6:104** [1], [7]; **6:105** [4]–[5]
Mellish v Motteux (1792) Peake's Nisi Prius Reports 156 (170 ER 113) . . . . . **6:102** [6]
Melville v Robertson (1749) Mor 10072 . . . . . **18:301** [8]

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Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd [2013] EWCA Civ 200 . . . . **6:102** [6]
Midgulf International Ltd v Groupe Chimique Tunisien [2010] EWCA Civ 66 . . . . . **2:103** [3]
Miliangos v George Frank (Textiles) Ltd [1975] 3 WLR 758, [1976] AC 443 (HL) . . . . . **9:510** [2]; **13:103** [3]
Milnes v Gery (1807) 14 Ves Jun 400 (33 ER 574) . . . . . **6:106** [7]–[8]
Mollett and Others v Robinson (1871-72) LR 7 CP 84 . . . . . **1:105** [6]
Moon v The Guardians of the Poor of the Witney Union (1837) 3 Bingham New Cases 814 (132 ER 624) . . . . **1:105** [6]
The Moorcock (1889) 14 PD 64 (CA) . . . . . **1:202** [1], [10]; **6:102** [8]
Mora Shipping Inc v Axa Corporate Solutions Assurance SA [2005] EWCA Civ 1069 . . . . . **7:105** [3]
Morley v Attenborough (1849) 3 Exch 500 (154 ER 943) . . . . . **6:108** [5]
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Multiservice Bookbinding v Marden [1978] 2 All ER 489 (Ch) . . . . . **6:107** [2]
Murray v Leisureplay plc [2005] Industrial Relations Law Reports 946 . . . . . **9:509** [5]

Nash and others v Paragon Finance Plc (formerly The National Home Loans Corporation) [2001] EWCA Civ 1466 (CA) . . . . . **6:105** [4]–[5]
National Car Parks Ltd v Baird (Valuation Officier) [2004] EWCA Civ 967, [2005] 1 All ER 53 . . . . . **7:102** [3]
National Carriers Ltd v Panalpina (Northern) Ltd [1981] AC 675 . . . . . **8:108** [16]
North & South Trust Co v Berkeley [1970] 2 Lloyd's Rep 467 . . . . . **3:205** [4]
North Shore Ventures Ltd v Anstead Holdings Inc [2010] 2 Lloyd's Rep 265 . . . . . **8:108** [16]
NRAM plc v McAdam [2014] EWHC 4174 (Comm), [2015] 2 All ER 340 . . . . . **5:106** [4]

Office of Fair Trading v Abbey National Plc [2009] UKSC 6 . . . . . **6:205** [10]
Oscar Chess Ltd v Williams [1957] 1 All ER 325 . . . . . **6:101** [3], [5]

Page v Newman (1829) 9 B & C 378 (109 ER 140) . . . . . **9:508** [5]
Paradine v Jane (1647) Aleyn 26 (82 ER 897) . . . . . **6:111** [11]; **8:108** [10]; **9:501 (1)** [4]
Paradine v Jane (1647) Style's King's Bench Reports 47 (82 ER 519) . . . . . **8:108** [10]
Partenreederie MS Karen Oltmann v Scarsdale Shipping Co Ltd (*The Karen Oltmann*) [1976] 2 Lloyd's Rep 708, QBD . . . . . **5:101** [7]
Patel v Mirza [2016] UKSC 42 . . . . . **15:102** [28]; **15:104** [3], [7]
Pateman v Pay (1974) 263 EG 467 . . . . . **6:103** [7]
Payne v Cave (1789) 3 Term Rep 148 (100 ER 502) . . . . . **2:202** [6]
Percevall Hutchinson v William Sturges (1741) Willes Common Plea Reports 261 (125 ER 1163) . . . . . **Intro before Art 13:101** [8], [26]
Perry v Barnett (1885) 15 QBD 388 . . . . . **1:105** [6]
Peters v Anderson (1814) 5 Taunt 596 (128 ER 823) . . . . . **7:109** [3]
Petromec Inc v Petroleo Brasileiro SA Petrobras [2005] EWCA Civ 891 . . . . . **2:301** [11]
Philips Hong Kong Ltd v Attorney-General of Hong Kong (1993) 61 BLR 41 . . . . . **9:509** [4]
Photo Production Ltd v Securicor Transport Ltd [1980] AC 827 . . . . . **8:103** [12]; **8:109** [3]
Pike, Sons, & Co v Ongley and Thornton (1887) 18 QBD 708 . . . . . **3:102** [5]
Pioneer Shipping Ltd v BTP Tioxide (The Nema) [1982] AC 724 (HL) . . . . . **5:101** [6]
Postlethwaite v Freeland (1880) 5 App Cas 599 . . . . . **7:102** [3]
Potomek Construction Ltd v Zurich Securities Ltd [2003] EWHC 2827 (Ch) . . . . . **7:109** [3]
Printing and Numerical Registering Company v Sampson (1874-75) LR 19 Eq 462 . . . . . **1:102** [10]
Produce Brokers Company v Olympia Oil and Cake Company [1916] 1 AC 314 . . . . . **1:105** [6]
Proforce Recruit Limited v The Rugby Group Limited [2006] EWCA Civ 69 . . . . . **2:105** [5]

R v Immigration Officer at Prague Airport, ex parte European Roma Rights Centre [2004] UKHL 55 . . . . . **1:201** [57]
Rasnoimport V/O v Guthrie & Co Ltd [1966] 1 Lloyd's Rep 1 . . . . . **3:204** [1]
Regus (Maxim) Ltd v Bank of Scotland plc [2013] CSIH 12, [2013] SC 331 . . . . . **2:107** [3]
Rein v Stein [1892] 1 QB 753 . . . . . **7:101** [5]
Reniger v Fogossa (1551) Plow 1 (75 ER 1) . . . . . **2:101 (1)** [4]
Reynolds v North Tyneside Health Authority [2002] Lloyd's Rep Med 459 . . . . . **19:201** [4]

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Ridgway v Wharton (1857) 6 HLC 238 (10 ER 1287) . . . . . **2:301** [11]
Robertson v French (1803) 4 East 130 (102 ER 779) . . . . . **5:104** [1]
Robey & Co v Snaefell Mining Co Ltd (1887) 20 QBD 152 . . . . . **7:101** [5]
Robinson v Graves [1935] 1 KB 579 (CA) . . . . . **18:101** [17]
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Rose & Frank Co v JR Crompton & Bros Ltd [1925] AC 445 . . . . . **2:101 (1)** [15]
Routledge v Grant (1828) 4 Bing 651 (130 ER 920) . . . . . **2:202** [6]
Royal Bank of Scotland plc v Etridge (no. 2) [2002] 2 AC 773 . . . . . **4:111** [5]
RTS Flexible Systems Ltd v Molkerei Alois Muller Gmbh & Company KG (UK Production) [2010] UKSC 14 . . . . . **2:101 (1)** [15]
Rugg v Minett (1809) 11 East 210 (103 ER 985) . . . . . **18:301** [8]; **18:303** [10]
Ruxley Electronics and Construction Ltd v Forsyth [1996] AC 344 . . . . . **9:102 (2)—(3)** [17]; **9:103** [1]; **9:501 (2)** [6]; **9:502** [12]

St Albans City and District Council v International Computers Ltd [1996] 4 All ER 481 (CA) . . . . . **18:101** [17]; **19:201** [4]
Scarf v Jardine (1882) 7 AC 345 . . . . . **Intro before Art 12:101** [7]
Schorsch Meier GmbH v Hennie [1975] QB 416 (CA) . . . . . **9.510** [2]
Seager v Copydex Ltd [1967] 2 All ER 415 . . . . . **2:302** [7], [13]
Seatrade Groningen BV v Geest Industries Ltd (*The Frost Express*) [1996] 2 Lloyd's Rep 375 . . . . . **3:102** [5]
Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Commissioners of Inland Revenue [2008] 1 AC 561 . . . . . **9:508** [5]; **9:508-4** [3]
Services Europe Atlantique Sud (SEAS) de Paris v Stockholms Rederiaktiebolag Svea of Stockholm (The Folias); Owners of MV Eleftherotria v Owners of MV Despina R (The Despina R) [1979] AC 685 (HL) . . . . . **9:510** [3]
Services Europe Atlantique Sud (SEAS) of Paris v Stockholms Rederiaktiebolag Svea (The Folias) [1979] QB 491 (CA) . . . . . **9:510** [3]
Seymour v Bridge (1885) 14 QBD 460 . . . . . **1:105** [6]
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Shirlaw v Southern Foundries (1926) Ltd [1939] 2 KB 206 (2 All ER 113) . . . . . **6:102** [8]
Silvester's Case (1619) Popham's King's Bench Reports 148 (79 ER 1248) . . . . . **6:105** [4]
Siu Yin Kwan v Eastern Insurance Co Ltd [1994] 2 AC 199 . . . . . **3:302** [5]
Sleech's case see *Devaynes v Noble*
Smith v Bromley (1760) 2 Doug KB 696 (99 ER 441) . . . . . **15:104** [3]
Smith v Eric S Bush (a firm) Harris and another v Wyre Forest District Council and another [1989] 2 All ER 514 . . . . . **19:201** [4]
Smith v Hughes (1871) LR 6 QB 597, [1861–73] All ER Rep 632 . . . . . **Intro before Art 2:401** [8]; **4:104** [3]; **6:101** [6]
Smith v Peters (1875) LR 20 Eq 511 . . . . . **6:106** [8]
Smith & Service and Nelson & Sons, In re (1890) 25 QBD 545 . . . . . **6:106** [8]
Snook v London and West Riding Investments Ltd [1967] 1 All ER 518 . . . . . **6:103** [8]–[9]
Socimer International Bank Ltd (in Liquidation) v Standard Bank London Ltd [2008] EWCA Civ 116 . . . . . **6:105** [5]
The Software Incubator Ltd v Computer Associates UK Ltd [2016] EWHC (QB) 1587 . . . . . **18:101** [17]
Solle v Butcher [1950] 1 KB 671 . . . . . **4:105** [4]
South Australia Asset Management v York Montague Ltd [1997] 1 AC 191 (HL) . . . . . **9:503** [1]
Southway Group v Wolff (1991) 57 Building LR 33 . . . . . **7:106** [4]
Spence v Ormiston (1687) Mor 10068 . . . . . **18:301** [8], [13]
Staffordshire Area Health Authority v South Staffordshire Waterworks [1978] 3 All ER 769 . . . . . **6:109** [7]

Star Shipping AS v China National Foreign Trade Transportation Corpn (*The Star Texas*) [1993] 2 Lloyd's Rep 445 . . . . . **6:105** [4]
Street v Mountford [1985] AC 809 . . . . . **6:103** [8]–[9]
Strongman (1945) Ltd v Sincock [1955] 2 QB 525 . . . . . **15:105** [2]
Stuart v Wilkins (1778) 1 Doug KB 18 (99 ER 15) . . . . . **6:101** [10]; **6:102** [8]
Sudbrook Trading Ltd v Eggleton [1983] 1 AC 444 (3 All ER 294) . . . . . **6:106** [7]–[9]
Suisse Atlantique Société d'Armament Maritime SA v N V Rotterdamsche Kolen Centrale [1967] 1 AC 361 . . . . . **8:103** [12]
Supershield Ltd v Siemens Building FE Ltd [2010] EWCA Civ 7 . . . . . **9:503** [9]
Suse and Others v Pompe and Another (1860) 8 CB (NS) 538 (141 ER 1276) . . . . . **1:105** [6]

Tamplin v James (1880) 15 Ch D 215 . . . . . **5:101** [5]
Tatlock and Another v Harris (1789) 3 Term Rep 174 (100 ER 517) . . . . . **Intro before Art 12:101** [1]
Taylor v Brewer (1813) 1 M & S 290 (105 ER 108) . . . . . **2:101** (**1**) [7]
Taylor v Caldwell (1863) 3 B & S 826 (122 ER 309) . . . . . **6:102** [8]; **6:111** [11], [16]; **8:108** [10], [16]; **9:301** [38]; **9:501** (**1**) [4]
Teheran-Europe Co Ltd v ST Belton (Tractors) Ltd (No 1) [1968] 2 QB 545 . . . . . **3:102** [5]; **3:302** [5]
Tekdata Interconnections Ltd v Amphenol Ltd [2009] EWCA Civ 1209 . . . . . **2:209** [5]
Thake v Maurice [1986] 2 WLR 337 . . . . . **6:108** [6]
Thomas v Fredericks (1847) 10 QB 775 (116 ER 294) . . . . . **6:106** [7]
Thomas v Ken Thomas Ltd [2006] EWCA Civ 1504, [2007] Business Law Reports 429 . . . . . **7:109** [3]
Thomas v Thomas (1842) 2 QB 851 (114 ER 330) . . . . . **2:101** (**1**) [20]
Thomas Marshall (Exports) Ltd v Guinle [1979] Ch 227 . . . . . **2:101** (**1**) [10]
Tito v Waddell (No 2) [1977] Ch 106 . . . . . **9:102** (**2**)—(**3**) [17]
Torkington v Magee [1902] 2 KB 427 . . . . . **Intro before Art 11:101** [11]
Traill v Baring [1864] 4 De G J & S (46 ER 941) . . . . . **2:301** [17]
Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas) [2009] AC 61 (HL) . . . . . **9:503** [9]
Tucker v Linger (1883) 8 AC 508 . . . . . **1:105** [6]

Union Eagle Ltd v Golden Achievement Ltd [1997] 2 WLR 341 . . . . . **1:201** [44], [79]

Valpy v Gibson (1847) 4 CB 837 (136 ER 737) . . . . . **6:104** [8]
Vaux v Newman (1610) 8 Co Rep 146a (77 ER 695) . . . . . **6:104** [9]
Veba Oil v Petrotrade [2002] 1 All ER 703 (CA) . . . . . **6:106** [9], [11]
Vickers v Vickers (1867) LR 4 Eq 529 . . . . . **6:106** [7]–[8]
Victoria Laundry (Windsor) Ltd v Newman Industries Ltd [1949] 2 KB 528 . . . . . **9:503** [4]

Wait v Baker (1848) 2 Exch 1 (154 ER 380) . . . . . **18:305** [7]
Wales v Wadham [1977] 1 WLR 199 . . . . . **2:301** [17]
Walford v Miles [1992] 2 AC 128 . . . . . **1:201** [44]; **Intro before Art 2:301** [12]; **2:301** [11]; **Intro before Art 2:401** [8]; **6:102** [6], [10]
Wallis v Day (1837) M & W 273 (150 ER 759) . . . . . **6:109** [6]
Wates Ltd v GLC [1983] 25 BLR 1 . . . . . **6:111** [16], [22]
Watteau v Fenwick [1893] 1 QB 346 . . . . . **3:303** [3]
Watts v Morrow [1991] 1 WLR 1421 . . . . . **9:501** (**2**) [6]
Weekes v Gallard (1869) 21 LT 655 . . . . . **6:106** [9]
Welsh Development Agency v Export Finance Co Ltd [1992] BCLC 148 (CA) . . . . . **6:103** [9]
Westbrook Resources LGd v Globe Metallurgical Inc [2009] EWCA Civ 210 . . . . . **2:106** [4]
Westdeutsche Landesbank Girozentrale v Islington Borough Council [1996] AC 669 (HL) . . . . . **9:508** [5]
WestLB AG v Nomura Bank International [2012] EWCA Civ 495 . . . . . **6:105** [5]
White v Wilks (1813) 5 Taunt 176 (128 ER 654) . . . . . **18:302** [6]
White & Carter (Councils) Ltd v McGregor [1962] AC 413 (HL) . . . . . **9:101** [19]
Wickman Machine Tool Sales Ltd v Schuler AG [1972] 2 All ER 1173, [1972] 1 WLR 840 . . . . . **Intro before Art 16:101** [10]
Wigglesworth v Dallison (1779) 1 Doug KB 201 (99 ER 132) . . . . . **1:105** [6]
Willmore v South Eastern Electricity Board [1957] 2 Lloyd's Rep 375 . . . . . **18:101** [17]
Wrotham Park Estate Co v Parkside Homes Ltd [1974] 1 WLR 798 . . . . . **9:502** [12]

Yam Seng Pte Ltd v International Trade Corp Ltd [2013] EWHC 111 (QB) . . . . . **1:201** [45]; **2:301** [3]; **6:102** [6], [10]

Zagury v Furnell (1809) 2 Campbell 240 (170 ER 1142) . . . . . **18:301** [8]; **18:303** [10]

UNITED STATES

Alpha Prime Development Corporation v Holland Loader Company, LLC and another
United States District Court for the District of Colorado, 6.7.2010 . . . . . **7:102** [6]
Aluminium Co of America v Essex Group 499 F Supp 53 (WD Pa 1980) . . . . . **6:107** [2]

Beatty v Guggenheim Exploration Co (1919) 225 NY 380 . . . . . **2:106** [4]

City of New Orleans v Firemen's Charitable Association (1891) 9 So 486 . . . . . **9:502** [12]

Grinder v Bryans Road Building and Supply Co 432 A 2d 453 (Md App 1981) . . . . . **3:303** [3]

Norfolk Southern Railway Company v Power Source Supply, Inc. United States District Court for
the Western District of Pennsylvania, 25.7.2008 . . . . . **7:102** [4]

Ricketts v Pennsylvania Railway Co (1946) 153 F.2d 757 . . . . . **Intro before 6:101** [5]

Wagner v Graziano (1957) 390 Pa 445 . . . . . **2:106** [4]
Wilson v Brown of California, Inc 132 California Reporter 3d 769 (California Court of Appeal,
First District, Division 1, 2005) . . . . . **18:307** [10]

Table of Historical Sources

AUSTRIA

Codex Theresianus . . . . . **6:103** [6]
Wiener Stadtrechtsbuch (Laws of the City of Vienna)
Art 62 . . . . . **18:303** [5]

CANON LAW

Corpus iuris canonici . . . . . **Intro before Art 5:101** [8]
Decretum Gratiani . . . . . **Gen Intro** [29]; **2:107** [2]; **6:111** [3], [5]
Pars II, *causa* XIV, *quaestio* III, *canon* 3 . . . . . **9:508** [1]
Pars II, *causa* XIV, *quaestio* IV, *canon* 8 . . . . . **9:508** [1]
Pars II, *causa* XIV, *quaestio* VI, *canon* 1 . . . . . **9:502** [3]
Pars II, *causa* XXII, *quaestio* II, *canon* 14 . . . . . **6:111** [3]
Decretales Gregorii IX, lib V, tit XIX . . . . **9:508** [1]
Liber Extra . . . . . **Intro before Art 5:101** [8]
Liber Sextus, Lib V, tit XII, cap V
reg 37 . . . . . **6:204** [2]
reg 57 . . . . . **6:206** [2]
Liber Sextus, Lib V, tit XIII, reg XV . . . . . **Intro before Art 5:101** [8]
Codex Iuris Canonici 1983
Can 200–203 . . . . . **1:304 (1)** [1]
Can 1101 § 2 . . . . . **6:103** [3]

GERMANY

Gesetz, betreffend die Abzahlungsgeschäfte 1894 (Act concerning Instalment Sales) . . . . . **1:102** [10]
Allgemeines Deutsches Handelsgesetzbuch (General German Commercial Code)
§ 1 . . . . . **1:105** [5]
§ 43 . . . . . **Intro before Art 3:101** [6]
§ 237 (3) . . . . . **2:207** [2]
§ 271 . . . . . **18:101** [10]
§ 279 . . . . . **1:105** [5]
§ 319 (1) . . . . . **2:202** [4]
§ 319 (2) . . . . . **2:207** [2]
§ 320 (2) . . . . . **2:205** [6]
§ 321 . . . . . **2:205** [6]
§ 325 . . . . . **7:101** [3]
§ 338 . . . . . **18:101** [10]
§ 344 . . . . . **18:303** [9]; **18:305** [6]
§ 345 . . . . . **18:305** [6]
§ 345 (2) . . . . . **18:305** [6]
§§ 354–357 . . . . . **9:301** [7]
§ 649 . . . . . **18:303** [12]; **18:306** [2]
Codex Maximilianeus Bavaricus Civilis
IV, 1, § 5 . . . . . **2:204** [11]
Sächsisches Bürgerliches Gesetzbuch (Saxonian Civil Code)
§ 79 . . . . . **15:102** [10]
§ 90 . . . . . **15:101** [3]; **15:102** [10]
§ 707 . . . . . **7:101** [3]

ISLAMIC LAW

Qur'an
2:278 . . . . . **9:508** [4]
3:275 . . . . . **9:508** [4]
3:278 . . . . . **9:508** [4]

JEWISH LAW

Deuteronomium 23.20 . . . . . **9:508** [4]
Exodus 22.24 . . . . . **9:508** [4]
Levitikus 25.35–25.38 . . . . . **9:508** [4]

PRUSSIA

Allgemeines Landrecht für die preußischen Staaten (General Code of Law for the Prussian Territories)
Einleitung
§§ 46–51 . . . . . **1:301** [1]
§ 49 . . . . . **1:106 (2)** [2]
I 4 § 6 . . . . . **15:102** [10]
I 4 § 8 . . . . . **15:102** [10]
I 4 §§ 9–13 . . . . . **15:101** [5]
I 5 § 51 . . . . . **15:101** [3]; **15:102** [10]
I 5 § 68 . . . . . **15:101** [3]; **15:102** [10]
I 5 §§ 79–80 . . . . . **2:205** [6]
I 5 § 84 . . . . . **2:204** [2]
I 5 § 90 . . . . . **2:202** [4]
I 5 §§ 91–101 . . . . . **2:202** [4]
I 5 § 94 . . . . . **2:202** [4]; **2:206** [2]
I 5 § 95 . . . . . **2:202** [4]
I 5 § 104 . . . . . **2:202** [4]
I 5 § 109 . . . . . **2:101 (2)** [12]
I 5 §§ 109–184 . . . . . **2:101 (2)** [11]
I 5 § 131 . . . . . **2:101 (2)** [12]
I 5 § 230 . . . . . **7:102** [2]
I 5 § 237 . . . . . **18:204** [5]
I 5 § 283 . . . . . **8:109** [2]
I 5 § 284 . . . . . **Intro before Art 2:301** [3]
I 5 § 317 . . . . . **18:204** [5]
I 5 § 318 . . . . . **18:204** [5]
I 5 § 319 . . . . . **18:204** [5]
I 5 § 323 . . . . . **18:204** [5]
I 5 § 325 . . . . . **9:102 (1)** [35]
I 5 § 328 . . . . . **18:204** [5]

I 5 § 343 . . . . . **18:204** [5]
I 5 § 344 . . . . . **18:204** [5]
I 5 § 378 . . . . . **6:111** [8]
I 5 § 424 . . . . . **10:102** [2]
I 5 § 450 . . . . . **Intro before Art 10:201** [4]
I 6 §§ 10–17 . . . . . **9:501 (1)** [2]
I 9 § 3 . . . . . **18:303** [8]
I 9 §§ 500–669 . . . . **Intro before Art 14:101** [3]
I 9 §§ 512–523 . . . . . **14:303** [1]
I 9 § 569 . . . . . **Intro before Art 14:101** [3]
I 11 § 95 . . . . . **18:302** [4]; **18:303** [8]; **18:306** [2]
I 11 § 102 . . . . . **18:304** [4]
I 11 § 103 . . . . . **18:304** [4]
I 11 § 128 . . . . . **18:305** [6]–[7]; **18:306** [2]
I 11 § 129 . . . . . **18:305** [6]
I 11 § 131 . . . . . **18:306** [2]
I 11 § 656 . . . . . **8:105** [2]
I 11 § 657 . . . . . **8:105** [2]
I 11 § 819 . . . . . **9:508-4** [5]
I 11 § 821 . . . . . **9:508-4** [2]
I 13 § 85 . . . . . **Intro before Art 3:101** [4]
I 13 § 151 . . . . . **3:204** [1]
I 13 § 262 . . . . . **3:303** [2]
I 14 § 399 . . . . . **12:101** [7]
I 14 §§ 399–406 . . . . **Intro before Art 12:101** [8]
I 16 § 51 . . . . . **7:106** [2]
I 16 § 151 . . . . . **7:109** [2]
I 16 § 156 . . . . . **7:109** [2]
I 16 §§ 172–173 . . . . . **15:104** [4]
I 16 §§ 205–206 . . . . . **15:104** [4]
I 16 §§ 264–274 . . . . **Intro before Art 12:101** [8]
I 20 § 37 . . . . . **7:106** [3]
I 20 § 367 . . . . . **18:303** [12]; **18:306** [2]

ROMAN LEGAL SOURCES

Corpus Iuris Civilis
Institutes
Inst 2.9.5 . . . . . **Intro before Art 3:101** [4]
Inst 3.13 . . . . . **Intro before Art 3:101** [3], **Intro before Art 7:101** [6]
Inst 3.14.4 . . . . . **8:108** [8]
Inst 3.15.2 . . . . . **7:102** [2]
Inst 3.15.7 . . . . . **9:509** [2]
Inst 3.16 . . . . . **Intro before Art 10:101** [5]
Inst 3.16.2 . . . . . **10:102** [7]
Inst 3.19.19 . . . . . **6:110** [11]; **9:509** [9]
Inst 3.19.27 . . . . . **7:102** [2]
Inst 3.23.1 . . . . . **6:106** [2], [7]; **19:203** [2]
Inst 3.23.3 . . . . . **18:301** [6]; **18:303** [2], [4], [6]
Inst 3.24 . . . . . **19.101** [2]
Inst 3.24.4 . . . . . **18:101** [7]; **19.101** [2]
Inst 3.29 . . . . . **7:106** [2]
Inst 4.6.30 . . . . . **Intro before Art 13:101** [4]–[5]; **13:101** [3], [23]; **13:102** [2]; **13:104** [2]–[3]; **13:107** [18]; **14:503** [1]
Inst 4.6.32 . . . . . **9:102 (1)** [11]
Inst 4.6.33 . . . . . **7:105** [2]
Inst 4.6.39 . . . . . **Intro before Art 13:101** [4]–[5]; **13:101** [3], [28]; **13:104** [3]
Inst 4.13.1 . . . . . **4:107** [2]; **4:108** [2]; **4:112** [3]
Digest
D 1.1.7 . . . . . **1:201** [28]
D 1.3 . . . . . **1:106 (1)** [3], **Intro before Art 5:101** [7]
D 1.3.10 . . . . . **1:106 (2)** [2]
D 1.3.11 . . . . . **1:106 (2)** [2]
D 1.3.17 . . . . . **1:106 (1)** [3]; **5:101** [12]
D 1.3.18 . . . . . **1:106 (1)** [3]
D 1.3.19 . . . . . **1:106 (1)** [3]
D 1.3.24 . . . . . **1:106 (1)** [3]; **5:105** [3]
D 1.3.29 . . . . . **1:106 (1)** [3]
D 1.3.30 . . . . . **1:106 (1)** [3]
D 1.3.37 . . . . . **1:106 (1)** [3]
D 1.3.38 . . . . . **1:106 (1)** [3]
D 2.12.8 . . . . . **1:304 (1)** [3]
D 2.14.1.3 . . . . . **Intro before Art 2:101** [1]; **2:101 (1)** [4]; **2:101 (2)** [8]
D 2.14.2 . . . . . **2:101 (1)** [19]
D 2.14.3 . . . . . **8:109** [2]
D 2.14.4 . . . . . **2:101 (1)** [19]
D 2.14.4.2 . . . . . **6:111** [4]
D 2.14.7 . . . . . **18:101** [4]
D 2.14.7.4 . . . . . **Intro before Art 2:101** [1]; **2:101 (2)** [8]
D 2.14.27.3 . . . . . **4:118** [2]
D 2.14.39 . . . . . **6:206** [2]
D 2.14.39(40) . . . . . **6:206** [2]
D 2.14.47.1 . . . . . **Intro before Art 13:101** [4], [19], [23]
D 2.14.51.1 . . . . **Intro before Art 13:101** [4], [19]
D 3.3.16 . . . . . **Intro before Art 11:101** [6]
D 3.3.73 . . . . . **7:111** [2]
D 3.5.7.2 . . . . . **Intro before Art 13:101** [4], [24]; **13:102** [2]
D 3.5.20 . . . . . **8:107** [2]
D 3.5.38 . . . . . **7:106** [2]
D 3.6.5.1 . . . . . **15:104** [1]
D 4.2.1 . . . . . **4:108** [2], [4]; **4:112** [3]
D 4.2.21.5 . . . . . **4:108** [2]
D 4.3.1 . . . . . **4:107** [2]; **4:112** [3]
D 4.3.18 . . . . . **4:107** [2]; **4:112** [3]
D 4.4.3.4 . . . . . **1:304 (3)** [5]
D 4.4.7.2 . . . . . **7:111** [2]
D 4.4.16.4 . . . . . **1:102** [8]–[9]
D 4.8.1 . . . . . **6:106** [10]
D 4.8.40 . . . . . **7:110** [2]
D 4.9.7 . . . . . **Intro before Art 6:201** [2]
D 5.1.19.2 . . . . . **7:101** [2]
D 5.1.38 . . . . . **7:101** [2]
D 5.1.65 . . . . . **7:101** [2]
D 7.1.12.2 . . . . . **18:101** [7]

D 7.1.25.1 . . . . . **7:107** [2]
D 7.1.38 . . . . . **18:101** [7]
D 7.1.67 . . . . . **18:101** [7]
D 9.2.8.1 . . . . . **19:201** [2]
D 9.2.9 . . . . . **9:504** [1]
D 9.2.11 . . . . . **9:504** [1]
D 9.2.27.1 . . . . . **8:107** [2]
D 9.2.27.11 . . . . . **8:107** [2]
D 9.2.52.4 . . . . . **8:108** [8]
D 10.2.5 . . . . . **7:111** [2]
D 10.2.19.6 . . . . . **9:401** [6]
D 10.2.25.17 . . . . . **6:108** [2]
D 11.6.2.1 . . . . . **8:107** [2]
D 11.7.8.1 . . . . . **Intro before Art 2:301** [4]
D 12.1.2.1 . . . . . **Intro before Art 7:101** [13]
D 12.1.19.1 . . . . . **Intro before Art 7:101** [10]
D 12.1.21 . . . . . **Intro before Art 7:101** [14]
D 12.1.22 . . . . . **7:108** [2]
D 12.5.8 . . . . . **15:104** [1]
D 12.6.23.1 . . . . . **Intro before Art 13:101** [4]; **13:104** [2]
D 12.6.26 . . . . . **9:508-4** [2]
D 12.6.26.13 . . . . . **7:105** [2]
D 12.6.29 . . . . . **Intro before Art 7:101** [10]
D 12.6.30 . . . . . **Intro before Art 13:101** [4]; **13:101** [3]; **13:106** [2]
D 12.7.5 . . . . . **15:104** [1]
D 13.3.4 . . . . . **7:101** [2]
D 13.4 . . . . . **7:101** [3]; **7.112** [2]
D 13.4.2 . . . . . **7:101** [3]
D 13.4.2.3 . . . . . **7:105** [2]
D 13.4.2.8 . . . . . **7:101** [3]
D 13.4.3 . . . . . **7:101** [3]; **7.112** [2]
D 13.4.8 . . . . . **7:101** [3]
D 13.4.9 . . . . . **7:101** [3]
D 13.5.18 . . . . . **7:110** [2]
D 13.5.21.1 . . . . . **7:102** [2]
D 13.6.12.1 . . . . . **7:101** [2]
D 13.6.17 . . . . . **8:109** [2]
D 13.6.18 . . . . . **8:108** [5]
D 13.6.18.4 . . . . . **Intro before Art 13:101** [4], [24], [27]; **13:102** [2]; **13:104** [2]
D 13.7.13.1 . . . . . **8:108** [5]
D 14.1.1.1 . . . . . **Intro before Art 3:101** [3]
D 14.2.10 . . . . . **19:201** [2]; **19:301** [3]
D 14.3.1 . . . . . **Intro before Art 2:301** [1], **Intro before Art 3:101** [3]
D 14.3.19 . . . . . **Intro before Art 3:101** [3]
D 14.14.3.11.2–4 . . . . . **Intro before Art 6:201** [2]
D 15.1 . . . . . **Intro before Art 3:101** [3]
D 15.3 . . . . . **Intro before Art 3:101** [3]
D 15.4 . . . . . **Intro before Art 3:101** [3]
D 16.1 . . . . . **4:109** [1]
D 16.1.8.3 . . . . . **7:106** [2]
D 16.1.8.11 . . . . . **10:205** [7]
D 16.2 . . . . . **Intro before Art 13:101** [4]
D 16.2.1 . . . . . **Intro before Art 13:101** [25]; **13:101** [3]
D 16.2.2 . . . . . **Intro before Art 13:101** [5]; **13:101** [3]; **13:104** [2]
D 16.2.3 . . . . . **Intro before Art 13:101** [26]; **13:106** [2]
D 16.2.4 . . . . . **Intro before Art 13:101** [5]; **13:101** [3]; **13:104** [2]–[3]; **13:106** [2]
D 16.2.5 . . . . . **Intro before Art 13:101** [4], [23], [26]; **13:101** [3]; **13:104** [2]; **13:105** [2]; **13:106** [2]
D 16.2.6 . . . . . **13:101** [13]
D 16.2.7 . . . . . **Intro before Art 13:101** [4], [23]; **13:101** [13]; **13:104** [2]
D 16.2.7.1 . . . . . **Intro before Art 13:101** [4], [24]; **13:102** [2]
D 16.2.8 . . . . . **Intro before Art 13:101** [4], [23]–[24]; **13:102** [2]
D 16.2.9 . . . . . **Intro before Art 13:101** [23]
D 16.2.9.1 . . . . . **13:101** [3]; **13:104** [2]
D 16.2.10 . . . . . **Intro before Art 13:101** [5], [23]–[24], [27]; **13:104** [3]
D 16.2.10.1 . . . . . **13:104** [2]; **13:106** [2]
D 16.2.10.2 . . . . . **Intro before Art 13:101** [23]; **13:104** [2]
D 16.2.10.3 . . . . . **13:104** [2]
D 16.2.11 . . . . . **Intro before Art 13:101** [23]; **13:104** [3]; **13:106** [2]
D 16.2.12 . . . **13:101** [3]; **13:106** [2]; **13:107** [23]
D 16.2.13 . . . . . **Intro before Art 13:101** [4]; **13:104** [2]
D 16.2.14 . . . . . **13:101** [13]
D 16.2.15 . . . . . **Intro before Art 13:101** [23]–[24]; **13:101** [8]; **13:103** [2]; **13:104** [2]
D 16.2.16 . . . . . **13:101** [3]; **13:104** [2]
D 16.2.16.1 . . . . . **13:101** [13], [26]; **13:104** [2]
D 16.2.17 . . . . . **Intro before Art 13:101** [23]; **13:107** [23]
D 16.2.18 . . . . . **Intro before Art 13:101** [4], [26]; **13:101** [3]
D 16.2.18.1 . . . . . **13:101** [3]; **13:104** [2]
D 16.2.19 . . . . . **13:101** [3]
D 16.2.20 . . . . . **Intro before Art 13:101** [23]; **13:107** [18], [23]
D 16.2.21 . . . . . **Intro before Art 13:101** [5]; **13:101** [3]; **13:104** [2]–[3]
D 16.2.22 . . . . . **Intro before Art 13:101** [23]; **13:104** [2]
D 16.2.23 . . . . . **13:101** [3]; **13:104** [2]
D 16.2.24 . . . . . **13:101** [23]; **13:107** [23]
D 16.3.1.8 . . . . . **8:108** [5]
D 16.3.1.10 . . . . . **Intro before Art 6:201** [2]
D 16.3.1.35 . . . . . **8:108** [8]
D 16.3.1.36 . . . . . **Intro before Art 10:201** [3]
D 16.3.1.37 . . . . . **7:111** [2]

D 16.3.12.1 . . . . . **7:101** [2]
D 16.3.14 . . . . . **Intro before Art 10:201** [3]
D 17.1.7.1 . . . . . **6:104** [2]
D 17.1.10.5 . . . . . **Intro before Art 3:101** [3]
D 17.1.34 . . . . . **18:301** [6]
D 17.1.52 . . . . . **6:108** [3]
D 17.1.56.1 . . . . . **7:111** [2]
D 17.2.17.1 . . . . . **2:202** [2]
D 17.2.76 . . . . . **6:106** [4]; **6:106** [4], [10]
D 17.2.78 . . . . . **6:106** [4]
D 17.2.79 . . . . . **6:105** [3]; **6:106** [4], [6]
D 18.1.1 . . . . . **7:107** [2]; **18:101** [4]; **18:201** [1]
D 18.1.1.1 . . . . . **18:101** [5]; **18:201** [1]
D 18.1.1.2 . . . . . **2:101 (1)** [5]; **2:202** [2]
D 18.1.7.1 . . . . . **6:104** [2]
D 18.1.8 . . . . . **4:102** [2]
D 18.1.15 . . . . . **4:103** [18]
D 18.1.20 . . . . . **18:101** [7]
D 18.1.21 . . . . . **6:206** [2]
D 18.1.34.6 . . . . . **7:105** [2], [5]
D 18.1.35.1 . . . . . **6:104** [3], [5]; **6:105** [2], [4]; **19:203** [2]
D 18.1.35.4 . . . . . **8:108** [8]
D 18.1.35.5 . . . . . **18:303** [3]
D 18.1.35.6 . . . . . **18:303** [3]
D 18.1.35.7 . . . . . **18:302** [2]
D 18.1.43.1 . . . . . **18:203 (3)** [2]
D 18.1.45 . . . . . **18:203 (3)** [2]
D 18.1.55 . . . . . **6:103** [5]
D 18.1.57 . . . . . **4:103** [18]
D 18.1.62.1 . . . . . **Intro before Art 2:301** [4]
D 18.2.1 . . . . . **Intro before Art 16:101** [2]
D 18.3.2 . . . . . **Intro before Art 16:101** [2]
D 18.4 . . . . . **11:204** [2]
D 18.4.4 . . . . . **11:204** [4], [6]
D 18.4.5 . . . . . **11:204** [4]; **11:307** [1]
D 18.4.6 . . . . . **11:201** [2], [7]
D 18.4.8 . . . . . **Intro before Art 2:301** [7]
D 18.4.9 . . . . . **Intro before Art 2:301** [7]
D 18.4.14 . . . . . **11:201** [2], [7]
D 18.4.22 . . . . . **7:104** [2]; **8:105** [2]
D 18.4.23 . . . . . **11:201** [2], [7]
D 18.4.23.1 . . . . . **11:203** [1]
D 18.6.1 . . . . . **18:301** [6]
D 18.6.1.3 . . . . . **7:110** [2]; **18:304** [2]
D 18.6.1.4 . . . . . **18:304** [2]
D 18.6.2 . . . . . **18:301** [6]
D 18.6.3 . . . . . **8:108** [5]
D 18.6.4 . . . . . **18:301** [6]
D 18.6.4.1 . . . . . **18:301** [6]
D 18.6.5 . . . . . **18:301** [6]; **18:302** [2]; **18:304** [2]
D 18.6.6 . . . . . **18:301** [6]
D 18.6.7 . . . . . **18:301** [6]
D 18.6.8 . . . . . **18:303** [2]–[3]
D 18.6.12 . . . . . **8:107** [2]; **18:301** [6]
D 18.6.13 . . . . . **18:302** [3]; **18:303** [2]
D 18.6.13–15 . . . . . **18:301** [6]
D 18.6.15 . . . . . **18:302** [3]; **18:303** [2], [4]; **18:304** [3]
D 18.6.15.1 . . . . . **18:301** [6]
D 18.6.16 . . . . . **18:204** [2]; **18:301** [6]
D 18.6.18 . . . . . **7:110** [2], [8]
D 18.25.1 . . . . . **18:202** [1]
D 18.165 . . . . . **18:101** [7]
D 19.1 . . . . . **18:203 (1)** [3]
D 19.1.1.1 . . . . . **18:203 (3)** [2], **Intro before Art 2:401** [7]
D 19.1.3.1 . . . . . **8:103** [4]
D 19.1.4 . . . . . **9:102 (1)** [29]; **18:204** [2]
D 19.1.6.4 . . . . . **9:102 (1)** [29]
D 19.1.6.9 . . . . . **8:109** [2]
D 19.1.8 . . . . . **8:105** [2]
D 19.1.9 . . . . . **18:201** [5]
D 19.1.11.2 . . . . . **18:202** [1]
D 19.1.11.3 . . . . . **18:203 (1)** [2]; **18:204** [3]
D 19.1.11.8 . . . . . **18:202** [1]
D 19.1.13 . . . . . **6:101** [9]; **9:102 (1)** [30]; **9:401** [4]–[5]; **9:503** [2]; **18:203 (1)** [2]–[3]; **18:204** [3]
D 19.1.13.3 . . . . . **Intro before Art 2:301** [9]
D 19.1.13.8 . . . . . **7:104** [2]
D 19.1.13.25 . . . . . **Intro before Art 3:101** [3]
D 19.1.30.1 . . . . . **18:204** [2]
D 19.1.30.1.1 . . . . . **Intro before Art 2:301** [2]
D 19.1.38.1 . . . . . **7:110** [2]
D 19.1.51 . . . . . **7:110** [2]
D 19.2.2 . . . . . **19:203** [2]; **19:301** [2]
D 19.2.9.1 . . . . . **9:401** [6]
D 19.2.9.5 . . . . . **8:108** [4]; **19:201** [2]
D 19.2.13 . . . . . **19:202** [2]
D 19.2.13.4–6 . . . . . **19:202** [2]
D 19.2.22.3 . . . . . **1:102** [8]–[9]
D 19.2.25 . . . . . **19:203** [2]
D 19.2.25.7 . . . . . **8:107** [2]; **18:301** [6]
D 19.2.26 . . . . . **7:110** [2]
D 19.2.27.1 . . . . . **9:401** [6]
D 19.2.28.2 . . . . . **6:104** [3]
D 19.2.33 . . . . . **18:301** [6]; **18:303** [2], [4]; **19:301** [3]
D 19.2.36 . . . . . **19:301** [2]
D 19.2.38 . . . . . **19:201** [2]
D 19.2.51.1 . . . . . **19:201** [3]
D 19.2.59 . . . . . **19:301** [3]
D 19.2.60.4 . . . . . **19:204** [2]
D 19.2.62 . . . . . **19:201** [2]; **19:301** [3]
D 20.1.31.20 . . . . . **6:102** [13]
D 20.3.3 . . . . . **7:106** [3]
D 20.4.4 . . . . . **Intro before Art 13:101** [4], [19], [23]–[24], [27]; **13:104** [2]; **13:106** [2]
D 20.4.11.1 . . . . . **Intro before Art 16:101** [9]
D 20.4.19 . . . . . **7:106** [3]

D 20.4.20 . . . . . **7:106** [3]
D 20.5.5 . . . . . **7:106** [3]
D 21.1 . . . . . **18:203 (1)** [3]
D 21.1.1 . . . . . **Intro before Art 2:401** [7]; **9:401** [4]; **18:204** [3]
D 21.1.1.1 . . . . . **9:102 (1)** [29]; **18:204** [3]
D 21.1.1.2 . . . . . **9:102 (1)** [29]
D 21.1.1.6 . . . . . **18:203 (3)** [2]
D 21.1.1.9–11 . . . . . **9:401** [4]
D 21.1.14.10 . . . . . **18:203 (3)** [2]
D 21.1.19.6 . . . . . **18:204** [3]
D 21.1.31.5 . . . . . **9:401** [5]
D 21.1.31.8 . . . . . **7:104** [2]; **8:105** [2]
D 21.1.32 . . . . . **8:109** [2]
D 21.1.38 . . . . . **9:102 (1)** [29]; **9:401** [5]; **18:204** [3]
D 21.1.44 . . . . . **8:109** [2]
D 21.1.51 . . . . . **18:203 (3)** [2]
D 21.1.55 . . . . . **18:204** [3]
D 21.1.84.4 . . . . . **18:203 (3)** [2]
D 21.2.74.3 . . . . . **11:204** [4]
D 22.1.1 . . . . . **9:508** [2]
D 22.1.7 . . . . . **7:110** [2]; **7:111** [2]
D 22.1.17.3 . . . . . **7:110** [2]
D 22.1.29 . . . . . **4:116** [3]; **9:508-4** [5]
D 22.1.32 . . . . . **8:108** [7]
D 22.1.32.2 . . . . . **8:103** [4]
D 22.2.8 . . . . . **7:110** [2]
D 22.3.19.3 . . . . . **Intro before Art 13:101** [4], [24]; **13:101** [23]
D 22.3.26 . . . . . **Intro before Art 13:101** [4], [23]; **13:102** [2]; **13:104** [2]
D 23.3.13 . . . . . **6:111** [4]
D 23.3.21 . . . . . **6:111** [4]
D 23.3.68 . . . . . **6:111** [4]
D 24.3.15.1 . . . . . **Intro before Art 13:101** [4], [23]; **13:104** [3]
D 24.3.26 . . . . . **7:110** [2]
D 24.3.39 . . . . . **Intro before Art 13:101** [4], [24]
D 26.7.36 . . . . . **Intro before Art 13:101** [4], [23], [26]
D 26.8.9.2 . . . . . **Intro before Art 7:101** [10]
D 27.4.1.4 . . . . . **Intro before Art 13:101** [4], [23]–[24]; **13:102** [2]; **13:104** [2]
D 28.4.4 . . . . . **7:111** [2]
D 28.7.15 . . . . . **15:102** [10]
D 30.1.37 . . . . . **6:108** [3]
D 30.34.14 . . . . . **7:105** [2]
D 30.47.1 . . . . . **7:101** [2]
D 30.71.2 . . . . . **7:102** [2]
D 30.75.1 . . . . . **4:104** [3]
D 30.112.1 . . . . . **8:108** [4]
D 31.11.1 . . . . . **7:105** [2]
D 31.19 . . . . . **7:105** [2]
D 31.77.26 . . . . . **7:111** [2]
D 32.25.1 . . . . . **5:101** [12]
D 33.1.1 . . . . . **7:101** [2]
D 33.1.15 . . . . . **7:103** [2]
D 34.3.27.4 . . . . . **7:108** [2]
D 34.5.26 . . . . . **5:103** [2]; **6:206** [2]
D 34.9.15 . . . . . **Intro before Art 13:101** [4], [23], [26]
D 35.1.17 . . . . . **4:104** [3]
D 35.1.24 . . . . . **Intro before Art 16:101** [15]
D 35.1.40.4 . . . . . **4:104** [3]
D 38.1.21 . . . . . **7:101** [2]; **7:101** [3]
D 39.2.24.3 . . . . . **8:108** [8]
D 40.2.4 . . . . . **2:202** [2]
D 40.7.3.2 . . . . . **7:110** [2]
D 40.7.4 . . . . . **7:111, 7:111** [2]
D 40.7.20.2 . . . . . **Intro before Art 13:101** [4]; **13:101** [13]; **13:104** [2]
D 41.1.31 . . . . . **Intro before Art 18:201** [3]
D 41.2.3.4 . . . . . **Intro before Art 18:201** [3]
D 41.2.18 . . . . . **18:303** [11]
D 41.3.31.3 . . . . . **1:304 (2)** [4]
D 42.1.6.1 . . . . . **8:103** [3]
D 42.1.13.1 . . . . . **9:102 (1)** [11]
D 42.1.27 . . . . . **9:508-4** [2]
D 43.5.5 . . . . . **7:111** [2]
D 43.5.12 . . . . . **5:106** [4]
D 44.3.1 . . . . . **1:304 (2)** [4]
D 44.4.2.3 . . . . . **2:101 (1)** [19]
D 44.4.4.33 . . . . . **4:108** [2]
D 44.4.5.6 . . . . . **14:501** [7]
D 44.4.6 . . . . . **7:110** [3]
D 44.4.8 . . . . . **Intro before Art 13:101** [26]
D 44.5.1.6 . . . . . **4:109** [1]
D 44.7.1.4 . . . . . **8:108** [8]
D 44.7.1.9 . . . . . **8:103** [4]
D 44.7.2.2 . . . . . **2:101 (1)** [5]
D 44.7.3.2 . . . . . **2:101 (1)** [9]
D 44.7.54 . . . . . **6:103** [5]
D 45.1.1.5 . . . . . **4:116** [3]; **6:204** [2]
D 45.1.1.6 . . . . . **15:103** [2]
D 45.1.1.138 . . . . . **7:105** [2]
D 45.1.23 . . . . . **8:108** [3]
D 45.1.27.1 . . . . . **Intro before Art 16:101** [8]
D 45.1.38.16 . . . . . **7:103** [2]
D 45.1.38.17 . . . . . **Intro before Art 3:101** [3]; **6:110** [11]; **9:509** [9]
D 45.1.38.21 . . . . . **6:110** [11]
D 45.1.41.1 . . . . . **7:102** [2]; **7:103** [2]
D 45.1.54 . . . . . **Intro before Art 7:101** [16]
D 45.1.57 . . . . . **Intro before Art 16:101** [2]
D 45.1.80 . . . . . **5:106** [4]
D 45.1.91.3 . . . . . **8:103** [4]; **8:108** [3]
D 45.1.99 . . . . . **7:105** [5]
D 45.1.99.1 . . . . . **Intro before Art 16:101** [8]
D 45.1.103 . . . . . **Intro before Art 16:101** [2]
D 45.1.106 . . . . . **7:105** [2]

D 45.1.115.1 . . . . . **Intro before Art 16:101** [8]
D 45.1.115.2 . . . . . **Intro before Art 16:101** [2]
D 45.1.137.2 . . . . . **7:103** [2]; **8:108** [4]
D 45.1.137.4 . . . . . **8:103** [4]
D 45.1.137.5 . . . . . **4:102** [4]
D 45.1.141.7 . . . . . **Intro before Art 16:101** [2]
D 45.2 . . . . . **Intro before Art 10:101** [5]
D 45.2.2 . . . . . **10:108** [2]; **10:205** [7]
D 45.2.7 . . . . . **10:102** [7]
D 45.2.9.2 . . . . . **10:102** [7]
D 45.2.10 . . . . . **10:111** [5], **Intro before Art 13:101** [4]; **13:101** [3]
D 46.1.18 . . . . . **7:106** [2]
D 46.1.64 . . . . . **7:111** [2]
D 46.1.71 . . . . . **10:107** [3]
D 46.2.1 . . . . . **Intro before Art 12:101** [6]
D 46.2.8.5 . . . . . **Intro before Art 12:101** [6]
D 46.2.31.1 . . . . . **10:205** [7]
D 46.3.1 . . . . . **7:109** [2]
D 46.3.3 . . . . . **7:109** [2]
D 46.3.5 . . . . . **7:109** [2]
D 46.3.5.3 . . . . . **7:109** [2]
D 46.3.8 . . . . . **7:109** [2]
D 46.3.14.8 . . . . . **Intro before Art 7:101** [10]
D 46.3.31 . . . . . **7:106** [2]
D 46.3.38 . . . . . **6:111** [4]–[5]
D 46.3.39 . . . . . **7:103** [2]; **18:301** [6]
D 46.3.48 . . . . . **7:109** [2]
D 46.3.56 . . . . . **7:106** [2]
D 46.3.70 . . . . . **7:103** [2]
D 46.3.72 . . . . . **7:110** [2]
D 46.3.78 . . . . . **Intro before Art 7:101** [10]
D 46.3.81.1 . . . . . **Intro before Art 10:201** [3]
D 46.3.95 . . . . . **7:105** [2]
D 46.3.96.3 . . . . . **Intro before Art 13:101** [4]
D 46.3.97 . . . . . **7:109** [2], [4], [8]
D 46.3.99 . . . . . **7:107** [2]; **7:108** [2]
D 46.3.101 . . . . . **7:109** [2]
D 46.3.107 . . . . . **8:103** [4]
D 46.4.13.12 . . . . . **10:205** [7]
D 46.4.16 . . . . . **10:108** [2]
D 46.5.11 . . . . . **9:509** [2]
D 47.2.14.1 . . . . . **7:104** [2]
D 48.13.6 . . . . . **7:111** [2]
D 48.19.41 . . . . . **5:105** [10]
D 49.14.46.4 . . . . . **Intro before Art 13:101** [4]; **13:104** [2]; **13:107** [23]
D 49.14.46.5 . . . . . **Intro before Art 13:101** [4], [23]; **13:104** [2]; **13:107** [23]
D 50.8.2.4 . . . . . **Intro before Art 13:101** [4]; **13:107** [23]
D 50.16 . . . . . **Intro before Art 5:101** [7]
D 50.16.19 . . . . . **7:104** [2]; **18:101** [4]
D 50.16.66 . . . . . **18:101** [9]
D 50.16.134 . . . . . **1:304 (3)** [5]
D 50.16.176 . . . . . **Intro before Art 7:101** [3]; **7:112** [2]
D 50.17 . . . . . **1:106 (1)** [3], **Intro before Art 5:101** [7]–[8]
D 50.17.14 . . . . . **7:102** [2]
D 50.17.22.1 . . . . . **6:105** [3]
D 50.17.23 . . . . . **8:109** [2]
D 50.17.34 . . . . . **1:105** [4]
D 50.17.67 . . . . . **1:106 (1)** [3]
D 50.17.77 . . . . . **Intro before Art 16:101** [11]
D 50.17.80 . . . . . **5:105** [10]
D 50.17.90 . . . . . **1:106 (1)** [3]
D 50.17.128 . . . . . **15:104** [1]
D 50.17.154 . . . . . **15:104** [1]
D 50.17.161 . . . . . **Intro before Art 16:101** [15]
D 50.17.173.3 . . . . . **Intro before Art 13:101** [26]
D 50.17.185 . . . . . **4:102** [2]; **9:102 (2)–(3)** [14]
D 50.17.202 . . . . . **1:106 (1)** [3]; **7:101** [2]; **18:306** [2]
D 50.17.203 . . . . . **9:504** [3]

Codex

C 1.14.5 . . . . . **15:102** [20]
C 2.3.20 . . . . . **Intro before Art 18:201** [2]
C 3.12.2 . . . . . **1:304 (2)** [2]
C 3.18 . . . . . **7:101** [3]
C 4.21.17 . . . . . **2:106** [3]
C 4.22 . . . . . **6:103** [5]
C 4.24.9 . . . . . **18:303** [6]
C 4.26 . . . . . **Intro before Art 3:101** [3]
C 4.28.2 . . . . . **18:304** [2]
C 4.31 . . . . . **Intro before Art 13:101** [5]
C 4.31.1 . . . . . **13:107** [23]
C 4.31.2 . . . . **13:101** [26]; **13:104** [3]; **13:106** [2]
C 4.31.3 . . . . . **13:107** [23]
C 4.31.4 . . . . . **Intro before Art 13:101** [27]; **13:101** [3], [23]; **13:104** [3]; **13:106** [2]
C 4.31.5 . . . . . **Intro before Art 13:101** [4], [26]; **13:106** [2]
C 4.31.6 . . . . . **Intro before Art 13:101** [4], [26]
C 4.31.7 . . . . . **Intro before Art 13:101** [4]; **13:104** [3]; **13:107** [23]
C 4.31.8 . . . . . **13:104** [3]
C 4.31.9 . . . . . **13:101** [3]; **13:104** [3]
C 4.31.10 . . . . . **Intro before Art 13:101** [4]; **13:104** [3]
C 4.31.11 . . . . . **Intro before Art 13:101** [24]; **13:101** [23]
C 4.31.12 . . . . . **13:101** [3]; **13:106** [2]
C 4.31.13 . . . . . **13:106** [2]
C 4.31.14 . . . . . **Intro before Art 13:101** [5]; **13:101** [23]; **13:104** [3]; **14:503** [1]
C 4.31.14.1 . . . . . **Intro before Art 13:101** [5]; **13:101** [23], [26]; **13:102** [2]; **13:104** [3]; **13:107** [18]

C 4.31.14.2 . . . . . **13:107** [13]
C 4.32.28 . . . . . **9:508-4** [2]
C 4.34.11 . . . . . **Intro before Art 13:101** [5], [24]; **13:104** [3]; **13:107** [18]
C 4.34.11.1 . . . . . **Intro before Art 13:101** [5]; **13:107** [18]
C 4.34.11.2 . . . . . **Intro before Art 13:101** [5]; **13:104** [3]; **13:107** [18]
C 4.35.22 . . . . . **Intro before Art 11:101** [23]
C 4.38.13 . . . . . **6:105** [2]–[3]
C 4.38.15 . . . . . **6:106** [7]; **19:203** [2]
C 4.38.15.1 . . . . . **6:104** [2]–[3]; **6:106** [2], [11]
C 4.38.15.2 . . . . . **6:106** [2]–[3], [6]
C 4.38.15.3 . . . . . **6:106** [2]
C 4.44.2 . . . . . **1:102** [9]
C 4.44.8 . . . . . **1:102** [9]
C 4.44.11.2 . . . . . **Intro before Art 13:101** [4]–[5], [19]
C 4.49 . . . . . **18:203 (1)** [3]
C 4.49.2.1 . . . . . **Intro before Art 13:101** [4]–[5], [19]; **13:101** [3]
C 4.58 . . . . . **18:203 (1)** [3]
C 5.12.31 . . . . . **Intro before Art 11:101** [7]
C 5.17.6 . . . . . **2:202** [2]
C 5.21.1 . . . . . **Intro before Art 13:101** [4]–[5], [26]; **13:101** [23]
C 5.21.1.1 . . . . . **Intro before Art 13:101** [5]; **13:101** [23]
C 7.7.1.2 . . . . . **7:110** [3]
C 7.32.1 . . . . . **Intro before Art 3:101** [4]
C 7.39.3 . . . . . **Intro before Art 14:101** [2]
C 7.47 . . . . . **9:503** [4]; **9:509** [3]
C 7.47.1 . . . . . **9:503** [4]
C 7.47.2 . . . . . **9:502** [8]
C 7.54.3 . . . . . **9:508-4** [2]
C 8.17.1 . . . . . **7:106** [3]
C 8.30.3 . . . . . **Intro before Art 13:101** [5], [27]; **13:106** [2]
C 8.39 . . . . . **Intro before Art 10:101** [5]
C 8.39.4 . . . . . **10:110** [2]; **10:205** [10]
C 8.40.28 . . . . . **10:109** [1]
C 8.41.1 . . . . . **18:101** [7]
C 8.41.3 . . . . . **11:303** [4]
C 8.42.1 . . . . . **7:109** [2]
C 8.42.7 . . . . . **Intro before Art 13:101** [5]; **13:106** [2]
C 8.42.9 . . . . . **7:111** [2]
C 8.53.1 . . . . . **18:303** [12]
C 8.53.33 . . . . . **Intro before Art 11:101** [6]
C 8.54(55).3 . . . . . **6:110** [11]
C 14.1 . . . . . **Intro before Art 5:101** [7]

Novellae
88.1 . . . . . **13:107** [18]

Basilika
XIII.1.27 . . . . . **13:107** [18]

Codex Theodosianus
4.14.1 . . . . . **Intro before Art 14:101** [2]

Gaius *Institutiones*
2.38 . . . . . **Intro before Art 11:101** [6], **Intro before Art 12:101** [6]
2.39 . . . . . **Intro before Art 11:101** [6]
2.84 . . . . . **Intro before Art 7:101** [10]
3.47 . . . . . **18:101** [7]
3.48 . . . . . **9:102 (1)** [11]
3.81 . . . . . **Intro before Art 13:101** [4]
3.88 . . . . . **Intro before 6:101** [1]
3.88–162 . . . . . **18:101** [12]
3.98 . . . . . **Intro before Art 16:101** [12]
3.140 . . . . . **6:104** [2]; **19:203** [2]
3.141 . . . . . **18:101** [5]
3.142 . . . . . **6:104** [3]
3.147 . . . . . **19.101** [2]
3.168 . . . . . **Intro before Art 7:101** [3]
3.205 . . . . . **8:108** [5]
3.206 . . . . . **8:108** [5]
4.61 . . . . . **Intro before Art 13:101** [4]; **13:101** [3], [28]; **13:102** [2]
4.61–68 . . . . . **Intro before Art 13:101** [4]
4.62 . . . . . **Intro before Art 13:101** [4]
4.63 . . . . . **Intro before Art 13:101** [4]; **13:101** [3]; **13:102** [2]
4.64 . . . . . **Intro before Art 13:101** [4], [23]; **13:104** [2]
4.65 . . . . . **Intro before Art 13:101** [4], [24]; **13:101** [3]
4.65–68 . . . . . **Intro before Art 13:101** [4]
4.66 . . . . . **Intro before Art 13:101** [4], [24]; **13:101** [3], [8], [11]; **13:104** [2]
4.66–68 . . . . . **Intro before Art 13:101** [4], [23]
4.67 . . . . . **Intro before Art 13:101** [4], [24]; **13:101** [13]
4.68 . . . . . **Intro before Art 13:101** [24]; **13:104** [2]
4.83 . . . . . **Intro before Art 11:101** [6]
4.131a . . . . . **18:202** [1]

Novellae Theodosiani
9.2 . . . . . **15:102** [20]

Pauli Sententiae
2.5.3 . . . . . **Intro before Art 13:101** [4], [24]; **13:101** [8], [28]
2.12.12 . . . . . **13:107** [18]

SWITZERLAND

Privatrechtliches Gesetzbuch Kanton Zürich (Civil Code of the Canton of Zürich)
§ 994 . . . . . **7:101** [3]

Table of National Legislation

ARGENTINA

Código Civil y Comercial (Civil and Commercial Code)
Art 9 . . . . . **1:201** [25]

AUSTRIA

Allgemeines Bürgerliches Gesetzbuch (General Civil Code) 1811
§§ 6–8 . . . . . **1:106 (1)** [4]
§ 7 . . . . . **1:106 (2)** [2]
§ 862 . . . . . **2:202** [4]; **2:206** [2]
§ 878 . . . . . **15:101** [3]; **15:102** [10]
§ 914 . . . **Intro before Art 5:101** [11]–[12]; **5:101** [14]
§ 915 . . . . . **Intro before Art 5:101** [11]
§ 932 . . . . . **18:203 (1)** [4]
§ 1295 . . . . . **3:204** [1]

Allgemeines Bürgerliches Gesetzbuch (General Civil Code)
§§ 1–13 . . . . . **Intro before Art 1:101** [2]
§ 7 . . . . . **Intro before Art 1:101** [2]; **1:106 (2)** [5]
§ 134 . . . . . **15:102** [3]
§ 271 . . . . . **3:205** [2]
§ 428 . . . . . **18:303** [17]
§ 429 . . . . . **18:305** [6]–[8]
§ 435 . . . . . **Intro before Art 18:201** [4]
§ 462 . . . . . **7:106** [3]
§ 696 . . . . . **Intro before Art 16:101** [1], [6]
§ 698 . . . . **15:103** [2]; **Intro before Art 16:101** [12]
§ 704 . . . . . **Intro before Art 16:101** [5]
§§ 861–864a . . . . . **Intro before Art 2:101** [4]
§ 862 . . . . . **2:202** [7]
§ 862a . . . . . **1:303** [19]; **2:207** [2]
§ 863 (2) . . . . . **1:201** [43]
§ 864 (2) . . . . . **2:204** [16]
§§ 869–877 . . . . . **Intro before 4:101** [2]
§ 870 . . . . . **4:107** [6]
§ 871 . . . . . **4:104** [4]
§ 871 (1) . . . . . **4:103** [6], [19]; **4:112** [2]
§ 871 (2) . . . . . **2:406** [10]
§ 872 . . . . . **4:103** [19]
§ 875 . . . . . **4:111** [5]
§ 876 . . . . . **1:107** [8]
§ 878 . . . . . **4:102** [2]–[3]; **4:116** [3]
§ 879 . . . . . **1:201** [43]
§ 879 (1) . . . . . **Intro before Art 15:101** [1]; **15:101** [4]; **15:102** [21]
§ 879 (2) . . . . . **15:101** [5]–[6]
§ 881 (2) . . . . . **6:110** [24]
§ 883 . . . . . **2:101 (2)** [4]
§§ 888–889 . . . . . **Intro before Art 10:101** [4]; **10:102** [2]; **Intro before Art 10:201** [2]
§ 890 . . . . . **Intro before Art 10:101** [6]; **Intro before Art 10:201** [4]; **10:203** [1]
§ 891 . . . . . **10:101** [10]
§ 892 . . . . . **10:201** [6]; 9
§§ 892–895 . . . . . **Intro before Art 10:201** [6]
§ 893 . . . . . **10:107** [1]; **10:205** [4]
§ 894 . . . . . **10:108** [3]–[4]
§ 895 . . . . . **10:201** [4]; **10:204** [1]
§ 896 . . . . . **10:105** [1]–[2]; **10:106** [2], [13]; **10:108** [3]–[4]; **10:111** [2]
§ 901 . . . . . **4:103** [6]
§§ 902–903 . . . . . **1:304 (1)** [7]
§ 902 (1) . . . . . **1:304 (3)** [2], [5]
§ 902 (2) . . . . . **1:304 (3)** [2], [6]
§ 903 . . . . . **1:304 (2)** [5]
§ 904 . . . . . **7:102** [3]
§ 905 . . . . . **7:101** [2]
§ 905 (1) . . . . . **7:101** [4]
§ 905 (2) . . . . . **7:112** [7]
§ 905a . . . . . **9:510** [2]
§ 905b . . . . . **Intro before Art 7:101** [16]
§ 906 (1) . . . . . **7:105** [3], [7]
§ 907a (1) . . . . . **7:101** [5]
§ 907b (1) . . . . . **7:108** [3]
§ 914 . . . . . **1:201** [43]; **4:104** [3]; **5:105** [4]
§ 915 . . . . . **2:402** [22]; **5:103** [3]
§ 916 (2) . . . . . **6:103** [7]
§ 917a . . . . . **15:103** [10]
§ 918 . . . . **8:105** [4]; **9:102 (1)** [18]; **Intro before Art 9:301** [8]; **9:301** [9], [47]; **9:303** [9]
§§ 918–921 . . . . . **9:102 (1)** [35]
§ 918 (2) . . . . . **9:302** [3]
§ 919 . . . . . **9:303** [15]
§ 920 . . . . . **9:301** [37], [40]; **9:302** [3]–[4]
§ 921 . . . . . **8:102** [3]
§ 922 . . . . . **18:203 (1)** [4], [8]; **18:204** [5]
§ 922 (1) . . . . . **18:203 (2)** [9], [11]
§ 922 (2) . . . . . **6:101** [8]
§ 924 . . . . . **18:301** [4]
§ 928 . . . . . **18:203 (3)** [3]
§ 931 . . . . . **18:202** [1]
§ 932 . . . . . **9:102 (1)** [35]; **9:401** [1], [11]; **14:501** [5]; **18:204** [5]
§§ 932–933 . . . . . **9:102 (1)** [35]
§ 932 (4) . . . . . **8:104** [6]; **9:301** [25]
§ 933 . . . . . **14:501** [5]; **18:203 (1)** [8]; **18:204** [5]
§ 933a . . . . . **14:501** [5]
§ 934 . . . . . **4:109** [3]
§ 935 . . . . . **4:109** [6]
§ 936 . . . . . **6:111** [8]

§ 941 . . . . . **6:111** [13]
§ 943 . . . . . **2:101 (2)** [13]
§ 1000 (2) . . . . . **9:508-4** [2], [5]
§§ 1002–1034 . . . . . **Intro before Art 3:101** [4]
§ 1017 . . . . . **3:102** [2]
§ 1019 . . . . . **3:102** [4]; **3:204** [1]
§ 1025 . . . . . **3:209** [4]
§ 1026 . . . . . **3:209** [2]
§ 1045 . . . . . **18:201** [2]
§ 1047 . . . . . **18:202** [2]–[3]
§ 1048 . . . . . **18:301** [11], [13]; **18:303** [8], [16]–[17]; **18:304** [4]
§ 1049 . . . . . **18:303** [8], [16]
§ 1051 . . . . . **18:303** [8], [16]; **18:304** [4]
§ 1052 . . . . . **7:104** [3]; **8:105** [3], [7]
§ 1053 . . . . . **18:202** [2]; **18:303** [8]
§§ 1053–1089 . . . . . **Intro before Art 2:101** [4]
§ 1054 . . . . . **7:107** [3]
§ 1061 . . . . . **18:202** [2]–[3]
§ 1062 . . . . . **7:104** [3]; **7:107** [3]; **18:201** [6]
§ 1063a . . . . . **7:112** [3]
§ 1064 . . . . . **18:301** [11]; **18:303** [8], [16]
§ 1066 . . . . . **18:201** [3]
§ 1152 . . . . . **2:402** [21]; **19:301** [2]
§§ 1153–1164 . . . . . **19:201** [4]
§ 1165 . . . . . **19:201** [4]
§ 1168 . . . . . **19:302** [3]
§ 1170 . . . . . **19:301** [4], [8]
§ 1170a (2) . . . . . **19:204** [3]
§ 1174 . . . . . **15:104** [3], [6]
§§ 1293–1341 . . . . . **Intro before Art 9:501** [3]
§ 1295 (2) . . . . . **1:201** [43]
§ 1298 . . . . . **9:508-1** [1]
§§ 1301–1302 . . . . . **Intro before Art 10:101** [10]
§ 1302 . . . . . **Intro before Art 10:101** [9]
§ 1304 . . . . . **9:504** [3], [16]
§ 1313a . . . . . **1:305** [9]; **Intro before Art 7:101** [11]; **8:107** [3]
§ 1323 . . . . **9:501 (1)** [2]; **9:501 (2)** [1]; **9:502** [3]
§ 1324 . . . . . **9:502** [8]; **9:503** [1]
§ 1333 (1) . . . . . **9:508-2 (1)** [6]
§ 1333 (2) . . . . . **9:508-2 (6)** [1]
§ 1334 . . . . . **9:508-1** [1]
§ 1336 (1) . . . . . **9:509** [15]
§ 1336 (2) . . . . . **9:509** [17]
§ 1336 (3) . . . . . **9:509** [13]
§ 1346 (2) . . . . . **2:101 (2)** [13]
§ 1379 (3) . . . . . **7:107** [8]
§ 1396 . . . . . **11:303** [8]
§ 1401 (3) . . . . . **7:107** [8]
§ 1405 . . . . . **12:101** [5]
§§ 1405–1410 . . . . . **Intro before Art 12:101** [10]
§ 1406 (1) . . . . . **12:101** [8]
§ 1406 (2) . . . . . **12:101** [13]
§ 1407 . . . . . **12:101** [1]
§ 1407 (1) . . . . . **12:102** [2]
§ 1407 (2) . . . . . **12:102** [8]
§ 1413 . . . . **Intro before Art 7:101** [13]; **7:103** [3]
§ 1415 . . . . **Intro before Art 7:101** [14]; **7:109** [3]
§ 1416 . . . . . **7:109** [3]–[4]
§ 1419 . . . . . **7:110** [4]
§ 1421 . . . . . **Intro before Art 7:101** [9]–[10]
§ 1423 . . . . . **7:106** [4]
§ 1425 . . . . . **7:110** [4], [9]; **7:111** [3]
§ 1426 . . . . . **7:112** [3]
§ 1432 . . . . . **14:501** [1]
§ 1447 . . . . . **9:102 (2)–(3)** [2]; **9:102 (2)–(3)** [3]; 16; **9:103** [2]; **9:301** [37]–[38], [40]
§ 1451 . . . . . **14:101** [4]; **14:501** [1]
§§ 1451–1502 . . . . . **Intro before Art 14:101** [3]
§ 1478 . . . . . **Intro before Art 14:101** [5]; **14:203** [2]
§ 1489 . . . . . **Intro before Art 14:101** [9]; **14:307** [2]; **14:501** [5]
§ 1494 . . . . . **14:305** [1], [3]
§§ 1494–1496 . . . . . **Intro before Art 14:301** [1]
§ 1495 . . . . . **14:305** [1], [4]
§ 1496 . . . . . **14:303** [1]
§ 1497 . . . . . **14:302 (1)–(2)** [1]; **14:401** [1]–[2]; **14:402** [1]
§ 1502 . . . . . **14:501** [1]; **14:601** [1]

Konsumentenschutzgesetz (Consumer Protection Act)
§ 3 (3) . . . . . **2:403** [6]
§ 5i (1) . . . . . **7:102-1** [2]
§ 6 (1)14 . . . . . **4:118** [3]
§ 12a . . . . . **7:103** [3]

Ratengesetz (Credit-Sale Act) 1961
§ 1 . . . . . **Intro before Art 2:501** [6]
§ 1 (2) . . . . . **2:501 App II** [2]
§ 4 . . . . . **Intro before Art 2:501** [5]; **2:504** [2]
§ 4 (1) . . . . . **2:406** [8]; **2:502** [3], [7]
§ 4 (3) . . . . . **2:503** [1], [3], [9]
§ 5 . . . . . **2:504** [2]; **2:504 App** [3]
§ 5 (1) . . . . . **2:504 App** [11]
§ 5 (1)(2) . . . . . **2:504 App** [19]
§ 10 (1) . . . . . **2:502** [2]
§ 15 (1) . . . . . **2:506** [1]

Unternehmensgesetzbuch (Commercial Code)
§ 348 . . . . . **10:102** [2]
§ 450 . . . . . **18:303** [17]
§§ 455–460 . . . . . **9:508** [6]; **9:508-2 (6)** [1]
§ 456 . . . . . **9:508** [3]; **9:508-2 (5)** [2]
§ 459 . . . . . **9:508-3** [4]
§ 650 . . . . . **18:303** [17]

BELGIUM

Code civil
Art 1157 . . . . . **5:106** [4]
Art 1161 . . . . . **5:105** [3]
Art 1247 (3) . . . . . **7:101** [5]

Art 1321 . . . . . **6:103** [4]
Art 1644 . . . . . **9:401** [1], [15]
Art 1651 . . . . . **7:101** [5]
Art 1653 . . . . . **9:201** [14]
Art 2262 . . . . . **Intro before Art 14:101** [7]
Art 2262bis . . . . . **Intro before Art 14:101** [7]
§ 1 (2) . . . . . **14:307** [2]
Art 2263 . . . . . **Intro before Art 14:101** [7]

Wetboek van Economisch Recht/Code de Droit Économique (Code of Economic Law)
Art XVII.36 . . . . . **2:406** [3]
Art XVII.37 . . . . . **2:406** [3]

BRAZIL

Código civil 2002 (Civil Code)
Art 187 . . . . . **1:201** [33]
Art 422 . . . . . **1:201** [25]

CANADA

Code civil du Québec
Art 1375 . . . . . **1:201** [25]

DENMARK

Forældelsesloven (Limitation Act) . . . . . **14:301** [3]
§ 2 (1) . . . . . **14:203** [2]
§ 2 (4) . . . . . **14:203** [3]
§ 3 (1) . . . . . **14:201** [2]
§ 3 (2) . . . . . **14:301** [1], [3]
§ 3 (3) . . . . . **14:301** [1]; **14:307** [2]
§§ 16–18 . . . . . **14:302 (3)** [1]
§ 26 . . . . . **14:601** [1]

Gjeldbrevlov (Promissory Notes Act 1939)
§ 3 (3) . . . . . **11:306** [2]

Køboloven (Sale of Goods Act)
§ 21 (1) . . . . . **9:303** [4]
§ 21 (2) . . . . . **9:301** [6]
§ 26 . . . . . **9:102 (2)–(3)** [44]
§ 42 . . . . . **9:401** [1]
§ 42 (1) . . . . . **9:301** [6]; **9:303** [4]
§ 43 (1) . . . . . **9:303** [4]
§ 43 (2) . . . . . **9:301** [6]
§ 49 (1) . . . . . **8:104** [7]

Lejeloven (Lease Act)
§ 11 (2) . . . . . **9:401** [6]
§ 15 . . . . . **9:401** [6]
§ 16 (2) . . . . . **9:401** [6]

Lov om forbrugeraftaler (Consumer Contracts Act)
§ 7 (2) . . . . . **2:403** [6]

ESTONIA

Tsiviilseadustiku üldosa seadus (General Part of the Civil Code Act) 2002
§ 147 (2) . . . . . **14:203** [5]

Võlaõigusseadus (Law of Obligations Act)
§ 28 (2) . . . . . **18:201** [4]
§ 79 (1) . . . . . **Intro before Art 7:101** [12]
§ 79 (2) . . . . . **Intro before Art 7:101** [10]
§ 82 (5) . . . . . **7:104** [3], [9]
§ 84 (1) . . . . . **7:103** [3]
§ 84 (3) . . . . . **7:103** [4]
§ 86 (1) . . . . . **7:105** [3]
§ 87 (1) . . . . . **7:105** [3]
§ 88 (1) . . . . . **7:109** [3]
§ 88 (2) . . . . . **7:109** [3]
§ 88 (6) . . . . . **7:109** [4]
§ 88 (8) . . . . . **7:109** [3]
§ 90 . . . . . **7:112** [3]
§ 91 (1) . . . . . **7:107** [3]
§ 91 (2) . . . . . **7:107** [3]
§ 91 (4) . . . . . **7:107** [3]
§ 91 (5) . . . . . **7:107** [3]
§ 93 (3) . . . . . **7:108** [3]
§ 93 (5) . . . . . **7:108** [3]
§ 106 (1) . . . . . **8:109** [3]
§ 106 (2) . . . . . **8:109** [3], [6]
§ 111 (4) . . . . . **8:105** [3]
§ 111 (5) . . . . . **8:105** [3]–[4]
§§ 119–126 . . . . . **7:110** [4]
§ 119 (2) . . . . . **7:110** [8]
§ 120 . . . . . **7:110** [4]
§ 120 (1) . . . . . **7:110** [9]; **7:111** [3]
§ 120 (2) . . . . . **7:110** [4]
§ 125 . . . . . **7:110** [4]
§ 125 (6) . . . . . **7:110** [4]
§ 208 (1) . . . . . **18:201** [6]
§ 211 . . . . . **18:202** [3]
§ 217 . . . . . **18:203 (1)** [4]
§ 217 (1) . . . . . **18:203 (1)** [5]
§ 217 (2) . . . . . **18:203 (2)** [11]
§ 226 (1) . . . . . **18:203 (2)** [9]
§ 254 (2) . . . . . **18:201** [3]

FINLAND

Kuluttajansuojalaki (Consumer Protection Act)
Art 5 § 3 (2) . . . . . **18:307** [6]

Kauppalaki (Sale of Goods Act)
s 1 (2) . . . . . **18:201** [3]
s 6 . . . . . **7:101** [4]
s 9 (1) . . . . . **7:102** [3]
s 15 . . . . . **18:306** [4]
s 17 . . . . . **18:301** [10]
s 17 (2)–(3) . . . . . **18:203 (2)** [9]
s 17 (2)(1) . . . . . **18:203 (2)** [11]
s 20 . . . . . **18:301** [11]
s 20 (2) . . . . . **18:203 (3)** [3]
s 23 (3) . . . . . **9:102 (2)–(3)** [44]
s 24 . . . . . **9:301** [49]; **9:303** [15]
s 25 (1) . . . . . **9:301** [6]; **9:303** [4]

s 25 (3) . . . . . **8:106** [3]
s 34 (2) . . . . . **9:102 (2)–(3)** [24]
s 36 . . . . . **8:104** [7]
s 36 (3) . . . . . **8:104** [7]
s 37 . . . . . **9:401** [1]
s 39 (1) . . . . . **9:301** [6]; **9:303** [4]
s 45 . . . . . **18:201** [4]
s 49 (2) . . . . . **7:102** [8]
s 49 (3) . . . . . **7:102** [8]
s 54 (3) . . . . . **8:106** [3]
s 55 (3) . . . . . **8:106** [3]
s 61 (1) . . . . . **8:105** [3]
s 62 . . . . . **8:105** [4]; **9:304** [2], [9]
s 72 . . . . . **7:110** [8]
s 73 . . . . . **7:110** [7]
s 74 . . . . . **7:110** [4]
s 75 . . . . . **7:110** [4]
s 76 . . . . . **7:110** [4]
s 78 . . . . . **7:110** [4]

FRANCE

Code civil 1804
Art 6 . . . . . **Intro before Art 15:101** [1]; **15:101** [4]
Art 900 . . . . . **15:101** [4]
Art 931 . . . . . **2:101 (2)** [11]
Art 1022 . . . . . **6:108** [3]
Art 1101 . . . . . **2:101 (1)** [11]
Art 1108 . . . **Intro before Art 2:101** [2]; **2:103** [4]; **12:101** [3]; **Intro before Art 15:101** [2]
Art 1114 . . . . . **4:109** [3]
Art 1116 . . . . . **Intro before Art 2:401** [9]
Art 1118 . . . . . **4:109** [3]
Art 1119 . . . . . **6:110** [14]
Art 1121 . . . . . **6:110** [4]–[5], [14]–[15], [33], [46]
Art 1124 (2) . . . . . **9:303** [3]
Art 1129 . . . . . **6:104** [5]
Art 1131 . . . . . **2:101 (1)** [19]; **Intro before Art 15:101** [2]; **15:102** [21]
Art 1133 . . . . . **Intro before Art 15:101** [1]–[2]; **15:101** [4]; **15:102** [3], [21]
Art 1134 . . . . . **1:102** [4]; **Intro before Art 2:301** [9]
Art 1134 (1) . . . . . **1:201** [22]
Art 1134 (2) . . . . . **Intro before Art 1:101** [7]; **6:109** [4]
Art 1134 (3) . . . . . **Intro before Art 1:101** [7]; **1:201** [22]
Art 1135 . . . . . **1:201** [22]; **6:102** [10], [13]–[14], [16]
Art 1137 . . . . . **6:108** [4]; **9:501 (1)** [5]
Art 1138 . . . . . **18:303** [8], [15]
Art 1139 . . . . . **9:501 (1)** [10]
Art 1142 . . . . **9:102 (1)** [5], [12]; **9:102 (2)–(3)** [28]
Art 1144 . . . . . **9:102 (1)** [12]
Art 1146 . . . . . **9:501 (1)** [10]
Art 1146–1155 . . . . . **Intro before Art 9:501** [3]
Art 1147 . . . . . **8:103** [6], [9]; **9:501 (1)** [2], [5], [10]
Art 1148 . . . . . **9:501 (1)** [2], [5]
Art 1149 . . . . . **9:502** [8]
Art 1150 . . . . . **9:503** [1]–[2], [4], [12]
Art 1151 . . . . . **9:503** [2]
Art 1152 . . . . . **9:509** [8], [17], [20]
Art 1153 . . . . . **9:508** [2]
Art 1153 (4) . . . . . **9:508-2 (6)** [1]
Art 1154 . . . . . **9:508-4** [2]
Art 1156 . . . . **Intro before Art 5:101** [3]–[4], [13]; **5:101** [2], [4], [6], [11]–[12]
Art 1156–1164 . . . . . **Intro before Art 5:101** [11], [13], [23]
Art 1157 . . . . . **Intro before Art 5:101** [3]; **5:106** [3]–[4]
Art 1158 . . . . . **5:102** [1]–[2]
Art 1159 . . . . . **Intro before Art 5:101** [4]
Art 1160 . . . . . **Intro before Art 5:101** [16]
Art 1161 . . . . . **Intro before Art 5:101** [3]–[4]; **5:105** [3], [7]
Art 1162 . . . . **Intro before Art 5:101** [4]; **5:103** [2]
Art 1163 . . . . . **Intro before Art 5:101** [11]
Art 1165 . . . . . **6:110** [14], [30]
Art 1168 . . . . . **Intro before Art 16:101** [1]
Art 1168–1184 . . . . . **Intro before Art 16:101** [7]
Art 1169 . . . . . **Intro before Art 16:101** [7]
Art 1170 . . . . . **Intro before Art 16:101** [7]
Art 1171 . . . . . **Intro before Art 16:101** [7]
Art 1172 . . . . . **4:116** [3]; **6:204** [2]; **15:101** [4]; **15:103** [2]; **Intro before Art 16:101** [12]
Art 1173 . . . . . **Intro before Art 16:101** [12]
Art 1174 . . . . . **Intro before Art 16:101** [7]; **16:101** [10]
Art 1178 . . . . . **Intro before Art 16:101** [15]
Art 1179 . . . . . **Intro before Art 16:101** [14]
Art 1181 . . . . . **Intro before Art 16:101** [6]
Art 1183 . . . . . **Intro before Art 16:101** [6]
Art 1184 . . . . . **8:103** [9], [19]; **9:102 (1)** [33]; **Intro before Art 9:301** [5], [8]; **9:301** [37]; **9:303** [3]; **Intro before Art 16:101** [3]; **16:101** [4]
Art 1184 (1) . . . . . **Intro before Art 9:301** [5]; **9:301** [5]; **9:303** [3]
Art 1184 (2) . . . . . **8:102** [8], [12]; **9:102 (1)** [12]; **9:301** [5]
Art 1184 (3) . . . . . **9:301** [5]; **9:302** [3]; **9:303** [3]
Art 1184 (5) . . . . . **8:107** [2]
Art 1193 . . . . . **7:105** [8]
Art 1197 . . . . . **10:201** [4], [9]; **10:205** [4]
Art 1197–1199 . . . . . **Intro before Art 10:201** [6]
Art 1198 (1) . . . . . **10:201** [6]
Art 1198 (2) . . . . . **10:205** [7]
Art 1199 . . . . . **10:205** [10]
Art 1200 . . . . . **Intro before Art 10:101** [5]; **10:107** [1]

Art 1202 . . . . . **10:102** [2]
Art 1203–1204 . . . . . **10:101** [10]
Art 1205 . . . . . **10:101** [11]
Art 1206 . . . . . **10:110** [2]
Art 1207 . . . . . **10:101** [12]
Art 1208 . . . . . **10:111** [2]
Art 1209 . . . . . **10:107** [3]
Art 1210–1213 . . . . . **10:108** [8]
Art 1213–1214 . . . . . **10:105** [1]
Art 1214 (1) . . . . . **10:106** [2]
Art 1214 (2) . . . . . **10:106** [13]
Art 1216 . . . . . **10:105** [2]
Art 1220 . . . . . **Intro before Art 10:101** [4]; **Intro before Art 10:201** [2]
Art 1222–1225 . . . . . **Intro before Art 10:101** [6]
Art 1224 . . . . . **Intro before Art 10:201** [4]
Art 1224 (1) . . . . . **Intro before Art 10:201** [4]; **10:203** [2]
Art 1226–1233 . . . . . **9:509** [8]
Art 1229 . . . . . **9:509** [13]
Art 1237 . . . . . **7:106** [4]
Art 1243 . . . . . **7:107** [3]
Art 1244-1 . . . . . **9:301** [50]
Art 1246 . . . . . **6:108** [2]–[3]; **Intro before Art 7:101** [16]
Art 1247 (1) . . . . . **7:101** [4]
Art 1249 . . . . . **11:101** [10]; **11:303** [6]
Art 1250 . . . . . **11:101** [10]; **11:303** [6]
Art 1251 . . . . . **7:106** [3]; **10:106** [6]
Art 1252 . . . . . **10:106** [12]
Art 1255 . . . . . **7:109** [3]
Art 1257–1264 . . . . . **7:111** [2]
Art 1271–1281 . . . . . **Intro before Art 12:101** [7]
Art 1273 . . . . . **12:101** [3]
Art 1274 . . . . . **12:101** [8]
Art 1275 . . . . . **Intro before Art 12:101** [7]; **12:101** [5], [13]
Art 1276 . . . . . **12:101** [14]
Art 1278 . . . . . **12:102** [8]
Art 1279 . . . . . **12:102** [8]
Art 1285 (1) . . . . . **10:108** [2], [4]
Art 1285 (2) . . . . . **10:108** [3]–[4]
Art 1289 . . . . . **13:101** [4]; **13:104** [5]
Art 1289–1299 . . . . . **Intro before Art 13:101** [9]
Art 1290 . . . . . **13:101** [4], [26]; **13:104** [5]; **13:106** [4]; **14:503** [1]
Art 1291 (1) . . . . . **13:101** [9], [11], [14], [19], [24]
Art 1291 (2) . . . . . **13:101** [9], [11], [14], [19], [24]
Art 1292 . . . . . **13:101** [14], [19]
Art 1293 . . . . . **13:107** [9], [14], [19]
Art 1294 (3) . . . . . **10:111** [5]
Art 1295 . . . . . **11:307** [8]
Art 1296 . . . . . **13:101** [9]
Art 1297 . . . . . **13:105** [3]
Art 1299 . . . . . **13:106** [4]
Art 1301 . . . . . **10:107** [3]
Art 1303 . . . . . **9:502** [13]
Art 1321 . . . . . **Intro before Art 11:101** [18]
Art 1326 . . . . . **2:101 (2)** [11]
Art 1341 . . . . . **2:101 (2)** [11]; **2:101 (2)** [12]; **5:102** [4]
Art 1382 . . . . . **Intro before Art 2:301** [9], [11]; **3:201** [9]; **3:204** [1]
Art 1583 . . . . . **Intro before Art 11:101** [11]
Art 1591 . . . . . **6:104** [6]
Art 1592 . . . . . **6:106** [2], [5], [10]
Art 1641 . . . . . **18:203 (1)** [4]
Art 1689 . . . . . **Intro before Art 11:101** [11]
Art 1690 . . . . . **Intro before Art 11:101** [14]; **11:303** [5]; **11:307** [2]
Art 1780 . . . . . **6:109** [4]
Art 1780 (2) . . . . . **6:109** [4]
Art 2219–2281 . . . . . **Intro before Art 14:101** [3]
Art 2220 . . . . . **14:601** [1]
Art 2251 . . . . . **14:303** [1]
Art 2262 . . . . . **Intro before Art 14:101** [5]; **14:201** [2]

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Art 1–6 . . . . . **Intro before Art 1:101** [2]
Art 4 . . . . . **Intro before Art 1:101** [2]; **1:106 (1)** [4]; **1:201** [72]
Art 5 . . . . . **1:106 (1)** [4]
Art 6 . . . . . **2:101 (1)** [19]; **Intro before Art 15:101** [1]
Art 318 . . . . . **7:106** [4]
Art 711 . . . . . **Intro before Art 18:201** [3]
Art 900 . . . . . **15:103** [2]
Art 931 . . . . . **2:101 (2)** [13]
Art 1100 . . . . . **1:107** [14]
Art 1100-1 . . . . . **1:107** [4]–[5], [10], [14]; **Intro before Art 5:101** [14]
Art 1100-1 (2) . . . . **1:107** [8]; **1:303** [4], [13], [19]
Art 1100-2 . . . . . **1:107** [28]
Art 1102 . . . . . **Intro before Art 1:101** [7]; **1:102** [4], [24]; **2:101 (2)** [2]; **12:101** [3]; **Intro before Art 15:101** [1]; **15:101** [4]; **15:102** [7]
Art 1102–1104 . . . . . **1:202** [12]
Art 1102 (1) . . . . . **2:101 (2)** [4]
Art 1103 . . . . **Intro before Art 1:101** [7]; **1:102** [4]
Art 1104 . . . . . **Intro before Art 1:101** [7]; **1:201** [38]–[39]; **Intro before Art 2:301** [9]; **2:301** [13]
Art 1104 (2) . . . . . **1:201** [95]
Art 1109 (3) . . . . . **2:101 (1)** [21]
Art 1110 . . . . . **4:103** [5]
Art 1111 . . . . . **6:112** [3]
Art 1111 (3) . . . . . **2:301** [25]
Art 1111-1 . . . . . **6:112** [3]
Art 1112 . . . . . **Intro before Art 2:301** [13]; **2:301** [13]
Art 1112–1127-6 . . . . . **Intro before Art 2:101** [4]

Art 1112-1 . . . . . **1:201** [39]; **Intro before Art 2:401** [9]; **2:401**; **2:401** [12]
Art 1112-1 (1) . . . . . **2:401** [8]–[9], [11]
Art 1112-1 (4) . . . . . **2:402** [30]
Art 1112-1 (6) . . . . . **2:406** [10], [13]
Art 1113 . . . . . **2:101 (1)** [5], [11]
Art 1113–1122 . . . . . **2:211** [1]
Art 1114 . . . . . **2:201** [4], [10]
Art 1115 . . . . . **1:303** [4], [19]; **2:202** [19]
Art 1116 . . . . . **2:202** [9]; **4:107** [8]
Art 1116 (1) . . . . . **2:202** [8]
Art 1116 (2) . . . . . **2:202** [8]; **2:301** [18]
Art 1116 (3) . . . . . **2:202** [8]; **2:301** [18]
Art 1117 . . . . . **2:206** [5]
Art 1117 (2) . . . . . **1:303** [35]; **2:203** [7]
Art 1118 . . . . . **1:303** [19]
Art 1118 (1) . . . . . **2:204** [2]
Art 1118 (2) . . . . . **1:303** [4]; **2:204** [5]
Art 1118 (3) . . . . . **2:208** [2]
Art 1119 (2) . . . . . **2:209** [5]
Art 1120 . . . . . **2:204** [11]
Art 1121 . . . . . **1:303** [4], [13], [19]; **2:205** [3]; **2:205** [4]
Art 1124 . . . . . **2:107** [3]
Art 1127 . . . . . **2:103** [4]
Art 1127-1 . . . . . **2:201** [10]
Art 1127-1 (2) . . . . . **2:201** [10]
Art 1127-1 (3) . . . . . **2:201** [10]
Art 1127-2 . . . . . **2:201** [10]
Art 1127-2 (3) . . . . . **2:201** [10]
Art 1127-3 . . . . . **2:201** [10]
Art 1127-3 (1) . . . . . **2:201** [10]
Art 1127-3 (2) . . . . . **2:201** [10]
Art 1128 . . . . . **Intro before Art 2:101** [2]
Art 1130 . . . . . **2:406** [10]; **Intro before 4:101** [2]
Art 1131 . . . . . **Intro before 4:101** [2]; **4:112** [2]
Art 1132 . . . . . **4:103** [5]
Art 1133 . . . . . **4:112** [2]
Art 1134 (3) . . . . . **1:201** [33], [37], [50]; **19:302** [3]
Art 1135 . . . . . **1:105** [4]; **1:201** [37]; **4:103** [5]
Art 1136 . . . . . **8:108** [12], [14]
Art 1137 . . . . . **4:111** [3]–[4]; **8:108** [12], [14]
Art 1137 (2) . . . . . **1:201** [39]
Art 1138 . . . . . **1:305** [4]; **4:111** [3]; **18:301** [9], [11]
Art 1142 . . . . . **4:111** [3]
Art 1144 . . . . . **4:112** [3]; **9:506** [2]
Art 1146 . . . . . **9:508-1** [1]
Art 1147 . . . . . **8:108** [12], [14]
Art 1149 . . . . . **9:502** [5]
Art 1152 (2) . . . . . **9:509** [6]
Art 1153–1161 . . . . . **Intro before Art 3:101** [6]
Art 1154 . . . . . **3:102** [2]; **9:508-4** [5]
Art 1156 . . . . . **3:201** [9]; **4:104** [3]
Art 1156 (1) . . . . . **3:201** [11]
Art 1156 (3) . . . . . **3:208** [2]
Art 1157 . . . . . **3:205** [3]–[5]
Art 1158 (1) . . . . . **3:208** [1]
Art 1160 . . . . . **1:105** [4]
Art 1161 . . . . . **3:205** [3]–[4]
Art 1161 (2) . . . . . **3:205** [5]
Art 1162 . . . . . **2:101 (1)** [19]; **Intro before Art 15:101** [1]–[2]; **15:101** [4]; **15:102** [7], [13]
Art 1163 . . . . . **6:104** [5]; **6:105** [2]
Art 1163 (3) . . . . . **2:402** [21]
Art 1164 . . . . . **6:104** [5]; **6:105** [1], [3]
Art 1164-1165 . . . . . **6:105** [2]
Art 1165 . . . . . **6:104** [5]; **6:105** [1], [3]
Art 1166 . . . . . **6:108** [1], [7]
Art 1167 . . . . . **6:107** [1]–[2]
Art 1168 . . . . . **4:109** [3]
Art 1169 . . . . . **2:101 (1)** [19]; **12:101** [3]
Art 1170 . . . . . **2:101 (1)** [19]; **8:109** [3], [6]
Art 1171 . . . . . **1:201** [39]
Art 1172 . . . . . **Intro before Art 1:101** [7]
Art 1178–1181 . . . . . **15:102** [23]
Art 1178 (1) . . . . . **4:112** [3]–[4]
Art 1178 (4) . . . . . **15:105** [2]
Art 1179 (2) . . . . . **15:102** [29]
Art 1181 . . . . . **15:102** [29]
Art 1184 . . . . . **4:116** [3]; **6:204** [2]; **7:110** [6]; **8:103** [6], [9]; **9:506** [2]
Art 1184 (1) . . . . . **15:103** [2]
Art 1184 (2) . . . . . **15:103** [3]
Art 1185 . . . . . **Intro before Art 16:101** [5]
Art 1186 . . . . . **2:101 (1)** [19]
Art 1188 . . . . . **5:101** [6]
Art 1188–1192 . . . . . **Intro before Art 5:101** [13]
Art 1188 (2) . . . . . **4:112** [2]; **Intro before Art 5:101** [27]
Art 1189 (1) . . . . . **5:105** [3]
Art 1189 (2) . . . . . **5:105** [7]
Art 1190 . . . . . **2:402** [22]; **5:103** [3], [5]
Art 1191 . . . . . **5:106** [3]–[4]
Art 1192 . . . . . **5:101** [14]
Art 1192 (2) . . . . . **5:101** [6]
Art 1194 . . . . . **6:102** [5], [10], [13], [16]
Art 1195 . . . . . **1:201** [39]; **6:107** [2]; **6:111** [14], [17]
Art 1196 . . . . . **18:301** [11]; **18:306** [5]
Art 1196 (1) . . . . . **18:303** [15]
Art 1196 (3) . . . . . **18:303** [15]
Art 1197 . . . . . **8:108** [14]
Art 1199 . . . . . **3:302** [6]; **3:303** [2]
Art 1199–1209 . . . . . **Intro before 6:101** [1]
Art 1199 (2) . . . . . **6:110** [30]
Art 1201 . . . . . **6:103** [4], [6]
Art 1202 . . . . . **6:103** [4], [6]
Art 1205 . . . . . **6:110** [27]
Art 1205–1209 . . . . **6:110** [5], [8], [15], [31], [37]
Art 1205 (1) . . . . . **6:110** [15]

Art 1205 (2) . . . . . **6:110** [17], [33]
Art 1206–1208 . . . . . **6:110** [46]
Art 1206 (1) . . . . . **6:110** [15], [33]
Art 1206 (2) . . . . . **6:110** [50]
Art 1206 (2) (1) . . . . . **6:110** [8]
Art 1206 (2) (2) . . . . . **6:110** [8]
Art 1206 (3) . . . . . **6:110** [50]
Art 1207 (1) . . . . . **6:110** [48]
Art 1207 (2) . . . . . **6:110** [47]
Art 1207 (3) . . . . . **6:110** [49]
Art 1207 (5) . . . . . **6:110** [47]
Art 1208 . . . . . **6:110** [50]
Art 1209 . . . . . **6:110** [56]–[57]
Art 1216 . . . . . **12:201** [6]
Art 1216–1216-3 . . . . . **12:201** [4]
Art 1216-1 . . . . . **12:201** [7]–[8]
Art 1216-2 . . . . . **12:201** [8]
Art 1217 . . . . . **8:101** [7]; **9:102 (1)** [21]; **9:103** [3]
Art 1217–1231-7 . . . . . **9:102 (1)** [33]
Art 1217 (1) . . . . . **8:101** [3]
Art 1217 (2) . . . . . **8:101** [7]; **8:102** [3], [6], [8], [12]; **9:102 (1)** [21]
Art 1218 . . . . . **8:108** [14]; **9:501 (1)** [5]; **Intro before Art 10:201** [5]
Art 1218 (2) . . . . **9:102 (2)–(3)** [8]; **9:301** [38], [42]
Art 1219 . . . . . **9:201** [8], [11], [14]; **16:101** [4]
Art 1220 . . . . . **8:105** [3]; **8:105** [7]; **9:304** [2]; **16:101** [4]
Art 1221 . . . . . **9:102 (1)** [12], [21], [33]; **9:102 (2)–(3)** [2]–[3], [6], [8], [17]–[18], [28], [44]
Art 1222 . . . . . **9:102 (1)** [12], [33]; **9:102 (2)–(3)** [28], [39]; **9:506** [2]
Art 1223 . . . . . **8:104** [6]; **9:401** [6], [11], [13], [15]
Art 1224 . . . . **8:103** [9]; **8:105** [4]; **9:102 (1)** [33]; **9:301** [5]; **9:303** [5]; **9:506** [2]
Art 1224–1230 . . . . . **8:103** [9]
Art 1226 . . . . . **8:103** [9]; **8:104** [6]; **9:301** [10]; **9:303** [5]
Art 1226 (4) . . . . . **8:103** [9]; **9:303** [8]
Art 1227 . . . . . **8:103** [9]; **8:104** [6]; **8:106** [3]; **9:301** [10]; **9:302** [3]; **9:303** [5]
Art 1228 . . . . . **8:106** [3]; **9:301** [50]; **9:303** [3], [5], [8]
Art 1229 (2) . . . . . **9:509** [15]
Art 1229 (3) . . . . . **6:112** [15]
Art 1231 . . . . . **9:102 (1)** [33]
Art 1231–1231-7 . . . . . **Intro before Art 9:501** [3]
Art 1231-1 . . . . . **8:103** [9], [14]; **9:501 (1)** [5]
Art 1231-2 . . . . . **9:502** [8]
Art 1231-3 . . . . . **9:503** [1]–[2], [4], [12]
Art 1231-4 . . . . . **9:503** [2], [12]
Art 1231-5 . . . . . **9:509** [6], [8], [20]
Art 1231-5 (3) . . . . . **9:509** [18]
Art 1231-5 (4) . . . . . **9:509** [18]
Art 1231-6 . . . . . **9:508** [2]; **9:508-2 (6)** [1]
Art 1231-6 (1) . . . . . **9:508-2 (1)** [6]
Art 1231-6 (2) . . . . . **9:508-2 (1)** [6]
Art 1240 . . . . . **Intro before Art 2:301** [9]; **3:201** [9]; **3:204** [1]; **4:106** [4]
Art 1242 (5) . . . . . **8:107** [2]–[3]
Art 1255 . . . . . **7:109** [2]
Art 1257 . . . . . **18:304** [4]
Art 1264 . . . . . **7:111** [2]
Art 1304 . . . . . **Intro before Art 16:101** [7]
Art 1304-1 . . . . . **15:103** [2]; **Intro before Art 16:101** [12]
Art 1304-2 . . . . . **Intro before Art 16:101** [7]
Art 1304-6 . . . . . **Intro before Art 16:101** [14]
Art 1304-7 . . . . . **Intro before Art 16:101** [14]
Art 1305-3 (1) . . . . . **7:103** [3]
Art 1307-1 (1) . . . . . **7:105** [3]
Art 1307-1 (2) . . . . . **7:105** [3]
Art 1307-1 (3) . . . . . **7:105** [7]
Art 1307-2–1307-5 . . . . . **7:105** [3], [8]
Art 1309 . . . . . **Intro before Art 10:101** [4]; **Intro before Art 10:201** [2]
Art 1309 (1) . . . **10:102** [2]; **10:103** [1]; **10:202** [1]
Art 1310 . . . . . **10:201** [9]
Art 1310–1312 . . . . . **Intro before Art 10:201** [6]
Art 1311 (1) . . . . . **10:201** [4]; **10:204** [1]; **10:205** [4]
Art 1311 (2) . . . . . **10:201** [6]
Art 1312 . . . . . **10:205** [10]
Art 1313 . . . . . **Intro before Art 10:101** [5]
Art 1313 (1) . . . . . **10:107** [1]
Art 1313 (2) . . . . . **10:101** [10]
Art 1314 . . . . . **10:101** [12]
Art 1315 . . . . . **10:111** [2]
Art 1316 . . . . . **10:108** [8]
Art 1317 . . . . . **10:105** [1]
Art 1317 (2) . . . . . **10:106** [2], [13]
Art 1318 . . . . . **10:105** [2]
Art 1319 . . . . . **10:101** [11]
Art 1320 . . . . . **Intro before Art 10:101** [6]; **Intro before Art 10:201** [4]
Art 1320 (1) . . . . . **Intro before Art 10:201** [4]; **10:203** [2]
Art 1321 . . . . . **11:103** [2]
Art 1321-1325 . . . . . **11:101** [10]
Art 1321–1326 . . . . . **18:101** [16]
Art 1321 (2) . . . . . **11:102** [4], [15]
Art 1321 (3) . . . . . **11:102** [4]; **11:201** [1]
Art 1321 (4) . . . . . **11:301** [4]
Art 1322 . . . . . **11:104** [3]
Art 1323 . . . . . **Intro before Art 11:101** [14]; **11:303** [6]
Art 1323 (2) . . . . . **Intro before Art 11:101** [14]
Art 1323 (3) . . . . . **Intro before Art 11:101** [14]
Art 1324 . . . . . **Intro before Art 11:101** [14]
Art 1324 (1) . . . . . **11:303** [7]–[8]
Art 1324 (2) . . . . . **11:307** [4]
Art 1324 (3) . . . . . **11:306** [5]

Art 1325 . . . . . **11:401** [1]
Art 1326 . . . . . **2:101 (2)** [13]
Art 1326 (1) . . . . . **11:204** [4]
Art 1326 (2) . . . . . **11:204** [6]
Art 1326 (3) . . . . . **11:204** [6]
Art 1327 . . . . . **12:101** [5], [9]
Art 1327–1328-1 . . . **Intro before Art 12:101** [10]; **12:201** [3]
Art 1327-1 . . . . . **12:101** [5]
Art 1327-2 . . . . . **12:101** [13]
Art 1328 . . . . . **12:102** [2]
Art 1328-1 . . . . . **12:102** [8]
Art 1329 . . . . . **Intro before Art 12:101** [7]; **12:101** [1]
Art 1329–1335 . . . . . **Intro before Art 12:101** [7]
Art 1329 (1) . . . . . **Intro before Art 7:101** [24]
Art 1330 . . . . . **12:101** [3]
Art 1331 . . . . . **12:101** [3]; **12:102** [6]
Art 1332 . . . . . **12:101** [8]
Art 1334 . . . . . **12:102** [3], [8]
Art 1336–1340 . . . . . **Intro before Art 12:101** [7]
Art 1341 . . . . . **2:101 (2)** [5]; **2:106** [4]; **9:102 (1)** [21]
Art 1341-1 . . . . . **3:302** [6]; **3:303** [2]
Art 1342 (1) . . . . . **19:301** [4]
Art 1342 (2) . . . . . **19:301** [4]
Art 1342-1 . . . . . **7:106** [4]
Art 1342-2 (2) . . . . . **Intro before Art 7:101** [12]
Art 1342-2 (3) . . . . . **Intro before Art 7:101** [10]
Art 1342-4 (1) . . . . . **Intro before Art 7:101** [14]
Art 1342-4 (2) . . . . . **Intro before Art 7:101** [13]
Art 1342-6 . . . . . **7:101** [4]–[5]
Art 1342-7 . . . . . **7:112** [3]
Art 1342-10 (1) . . . . . **7:109** [3]
Art 1342-10 (2) . . . . . **7:109** [4]
Art 1343-1 (1) . . . . . **7:109** [3]
Art 1343-2 . . . . . **9:508-4** [2], [5]
Art 1343-3 . . . . . **Intro before Art 7:101** [22]; **7:108** [3]
Art 1344 . . . . . **9:501 (1)** [10]
Art 1344-1 . . . . . **9:501 (1)** [10]
Art 1345–1345-3 . . . . . **7:110** [4]
Art 1345 (2) . . . . . **7:110** [8]; **18:304** [6]
Art 1345-1 . . . . . **7:110** [4]
Art 1345-1 (1) . . . . . **7:111** [2]–[3]
Art 1345-1 (2) . . . . . **7:110** [4]
Art 1345-2 . . . . . **7:110** [12]
Art 1345-3 . . . . . **7:110** [4]
Art 1346 . . . . . **7:106** [3]; **10:106** [6]
Art 1346–1346-5 . . . . . **11:101** [10]
Art 1346-1 . . . . . **11:303** [6]
Art 1346-3 . . . . . **10:106** [12]
Art 1346-4 (1) . . . . . **11:201** [1]
Art 1347–1348-2 . . . . **Intro before Art 13:101** [9]
Art 1347 (1) . . . . . **Intro before Art 13:101** [25]; **13:101** [4]
Art 1347 (2) . . . . . **13:104** [5]; **13:106** [4]; **14:503** [1]
Art 1347-1 . . . . . **13:101** [9], [11], [14], [19], [24]; **13:103** [3]
Art 1347-2 . . . . . **13:107** [9], [14], [19]
Art 1347-3 . . . . . **13:101** [14], [19]
Art 1347-4 . . . . . **13:105** [3]
Art 1347-5 . . . . . **11:307** [5], [8]
Art 1347-6 (2) . . . . . **10:111** [5]
Art 1348 . . . . . **13:101** [14], [19], [24]; **13:102** [3]; **13:106** [4]
Art 1348-1 . . . . . **13:101** [14], [19], [24], [29]; **13:102** [3]; **13:106** [4]
Art 1348-2 . . . . . **Intro before Art 13:101** [19]; **13:101** [4]; **13:106** [4]
Art 1349 . . . . . **Intro before Art 7:101** [24]
Art 1349-1 . . . . . **10:107** [3]
Art 1349-1 (1) . . . . . **10:205** [5]
Art 1350-1 (1) . . . . . **10:108** [3]–[4]
Art 1350-1 (2) . . . . . **10:205** [7]
Art 1351 . . . . . **9:102 (2)–(3)** [2], [8]
Art 1351-1 . . . . . **9:502** [13]
Art 1351-1 (2) . . . . . **9:102 (2)–(3)** [16]
Art 1352 . . . . . **Intro before Art 9:305** [27]; **9:306** [36]
Art 1352-8 . . . . . **9:306** [36]
Art 1359 . . . . . **2:101 (2)** [11]–[12]
Art 1359 (1) . . . . . **2:101 (2)** [12]–[13]
Art 1359 (2) . . . . . **5:102** [4]
Art 1360-2 . . . . . **2:101 (2)** [12]
Art 1369-4 . . . . . **2:201** [10]
Art 1369-5 . . . . . **2:201** [10]
Art 1369-6 . . . . . **2:201** [10]
Art 1376 . . . . . **2:101 (2)** [13]
Art 1382 . . . . . **Intro before Art 2:301** [11]; **4:103** [11]; **15:105** [2]
Art 1383 . . . . . **4:103** [11]
Art 1384 (1) . . . . . **19:202** [3]
Art 1393 . . . . . **19:204** [2]
Art 1582 . . . . . **18:202** [2]
Art 1583 . . . . . **18:303** [15]
Art 1585 . . . . . **18:302** [4]–[5], [7]; **18:305** [7]
Art 1591 . . . . . **6:104** [2]–[3], [5]; **18:201** [4]
Art 1592 . . . . . **6:104** [2]–[3]; **6:105** [2]
Art 1598 . . . . . **18:101** [16], [24]
Art 1601 . . . . . **18:306** [5]
Art 1601 (1) . . . . . **4:102** [2]
Art 1603 . . . . . **18:202** [2]
Art 1607 . . . . . **18:101** [16]
Art 1610 . . . . . **9:102 (1)** [33]
Art 1612 . . . . . **7:104** [3]; **9:201** [8]
Art 1613 . . . . . **8:105** [2]–[3]
Art 1615 . . . . . **18:202** [3]
Art 1624 . . . . . **18:303** [15]
Art 1625 . . . . . **18:204** [6]

Art 1626–1640 . . . . . **18:203 (1)** [8]
Art 1641 . . . . . **9:102 (1)** [33]; **18:203 (2)** [11]
Art 1641–1649 . . . . . **9:102 (1)** [33]; **18:204** [6]
Art 1642 . . . . . **18:203 (3)** [3]
Art 1644 . . . . . **8:104** [4]; **9:102 (1)** [33]; **9:401** [6], [15]; **18:204** [6]
Art 1645 . . . . . **8:109** [3]; **9:102 (1)** [33]–[34]; **18:204** [6]
Art 1647 . . . . . **9:301** [52]
Art 1647 (2) . . . . . **18:303** [15]
Art 1648 . . . . . **14:501** [5]; **18:204** [6]
Art 1651 . . . . . **7:101** [5]; **7:102** [8]
Art 1653 . . . . . **9:201** [8], [14]
Art 1657 . . . . . **9:303** [5]; **18:201** [6]
Art 1674–1685 . . . . . **4:109** [3]
Art 1681 . . . . . **4:109** [6]
Art 1689–1701 . . . . . **18:101** [16]
Art 1699–1701 . . . . . **Intro before Art 11:101** [23]
Art 1701-1 . . . . . **18:101** [16]
Art 1703 . . . . . **18:201** [2]
Art 1707 . . . . . **18:101** [11]; **18:201** [3]
Art 1709 . . . . . **6:104** [3]; **6:109** [4]
Art 1722 . . . . . **9:401** [6]
Art 1743 . . . . . **12:201** [4]
Art 1787–1799-1 . . . . . **19.101** [3]; **19:201** [4]
Art 1794 . . . . . **9:101** [18]
Art 1838 . . . . . **6:109** [4]
Art 1843-4 . . . . . **6:106** [5]
Art 1939 (3) . . . . . **Intro before Art 10:201** [4]
Art 1944 . . . . . **6:109** [4]
Art 1948 . . . . . **9:201** [8]
Art 1984–1990 . . . . . **Intro before Art 3:101** [4]
Art 1991 . . . . . **3:209** [4]
Art 1996 (2) . . . . . **18:303** [15]
Art 1997 . . . . . **3:204** [1]
Art 2002 . . . . . **10:102** [2]
Art 2005 . . . . . **3:209** [2]
Art 2219 . . . . . **14:101** [2]
Art 2219–2254 . . . **Intro before Art 14:101** [3], [6]
Art 2224 . . . . . **14:101** [2]; **14:201** [2]; **14:301** [1]
Art 2230 . . . . . **Intro before Art 14:301** [1]
Art 2232 . . . . . **14:301** [3]
Art 2232 (1) . . . . . **14:307** [2]
Art 2233–2239 . . . . . **Intro before Art 14:301** [1]
Art 2234 . . . . . **14:303** [1]
Art 2235 . . . . . **14:305** [2]
Art 2236 . . . . . **14:305** [4]
Art 2237 . . . . . **14:306** [1]
Art 2239 . . . . . **14:302 (3)** [2]
Art 2240 . . . . . **14:401** [1]
Art 2241–2243 . . . . . **14:302 (1)–(2)** [1]
Art 2244 . . . . . **14:402** [1]
Art 2245 (1) . . . . . **10:110** [2]
Art 2247 . . . . . **14:501** [1]
Art 2249 . . . . . **14:501** [1]
Art 2254 . . . . . **14:601** [3]
Art 2254 (1) . . . . . **14:601** [1]
Art 2255–2279 . . . . . **Intro before Art 14:101** [3]
Art 2259 . . . . . **Intro before Art 14:101** [3]
Art 2367 (2) . . . . . **11:201** [8]

Code de commerce (Commercial Code) 1807
Art 100 . . . . . **18:305** [7]–[8]
Art 109 . . . . . **18:101** [10]

Code de commerce (Commercial Code)
Art L110-3 . . . . . **2:101 (2)** [12]; **5:102** [4]
Art L132-1 . . . . . **3:102** [3]
Art L132-7 . . . . . **18:305** [7]–[8]
Art L441-6 . . . . . **9:508** [6]; **9:508-3** [4]

Code de la consommation (Consumer Code)
Art L111-1 . . . . . **Intro before Art 2:401** [9]; **2:402** [1], [18]
Art L111-2 . . . . . **2:402** [1]
Art L111-5 . . . . . **2:402** [30]
Art L121-20-3 . . . . . **7:102-1** [2]
Art L121-26 . . . . . **2:501 App I** [1]
Art L122-3 . . . . . **2:204** [16]
Art L133-2 (2) . . . . . **5:103** [3]
Art L212-1 (formerly L132-1) . . . . . **Intro before Art 6:201** [3]
Art L212-1 (1) . . . . . **6:201** [19]; **6:202** [4]
Art L212-1 (2) . . . . . **6:201** [10]
Art L212-2 (formerly L132-2) . . . . . **Intro before Art 6:201** [3]
Art L212-2 (1) (formerly L132-2 (1)) . . . . **6:201** [8]
Art L214-2 . . . . . **6:202** [11]
Art L216-4 . . . . . **18:307** [8]
Art L216-5 . . . . . **18:307** [8]
Art L217-1 . . . . . **18:101** [16]
Art L217-13 . . . . . **9:102 (1)** [37]
Art L242-1 . . . . . **2:406** [4]
Art L242-2 . . . . . **2:406** [4]
Art L242-26 . . . . . **2:406** [4]
Art R212-1–R212-5 . . . . . **6:202** [7]
Art R212-1 (formerly R132-1) . . . . . **6:202** [3]
Art R212-1 no 10 . . . . . **6:202** [10]
Art R212-2 no 5 (formerly L132-2 (5)) . . . . . **6:202** [12]
Art R212-2 no 8 . . . . . **6:202** [10]

Code du travail (Labour Code)
Art L1224-1 . . . . . **12:201** [4]
Art L3241-1 . . . . . **7:107** [3]
Art L3252-2 . . . . . **Intro before Art 11:101** [24]
Art L3252-3 . . . . . **Intro before Art 11:101** [24]

Code monétaire et financier (Monetary and Financial Code)
Art D112-3 . . . . . **7:107** [3]

Art L112-6–L112-8 . . . . . **7:107** [3]
Art L313-2 . . . . . **9:508** [3]
Art L313-23 . . . . . **11:102** [15]
Art L313-23–L313-29-2 . . . . . **11:101** [10]
Art L313-24 . . . . . **11:204** [6]
Art L313-27 . . . . . **11:201** [1]; **11:308** [1]

GERMANY

Abzahlungsgesetz (Credit-Sale Act) 1974
§ 1b . . . . . **Intro before Art 2:501** [5]; **2:503** [3]; **2:504** [2]
§ 1b (2) . . . . . **2:406** [8]; **2:502** [2]–[3], [6]
§ 1d (1) . . . . . **2:504 App** [15]
§ 1d (3) . . . . . **2:504 App** [19]

Bürgerliches Gesetzbuch (Civil Code) 1900
§ 133 . . . . . **Intro before Art 5:101** [11]
§ 147 (1) . . . . . **2:206** [2]
§ 157 . . . . . **Intro before Art 5:101** [11]
§ 195 . . . . . **Intro before Art 14:101** [5]
§ 196 . . . . . **14:203** [5]
§ 201 . . . . . **14:203** [5]
§ 206 . . . . . **14:305** [1]
§ 209 . . . . . **14:302 (1)–(2)** [1]
§ 225 . . . . . **14:601** [1]
§ 253 . . . . . **9:501 (2)** [2]
§ 275 . . . . . **8:103** [7]
§ 276 (2) . . . . . **8:109** [2]
§ 306 . . . . . **8:103** [7]; **9:102 (2)–(3)** [14]; **18:306** [3]
§ 307 . . . . . **15:105** [2]
§§ 307–309 . . . . . **15:105** [2]
§ 309 . . . . . **15:105** [2]
§ 321 . . . . . **8:105** [3], [7]
§ 323 . . . . . **8:103** [7]
§ 324 (2) . . . . . **18:304** [4]
§ 326 . . . . . **8:103** [7]; **9:301** [4], [7], [47]; **9:303** [6]
§§ 387–396 . . . . . **Intro before Art 13:101** [10]
§ 390 . . . . . **Intro before Art 13:101** [10]; **13:101** [26]
§ 437 . . . . . **11:204** [2]
§ 441 . . . . . **11:204** [2]
§ 459 (1) . . . . . **18:203 (1)** [4]
§ 463 . . . . . **Intro before Art 8:101** [9]
§ 477 (1) . . . . . **14:601** [1]
§ 480 . . . . . **9:102 (1)** [32]
§ 480 (1) . . . . . **14:601** [1]
§ 482 . . . . . **14:601** [1]
§ 490 . . . . . **14:601** [1]
§ 490 (1) . . . . . **14:601** [1]
§ 494 . . . . . **18:203 (2)** [9]
§ 515 . . . . . **18:101** [11]
§ 538 (1) . . . . . **9:501 (1)** [3]
§ 607 . . . . . **9:508** [1]
§ 610 . . . . . **8:105** [2]
§ 638 (2) . . . . . **14:601** [1]
§ 639 (2) . . . . . **14:304** [2]
§ 847 . . . . . **9:501 (2)** [2]
§ 852 . . . . . **Intro before Art 14:101** [9]
§ 852 (1) . . . . . **14:301** [1]; **14:307** [2]

Bürgerliches Gesetzbuch (Civil Code)
§ 90 . . . . . **18:101** [15]
§§ 104–185 . . . . . **1:107** [9]
§ 117 (1) . . . . . **6:103** [2]
§ 119 . . . . . **Intro before Art 2:401** [10]; **4:105** [4]
§§ 119–124 . . . . . **Intro before 4:101** [2]
§ 119 (1) . . . . . **4:104** [4]
§ 119 (2) . . . . . **4:103** [5], [18], [24]
§ 121 (1) . . . . . **1:107** [21]; **4:113** [2], [4]
§ 121 (2) . . . . . **4:113** [4]
§ 122 . . . . . **Intro before Art 2:301** [13]; **4:103** [5], [24]; **4:104** [4]; **4:106** [2]
§ 123 . . . . . **Intro before Art 2:401** [10]; **4:105** [4]; **4:108** [8]; **4:116** [2]
§ 123 (1) . . . . . **4:111** [3]
§ 123 (2) . . . . . **4:111** [3], [5]
§ 124 . . . . . **9:305** [2]
§ 124 (1) . . . . . **4:113** [2]
§ 124 (2) . . . . . **4:113** [4]; **14:101** [8]
§ 124 (3) . . . . . **4:113** [4]
§ 125 . . . . . **2:106** [4]; **2:204** [7]
§ 130 . . . . . **1:107** [22]; **1:303** [1], [13], [19]–[20], [24], [29], [32]
§ 130 (1) . . . . . **2:202** [19]
§ 132 . . . . . **1:303** [30]
§ 133 . . . . . **4:104** [3]; **Intro before Art 5:101** [13]; **5:101** [2], [6], [11], [14]
§ 134 . . . . . **Intro before Art 9:305** [31]; **Intro before Art 15:101** [1]; **15:102** [8], [12], [21], [23]
§§ 135–136 . . . . . **15:102** [24]
§ 138 . . . . **1:201** [26]; **Intro before Art 15:101** [1]; **15:101** [4]; **15:102** [23]
§ 138 (1) . . . . . **1:201** [27], [30]
§ 138 (1) . . . . . **4:104** [3]
§ 138 (2) . . . . . **4:109** [3]; **15:101** [6]
§ 139 . . . . . **4:116** [2]–[4]; **6:204** [2]; **10:111** [2]
§ 142 . . . . . **4:112** [2]
§ 143 . . . . . **4:112** [3]
§ 144 . . . . . **4:114** [2]
§ 145 . . . . . **2:107** [3]; **2:202** [4], [7]
§§ 145–153 . . . . . **2:101 (1)** [5]
§§ 145–157 . . . . . **Intro before Art 2:101** [4]
§ 146 (1) . . . . . **2:203** [4]
§ 147 . . . . . **2:202** [9]
§ 147 (2) . . . . . **2:202** [7], [9]
§ 149 . . . . . **2:202** [7]; **2:207** [2]

§ 150 (1) . . . . . **2:207** [1]
§ 150 (2) . . . . . **2:203** [3]; **2:208** [2]–[3]
§ 151 . . . . . **2:205** [9]
§ 154 . . . . . **2:103** [4], [8]
§ 154 (1) . . . . . **2:102** [2]; **2:103** [8]
§ 154 (2) . . . . . **2:204** [7]
§ 155 . . . . . **2:102** [2]; **2:208** [7]
§ 156 . . . . . **2:505 App** [18]
§ 157 . . . . . **1:302** [9]; **2:401** [10]; **Intro before Art 5:101** [13]; **5:102** [1], [5]; **6:102** [5]
§ 158 . . . . . **Intro before Art 16:101** [1], [6]
§ 158 (2) . . . . . **Intro before Art 16:101** [6]
§ 159 . . . . . **Intro before Art 16:101** [14]; **18:303** [21]
§ 160 . . . . . **16:104** [3]–[4]
§ 160 (1) . . . . . **16:104** [3]
§ 160 (2) . . . . . **16:104** [3]
§ 161 . . . . . **16:104** [3]
§ 161 (1) . . . . . **16:104** [3]
§ 161 (2) . . . . . **16:104** [3]
§ 161 (3) . . . . . **16:104** [3]
§ 162 . . . . . **Intro before Art 16:101** [15]; **16:104** [3]
§ 163 . . . . . **Intro before Art 16:101** [5]
§ 164 (1) . . . . **Intro before Art 3:101** [6]; **3:102** [2]
§ 164 (2) . . . . . **3:102** [6]
§ 164 (3) . . . . . **Intro before Art 3:101** [6]
§ 166 . . . . . **1:305** [8]; **8:107** [7]
§ 166 (1) . . . . . **1:305** [4], [6]
§ 166 (2) . . . . . **1:305** [7]
§ 167 (1) . . . . . **3:201** [3]
§ 167 (2) . . . . . **3:201** [4]
§ 168 . . . . . **3:209** [1], [4]
§ 169 . . . . . **3:209** [2]
§ 170–173 . . . . . **3:209** [2]
§ 171 . . . . . **1:303** [12]; **3:209** [2]
§ 177 (2) . . . . . **3:207** [3]; **3:208** [1]
§ 178 . . . . . **3:208** [2]
§ 179 . . . . . **3:102** [4]; **3:204** [1]
§ 179 (1) . . . . . **3:204** [5]
§ 179 (2) . . . **Intro before Art 2:301** [13]; **3:204** [5]
§ 181 . . . . . **3:205** [2], [4]–[5]
§ 181 (7) . . . . . **1:304 (3)**
§ 183 . . . . . **12:101** [6]
§ 186–193 . . . . . **1:304 (1)** [7]
§ 187 (1) . . . . . **1:304 (3)** [4]–[5]
§ 187 (2) . . . . . **1:304 (3)** [3]
§ 188 (1) . . . . . **1:304 (3)** [2]
§ 188 (2) . . . . . **1:304 (3)** [2]–[3], [6]
§ 193 . . . . . **1:304 (2)** [1], [5]
§§ 194–218 . . . . . **Intro before Art 14:101** [3], [6]
§§ 194–225 . . . . . **Intro before Art 14:101** [3]
§ 194 (1) . . . . . **14:101** [1]
§ 195 . . . . . **14:201** [2]
§ 197 (1) . . . . . **14:202** [1]
§ 199 . . . . . **14:301** [3]
§ 199 (1) . . . . . **14:203** [2], [5]
§ 199 (2) . . . . . **14:301** [1]
§ 199 (3) . . . . . **14:301** [1]; **14:307** [2]
§ 199 (4) . . . . . **14:307** [2]
§ 199 (5) . . . . . **14:203** [4]
§ 201 . . . . . **14:203** [4]
§ 202 (1) . . . . . **14:601** [1]
§ 202 (2) . . . . . **14:601** [1]
§ 203 . . . . . **14:303** [1]; **14:304** [1]–[3]
§§ 203–209 . . . . . **Intro before Art 14:301** [1]
§ 204 . . . . . **14:302 (1)–(2)** [4]; **14:302 (3)** [1]–[2]
§ 204 (1) . . . . . **14:302 (3)** [1]
§ 204 (2) . . . . . **14:302 (1)–(2)** [2]–[3]
§ 206 . . . . . **14:303** [1]–[2]
§ 207 (1) . . . . . **14:305** [4]
§ 210 . . . . . **Intro before Art 14:301** [1]; **14:305** [1]
§ 210 (1) . . . . . **14:305** [3]
§ 211 . . . . . **14:306** [1]
§ 212 . . . . . **14:401** [1]
§ 212 (1) . . . . . **14:401** [1]–[2]; **14:402** [1]
§ 212 (2) . . . . . **14:402** [1]
§ 212 (3) . . . . . **14:402** [1]
§ 214 (1) . . . . . **14:501** [1]
§ 214 (2) . . . . . **14:501** [1]
§ 215 . . . . . **Intro before Art 13:101** [10]; **13:101** [26]; **14:501** [7]; **14:503** [1]
§ 218 . . . . . **14:101** [8]; **14:501** [5]
§ 224 . . . . . **14:502** [1]
§ 241 . . . . . **6:102** [14]
§§ 241–432 . . . . . **Intro before Art 1:101** [2]
§ 241 (1) . . . . . **9:102 (1)** [13], [21]
§ 241 (2) . . . . . **1:201** [100]; **1:202** [10]; **1:302** [9]; **Intro before Art 2:301** [13]; **2:406** [13]; **4:103** [11]; **6:110** [15]; **8:103** [18]; **9:101** [5]; **15:105** [2]; **19:202** [3]
§ 242 . . . . **Intro before Art 1:101** [7]; **1:102** [11]; **1:201** [26]–[33], [43], [48], [50], [56], [72]–[73], [76], [79], [86], [88], [90]–[91]; **1:302** [9]; **1:303** [30]; **2:401** [10]; **6:102** [5], [14]; **6:111** [10]; **Intro before Art 7:101** [14]; **9:101** [5]; **9:102 (2)–(3)** [45]; **9:506** [3]; **14:101** [8]; **14:304** [2], [4]; **19:203** [5]
§ 242 (2) . . . . . **1:201** [31]
§ 243 . . . . . **Intro before Art 7:101** [16]
§ 243 (1) . . . . . **6:108** [2]–[3]
§ 243 (2) . . . . . **6:108** [3]; **18:302** [5], [7], [9]; **18:304** [6]
§ 244 . . . . . **9:510** [2]
§ 244 (1) . . . . . **7:108** [3]; **13:103** [3]
§ 244 (2) . . . . . **7:108** [3], [10]
§ 246 . . . . . **9:508** [2]
§ 247 . . . . . **9:508** [3]
§ 247 (1) . . . . . **9:508-2 (5)** [2]
§ 248 (2) . . . . . **9:508-4** [4]–[5]
§ 249 . . . . . **9:502** [3]; **9:504** [3]

§§ 249–255 . . . . . **Intro before Art 9:501** [3]
§ 249 (1) . . . . . **9:502** [6]
§ 252 . . . . . **9:502** [8]; **9:507** [3]
§ 253 . . . . . **9:501 (2)** [7]
§ 253 (2) . . . . . **9:501 (2)** [3], [7]
§ 254 . . . . . **9:503** [8]; **9:504** [5], [7], [16]
§ 254 (1) . . . . . **9:504** [3], [7], [16], [20]
§ 254 (2) . . . . . **9:504** [13], [16]; **9:506** [3]
§ 262 . . . . . **7:105** [3]
§ 263 . . . . . **7:105** [7]
§ 265 . . . . . **7:105** [3], [8]
§ 266 . . . . **Intro before Art 7:101** [14]; **9:201** [15]
§ 267 . . . . . **7:106** [4]; **12:101** [8]
§ 267 (1) . . . . . **12:101** [9]
§ 267 (2) . . . . . **7:106** [2], [4]; **12:101** [8]
§ 268 (1) . . . . . **7:106** [3]
§ 269 . . . . . **7:101** [5]
§ 269 (1) . . . . . **7:101** [2], [4]–[5]
§ 269 (2) . . . . . **7:101** [4]
§ 269 (3) . . . . . **7:112** [7]
§ 270 . . . . . **7:101** [3]; **7:112** [3]
§ 270 (1) . . . . . **18:301** [9]
§ 270 (3) . . . . . **7:101** [5], [11]; **11:306** [2], [5]
§ 271 (1) . . . . . **7:102** [3]; **7:102-1** [2]
§ 271 (2) . . . . . **7:103** [3]
§ 275 . . . . . **8:103** [11]
§ 275 (1) . . . . . **8:108** [11]; **9:102 (2)–(3)** [2]–[3], [5]–[6], [15]
§ 275 (2) . . . . . **8:108** [11]; **9:102 (2)–(3)** [6], [17]–[21], [26]
§ 275 (3) . . . . . **9:102 (2)–(3)** [7], [28]
§ 275 (4) . . . . . **9:103** [3]
§ 276 . . . . . **8:108** [13], [18]; **9:501 (1)** [2]
§ 276 (1) . . . . **8:108** [11]; **9:501 (1)** [3]; **19:201** [4]
§ 276 (2) . . . . . **8:108** [11]
§ 276 (3) . . . . . **4:118** [2]; **8:109** [3]
§ 278 . . . . **1:305** [9]; **Intro before Art 2:301** [10]; **Intro before Art 7:101** [11]; **7:106** [4]; **8:107** [2]–[3]; **9:501 (1)** [3]
§ 279 (4) . . . . . **7:101** [5]
§ 280 . . . . . **2:406** [13]; **8:103** [11]
§ 280 (1) . . . . . **Intro before Art 2:301** [13]; **4:103** [11]; **4:106** [4]; **4:117** [2]; **8:102** [6]; **8:108** [11]; **9:501 (1)** [2]–[3]; **9:503** [1]; **14:501** [5]; **15:105** [2]; **18:204** [9]; **19:202** [3]
§ 280 (1)1 . . . . . **19:201** [4]
§ 280 (1)2 . . . . . **19:201** [4]
§ 280 (2) . . . . . **8:102** [6]
§ 281 . . . . . **9:501 (1)** [10]; **9:502** [13]
§ 281 (1) . . . . . **9:102 (1)** [18]
§ 281 (2) . . . . . **9:102 (1)** [18]
§ 283 . . . . . **8:103** [11]; **9:102 (1)** [18]
§ 285 . . . . . **2:302** [18]; **9:102 (2)–(3)** [16]; **9:502** [13]
§ 286 . . . . . **8:102** [6]; **9:508-1** [1]
§ 286 (2) . . . . . **9:301** [9]; **9:501 (1)** [10]
§ 286 (4) . . . . . **9:508-2 (1)** [4]
§ 287 . . . . . **9:501 (1)** [3]; **9:502** [15]
§ 288 . . . . . **9:508** [3]
§ 288 (1) . . . . . **9:508-2 (1)** [4], [6]
§ 288 (2) . . . . . **9:508-2 (5)** [2]
§ 288 (4) . . . . . **9:508-2 (6)** [1]
§ 289 . . . . . **9:508-4** [2]
§§ 293–304 . . . . . **1:202** [1]
§ 300 . . . . . **19:302** [3]
§ 300 (1) . . . . . **7:110** [8]; **8:101** [15]
§ 300 (2) . . . . . **18:301** [9]; **18:304** [4], [6]
§ 301 (1) . . . . . **7:110** [8]
§ 303 . . . . . **7:110** [8]
§ 304 . . . . . **7:110** [4], [8]; **18:201** [6]
§§ 305–310 . . . . . **Intro before Art 6:201** [15]
§ 305 . . . . . **6:201** [10]
§ 305 (2) . . . . . **2:104** [3]
§ 305 (3) . . . . . **2:104** [3]
§ 305b . . . . . **2:106** [4]; **5:104** [1]
§ 305c . . . . . **2:104** [8]
§ 305c (2) . . . . . **2:402** [22]; **5:103** [2]
§ 306 . . . . . **4:102** [2], [4]; **18:306** [4]–[5]
§ 307 . . . . **Intro before Art 2:301** [13]; **4:102** [3]; **6:201** [10]
§§ 307–309 . . . . . **2:106** [4]
§ 307 (1) . . . . . **4:118** [3]; **6:201** [13]; **6:204** [1]
§ 307 (2) . . . . . **4:118** [3]; **6:201** [13]
§ 307 (3) . . . . . **6:201** [13]
§ 308 . . . . . **6:201** [13]; **6:202** [7]
§ 309 . . . . . **6:201** [13]; **6:202** [3], [8], [10], [12]; **6:205** [5]
§ 310 (1) . . . . . **6:203** [10]; **6:205** [5]
§ 310 (3) . . . . . **2:402** [22]
§ 311 (1) . . . . . **19:201** [7]
§ 311 (2) . . . . . **Intro before Art 2:301** [13]; **Intro before Art 2:401** [10]; **2:406** [13]; **4:106** [4]; **4:117** [2]; **15:105** [2]
§ 311a . . . . . **8:103** [11]
§ 311a (1) . . . . . **9:102 (2)–(3)** [14]
§ 311a (2) . . . . . **4:102** [3]
§ 311b (1) . . . . . **2:101 (2)** [13]
§ 311c . . . . . **18:202** [3]
§ 312 (2) . . . . . **2:403** [6]
§ 312a (2) . . . . . **2:403** [15]
§ 312e . . . . . **2:403** [15]
§ 312f (1) . . . . . **2:404** [6]
§ 312k (2) . . . . . **2:402** [30]
§ 313 . . . . . **1:201** [31]; **2:101 (2)** [11]; **6:111** [10], [12], [14], [20]
§ 313 (1) . . . . . **4:105** [7]
§ 313 (2) . . . . . **4:103** [18]; **6:111** [12]; **9:305** [4]
§ 313 (3) . . . . . **6:109** [5]; **6:111** [12]; **Intro before Art 9:305** [8]; **9:305** [4]
§ 314 . . . . . **1:201** [31]; **6:109** [5]; **6:112** [14]
§ 314 (1) . . . . . **6:112** [10], [13]–[15]

§ 314 (3) . . . . . **9:303** [15]
§ 315 . . . . . **6:104** [4]; **6:105** [3]
§ 316 . . . . . **6:104** [4], [10]
§§ 317–319 . . . . . **6:104** [4]; **6:106** [10]
§ 317 (1) . . . . . **6:106** [6]
§ 319 . . . . . **6:105** [3]
§ 319 (1) . . . . . **6:106** [6]
§ 319 (2) . . . . . **6:106** [6]
§ 320 . . . . . **7:104** [3]; **9:201** [10], [14]
§ 320 (1) . . . . . **10:103** [2]
§ 320 (2) . . . . . **9:201** [15]
§ 321 . . . . . **8:105** [7]
§ 321 (1) . . . . . **8:105** [3]
§ 321 (2) . . . . . **8:105** [4]; **9:304** [2]
§ 322 (1) . . . . . **9:201** [17]
§ 322 (2) . . . . . **4:103** [11]
§ 323 . . . . **8:103** [11]; **Intro before Art 9:301** [8]; **9:301** [2]; **9:501 (1)** [10]
§§ 323–326 . . . . . **9:301** [8]
§ 323 (1) . . . . . **8:103** [11]; **8:104** [6]; **9:301** [7]; **9:303** [10]
§ 323 (2) . . . . . **Intro before Art 9:301** [8]; **9:301** [8]; **9:304** [7]
§ 323 (3) . . . . . **9:304** [2]
§ 323 (4) . . . . . **9:304** [2], [7], [9]
§ 323 (5) . . . . . **8:103** [11]; **8:103** [15]; **8:106** [8]; **9:301** [7], [25], [56]; **9:302** [2]–[4], [12]; **9:304** [8]; **Intro before Art 9:305** [11]
§ 323 (6) . . . . . **8:101** [15]; **9:301** [53]
§ 324 . . . . . **8:103** [11], [18]; **9:301** [2], [7]
§ 325 . . . . . **8:102** [3], [7]
§ 325 (5) . . . . . **8:103** [13]
§ 326 . . . . . **8:103** [11]
§ 326 (1) . . . . . **8:103** [11]; **9:301** [8], [38]; **9:304** [2]
§ 326 (2) . . . . . **9:101** [18]; **9:301** [53]
§ 326 (5) . . . . . **9:301** [2], [8], [41]
§ 328 . . . . . **6:110** [6]
§§ 328–335 . . . . . **2:107** [3]; **6:110** [5]
§ 328 (1) . . . . . **6:110** [15], [33]
§ 328 (2) . . . . . **6:110** [24], [46]
§ 335 . . . . . **6:110** [56]
§§ 339–345 . . . . . **9:509** [8]
§ 340 (1) . . . . . **9:509** [15]
§ 340 (2) . . . . . **9:509** [13]
§ 341 (1) . . . . . **9:509** [15]
§ 341 (3) . . . . . **9:509** [15]
§ 343 . . . . . **9:509** [17]
§ 343 (1) . . . . . **9:509** [18]–[20]
§ 343 (2) . . . . . **9:509** [9]
§ 346 . . . . . **9:306** [3], [48]
§§ 346–348 . . . . . **Intro before Art 9:305** [11], [25]; **9:305** [2]
§ 346 (1) . . . . . **9:102 (1) App** [9]
§ 346 (2) . . . . . **9:306** [34]
§ 346 (3)(2) . . . . . **9:306** [29]
§ 348 . . . . . **9:306** [15]
§ 349 . . . . . **9:303** [4]
§ 350 . . . . . **9:303** [15]
§§ 357–361 . . . . . **Intro before Art 9:305** [25]
§ 362 (2) . . . . . **Intro before Art 7:101** [12]
§ 364 . . . . . **Intro before Art 7:101** [13]
§ 364 (2) . . . . . **7:107** [3]
§ 366 . . . . . **13:105** [3]
§ 366 (1) . . . . . **7:109** [3]
§ 366 (2) . . . . . **7:109** [4], [8]
§ 367 . . . . . **13:105** [3]
§ 367 (1) . . . . . **7:109** [3]
§ 367 (2) . . . . . **7:109** [14]
§ 369 (1) . . . . . **7:112** [3]
§ 372 . . . . . **7:110** [4], [9]; **7:111** [3]; **8:101** [15]
§ 381 . . . . . **7:110** [4]
§ 383 . . . . . **7:110** [4]
§ 386 . . . . . **7:110** [4]
§ 387 . . . . . **13:101** [4], [9], [14], [19]; **13:104** [6]
§ 388 . . . . . **13:104** [6]; **14:503** [1]
§ 389 . . . . . **13:101** [4]; **13:106** [4]; **14:503** [1]
§ 391 (1) . . . . . **13:101** [9]
§ 391 (2) . . . . . **13:101** [9]
§ 392 . . . . . **13:101** [26]
§ 393 . . . . . **13:107** [14]
§ 394 . . . . . **13:107** [9]
§ 395 . . . . . **13:107** [24]
§ 396 (1) . . . . . **13:105** [3], [5]
§ 396 (2) . . . . . **13:105** [3]
§ 397 . . . . . **12:101** [8]
§ 398 . . . . . **Intro before Art 11:101** [15]
§ 399 . . . . . **11:301** [4]; **11:302** [2]
§ 400 . . . . . **Intro before Art 11:101** [24]
§ 401 . . . . . **11:201** [1]
§ 405 . . . . . **6:103** [6]; **11:301** [4]
§ 406 . . . . . **11:307** [5]
§ 407 . . . . . **Intro before Art 11:101** [15]; **11:303** [8]
§ 409 . . . . . **11:303** [16], [22]
§ 410 . . . . . **11:303** [22]
§ 412 . . . . . **11:101** [13]
§ 413 . . . . . **11:101** [3]
§ 414 . . . . . **12:101** [8]
§§ 414–419 . . . . . **Intro before Art 12:101** [9]
§ 415 . . . . . **12:101** [5]
§ 417 (1) . . . . . **12:102** [2], [5]
§ 417 (2) . . . . . **12:102** [4]
§ 418 (1) . . . . . **12:102** [8]
§ 420 . . . . . **Intro before Art 10:101** [4]; **10:103** [1]; **Intro before Art 10:201** [2]; **10:202** [1]
§ 421 . . . . **Intro before Art 10:101** [5]; **10:101** [10]
§ 422 . . . . . **10:107** [1]
§ 422 (1) . . . . . **10:107** [2]; **10:205** [4], [7]
§ 422 (2) . . . . . **10:111** [5]; **10:205** [12]
§ 423 . . . . . **10:108** [2]–[4]

§ 425 . . . . . **10:101** [11]–[12]; **10:107** [3]; **10:109** [2]–[3]; **10:110** [2]; **10:205** [3], [9]–[10]
§ 426 . . . . . **10:105** [1]
§ 426 (1) . . . . . **10:105** [2]; **10:106** [13]
§ 426 (2) . . . . . **10:106** [6], [12]
§ 427 . . . . . **10:102** [2]–[3]
§ 428 . . . . . **10:201** [6]
§§ 428–430 . . . . . **Intro before Art 10:201** [6]
§ 429 (2) . . . . . **10:205** [5]
§ 429 (3) . . . . . **10:201** [4]; **10:205** [3]–[4], [7], [9]–[10], [12]
§ 430 . . . . . **10:204** [1]–[2]
§ 431 . . . . . **10:101** [1]
§ 432 . . . . . **Intro before Art 10:201** [4]
§ 432 (1) . . . . . **Intro before Art 10:201** [4]; **10:203** [1]
§ 432 (2) . . . . . **10:203** [2]
§ 433 . . . . . **18:101** [15]
§ 433 (1) . . . . . **Intro before Art 18:201** [7]; **18:202** [2]; **18:203 (1)** [5]; **18:204** [9]; **18:303** [17]
§ 433 (2) . . . . . **1:202** [1]; **9:101** [5]; **18:201** [6]
§ 433 (3) . . . . . **18:203 (1)** [7]
§§ 433–479 . . . . . **Intro before Art 2:101** [4]
§ 434 . . . . . **18:301** [4]
§ 434 (1) . . . . . **6:101** [8]; **18:203 (2)** [11]
§ 434 (2) . . . . . **19.101** [5], [21]
§ 434 (3) . . . . . **9:302** [2]; **18:203 (1)** [7]
§ 435 . . . . . **18:203 (1)** [8]
§ 437 . . . . . **8:101** [3]; **9:102 (1)** [21]; **9:301** [2]; **9:401** [1], [11]; **9:503** [1]; **18:204** [9]
§ 438 . . . . . **9:201** [14]
§ 438 (1) . . . . . **14:501** [5]; **18:204** [9]
§ 438 (2) . . . . . **14:501** [5]
§ 438 (4) . . . . . **14:501** [5]
§ 438 (5) . . . . . **14:501** [5]
§ 439 (3) . . . . . **9:102 (1) App** [3]; **9:102 (2)–(3)** [21]
§ 439 (4) . . . . . **9:102 (1) App** [9]
§ 440 (2) . . . . . **18:204** [8]
§ 441 . . . . . **9:401** [1], [6], [11]
§ 441 (1) . . . . . **18:203 (3)** [3]
§ 441 (3) . . . . . **9:401** [15]
§ 442 (1) . . . . . **18:203 (3)** [3]
§ 442 (2) . . . . . **18:203 (3)** [9]–[10]
§ 446 . . . . . **18:301** [9], [11]; **18:303** [9], [16]; **18:304** [6]
§ 447 . . . . . **18.301** [9]; **18:305** [8]; **18:307** [3]–[5], [7]
§ 447 (1) . . . . . **18:305** [6]
§ 448 . . . . . **7:112** [3]
§ 453 . . . . . **11:204** [2]; **18:101** [15], [24]
§ 453 (1) . . . . . **18:101** [15]
§ 459 . . . . . **18:204** [10]
§ 462 . . . . . **18:204** [8]
§ 463 . . . . . **6:101** [9]; **18:204** [8]
§§ 474–479 . . . . . **18:101** [15]
§ 474 (2) . . . . . **18:307** [7]–[8]
§ 474 (4) . . . . . **18:307** [8]
§ 476a . . . . . **9:102 (1)** [32]
§ 477 . . . . . **9:401** [5]; **18:204** [8]
§ 480 . . . . . **9:401** [6]; **18:101** [11]; **18:201** [3]
§ 490 (2) . . . . . **7:103** [3]
§ 494 (1) . . . . . **2:406** [4]
§ 512 . . . . . **Intro before Art 2:501** [35]
§ 518 . . . . . **2:101 (2)** [11]
§ 518 (1) . . . . . **2:101 (2)** [13]
§ 536 . . . . . **9:401** [6], [11]
§ 536a (1) . . . . . **9:501 (1)** [3]
§ 556b (1) . . . . . **7:104** [9]
§ 566 . . . . . **12:201** [4]
§ 594 (2) . . . . . **6:109** [5]
§ 594a (1) . . . . . **6:109** [5]
§ 611 . . . . . **7:106** [4]; **19:201** [4]
§ 612 . . . . . **6:104** [4]
§ 612 (2) . . . . . **2:402** [21]
§ 613 . . . . . **7:106** [4]; **11:302** [3]
§ 613a . . . . . **12:201** [4]
§ 620 (2) . . . . . **6:109** [5]
§ 622 . . . . . **6:109** [5]
§ 623 (2) . . . . . **19:301** [4], [7]
§ 624 . . . . . **6:109** [4]–[5]
§ 631 . . . . . **6:104** [4]; **19:201** [4]
§ 631 (1) . . . . . **19:301** [4]
§ 632 (2) . . . . . **2:402** [21]
§ 633 . . . . . **8:104** [6]
§ 633 (2) . . . . . **19:201** [4]
§ 634 . . . . . **8:101** [3]; **8:104** [6]; **9:102 (1)** [21]; **9:301** [2]; **9:401** [6]
§ 638 . . . . . **9:401** [6]
§ 640 (1) . . . . . **19:301** [4]
§ 641 (1) . . . . . **19:301** [4], [8]
§ 642 (1) . . . . . **19:302** [3]
§ 644 . . . . . **19:301** [4]
§ 644 (1) . . . . . **19:301** [4]
§ 645 . . . . . **19:301** [4]
§ 645 (1) . . . . . **19:204** [3]
§ 649 . . . . . **9:101** [18]
§ 649 (1) . . . . . **19:204** [3]
§ 649 (2) . . . . . **19:204** [3]
§ 650 . . . . . **19:204** [3]
§ 650g (4) . . . . . **19:203** [3]; **19:301** [4]
§ 651 . . . . . **18:101** [15]
§ 651d . . . . . **9:401** [6], [11]
§ 651f (2) . . . . . **9:501 (2)** [7]
§ 651g (3) . . . . . **14:304** [2]
§ 653 . . . . . **6:104** [4]
§ 657 . . . . . **2:107** [3]
§ 672 . . . . . **3:209** [4]
§ 674 . . . . . **3:209** [2]
§ 683 . . . . . **7:106** [11]

§ 684 . . . . . **7:106** [11]
§ 687 (2) . . . . . **9:502** [13]
§ 723 (1) . . . . . **6:109** [5]
§ 729 . . . . . **3:209** [2]
§ 766 . . . . . **2:101 (2)** [11], [13]
§ 812 . . . . . **Intro before Art 9:305** [31]; **9:306** [48]
§§ 812–822 . . . . **Intro before Art 9:305** [11], [25]
§ 812 (1) . . . . . **7:106** [11]; **9:306** [3]
§ 816 (2) . . . . . **11:101** [6]; **11:203** [1]
§ 817 . . . . . **15:104** [3]
§ 817 (2) . . . . . **Intro before Art 9:305** [31]
§ 823 (1) . . . . . **19:202** [3]
§ 823 (2) . . . . . **4:117** [2]
§ 823 I . . . . . **2:302** [6]
§ 826 . . . . . **1:201** [26]; **4:117** [2]
§ 831 . . . . . **Intro before Art 2:301** [10]; **8:107** [2]
§ 831 (1) . . . . . **8:107** [3]
§ 840 . . . . . **Intro before Art 10:101** [10]
§ 852 (2) . . . . . **14:304** [2]
§ 852 II . . . . . **14:304** [4]
§ 868 . . . . . **18:303** [17]
§ 870 . . . . . **18:303** [11], [17]
§ 929 . . . . . **18:303** [9], [16]
§ 931 . . . . . **18:303** [11], [17]
§ 932 . . . . . **1:201** [5]
§§ 937–945 . . . . . **Intro before Art 14:101** [3]
§ 985 . . . . . **9:306** [3]
§§ 985–986 . . . . . **Intro before Art 9:305** [25]
§§ 1273–1296 . . . . . **11:101** [10]
§ 2084 . . . . . **5:106** [4]
§ 2297 . . . . . **5:106** [4]

Bürgerliches Gesetzbuch (Civil Code) 2018 reform
§ 346 (1) . . . . . **9:102 (1) App** [9]
§ 439 (4) . . . . . **9:102 (2)–(3)** [21]
§ 439 (5) . . . . . **9:102 (1) App** [9]
§§ 631–650 . . . . . **19.101** [3]
§ 648 . . . . . **9:101** [18]
§ 648a (5) . . . . . **9:101** [18]
§ 649 . . . . . **19:204** [3]
§§ 650a–650o . . . . . **19.101** [3]
§§ 650p–650t . . . . . **19.101** [3]
§§ 650u–650v . . . . . **19.101** [3]
§§ 651a–651m . . . . . **19.101** [3]

Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen (Standard Contract Terms Act) 1976
§ 5 . . . . . **5:103** [2]
§ 10 . . . . . **6:202** [2], [5]
§ 11 . . . . . **6:202** [8]
§ 11 (10) . . . . . **6:202** [8]

Handelsgesetzbuch (Commercial Code)
§ 253 (4) . . . . . **9:507** [6]
§ 346 . . . . . **1:105** [5]
§ 348 . . . . . **9:509** [18]
§ 352 . . . . . **9:508** [2]
§ 353 . . . . . **9:508-2 (1)** [6]; **9:508-4** [2]
§ 354a . . . . . **11:203** [3]; **11:301** [8]
§ 354a (1) . . . . . **11:301** [4]
§ 354a (2) . . . . . **11:301** [4]
§ 355 (1) . . . . . **9:508-4** [5]
§ 361 . . . . . **9:510** [2]
§§ 373–381 . . . . . **18:101** [11]
§ 376 . . . . . **9:102 (2)–(3)** [44]
§ 376 (2) . . . . . **9:507** [3], [6], [8]
§ 376 (3) . . . . . **9:506** [3]; **9:507** [7]
§ 377 . . . . . **9:102 (2)–(3)** [44]
§ 377 (4) . . . . . **1:107** [21]
§ 383 . . . . . **3:102** [3]
§ 392 (2) . . . . . **3:302** [6]
§ 448 . . . . . **18:303** [17]
§ 475g . . . . . **18:303** [17]
§ 524 . . . . . **18:303** [17]

GREECE

Astikos Kodikas (Civil Code)
Art 140–157 . . . . . **Intro before 4:101** [2]
Art 144 . . . . . **4:105** [4]
Art 154 . . . . . **4:112** [3]
Art 157 . . . . . **4:113** [4]
Art 173 . . . . . **Intro before Art 5:101** [11]
Art 174 . . . . . **Intro before Art 15:101** [1]; **15:102** [3], [21]
Art 178 . . . . . **Intro before Art 15:101** [1]; **15:101** [4]
Art 179 . . . . . **4:109** [3]; **15:101** [5]–[6]
Art 181 . . . . . **4:116** [4]; **15:103** [2]
Art 185 . . . . . **2:202** [7]
Art 197 . . . . . **Intro before Art 2:301** [11]
Art 198 . . . . . **Intro before Art 2:301** [11]
Art 200 . . . . . **Intro before Art 5:101** [11]
Art 247 . . . . . **14:101** [2]
Art 251 . . . . . **14:203** [2]
Art 253 . . . . . **14:203** [5]
Art 255 . . . . . **14:303** [1]
Art 255–259 . . . . . **Intro before Art 14:301** [1]
Art 256 . . . . . **14:305** [1], [4]
Art 258 . . . . . **14:305** [1]
Art 258 (2) . . . . . **14:305** [1], [3]
Art 259 . . . . . **14:306** [1]
Art 260 . . . . . **14:401** [1]–[2]
Art 261 . . . . . **14:302 (1)–(2)** [1]
Art 262 . . . . . **14:302 (3)** [1]
Art 263 (2) . . . . . **14:302 (1)–(2)** [3]
Art 264 . . . . . **14:302 (3)** [1]; **14:402** [1]
Art 268 . . . . . **14:202** [1]; **14:203** [4]
Art 269 . . . . . **14:302 (3)** [1]
Art 272 (1) . . . . . **14:501** [1]

Art 272 (2) . . . . . **14:501** [1]
Art 273 . . . . . **14:501** [7]
Art 274 . . . . . **14:502** [1]
Art 275 . . . . . **14:601** [1]
Art 281 . . . . . **1:201** [33]
Art 288 . . . . . **1:201** [33]
Art 297 . . . . . **9:502** [4]
Art 330 . . . . . **9:501 (1)** [2]
Art 336 . . . . . **9:501 (1)** [2]
Art 374 (2) . . . . . **10:103** [2]
Art 388 . . . . . **1:201** [33]
Art 409 . . . . . **9:509** [17]
Art 441 . . . . . **14:503** [1]
Art 443 . . . . . **14:503** [1]
Art 471 . . . . . **12:101** [5], [8]
Art 473 . . . . . **12:102** [2], [5]
Art 475 . . . . . **12:102** [8]
Art 480 . . . . . **Intro before Art 10:101** [4]; **10:102** [2]; **10:103** [1]; **Intro before Art 10:201** [2]; **10:202** [1]
Art 482 . . . . . **10:101** [10]
Art 483 (1) . . . . . **10:107** [1]–[2]
Art 483 (2) . . . . . **10:111** [5]
Art 484 . . . . . **10:108** [2]–[3]
Art 486 . . . . . **10:101** [11]–[12]; **10:107** [3]; **10:109** [3]; **10:110** [2]
Art 487 . . . . . **10:105** [1]
Art 487 (1) . . . . . **10:105** [2]
Art 487 (2) . . . . . **10:106** [13]
Art 488 . . . . . **10:106** [6]
Art 489–493 . . . . . **Intro before Art 10:201** [6]
Art 490 . . . . . **10:201** [6]
Art 491 (1) . . . . . **10:205** [4]–[5], [7]
Art 492 . . . . . **10:205** [3], [9]–[10]
Art 493 . . . . . **10:204** [1]–[2]
Art 494 . . . . . **Intro before Art 10:101** [6]; **10:104** [1]
Art 495 . . . . . **Intro before Art 10:201** [4]
Art 495 (2) . . . . . **10:203** [2]
Art 536 . . . . . **18:203 (3)** [3]
Art 537 . . . . . **18:203 (3)** [3]
Art 907 . . . . . **15:104** [3], [6]
Art 927 . . . . . **10:105** [3]

ITALY

Codice civile (Civil Code) 1865

Art 1132 . . . . . **5:106** [4]
Art 1136 . . . . . **5:105** [3]
Art 1225 . . . . . **9:501 (1)** [2]
Art 1226 . . . . . **9:501 (1)** [2]
Art 1454 . . . . . **6:104** [6]
Art 1491 . . . . . **18:203 (3)** [3]
Art 1498 . . . . . **18:203 (1)** [4]
Art 2105–2147 . . . . . **Intro before Art 14:101** [3]
Art 2135 . . . . . **Intro before Art 14:101** [5]

Codice civile (Civil Code)

Art 1–16 . . . . . **Intro before Art 1:101** [2]
Art 12 . . . . . **1:106 (1)** [4]; **1:106 (2)** [2], [5]
Art 634 . . . . . **15:103** [2]
Art 782 . . . . . **2:101 (2)** [13]
Art 808 . . . . . **2:104** [4]
Art 1135 . . . . . **1:303** [19]
Art 1137 . . . . . **Intro before Art 2:401** [10]
Art 1144 . . . . . **4:113** [2]
Art 1158–1167 . . . . . **Intro before Art 14:101** [3]
Art 1173–1320 . . . . . **Intro before Art 1:101** [2]
Art 1175 . . . . . **1:201** [41]
Art 1176 . . . . . **2:104** [4]; **6:108** [4]; **8:108** [15], [18]; **9:501 (1)** [2]
Art 1178 . . . . **6:108** [2]; **Intro before Art 7:101** [16]
Art 1180 . . . . . **12:101** [8]
Art 1180 (1) . . . . . **7:106** [4]
Art 1180 (2) . . . . . **7:106** [4]
Art 1181 . . . . . **Intro before Art 7:101** [14]
Art 1182 (1) . . . . . **7:101** [4]
Art 1182 (2) . . . . . **7:101** [4]
Art 1182 (3) . . . . . **7:101** [5]
Art 1182 (4) . . . . . **7:101** [4]
Art 1183 . . . . . **7:102** [3]
Art 1184 . . . . . **7:103** [3]
Art 1187 . . . . . **1:304 (1)** [7]
Art 1188 (2) . . . . . **Intro before Art 7:101** [12]
Art 1193 (1) . . . . . **7:109** [3]
Art 1193 (2) . . . . . **7:109** [4]
Art 1194 . . . . . **7:109** [3]
Art 1195 . . . . . **7:109** [3]
Art 1196 . . . . . **7:112** [3]
Art 1197 (1) . . . . . **Intro before Art 7:101** [13]; **7:107** [3]
Art 1199 (1) . . . . . **7:112** [3]
Art 1203 (3) . . . . . **10:106** [6]
Art 1205 . . . . . **10:106** [12]
Art 1206–1217 . . . . . **7:110** [4]
Art 1207 (1) . . . . . **18:304** [6]
Art 1207 (2) . . . . . **7:110** [4]
Art 1210 . . . . . **7:110** [4], [9]; **7:111** [3]
Art 1211 . . . . . **7:110** [4]
Art 1215 . . . . . **7:110** [4]
Art 1218 . . . **8:103** [10]; **8:108** [15]; **9:501 (1)** [2]; **9:508-1** [1]
Art 1219 . . . . . **9:501 (1)** [10]
Art 1223 . . . . . **9:502** [8]; **9:503** [2]
Art 1223–1229 . . . . . **Intro before Art 9:501** [3]
Art 1224 . . . . . **9:508** [2]; **9:508-1** [1]; **9:508-2 (1)** [6]
Art 1224 (2) . . . . . **9:508-2 (6)** [1]
Art 1225 . . . . . **9:503** [1], [5], [12]
Art 1226 . . . . . **9:502** [15]
Art 1227 . . . . . **9:504** [17]

Art 1227 (1) . . . . . **9:504** [3], [13]
Art 1227 (2) . . . . . **9:504** [13]
Art 1228 . . . . . **1:305** [9]; **Intro before Art 7:101** [11]; **8:107** [3]
Art 1229 . . . . . **2:104** [4]; **4:118** [2]–[3]
Art 1229 (1) . . . . . **4:118** [2]; **8:109** [3]
Art 1242 (2) . . . . . **14:503** [1]
Art 1248 (1) . . . . . **11:307** [5]
Art 1256 . . . . . **8:103** [10]; **8:108** [15]; **9:102 (2)–(3)** [2]; **9:103** [2]; **9:501 (1)** [2]
Art 1259 . . . . . **9:502** [13]
Art 1260 (1) . . . . . **11:302** [2]
Art 1260 (2) . . . . . **11:301** [4]
Art 1263 (1) . . . . . **11:201** [1]
Art 1264 . . . . . **11:303** [6]
Art 1265 . . . . . **11:303** [6]
Art 1272 . . . . . **12:101** [8]
Art 1272–1276 . . . . . **Intro before Art 12:101** [10]
Art 1272 (1) . . . . . **12:101** [13]
Art 1272 (2) . . . . . **12:102** [2], [4]
Art 1272 (3) . . . . . **12:102** [5]
Art 1273 (3) . . . . . **12:101** [13]
Art 1273 (4) . . . . . **12:102** [2]
Art 1274 . . . . . **12:101** [14]
Art 1275 . . . . . **12:102** [8]
Art 1277–1281 . . . . . **9:510** [2]
Art 1277 (1) . . . . . **7:107** [3]
Art 1278 . . . . . **7:108** [10]
Art 1279 . . . . . **7:108** [3]
Art 1283 . . . . . **9:508-4** [2], [4]–[5]
Art 1284 . . . . . **9:508** [2]
Art 1286 (1) . . . . . **7:105** [3]
Art 1286 (2) . . . . . **7:105** [7]
Art 1288 . . . . . **7:105** [8]
Art 1288–1290 . . . . . **7:105** [3]
Art 1289 . . . . . **7:105** [8]
Art 1290 . . . . . **7:105** [8]
Art 1292 . . . . . **Intro before Art 10:101** [5]; **10:107** [1]; **10:201** [4]; **10:205** [4]
Art 1292–1310 . . . . . **Intro before Art 10:201** [6]
Art 1294 . . . . . **10:102** [2], [6]
Art 1296 . . . . . **10:201** [6]
Art 1297 (1) . . . . . **10:111** [2]
Art 1297 (2) . . . . . **10:205** [11]
Art 1298 . . . . . **10:201** [4]; **10:204** [1]
Art 1298–1299 . . . . . **10:105** [1]
Art 1298 (1) . . . . . **10:105** [2]
Art 1298 (2) . . . . . **10:105** [2]; **10:204** [2]
Art 1299 (1) . . . . . **10:106** [2]
Art 1299 (2) . . . . . **10:106** [13]
Art 1299 (3) . . . . . **10:106** [13]
Art 1300 (2) . . . . . **10:205** [7]
Art 1301 (1) . . . . . **10:108** [2]–[4]
Art 1301 (2) . . . . . **10:205** [7]
Art 1302 (1) . . . . . **10:111** [5]
Art 1302 (2) . . . . . **10:205** [12]
Art 1303 (1) . . . . . **10:107** [3]
Art 1303 (2) . . . . . **10:205** [5]
Art 1306 . . . . . **10:203** [2]
Art 1306 (1) . . . . . **10:109** [2]; **10:205** [9]
Art 1306 (2) . . . . . **10:109** [3]; **10:205** [9]
Art 1307 . . . . . **10:101** [11]
Art 1308 (1) . . . . . **10:101** [12]
Art 1308 (2) . . . . . **10:205** [3]
Art 1310 (1) . . . . . **10:110** [2]; **10:205** [10]
Art 1310 (2) . . . . . **10:110** [4]; **10:205** [10]
Art 1310 (3) . . . . . **10:110** [4]; **10:205** [10]
Art 1311–1313 . . . . . **10:108** [8]
Art 1314 . . . . . **Intro before Art 10:101** [4]; **Intro before Art 10:201** [2]
Art 1316 . . . . . **Intro before Art 10:201** [5]
Art 1316–1320 . . . . . **Intro before Art 10:201** [4]
Art 1317 . . . . . **10:203** [2]
Art 1319 . . . . . **Intro before Art 10:201** [4]
Art 1320 . . . . . **10:203** [2]
Art 1321 . . . . . **2:101 (1)** [11]
Art 1322 (1) . . . . . **1:102** [4]
Art 1324 . . . . . **1:107** [4], [8]; **2:107** [3]
Art 1325 . . . . . **Intro before Art 2:101** [2]; **2:101 (2)** [4]
Art 1326 . . . . . **2:104** [4]
Art 1326–1336 . . . . . **2:101 (1)** [5]
Art 1326–1342 . . . . . **Intro before Art 2:101** [4]
Art 1326 (1) . . . . . **1:303** [19]; **2:205** [7]
Art 1326 (2) . . . . . **2:206** [5]
Art 1326 (3) . . . . . **2:207** [1]
Art 1326 (4) . . . . . **2:204** [7]
Art 1326 (5) . . . . . **2:204** [2]; **2:208** [2]–[3]
Art 1327 . . . . . **2:205** [9]
Art 1327 (1) . . . . . **2:205** [9]
Art 1328 . . . . . **2:202** [6], [19]; **2:205** [3]
Art 1329 . . . . . **2:202** [6]
Art 1333 . . . . . **2:204** [13]
Art 1334 . . . . . **1:303** [13], [19]–[20]; **2:202** [19]
Art 1335 . . . . . **2:205** [3], [7]
Art 1336 . . . . . **2:201** [8], [10]
Art 1336 (2) . . . . . **2:202** [17]
Art 1337 . . . . . **1:201** [41]; **2:207** [2]; **Intro before Art 2:301** [13]; **4:106** [3]
Art 1338 . . . . . **Intro before Art 2:301** [13]; **4:106** [3]–[4]; **15:105** [2]
Art 1341 . . . **2:104** [4]; **Intro before Art 6:201** [1]
Art 1341 (1) . . . . . **2:104** [4]
Art 1341 (2) . . . . . **2:104** [4]
Art 1342 . . . . . **5:104** [1]
Art 1343 . . . . . **2:101 (1)** [19]; **Intro before Art 15:101** [1]–[2]; **15:101** [4]; **15:102** [3], [21]

Art 1344 . . . . . **Intro before Art 15:101** [2]
Art 1345 . . . . . **Intro before Art 15:101** [2]; **15:102** [13]
Art 1346 . . . . . **2:103** [4]; **4:102** [2]; **Intro before Art 15:101** [2]; **15:102** [10]; **18:306** [4]
Art 1350 (1) . . . . . **2:101 (2)** [13]
Art 1352 . . . . . **2:106** [4]
Art 1354 (1) . . . . . **15:103** [2]
Art 1359 . . . . . **Intro before Art 16:101** [15]
Art 1362 . . . . . **4:104** [3]
Art 1362–1371 . . . . . **Intro before Art 5:101** [11]
Art 1363 . . . . . **5:105** [3]
Art 1366 . . . . . **1:201** [41]; **5:102** [5]
Art 1367 . . . . . **5:106** [4]
Art 1370 . . . . . **2:104** [4]; **5:103** [3]
Art 1373 . . . . . **2:104** [4]
Art 1374 . . . . . **6:102** [5], [10]
Art 1375 . . . . . **1:201** [41]
Art 1376 . . . . . **18:303** [15]
Art 1378 . . . . . **18:302** [7]; **18:304** [6]; **18:305** [8]
Art 1382 . . . . . **9:509** [13]
Art 1382–1384 . . . . . **9:509** [8]
Art 1382 (1) . . . . . **9:509** [12]–[13]
Art 1382 (2) . . . . . **9:509** [11]
Art 1383 . . . . . **9:509** [15]
Art 1384 . . . . . **9:509** [17]–[18]
Art 1388 . . . . . **Intro before Art 3:101** [6]; **3:102** [2]
Art 1390 . . . . . **1:305** [4], [7]–[8]
Art 1391 . . . . . **1:305** [7]
Art 1392 . . . . . **3:201** [4]
Art 1394 . . . . . **3:205** [2]–[5]
Art 1395 . . . . . **3:205** [2]
Art 1398 . . . . . **3:204** [1]
Art 1399 (2) . . . . . **3:208** [2]
Art 1399 (3) . . . . . **3:208** [1]
Art 1405 . . . . . **3:102** [4]
Art 1406 . . . . . **12:201** [6]
Art 1406–1410 . . . . . **12:201** [4]
Art 1407 (1) . . . . . **12:201** [6]
Art 1408 (1) . . . . . **12:201** [7]
Art 1408 (2) . . . . . **12:201** [7]
Art 1409 . . . . . **12:201** [8]
Art 1411 (1) . . . . . **6:110** [6]
Art 1414 . . . . . **6:103** [4]
Art 1418 . . . . . **4:102** [2]; **15:102** [3]; **18:306** [4]
Art 1418 (1) . . . . . **15:102** [21]
Art 1418 (2) . . . . . **Intro before Art 15:101** [2]; **15:102** [13], [21]
Art 1419 . . . . . **4:116** [2]–[4]
Art 1419 (1) . . . . . **15:103** [2]
Art 1427–1440 . . . . . **Intro before 4:101** [2]
Art 1428 . . . . . **4:103** [5]
Art 1429 . . . . . **4:103** [5]
Art 1431 . . . . . **4:103** [5]
Art 1432 . . . . . **4:105** [4], [6]–[7]
Art 1433 . . . . . **4:104** [4]
Art 1434 . . . . . **4:111** [3]
Art 1435 . . . . . **4:108** [8]
Art 1437 . . . . . **4:109** [3]
Art 1439 . . . . . **4:111** [3], [5]
Art 1439 (1) . . . . . **4:107** [8]
Art 1440 . . . . . **4:107** [8]
Art 1441 . . . . . **4:112** [2]
Art 1441–1446 . . . . . **4:112** [3]
Art 1442 (1) . . . . . **4:113** [2]
Art 1444 . . . . . **4:114** [2], [6]
Art 1448 . . . . . **4:109** [3]
Art 1453 . . . . . **8:103** [10]; **9:102 (1)** [14]; **Intro before Art 9:301** [8]; **9:303** [5]
Art 1453 (1) . . . . . **8:102** [3]
Art 1453 (2) . . . . . **8:102** [13]; **9:303** [13]
Art 1454 . . . . . **8:103** [10]; **9:301** [10], [47]; **9:303** [5]
Art 1454 (3) . . . . . **9:303** [9]
Art 1455 . . . . . **8:103** [10]; **9:301** [5]
Art 1460 . . . . . **7:104** [3]; **9:201** [10]
Art 1460 (1) . . . . . **7:104** [3]
Art 1460 (2) . . . . . **9:201** [14]
Art 1461 . . . . . **2:104** [4]; **8:105** [3]
Art 1462 . . . . . **2:104** [4]; **4:118** [3]
Art 1462 (1) . . . . . **4:118** [2]
Art 1463 . . . . . **8:103** [10]; **9:301** [38]
Art 1464 . . . . . **9:302** [3]–[4]
Art 1465 (1) . . . . . **18:303** [15]; **18:304** [6]
Art 1465 (3) . . . . . **18:302** [7]
Art 1467 . . . . . **1:201** [41]; **6:111** [15], [17], [22]
Art 1469 . . . . . **6:201** [19]; **6:202** [4]
Art 1470 . . . . . **18:202** [2]
Art 1470–1547 . . . . . **Intro before Art 2:101** [4]
Art 1474 . . . . . **6:104** [6]
Art 1474 (1) . . . . . **18:201** [4]
Art 1474 (3) . . . . . **18:201** [4]
Art 1476 . . . . . **18:202** [2]
Art 1477 (3) . . . . . **18:202** [3]
Art 1478–1486 . . . . . **18:203 (1)** [8]
Art 1481 . . . . . **8:105** [3]
Art 1482 . . . . . **8:105** [3]
Art 1483 . . . . . **18:204** [7]
Art 1490 . . . . . **18:203 (1)** [4]
Art 1490 (1) . . . . . **18:203 (2)** [11]
Art 1490 (2) . . . . . **8:109** [3]
Art 1492 . . . . . **18:204** [7]
Art 1492 (1) . . . . . **9:401** [1]
Art 1492 (3) . . . . . **9:301** [52]
Art 1495 . . . . . **18:204** [7]
Art 1497 (1) . . . . . **18:203 (2)** [11]
Art 1498 . . . . . **18:201** [6]
Art 1498 (2) . . . . . **7:101** [5]; **7:102** [8]
Art 1498 (3) . . . . . **7:101** [5]
Art 1510 (1) . . . . . **7:101** [4]
Art 1515 . . . . . **9:506** [3]

Art 1515 (3) . . . . . **9:507** [6]
Art 1516 . . . . . **9:506** [3]
Art 1518 . . . . . **9:507** [3]
Art 1518 (1) . . . . . **9:507** [7]–[9]
Art 1522 . . . . . **18:203 (2)** [9]
Art 1529 . . . . . **18:306** [4]
Art 1529 (1) . . . . . **18:306** [4]
Art 1529 (2) . . . . . **18:306** [4]
Art 1555 . . . . . **18:201** [3]
Art 1559 . . . . . **19:204** [3]
Art 1562 . . . . . **18:301** [11]
Art 1565 . . . . . **8:105** [3]
Art 1579 . . . . . **8:109** [3]
Art 1647 . . . . . **19:301** [4]
Art 1655 . . . . . **19:302** [3]
Art 1656 . . . . . **7:106** [4]
Art 1657 . . . . . **6:104** [6]
Art 1658 . . . . . **19:302** [3]
Art 1660 . . . . . **19:204** [3]; **19:301** [12]
Art 1661 . . . . . **6:105** [2]
Art 1665 (5) . . . . . **19:301** [4]
Art 1671 . . . . . **9:101** [18]
Art 1705 . . . . . **3:102** [1]
Art 1705 (2) . . . . . **3:302** [6]
Art 1709 . . . . . **6:104** [6]
Art 1728 (1) . . . . . **3:209** [4]
Art 1731–1736 . . . . . **3:102** [3]
Art 1901 . . . . . **8:105** [3]
Art 1961 (3) . . . . . **7:110** [4]
Art 1987 . . . . . **2:107** [3]
Art 1989 . . . . . **2:107** [3]
Art 2035 . . . . . **15:104** [3], [6]
Art 2055 . . . . . **Intro before Art 10:101** [10]
Art 2055 (2) . . . . . **10:105** [3]
Art 2058 . . . . . **9:502** [4]
Art 2059 . . . . . **9:501 (2)** [2]
Art 2227 . . . . . **9:101** [18]
Art 2233 . . . . . **6:104** [6]
Art 2931 . . . . . **9:102 (1)** [14]; **9:102 (2)–(3)** [28]
Art 2934 . . . . . **14:101** [2], [4]
Art 2934–2969 . . . . . **Intro before Art 14:101** [3]
Art 2934 (1) . . . . . **14:501** [1]
Art 2935 . . . . . **14:203** [2]
Art 2936 . . . . . **14:601** [1]
Art 2938 . . . . . **14:501** [1]
Art 2940 . . . . . **14:501** [1]
Art 2941 . . . . . **Intro before Art 14:301** [1]; **14:305** [1], [4]
Art 2942 . . . . . **14:303** [1]; **14:305** [1], [3]
Art 2943 . . . . . **14:302 (1)–(2)** [1]; **14:302 (3)** [1]
Art 2943 (1) . . . . . **14:402** [1]
Art 2943 (2) . . . . . **14:302 (1)–(2)** [4]
Art 2943 (4) . . . . . **14:302 (3)** [1]
Art 2944 . . . . . **14:401** [1]
Art 2945 . . . . . **14:401** [1]
Art 2947 . . . . . **Intro before Art 14:101** [9]
Art 2953 . . . . . **14:202** [1]; **14:203** [4]
Art 2963 . . . . . **1:304 (1)** [7]; **1:304 (3)** [2], [5]
Art 2963 (3) . . . . . **1:304 (2)** [5]
Art 2963 (4) . . . . . **1:304 (3)** [6]
Art 2964–2969 . . . . . **14:101** [8]

Codice del consumo (Consumer Code)
Art 33 (2) . . . . . **6:202** [4]
Art 47 (2) . . . . . **2:403** [6]
Art 53 (1) . . . . . **2:404** [4]
Art 54 (1) . . . . . **7:102-1** [2]

Codice di commercio (Commercial Code) 1882
Art 35 (1) . . . . . **2:206** [5]; **2:207** [1]
Art 35 (2) . . . . . **2:205** [9]
Art 35 (3) . . . . . **2:202** [6]
Art 36 . . . . . **2:204** [2]

LUXEMBOURG

Code civil
Art 1153-1 . . . . . **7:108** [3]
Art 1157 . . . . . **5:106** [4]
Art 1161 . . . . . **5:105** [3]
Art 1644 . . . . . **9:401** [1], [15]

MALTA

Civil Code
Art 2107–2160 . . . . . **Intro before Art 14:101** [3]

NETHERLANDS

Burgerlijk Wetboek (Civil Code) 1838
Art 1286 . . . . . **9:508** [2]
Art 1343 . . . . . **7:109** [3]
Art 1359 . . . . . **4:111** [3]
Art 1364 . . . . . **4:111** [3]
Art 1378 . . . . . **5:101** [12]
Art 1380 . . . . . **5:106** [4]
Art 1384 . . . . . **5:105** [3]
Art 1495 . . . . . **18:303** [16]
Art 1496 . . . . . **18:303** [16]
Art 1591 . . . . . **6:104** [6]
Art 1983–2030 . . . . . **Intro before Art 14:101** [3]
Art 2004 . . . . . **Intro before Art 14:101** [5]

Burgerlijk Wetboek (Civil Code)
Art 3:11 . . . . . **1:201** [5]
Art 3:12 . . . . . **1:302** [4]
Art 3:13 . . . . . **9:102 (2)–(3)** [41]
Art 3:33 . . . . . **1:107** [9]; **2:101 (1)** [11]
Art 3:35 . . . . . **4:104** [4]
Art 3:37 . . . . . **1:303** [13], [15]
Art 3:37 (1) . . . . . **1:303** [15]; **2:101 (2)** [4]
Art 3:37 (2) . . . . . **1:303** [15]
Art 3:37 (3) . . . . . **1:303** [19], [30]
Art 3:38 (2) . . . . . **Intro before Art 16:101** [14]
Art 3:40 . . . . . **4:118** [2]; **Intro before Art 15:101** [1]–[2]

Art 3:40 (1) . . . . . **15:101** [4]
Art 3:40 (2) . . . . . **15:102** [3], [21], [23]
Art 3:40 (3) . . . . . **15:102** [21]
Art 3:41 . . . . . **4:116** [2], [4]; **15:103** [2]
Art 3:44 . . . . . **Intro before 4:101** [2]
Art 3:44 (2) . . . . . **4:108** [8]
Art 3:44 (3) . . . . . **4:107** [4]
Art 3:44 (4) . . . . . **4:104** [3]
Art 3:44 (5) . . . . . **4:111** [3], [5]
Art 3:49 . . . . . **4:112** [3]
Art 3:50 (2) . . . . . **4:112** [3]
Art 3:52 (1)(c) . . . . . **4:113** [2]
Art 3:55 (1) . . . . . **4:114** [2]
Art 3:59 . . . . . **1:107** [9]
Art 3:60 . . . . . **Intro before Art 3:101** [6]
Art 3:61 (2) . . . . . **3:201** [9]
Art 3:62 . . . . . **3:201** [4]
Art 3:66 (1) . . . . . **3:102** [2]
Art 3:66 (2) . . . . . **1:305** [4], [7]–[8]
Art 3:67 (2) . . . . . **3:102** [4]
Art 3:68 . . . . . **3:205** [2], [5]
Art 3:69 (3) . . . . . **3:208** [2]
Art 3:69 (4) . . . . . **3:208** [1]
Art 3:70 . . . . . **3:204** [1]
Art 3:73 . . . . . **3:209** [4]
Art 3:76 . . . . . **3:209** [2]
Art 3:82 (2) . . . . . **11:301** [4]
Art 3:83 . . . . . **Intro before Art 11:101** [11]; **11:102** [1]
Art 3:83 (2) . . . . . **11:301** [4]
Art 3:83 (3) . . . . . **11:101** [10]
Art 3:84 . . . . . **11:101** [10]; **11:102** [15]
Art 3:94 . . . . . **11:303** [8]
Art 3:94 (1) . . . . . **11:303** [6]
Art 3:99–3:106 . . . . . **Intro before Art 14:101** [3]
Art 3:166–3:171 . . . . **Intro before Art 10:201** [5]; **10:201** [10]
Art 3:170 . . . . . **10:203** [2]
Art 3:171 . . . . . **Intro before Art 10:201** [4]; **10:203** [2]
Art 3:237 . . . . . **11:101** [10]
Art 3:260 (3) . . . . . **3:201** [4]
Art 3:296 . . . . . **9:102 (1)** [14]
Art 3:299 . . . . . **9:102 (2)–(3)** [39]
Art 3:303 . . . . . **9:102 (2)–(3)** [28]
Art 3:306 . . . . . **14:101** [2]
Art 3:306–3:325 . . . . . **14:101** [4]
Art 3:306–3:326 . . . . . **Intro before Art 14:101** [3]
Art 3:309 . . . . . **14:301** [1]
Art 3:310 . . . . . **Intro before Art 14:101** [9]; **14:307** [2]
Art 3:310 (1) . . . . . **14:301** [1]
Art 3:310 (5) . . . . . **14:307** [2]
Art 3:311 . . . . . **14:301** [1]
Art 3:316 . . . . . **14:302 (1)–(2)** [1]; **14:302 (3)** [1]
Art 3:316 (1) . . . . . **14:302 (3)** [1]
Art 3:316 (2) . . . . . **14:302 (1)–(2)** [3]
Art 3:316 (3) . . . . . **14:302 (3)** [1]
Art 3:318 . . . . . **14:401** [1]
Art 3:320 . . . . . **Intro before Art 14:301** [1]
Art 3:321 . . . . . **14:305** [1]
Art 3:321 (1)(a) . . . . . **14:305** [4]
Art 3:322 . . . . . **14:601** [1]
Art 3:322 (1) . . . . . **14:501** [1]
Art 3:323 . . . . . **14:502** [1]
Art 3:324 . . . . . **14:202** [1]–[2]
Art 3:324 (1) . . . . . **14:203** [4]
Art 3:325 (2)(c) . . . . . **14:402** [1]
Art 6:2 . . . . . **Intro before Art 1:101** [7]; **1:201** [73]; **8:106** [3]; **9:102 (2)–(3)** [20]; **14:303** [1]
Art 6:2 (2) . . . . . **1:201** [33]
Art 6:6 (1) . . . . . **Intro before Art 10:101** [4]; **10:102** [2]; **10:103** [1]
Art 6:6 (2) . . . . . **Intro before Art 10:101** [5]; **10:101** [1]
Art 6:7 (2) . . . . . **10:107** [1]–[2]
Art 6:9 . . . . . **10:108** [2]
Art 6:9 (1) . . . . . **10:108** [2]
Art 6:10 . . . . . **10:105** [1]
Art 6:10 (2) . . . . . **10:106** [2]–[3]
Art 6:10 (3) . . . . . **10:106** [4]
Art 6:11 . . . . . **10:111** [3]
Art 6:11 (1) . . . . . **10:111** [4]
Art 6:11 (2) . . . . . **10:108** [3]; **10:111** [3]
Art 6:11 (3) . . . . . **10:110** [4]
Art 6:12 . . . . . **10:106** [6]
Art 6:13 . . . . . **10:106** [13]; **10:201** [10]
Art 6:13 (2) . . . . . **10:106** [13]
Art 6:14 . . . . . **10:108** [3]–[4]
Art 6:15 . . . . . **Intro before Art 10:201** [5]; **10:203** [2]
Art 6:15 (1) . . . . . **Intro before Art 10:201** [2]; **10:202** [1]
Art 6:15 (2) . . . . . **Intro before Art 10:201** [4]
Art 6:17 (2) . . . . . **7:105** [3]
Art 6:18 . . . . . **7:105** [7]
Art 6:19 (1) . . . . . **7:105** [3]
Art 6:20 . . . . . **7:105** [3]
Art 6:20 (1) . . . . . **7:105** [8]
Art 6:28 . . . . . **Intro before Art 7:101** [16]
Art 6:29 . . . . . **Intro before Art 7:101** [14]
Art 6:30 . . . . . **12:101** [8]
Art 6:30 (2) . . . . . **7:106** [4]
Art 6:30 (1) . . . . . **7:106** [4]
Art 6:31 . . . . . **Intro before Art 7:101** [10]
Art 6:32 . . . . . **Intro before Art 7:101** [12]
Art 6:37 . . . . . **9:506** [4]–[5]; **11:303** [22]
Art 6:38 . . . . . **7:102** [3]; **9:506** [4]
Art 6:39 (1) . . . . . **7:103** [3]
Art 6:41 (a) . . . . . **7:101** [4]
Art 6:41 (b) . . . . . **7:101** [4]

Art 6:44 (1) . . . . . **7:109** [3]
Art 6:44 (2) . . . . . **7:109** [14]
Art 6:45 . . . . . **Intro before Art 7:101** [13]
Art 6:46 (1) . . . . . **7:107** [3]
Art 6:47 (1) . . . . . **7:112** [3]
Art 6:47 (2) . . . . . **7:112** [3]
Art 6:52 (1) . . . . . **9:201** [10]
Art 6:56 . . . . . **14:501** [7]
Art 6:58–6:73 . . . . . **7:110** [4]
Art 6:64 . . . . . **7:110** [8]
Art 6:66 . . . . . **7:110** [4], [9]; **7:111** [3]
Art 6:74 . . . . . **9:501 (1)** [6]
Art 6:75 . . . . . **9:501 (1)** [6]
Art 6:76 . . . . . **1:305** [9]; **Intro before Art 7:101** [11]; **8:107** [3]
Art 6:80 . . . . . **9:304** [2]
Art 6:80 (1) . . . . . **9:304** [4], [8]
Art 6:80 (1)(b) . . . . . **9:304** [7]
Art 6:80 (1)(c) . . . . . **8:105** [4]; **9:304** [7], [9]
Art 6:82 (1) . . . . . **9:301** [10]
Art 6:83 (1) . . . . . **9:301** [10]
Art 6:86 . . . . . **8:104** [7]
Art 6:88 . . . . . **9:301** [49]; **9:303** [15]
Art 6:89 . . . . . **9:102 (2)–(3)** [44]; **9:303** [15]
Art 6:90 . . . . . **7:110** [8]
Art 6:91 . . . . . **9:509** [6]
Art 6:91–94 . . . . . **9:509** [8]
Art 6:92 (1) . . . . . **9:509** [15]
Art 6:92 (2) . . . . . **9:509** [13]
Art 6:92 (3) . . . . . **9:509** [10]
Art 6:92 (4) . . . . . **9:509** [13]
Art 6:94 (1) . . . . . **9:509** [17], [19], [20]
Art 6:94 (2) . . . . . **9:509** [20]
Art 6:94 (3) . . . . . **9:509** [18]
Art 6:95 . . . . . **9:501 (2)** [2]
Art 6:95–6:110 . . . . . **Intro before Art 9:501** [3]
Art 6:96 . . . . . **9:501 (1)** [14]
Art 6:96 (1) . . . . . **9:502** [8]
Art 6:96 (2)(a) . . . . . **9:505** [20]
Art 6:97 . . . . . **9:502** [15]; **9:506** [4]; **9:507** [3]
Art 6:98 . . . . . **9:503** [8]; **9:504** [5]
Art 6:100 . . . . . **9:502** [10]
Art 6:101 . . . . . **10:105** [3]
Art 6:101 (1) . . . . . **9:504** [9], [13], [16]–[17], [20]
Art 6:102 . . . . . **Intro before Art 10:101** [9]
Art 6:102 (1) . . . . . **Intro before Art 10:101** [10]; **10:105** [3]
Art 6:103 . . . . . **9:502** [4]
Art 6:104 . . . . . **9:502** [13]
Art 6:105 . . . . . **9:501 (2)** [10]
Art 6:106 . . . . . **9:501 (2)** [7]
Art 6:114 . . . . . **7:107** [3]
Art 6:116 . . . . . **11:306** [2]
Art 6:117 . . . . . **7:101** [5]; **11:306** [5]
Art 6:119 . . . . . **9:508-2 (1)** [6]
Art 6:119 (2) . . . . . **9:508-4** [3]
Art 6:119a . . . . . **9:508-3** [4], [6]
Art 6:119a (3) . . . . . **9:508-4** [3]
Art 6:120 . . . . . **9:508** [3]
Art 6:120 (2) . . . . . **9:508** [3], [6]
Art 6:121 (2) . . . . . **7:108** [3]
Art 6:123–6:126 . . . . . **9:510** [2]
Art 6:124 . . . . . **7:108** [3], [10]
Art 6:125 (1) . . . . . **7:108** [10]
Art 6:126 . . . . . **4:117** [2]; **7:108** [3]
Art 6:127 (1) . . . . . **14:503** [1]
Art 6:129 . . . . . **14:503** [1]
Art 6:130 . . . . . **3:302** [6]
Art 6:131 . . . . . **14:503** [1]
Art 6:131 (1) . . . . . **14:503** [1]
Art 6:142 . . . . . **11:201** [1]
Art 6:143 (2) . . . . . **7:109** [4]
Art 6:145 . . . . . **3:302** [6]
Art 6:155 . . . . . **12:101** [5], [9]
Art 6:155–6:157 . . . . **Intro before Art 12:101** [10]
Art 6:156 (1) . . . . . **12:101** [5]
Art 6:156 (2) . . . . . **12:101** [6]
Art 6:157 . . . . . **12:102** [2], [8]
Art 6:157 (2) . . . . . **12:102** [9]
Art 6:159 . . . . . **12:201** [4]
Art 6:159 (1) . . . . . **12:201** [6]
Art 6:159 (3) . . . . . **12:201** [8]
Art 6:170 . . . . . **8:107** [3]
Art 6:193f (b) . . . . . **2:406** [10]
Art 6:193j (1) . . . . . **2:402** [30]
Art 6:193j (3) . . . . . **2:406** [10]
Art 6:211 . . . . . **15:104** [3]
Art 6:211 (1) . . . . . **9:306** [11]
Art 6:211 (2) . . . . . **15:104** [5]
Art 6:216 . . . . . **1:107** [8]–[9]
Art 6:217–6:226 . . . . . **2:101 (1)** [5]
Art 6:219 . . . . . **2:202** [15]
Art 6:221 . . . . . **2:203** [4]
Art 6:221 (1) . . . . . **2:206** [2]
Art 6:223 (1) **2:207**
Art 6:225 . . . . . **2:208** [3]; **2:209** [5]
Art 6:228 . . . . . **Intro before 4:101** [2]; **4:103** [6]
Art 6:228 (1) . . . . . **2:406** [10]; **4:103** [19]–[20]
Art 6:228 (1)(a) . . . . . **4:103** [19]
Art 6:228 (1)(b) . . . . . **4:103** [11]
Art 6:228 (1)(c) . . . . . **4:103** [17], [19]
Art 6:230 . . . . . **4:105** [5], [7]
Art 6:230 (1) . . . . . **4:105** [4]
Art 6:230h (2)(a) . . . . . **2:403** [6]
Art 6:231–6:248 . . . . . **9:508-3** [4]
Art 6:232 . . . . . **6:204** [1]
Art 6:235 . . . . . **6:201** [4]
Art 6:248 . . . . . **1:102** [4]; **6:102** [5], [10], [16]; **8:106** [3]; **8:109** [3]
Art 6:248 (2) . . . . **1:201** [33]; **9:102 (2)–(3)** [45]
Art 6:253–256 . . . . . **6:110** [31]
Art 6:253 (1) . . . . . **6:110** [27], [33], [37]

Art 6:253 (2) . . . . . **6:110** [45]
Art 6:254 (1) . . . . . **6:110** [34]
Art 6:257 . . . . . **6:110** [37]
Art 6:262 . . . . . **7:104** [3]
Art 6:262 (1) . . . . . **9:201** [10]
Art 6:262 (2) . . . . . **9:201** [15]
Art 6:263 (1) . . . . . **8:105** [3], [7]
Art 6:263 (2) . . . . . **9:201** [15]
Art 6:265 . . . . . **8:106** [3]; **Intro before Art 9:301** [8]; **9:303** [10]; **9:401** [6], [9]
Art 6:265 (1) . . . . . **9:301** [5]; **9:302** [3]–[4]
Art 6:265 (2) . . . . . **9:301** [10], [40]
Art 6:266 . . . . . **8:101** [15]; **9:301** [53]
Art 6:267 . . . . . **9:303** [5]; **9:507** [7]
Art 6:270 . . . . . **9:401** [15]
Art 6:277 . . . . . **8:102** [3]
Art 6:279 . . . . . **6:110** [34]
Art 6:6116 (1) . . . . . **7:101** [5]
Art 7:1 . . . . . **18:202** [2]
Art 7:2 . . . . . **Intro before Art 2:501** [14]
Art 7:4 . . . . . **6:104** [6]
Art 7:9 (1) . . . . . **18:202** [2], [3]
Art 7:10 . . . . . **18:303** [16]
Art 7:11 . . . . . **18:307** [6]
Art 7:11 (2) . . . . . **18:307** [8]
Art 7:15 . . . . . **18:203 (1)** [8]
Art 7:16 . . . . . **18:203 (1)** [8]
Art 7:17 (1) . . . . . **18:203 (1)** [4]–[5]
Art 7:17 (2) . . . . . **18:203 (2)** [11]
Art 7:17 (3) . . . . . **18:203 (1)** [7]
Art 7:17 (4) . . . . . **18:203 (2)** [9]
Art 7:17 (5) . . . . . **18:203 (3)** [3]
Art 7:23 . . . . . **4:119** [2]
Art 7:23 (1) . . . . . **14:501** [5]
Art 7:23 (2) . . . . . **14:501** [5]
Art 7:26 (2) . . . . . **7:102** [8]
Art 7:30 . . . . . **7:110** [4]
Art 7:36 . . . . . **9:507** [6]
Art 7:36 (1) . . . . . **9:507** [3], [7]
Art 7:36 (2) . . . . . **9:507** [8]
Art 7:37 . . . . . **9:506** [4]
Art 7:38 . . . . . **9:506** [4]; **9:507** [9]
Art 7:50 . . . . . **18:201** [3]
Art 7:401 . . . . . **19:201** [4]
Art 7:403 (2) . . . . . **19:203** [3]
Art 7:404 . . . . . **7:106** [4]
Art 7:405 . . . . . **19:301** [4]
Art 7:405 (2) . . . . . **19:301** [4], [7]
Art 7:406 (1) . . . . . **19:301** [4]
Art 7:408 (1) . . . . . **10:102** [2]
Art 7:416 (2) . . . . . **3:205** [2]
Art 7:417 (2) . . . . . **3:205** [2]
Art 7:419 . . . . . **3:302** [2]
Art 7:420 (1) . . . . . **3:302** [6]
Art 7:420 (2) . . . . . **3:302** [6]
Art 7:421 . . . . . **3:303** [2]
Art 7:752 (1) . . . . . **19:203** [3]
Art 7:752 (2) . . . . . **19:204** [3]
Art 7:753 (1) . . . . . **19:204** [3]; **19:301** [12]
Art 7:753 (3) . . . . . **19:204** [3]
Art 7:755 . . . . . **19:204** [3]
Art 7:764 (1) . . . . . **19:204** [3]
Art 7:764 (2) . . . . . **19:203** [3]; **19:204** [3]
Art 7:859 (1) . . . . . **2:101 (2)** [13]

NEW ZEALAND

Contract and Commercial Law Act 2017
Art 76–80 . . . . . **15:102** [28]; **15:104** [8]

Illegal Contract Act 1970
Art 7 . . . . . **15:102** [28]; **15:104** [8]

NORWAY

Forbrukerkjøpsloven (Consumer Sales Law) 2002
§ 7 . . . . . **18:307** [6]
§ 14 . . . . . **18:307** [6]
§ 14 (4) . . . . . **18:307** [8]

Kjøpsloven (Sale of Goods Act)
§ 7 (2) . . . . . **18:305** [8]
§ 7 (4) . . . . . **18:307** [6]
§ 9 (1) . . . . . **7:102** [3]
§ 13 . . . . . **18:307** [6]
§ 13 (1) . . . . . **18:303** [16]; **18:305** [8]
§ 15 . . . . . **18:306** [4]
§ 17 . . . . . **18:301** [10]
§ 20 . . . . . **18:301** [11]
§ 23 (3) . . . . . **9:102 (2)–(3)** [44]
§ 24 . . . . . **9:301** [49]; **9:303** [15]
§ 25 (1) . . . . . **9:301** [6]; **9:303** [4]
§ 34 (2) . . . . . **9:102 (2)–(3)** [24]
§ 36 . . . . . **8:104** [7]
§ 36 (3) . . . . . **8:104** [7]
§ 39 (1) . . . . . **9:301** [6]; **9:303** [4]
§ 49 (2) . . . . . **7:102** [8]
§ 49 (3) . . . . . **7:102** [8]
§ 62 . . . . . **9:304** [2]
§ 62 (2) . . . . . **9:304** [9]

POLAND

Kodeks cywilny (Civil Code)
Art 58 (1) . . . . . **15:102** [21]
Art 58 (3) . . . . . **15:103** [2]
Art 353 . . . . . **1:201** [51]
Art 357 . . . . . **Intro before Art 7:101** [16]
Art 358 §1 . . . . . **7:107** [3]; **7:108** [3]
Art 365 §1 . . . . . **7:105** [3]
Art 365 §3 . . . . . **7:105** [3]
Art 412 . . . . . **15:104** [4]
Art 451 §1 . . . . . **7:109** [3]
Art 451 §2 . . . . . **7:109** [3]

Art 451 §3 . . . . . **7:109** [4]
Art 457 . . . . . **7:103** [3]
Art 467 . . . . . **7:110** [4]
Art 470 . . . . . **7:110** [4]
Art 473 §2 . . . . . **8:109** [3]
Art 490 §1 . . . . . **8:105** [3]
Art 547 . . . . . **7:112** [3]
Art 548 . . . . . **18:303** [16]

PORTUGAL

Código civil (Civil Code)

Art 9 . . . . . **1:106** (**1**) [4]
Art 81 . . . . . **15:101** [4]
Art 219 . . . **Intro before Art 1:101** [7]; **2:101** (**2**) [4]
Art 224 . . . . . **1:303** [13]
Art 224 (1) . . . . . **1:303**; **1:303** [19], [27]
Art 224 (2) . . . . . **1:303** [30]
Art 227 . . . . . **Intro before Art 2:401** [10]
Art 227 (1) . . . . . **1:201** [33]
Art 230 . . . . . **2:202** [7]
Art 236 . . . . . **5:101** [10]
Art 240–247 . . . . . **Intro before 4:101** [2]
Art 242 (2) . . . . . **4:105** [7]
Art 247 . . . . . **4:103** [20]
Art 248 . . . . . **4:105** [4]–[5]
Art 254 (2) . . . . . **4:111** [5]
Art 255 (1) . . . . . **4:108** [8]
Art 262 (2) . . . . . **3:201** [4]
Art 271 . . . . . **15:103** [2]
Art 280–282 . . . . . **Intro before Art 15:101** [2]
Art 280 (1) . . . . . **15:101** [3]; **15:102** [10]
Art 280 (2) . . . . . **Intro before Art 15:101** [1]; **15:101** [4]
Art 281 . . . . . **Intro before Art 15:101** [1]; **15:101** [4]; **15:102** [13]
Art 282 . . . . . **4:109** [3]
Art 283 . . . . . **15:103** [10]
Art 288 . . . . . **4:114** [2]
Art 288 (4) . . . . . **4:114** [3]
Art 291 (1) . . . . . **4:112** [4]
Art 292 . . . . . **4:116** [2]–[4]; **15:103** [2]
Art 294 . . . . . **Intro before Art 15:101** [1]; **15:102** [3], [21]
Art 295 . . . . . **1:107** [15], [28]; **1:303** [13]
Art 298 . . . . . **14:101** [2]
Art 300 . . . . . **14:601** [1]
Art 300–327 . . . . . **Intro before Art 14:101** [3]
Art 303 . . . . . **14:501** [1]
Art 304 (1) . . . . . **14:501** [1]
Art 304 (2) . . . . . **14:501** [1]
Art 305–366 . . . . . **Intro before Art 14:101** [3]
Art 306 (1) . . . . . **14:203** [2]
Art 311 (1) . . . . . **14:202** [1]
Art 318–322 . . . . . **Intro before Art 14:301** [1]
Art 318 (a) . . . . . **14:305** [4]
Art 318 (b) . . . . . **14:305** [1]
Art 320 (1) . . . . . **14:305** [1], [3]
Art 321 (1) . . . . . **14:303** [1]
Art 322 . . . . . **14:306** [1]
Art 323 . . . . . **14:302** (**1**)–(**2**) [1]; **14:302** (**3**) [1]
Art 323 (1) . . . . . **14:402** [1]
Art 324 . . . . . **14:302** (**3**) [1]
Art 325 . . . . . **14:401** [1]
Art 325 (1) . . . . . **14:401** [2]
Art 325 (2) . . . . . **14:401** [2]
Art 326 . . . . . **14:401** [1]
Art 334 . . . . . **1:201** [33]
Art 397–873 . . . . . **Intro before Art 1:101** [2]
Art 405 . . . . **Intro before Art 1:101** [7]; **1:102** [4]
Art 424–427 . . . . . **12:201** [4]
Art 424 (1) . . . . . **12:201** [6]
Art 424 (2) . . . . . **12:201** [6]
Art 429 . . . . . **8:105** [3]
Art 430 . . . . . **14:501** [7]
Art 437 . . . . . **1:201** [33]
Art 444 (1) . . . . . **6:110** [27]
Art 497 (2) . . . . . **10:105** [3]
Art 507 (2) . . . . . **10:105** [3]
Art 512 . . . . . **Intro before Art 10:101** [5]; **10:201** [4]
Art 512–517 . . . . . **Intro before Art 10:201** [6]
Art 513 . . . . . **10:102** [2]; **10:201** [9]
Art 514 (1) . . . . . **10:111** [2]
Art 514 (2) . . . . . **10:205** [11]
Art 516 . . . . . **10:105** [1]–[2]; **10:204** [2]
Art 517–519 . . . . . **10:101** [10]
Art 520 . . . . . **10:101** [11]
Art 521 (1) . . . . . **10:110** [4]
Art 521 (2) . . . . . **10:110** [4]
Art 522 . . . . . **10:109** [3]
Art 523 . . . . . **10:107** [1]–[2]
Art 524 . . . . . **10:105** [1]; **10:106** [2]
Art 525 . . . . . **10:111** [3]–[4]
Art 525 (1) . . . . . **10:111** [3], [6]
Art 526 . . . . . **10:106** [13]
Art 527 . . . . . **10:108** [8]
Art 528–533 . . . . . **Intro before Art 10:201** [6]
Art 528 (1) . . . . . **10:201** [6]
Art 529 (1) . . . . . **10:205** [3]
Art 530 . . . . . **10:205** [10]
Art 530 (2) . . . . . **10:205** [10]
Art 531 . . . . . **10:205** [9]
Art 532 . . . . . **10:205** [4], [7]
Art 533 . . . . . **10:204** [1]
Art 534 . . . . . **Intro before Art 10:101** [4]; **10:103** [1]; **Intro before Art 10:201** [2]; **10:202** [1]
Art 535–537 . . . . . **Intro before Art 10:101** [6]; **10:104** [1]
Art 538 . . . . . **Intro before Art 10:201** [4]
Art 538 (1) . . . . . **Intro before Art 10:201** [4]
Art 539 . . . . . **10:203** [2]

Art 577 (1) . . . . . **11:302** [2]
Art 595 (1) . . . . . **12:101** [5]
Art 595 (1)(b) . . . . . **12:101** [8]
Art 628 (1) . . . . . **2:101** (**2**) [13]
Art 762 . . . . . **1:201** [33]
Art 763 . . . . . **Intro before Art 7:101** [14]
Art 767 (2) . . . . . **7:106** [4]
Art 772 . . . . . **7:101** [4]
Art 772 (1) . . . . . **7:101** [4]
Art 772 (2) . . . . . **7:101** [4]
Art 774 . . . . . **7:101** [5]
Art 775 . . . . . **7:101** [5]
Art 800 (1) . . . . . **8:107** [3]
Art 808 . . . . . **9:301** [9]
Art 813–816 . . . . . **7:110** [4]
Art 814 (1) . . . . . **7:110** [8]
Art 841 (1) . . . . . **7:110** [9]; **7:111** [3]
Art 841 (1)(b) . . . . . **7:111** [3]
Art 848 . . . . . **14:503** [1]
Art 850 . . . . . **14:503** [1]
Art 854 . . . . . **14:503** [1]
Art 864 (3) . . . . . **10:205** [7]
Art 869 (2) . . . . . **10:205** [5]
Art 875 . . . . . **2:101** (**2**) [13]
Art 883 . . . . . **18:201** [4]
Art 885 (2) . . . . . **7:101** [5]
Art 911 . . . . . **9:401** [1]
Art 913 . . . . . **9:401** [1]
Art 919 . . . . . **18:203** (**2**) [9]
Art 939 . . . . . **18:201** [3]
Art 1180–1184 . . . . . **3:102** [1]
Art 1222 . . . . . **9:401** [6]
Art 1262 . . . . . **Intro before Art 2:101** [4]
Art 1262 (2) . . . . . **2:205** [7]
Art 1288 . . . . . **2:402** [22]
Art 1297–1301 . . . . . **Intro before Art 14:101** [3]
Art 1445–1525 . . . . . **Intro before Art 2:101** [4]
Art 2721 (1) . . . . . **2:101** (**2**) [12]

Decreto-Lei n° 24/2014, de 14 de Fevereiro (Distance and Off-Premises Act)
Art 9 (1) . . . . . **2:404** [10]; **2:406** [4]

Lei n° 24/96 de 31 de Julho Estabelece o regime legal aplicável à defesa dos consumidores (Consumer Protection Act)
Art 12 . . . . . **18:203** (**3**) [5]
Art 12 (1) . . . . . **18:203** (**3**) [3]

ROMANIA

Codul civil (Civil Code) 2011
Art 1:274 . . . . . **18:303** [16]

SOUTH AFRICA

Consumer Protection Act 69 of 2008
s 52 (3)(b)(ii)(aa) . . . . . **6:204** [9]
s 52 (3)(b)(ii)(bb) . . . . . **6:204** [9]

Conventional Penalties Act 15 of 1962 . . . . . **9:509** [7], [21]
s 2 (1) . . . . . **9:509** [13]
s 3 . . . . . **9:509** [17]–[18]
s 4 . . . . . **9:509** [21]

Prescription Act 68 of 1969 . . . . . **Intro before Art 14:101** [3], [6]
s 10 (1) . . . . . **14:501** [1]
s 10 (3) . . . . . **14:501** [1]
s 11 (a)(ii) . . . . . **14:202** [1]
s 11 (d) . . . . . **14:201** [2]
s 12 . . . . . **14:203** [2]
s 12 (3) . . . . . **14:301** [1], [3]
s 13 . . . . . **Intro before Art 14:301** [1]
s 13 (1)(a) . . . . . **14:303** [1]; **14:305** [1]–[2]
s 13 (1)(c) . . . . . **14:305** [4]
s 14 (1) . . . . . **14:401** [1]–[2]
s 15 . . . . . **14:302** (**1**)–(**2**) [1]

SPAIN

Código civil (Civil Code)
Art 1 . . . . . **1:106** (**1**) [4]
Art 3 . . . . . **1:106** (**1**) [4]
Art 4 . . . . . **1:106** (**1**) [4]
Art 6 . . . . . **15:102** [21]
Art 7 . . . . . **1:201** [33]
Art 7 (1) . . . . . **Intro before Art 2:401** [10]
Art 609 . . . . . **18:303** [15]
Art 633 . . . . . **2:101** (**2**) [13]
Art 1097 . . . . . **18:202** [3]
Art 1102 . . . . . **4:118** [2]; **8:109** [3]
Art 1116 . . . . . **15:103** [2]
Art 1120 (1) . . . . . **9:305** [6]
Art 1123 (1) . . . . . **9:305** [6]
Art 1124 (1) . . . . . **9:305** [6]
Art 1124 (2) . . . . . **9:305** [6]
Art 1127 . . . . . **7:103** [3]
Art 1128 . . . . . **7:102** [3]
Art 1131 . . . . . **7:105** [3]
Art 1134 . . . . . **7:105** [8]
Art 1134–1136 . . . . . **7:105** [3]
Art 1137 (2) . . . . . **Intro before Art 10:101** [5]; **10:201** [4]
Art 1138 . . . . . **Intro before Art 10:101** [4]; **Intro before Art 10:201** [2]; **10:202** [1]
Art 1139 . . . . . **Intro before Art 10:101** [6]; **10:203** [2]
Art 1141–1143 . . . . . **Intro before Art 10:201** [6]
Art 1141 (1) . . . . . **10:205** [2]
Art 1141 (2) . . . . . **10:101** [12]
Art 1142 . . . . . **10:201** [6]
Art 1143 . . . . . **10:205** [4]–[5], [7]
Art 1143 (1) . . . . . **10:107** [1]–[3]; **10:108** [2]
Art 1143 (2) . . . . . **10:204** [1]–[2]

Art 1144 . . . . . **10:101** [10]
Art 1145 (1) . . . . . **10:107** [1]
Art 1145 (2) . . . . . **10:105** [1]; **10:106** [5]
Art 1145 (3) . . . . . **10:106** [13]
Art 1146 . . . . . **10:108** [3]
Art 1147 . . . . . **10:101** [11]
Art 1148 . . . . . **10:111** [2]
Art 1148 (2) . . . . . **10:111** [2]
Art 1150 . . . . . **Intro before Art 10:101** [6]; **10:104** [1]
Art 1160 . . . . . **Intro before Art 7:101** [10]
Art 1161 . . . . . **7:106** [4]
Art 1162 . . . . . **Intro before Art 7:101** [12]
Art 1166 . . . . . **Intro before Art 7:101** [13]
Art 1166 (1) . . . . . **7:107** [3]
Art 1167 . . . . . **Intro before Art 7:101** [16]
Art 1168 . . . . . **7:112** [3]
Art 1169 . . . . . **Intro before Art 7:101** [14]
Art 1170 . . . . . **7:107** [3]; **7:108** [3]
Art 1171 (1) . . . . . **7:101** [4]
Art 1171 (2) . . . . . **7:101** [4]
Art 1171 (3) . . . . . **7:101** [4]–[5]
Art 1172 (1) . . . . . **7:109** [3]
Art 1172 (2) . . . . . **7:109** [3]
Art 1173 . . . . . **7:109** [3]
Art 1174 . . . . . **7:109** [4]
Art 1176 . . . . . **7:110** [4]
Art 1179 . . . . . **7:110** [4]
Art 1188 . . . . . **5:103** [3]
Art 1198 (1) . . . . . **11:307** [5]
Art 1203–1208 . . . . . **Intro before Art 12:101** [7]
Art 1204 . . . . . **12:101** [13]
Art 1205 . . . . . **12:101** [5], [8]
Art 1206 . . . . . **12:101** [14]
Art 1208 . . . . . **12:101** [3]; **12:102** [6]
Art 1210 (3) . . . . . **10:106** [6]
Art 1213 . . . . . **10:106** [12]
Art 1255 . . . . . **Intro before Art 15:101** [1]; **15:101** [4]; **15:102** [3]
Art 1258 . . . . . **1:201** [33]; **5:101** [8]; **6:101** [8]; **6:102** [5], [10]; **19:302** [3]
Art 1262 . . . . . **1:303** [19]–[20]; **2:101 (1)** [5]
Art 1265 . . . . . **Intro before 4:101** [2]
Art 1266 . . . . . **1:103** [5]
Art 1267 . . . . . **4:108** [4]
Art 1269 . . . . . **4:107** [4]; **4:111** [4]
Art 1270 (2) . . . . . **4:107** [8]
Art 1271 . . . . . **Intro before Art 15:101** [2]
Art 1271 (3) . . . . . **Intro before Art 15:101** [1]; **15:101** [4]
Art 1272 . . . . . **4:102** [2]
Art 1275 . . . . . **Intro before Art 15:101** [2]; **15:102** [21]
Art 1275 (2) . . . . . **Intro before Art 15:101** [1]; **15:101** [4]; **15:102** [3]
Art 1278 . . . . . **2:101 (2)** [4]
Art 1280 (2) . . . . . **2:101 (2)** [12]
Art 1281–1289 . . . . . **Intro before Art 5:101** [11]
Art 1281 (1) . . . . . **5:101** [12]
Art 1281 (2) . . . . . **5:101** [12]
Art 1284 . . . . . **5:106** [4]
Art 1285 . . . . . **5:105** [3]
Art 1301 (1) . . . . . **4:113** [2]
Art 1301 (3) . . . . . **4:113** [2]
Art 1305 . . . . . **15:104** [3], [6]
Art 1306 . . . . . **15:104** [3], [6]
Art 1447 . . . . . **18:201** [4]
Art 1449 . . . . . **6:105** [2]
Art 1452 . . . . . **18:303** [15]
Art 1461 . . . . . **18:202** [2]
Art 1466 . . . . . **7:104** [3]
Art 1467 . . . . . **8:105** [3]
Art 1467 (4) . . . . . **4:109** [3]
Art 1475–1483 . . . . . **18:203 (1)** [8]
Art 1484 . . . . . **18:203 (2)** [12]; **18:203 (3)** [3]
Art 1500 . . . . . **7:104** [3]; **18:201** [6]
Art 1500 (2) . . . . . **7:101** [5]; **7:102** [8]
Art 1541 . . . . . **18:201** [3]
Art 1717 . . . . . **3:102** [1]–[2]
Art 1731 . . . . . **10:102** [2]
Art 1968 . . . . . **Intro before Art 14:101** [9]
Art 1974 . . . . . **10:110** [2]; **10:205** [10]

Código de comercio (Commercial Code)
Art 331 . . . . . **18:303** [15]

SWEDEN

Konsumentköplag (Consumer Sales Law)
§ 6 . . . . . **18:307** [6]
§ 8 (2) . . . . . **18:307** [6]

Köplag (Sale of Goods Act)
§ 6 . . . . . **7:101** [4]
§ 15 . . . . . **18:306** [4]
§ 17 . . . . . **18:301** [10]
§ 17 (1) . . . . . **18:203 (1)** [7]
§ 20 . . . . . **18:301** [11]
§ 23 (3) . . . . . **9:102 (2)–(3)** [44]
§ 24 . . . . . **9:301** [49]; **9:303** [15]
§ 25 (1) . . . . . **9:301** [6]; **9:303** [4]
§ 34 (2) . . . . . **9:102 (2)–(3)** [24]
§ 36 . . . . . **8:104** [7]
§ 36 (2) . . . . . **8:104** [7]
§ 37 . . . . . **9:401** [1]
§ 39 (1) . . . . . **9:301** [6]; **9:303** [4]
§ 62 . . . . . **9:304** [2], [9]

Lag 1915:218 om avtal och andra rättshandlingar på förmögenhetsrättens område (Contract Code)
s 6 (2) . . . . . **2:208** [3]–[4]
§ 36 . . . . . **Intro before Art 6:201** [3]; **6:201** [10]

SWITZERLAND

Obligationenrecht (Code of Obligations)

Art 2 (1) . . . . . **2:103** [8]
Art 2 (2) . . . . . **Intro before Art 5:101** [11]
Art 3–5 . . . . . **2:202** [7]
Art 5 (1) . . . . . **2:202** [9]
Art 5 (3) . . . . . **2:207** [2]
Art 6a . . . . . **2:204** [16]
Art 7 (2) . . . . . **2:201** [10]
Art 7 (3) . . . . . **2:201** [10]
Art 9 . . . . . **2:202** [19]
Art 9 (2) . . . . . **2:205** [6]
Art 10 . . . . . **1:303** [19]–[20]
Art 10 (1) . . . . . **2:205** [6]
Art 11 (1) . . . . . **2:101** (**2**) [4]
Art 16 . . . . . **2:204** [7]
Art 18 . . . . . **4:104** [3]
Art 18 (1) . . . . **Intro before Art 5:101** [11]; **5:101** [7]
Art 19 . . . . . **Intro before Art 15:101** [1]
Art 19 (1) . . . . . **1:102** [4], [20]
Art 19 (2) . . . . . **15:101** [4]
Art 20 . . . . . **4:102** [2]; **15:102** [3]
Art 20 (1) . . . . . **15:101** [3]; **15:102** [21]
Art 20 (2) . . . . . **4:116** [3]–[4]; **15:103** [2]
Art 21 . . . . . **4:109** [3]
Art 23 . . . . . **4:112** [2]
Art 24 . . . . . **4:103** [5]
Art 24 (1) . . . . . **4:104** [4]; **6:111** [13]
Art 26 . . . . . **4:104** [4]
Art 28 . . . . . **4:111** [3]
Art 28 (2) . . . . . **4:111** [5]
Art 29 . . . . . **4:111** [3]
Art 29 (2) . . . . . **4:111** [3]
Art 31 (1) . . . . . **4:112** [3]; **4:113** [2]
Art 31 (2) . . . . . **4:113** [4]
Art 32–40 . . . . . **3:205** [2]
Art 32 (1) . . . . . **Intro before Art 3:101** [6]; **3:102** [2]
Art 33 (3) . . . . . **3:201** [3]
Art 37 . . . . . **3:209** [2]
Art 38 (2) . . . . . **3:208** [1]
Art 39 . . . . . **3:204** [1]
Art 39 (2) . . . . . **3:204** [5]
Art 41–61 . . . . . **Intro before Art 9:501** [3]
Art 50 . . . . . **Intro before Art 10:101** [10]
Art 50–51 . . . . . **Intro before Art 10:101** [9]
Art 60 . . . . . **14:101** [2]; **14:307** [2]
Art 60 (1) . . . . . **14:301** [1]
Art 63 (2) . . . . . **14:501** [1]
Art 66 . . . . . **15:104** [3], [6]
Art 67 (1) . . . . . **14:301** [1]
Art 69 . . . . . **Intro before Art 7:101** [14]
Art 70 . . . . . **Intro before Art 10:201** [4]
Art 70 (1) . . . . . **Intro before Art 10:201** [4]
Art 70 (2) . . . . . **Intro before Art 10:101** [6]
Art 70 (3) . . . . . **Intro before Art 10:101** [6]
Art 71 . . . . . **Intro before Art 7:101** [16]
Art 71 (1) . . . . . **Intro before Art 7:101** [16]
Art 72 . . . . . **7:105** [3]
Art 74 (1) . . . . . **7:101** [4]
Art 74 (2) . . . . . **7:101** [4]
Art 74 (3) . . . . . **7:101** [11]
Art 75 . . . . . **1:304** (**1**) [7]; **7:102** [3]
Art 76–79 . . . . . **1:304** (**1**) [7]
Art 77 (1) . . . . . **1:304** (**3**) [2]; **1:304** (**3**) [5]–[6]
Art 78 (1) . . . . . **1:304** (**2**) [5]
Art 79 . . . . . **Intro before Art 9:305** [27]
Art 80 . . . . . **Intro before Art 9:305** [14]
Art 81 (1) . . . . . **7:103** [3]
Art 82 . . . . . **7:104** [3]
Art 84 (2) . . . . . **7:108** [3], [10]
Art 86 (1) . . . . . **7:109** [3]
Art 86 (2) . . . . . **7:109** [3]
Art 87 . . . . . **7:109** [4]
Art 91–96 . . . . . **7:110** [4]
Art 92 . . . . . **7:110** [9]; **7:111** [3]
Art 96 . . . . . **7:110** [9]; **7:111** [3]
Art 97 . . . . . **9:501** (**1**) [2]
Art 99 . . . . . **9:501** (**1**) [2]
Art 100 (1) . . . . . **8:109** [3]
Art 101 . . . . . **1:305** [9]
Art 107 . . . . . **9:301** [9]; **9:303** [10]
Art 107 (1) . . . . . **9:301** [7]
Art 108 . . . . . **9:301** [9]
Art 112 . . . . . **6:110** [6], [15]
Art 119 (2) . . . . . **9:301** [38]
Art 120 (3) . . . . . **14:503** [1]
Art 124 (1) . . . . . **14:503** [1]
Art 124 (2) . . . . . **14:503** [1]
Art 127 . . . . . **14:101** [2], [4]
Art 129 . . . . . **14:601** [1]
Art 130 (1) . . . . . **14:203** [2]
Art 133 . . . . . **14:502** [1]
Art 134 . . . . . **Intro before Art 14:301** [1]; **14:303** [1]; **14:305** [1], [4]
Art 135 . . . . . **14:302** (**1**)–(**2**) [1]; **14:302** (**3**) [1]; **14:401** [1]–[2]; **14:402** [1]
Art 136 . . . . . **10:205** [10]
Art 136 (1) . . . . . **10:110** [2]
Art 137 (2) . . . . . **14:202** [1]
Art 139 . . . . . **14:302** (**1**)–(**2**) [3]
Art 141 (2) . . . . . **10:110** [4]
Art 142 . . . . . **14:501** [1]
Art 143 . . . . . **Intro before Art 10:101** [5]; **10:102** [2]
Art 144 . . . . . **10:101** [10]
Art 145 (1) . . . . . **10:111** [2]
Art 145 (2) . . . . . **10:111** [4]
Art 146 . . . . . **10:110** [4]
Art 147 (1) . . . . . **10:107** [1]–[2]
Art 147 (2) . . . . . **10:108** [2]–[3]

Art 148 . . . . . **10:105** [1]
Art 148 (1) . . . . . **10:105** [2]
Art 148 (2) . . . . . **10:106** [2]
Art 148 (3) . . . . . **10:106** [13]
Art 149 . . . . . **10:106** [6]
Art 150 . . . . **Intro before Art 10:201** [6]; **10:201** [4]
Art 150 (1) . . . . . **10:201** [9]; **10:205** [4]
Art 150 (3) . . . . . **10:201** [6]
Art 151 . . . . . **Intro before Art 16:101** [1], [6]
Art 152 . . . . . **16:104** [4]
Art 154 . . . . . **Intro before Art 16:101** [6]
Art 155 . . . . . **16:101** [10]
Art 156 . . . . . **Intro before Art 16:101** [15]
Art 157 . . . . . **15:103** [2]
Art 163 (3) . . . . . **9:509** [17]
Art 164 (1) . . . . . **11:301** [4]; **11:302** [2]
Art 164 (2) . . . . . **11:301** [4]
Art 167 . . . . . **11:303** [8]
Art 169 (2) . . . . . **11:307** [5]
Art 170 (1) . . . . . **11:201** [1]
Art 175–183 . . . . . **Intro before Art 12:101** [10]
Art 176 (1) . . . . . **12:101** [8]
Art 176 (2) . . . . . **12:101** [5], [8]
Art 178 (1) . . . . . **12:102** [8]
Art 179 (1) . . . . . **12:102** [2]
Art 179 (2) . . . . . **12:102** [5]
Art 179 (3) . . . . . **12:102** [4]
Art 184 (1) . . . . . **18:202** [2]
Art 185 . . . . . **18:301** [11]
Art 185 (1) . . . . . **18:303** [15]
Art 188 . . . . . **7:112** [3]
Art 189 . . . . . **7:112** [3]
Art 190 (2) . . . . . **9:102 (2)–(3)** [44]
Art 197 (1) . . . . . **18:203 (1)** [4]; **18:203 (2)** [11]
Art 205 . . . . . **9:401** [15]
Art 211 (1) . . . . . **18:201** [6]
Art 212 (1) . . . . . **18:201** [4]
Art 216 (1) . . . . . **2:101 (2)** [13]
Art 222 . . . . . **18:203 (2)** [9]
Art 226a (2) . . . . . **2:502** [2]
Art 226a (3) . . . . . **2:502** [3]
Art 226c . . . . . **Intro before Art 2:501** [5]–[6]; **2:503** [1]; **2:504** [2]; **2:504 App** [3]; **2:506** [1]
Art 226c (1) . . . . . **2:503** [3], [9]
Art 226c (2) . . . . . **2:504 App** [15]
Art 226m (4) . . . . . **2:501 App II** [2]
Art 237 . . . . . **18:201** [3]
Art 243 (2) . . . . . **2:101 (2)** [13]
Art 261 (1) . . . . . **12:201** [4]
Art 308 . . . . . **10:102** [2]
Art 325 . . . . . **Intro before Art 11:101** [24]
Art 333 (1) . . . . . **12:201** [4]
Art 340a . . . . . **15:103** [10]
Art 363 . . . . . **19:201** [4]
Art 375 (1) . . . . . **19:204** [3]
Art 375 (2) . . . . . **19:204** [3]
Art 394 . . . . . **19:201** [4]
Art 401 (1) . . . . . **3:302** [6]
Art 401 (2) . . . . . **3:302** [6]
Art 401 (3) . . . . . **3:302** [6]
Art 403 . . . . . **10:102** [2]
Art 478 . . . . . **10:102** [2]
Art 493 (2) . . . . . **2:101 (2)** [13]
Art 493 (6) . . . . . **3:201** [4]
Art 544 (3) . . . . . **10:102** [2]

Zivilgesetzbuch (Civil Code)
Art 1 . . . . . **Intro before Art 1:101** [2]; **1:106 (1)** [4]; **1:201** [87]
Art 1–10 . . . . . **Intro before Art 1:101** [2]
Art 1 (2) . . . . . **1:106 (2)** [2]
Art 2 . . . . . **1:201** [32]–[33]; **1:201** [50]
Art 2 (1) . . . . . **Intro before Art 1:101** [2]; **1:201** [32]
Art 2 (2) . . . . . **1:201** [32]
Art 7 . . . . . **1:107** [8], [10]
Art 27 . . . . . **15:101** [5]
Art 714 (1) . . . . . **18:303** [15]

UNITED KINGDOM

Consumer Credit Act 1974
ss 67–73 . . . . . **Intro before Art 2:501** [5]
s 69 . . . . . **2:503** [1]
s 69 (1) . . . . . **2:505** [2]–[3]

Consumer Contracts (Information, Cancellation and Additional Charges) Regulations (SI 2013/3134)
reg 7 (4) . . . . . **2:403** [6]
reg 8 . . . . . **2:404** [4]
reg 9 (3) . . . . . **2:402** [29]; **2:403** [26]
reg 10 (5) . . . . . **2:403** [26]
reg 12 (2) . . . . . **2:404** [6]
reg 12 (4) . . . . . **2:404** [6]
reg 13 (1) . . . . . **2:404** [4]
reg 13 (6) . . . . . **2:403** [26]
Sch 1 (k) . . . . . **2:402** [27]
Sch 2 (w) . . . . . **2:402** [27]

Consumer Rights Act 2015
s 1 (1) . . . . . **18:201** [3]
s 1 (2)(a) . . . . . **18:201** [3]
s 3 (1) . . . . . **18:201** [3]
s 3 (2)(a) . . . . . **18:201** [3]
s 3 (2)(d) . . . . . **18:201** [3]
s 3 (5) . . . . . **18:201** [3]
s 3 (8) . . . . . **18:201** [3]
ss 9–24 . . . . . **9:301** [2]
s 11 (4) . . . . . **2:403** [26]
s 12 (2) . . . . . **2:403** [26]
s 19 . . . . . **2:403** [26]
s 19 (3) . . . . . **9:102 (1)** [38]
s 19 (4) . . . . . **9:102 (1)** [38]

s 19 (9)–(11) . . . . . **9:102 (1)** [37]
s 20 . . . . . **8:104** [4]; **9:301** [32]
s 20 (5) . . . . . **9:303** [4]
s 21 . . . . . **9:302** [3]
s 22 . . . . . **8:104** [4]; **9:301** [32]
s 23 . . . . . **8:104** [4]; **9:102 (1)** [38]
s 23 (3)(a) . . . . . **9:102 (2)–(3)** [2]
s 24 . . . . . **9:301** [32]; **9:401** [7]
s 24 (5) . . . . . **8:104** [4]
s 25 . . . . . **9:302** [3]
s 26 . . . . . **9:302** [3]
s 29 . . . . . **18:307** [8]
s 36 (3) . . . . . **2:403** [26]
s 37 (2) . . . . . **2:403** [26]
s 42 . . . . . **2:403** [26]
s 50 (3) . . . . . **2:403** [26]
s 51 . . . . . **2:402** [21]
s 54 . . . . . **2:403** [26]
s 62 (1) . . . . . **6:201** [19]; **6:202** [4], [5]
s 62 (4) . . . . . **4:118** [3]

Contract (Third Party Rights) (Scotland) Act 2017
s 1 (3) . . . . . **6:110** [18]
s 2 (2) . . . . . **6:110** [31]
s 2 (4)(a) . . . . . **6:110** [27], [46]
s 2 (4)(b) . . . . . **6:110** [29]
s 3 (1) . . . . . **6:110** [46], [48]
s 6 . . . . . **6:110** [50]
s 9 . . . . . **6:110** [30]

Contracts (Rights of Third Parties) Act 1999
s 1 (1)(b) . . . . . **6:110** [24]
s 1 (2) . . . . . **6:110** [24]
s 1 (3) . . . . . **6:110** [18]
s 1 (5) . . . . . **6:110** [33]–[34]
s 1 (6) . . . . . **6:110** [37]
s 2 (1) . . . . . **6:110** [50]
s 3 (2) . . . . . **6:110** [53]
s 3 (6) . . . . . **6:110** [37]
s 4 . . . . . **6:110** [56]
s 5 . . . . . **6:110** [57]
s 8 . . . . . **6:110** [30]
s 10 (4) . . . . . **6:110** [15]

Hire Purchase Act 1964
s 2 . . . . . **2:501 App II** [2]
ss 4–9 . . . . . **Intro before Art 2:501** [5]
s 6 (1)(b) . . . . . **2:503** [1], [9]
s 7 . . . . . **2:504 App** [3]
s 8 (1) . . . . . **2:504** [2]; **2:505** [2]–[3]

Late Payment of Commercial Debts (Interest) Act 1998
Art 14 (2) . . . . . **9:508-3** [4]

Law of Property Act 1925
s 53 (1) . . . . . **3:201** [4]
s 54 . . . . . **3:201** [4]
s 136 (1) . . . . . **Intro before Art 11:101** [11]; **11:101** [4]; **11:103** [2]; **11:201** [2], [5]; **11:303** [8]

Limitation Act 1980
s 11 . . . . . **14:301** [1]
s 11A . . . . . **14:301** [1]
s 12 . . . . . **14:301** [1]
s 14 . . . . . **14:301** [1]
s 14A . . . . . **14:301** [1]
s 24 (1) . . . . . **14:203** [4]
s 28 . . . . . **14:305** [2]
s 28A . . . . . **14:305** [2]
ss 29–31 . . . . . **14:401** [1]
s 30 . . . . . **14:401** [2]
s 36 . . . . . **9:102 (2)–(3)** [44]
s 38 . . . . . **14:101** [1]

Misrepresentation Act 1967
s 2 . . . . . **4:105** [7]; **4:106** [4]
s 2 (1) . . . . . **2:406** [13]
s 3 . . . . . **4:118** [3]

Prescription and Limitation (Scotland) Act 1973
s 10 . . . . . **14:401** [1]–[2]
s 13 . . . . . **14:601** [1]
s 23A . . . . . **14:101** [3]

Requirements of Writing (Scotland) Act 1995
s 1 (2)(a)(ii) . . . . . **2:107** [3]
s 1 (3) . . . . . **2:107** [3]
s 1 (4) . . . . . **2:107** [3]

Sale of Goods Act 1893
s 4 . . . . . **2:101 (2)** [12]
s 4 (1) . . . . . **2:101 (2)** [12]
s 14 . . . . . **6:108** [5]
s 14 (1) . . . . . **6:108** [5]
s 17 . . . . . **18:303** [10]
s 18 . . . . . **18:303** [10]
r 1 . . . . . **18:303** [10]
r 2 . . . . . **18:303** [10]
r 3 . . . . . **18:303** [10]
s 20 . . . . . **18:303** [10]

Sale of Goods Act 1979
s 2 (1) . . . . . **18:202** [2]
s 2 (4) . . . . . **18:202** [2]
s 2 (5) . . . . . **18:202** [2]
s 5 (1) . . . . . **18:101** [17]
s 6 . . . . . **4:102** [2]
s 7 . . . . . **8:108** [16]; **9:301** [40]
s 8 . . . . . **19:301** [4]
s 8 (2) . . . . . **2:402** [21]; **6:104** [1], [7]; **18:201** [4]
s 9 . . . . . **6:106** [7]
s 9 (1) . . . . . **6:106** [7]
s 11 (3) . . . . . **9:301** [40]
s 12 . . . . . **18:203 (1)** [8]

ss 12–15 . . . . . **9:301** [27]
ss 12–15A . . . . . **9:301** [2]
s 12 (2)(a) . . . . . **18:203 (3)** [3]
s 14 . . . . . **18:204** [10]
s 14 (2) . . . . . **18:101** [17]
s 14 (2A) . . . . . **6:108** [5], [7]
s 14 (2B)(a) . . . . . **18:203 (2)** [11]
s 14 (2C)(a) . . . . . **18:203 (3)** [3]
s 14 (2C)(b) . . . . . **18:203 (3)** [7]
s 14 (3) . . . . . **18:203 (3)** [3]
s 15 (2)(a) . . . . . **18:203 (2)** [9]
s 15A . . . . . **9:301** [27], [32]
s 17 . . . . . **Intro before Art 18:201** [4]; **18:303** [15]
s 17 (1) . . . . . **18:303** [15]
s 18
r 1 . . . . . **18:303** [15], [21]; **18:306** [5]
r 5 (1) . . . . . **18:302** [7]
r 5 (2) . . . . . **18:302** [7]; **18:305** [8]
s 20 (1) . . . . . **18:302** [6]; **18:303** [15]
s 20 (2) . . . . . **18:304** [6], [8]
s 20 (3) . . . . . **7:110** [8]
s 20 (4) . . . . . **18:307** [7]–[8]
s 27 . . . . . **7:110** [4]; **18:202** [2]
s 28 . . . . . **7:102** [8]; **7:104** [3]; **9:201** [7]
s 29 (2) . . . . . **7:101** [4]
s 29 (3) . . . . . **7:102** [3]
s 29 (6) . . . . . **7:112** [3]
s 30 . . . . . **9:302** [2]–[3]; **9:401** [7]
s 31 . . . . . **9:302** [3]
s 32 (4) . . . . . **18:307** [7]
s 33 . . . . . **18:306** [5]
s 35A . . . . . **9:302** [3]
s 37 (1) . . . . . **18:201** [6], [8]
s 39 (1)(a) . . . . . **9:201** [6]
s 39 (1)(b) . . . . . **8:105** [3]
s 41 . . . . . **9:201** [6]
s 48C (1)(a) . . . . . **9:401** [7]
s 49 . . . . . **9:101** [4]
s 50 . . . . . **9:101** [5], [16]
s 50 (2) . . . . . **9:507** [2], [6]–[7], [9]
s 50 (3) . . . . . **9:507** [2], [9]
s 51 (2) . . . . . **9:507** [2], [6], [9]
s 51 (3) . . . . . **9:507** [2], [7], [9]
s 52 . . . . . **9:102 (1)** [16], [38]
s 52 (1) . . . . . **9:102 (1)** [36]
s 53 . . . . . **9:401** [7]; **18:204** [10]
s 61 (1) . . . . . **18:101** [17]

Statute of Frauds 1677
s 4 . . . . . **2:101 (2)** [13]; **18:101** [13]
s 16 . . . . . **2:101 (2)** [12]
s 17 . . . . . **18:101** [13]

Supply of Goods and Services Act 1982
ss 12–16 . . . . . **6:108** [6]; **19.101** [3]
s 13 . . . . . **6:108** [6]–[7]; **7:106** [4]; **9:501 (1)** [4]; **19:201** [4]
s 15 . . . . . **19:301** [4], [7]
s 15 (1) . . . . . **6:104** [1], [7]

Supreme Court of Judicature
Act 1873 . . . . . **9:102 (1)** [17]; **Intro before Art 13:101** [8]

Unfair Contract Terms Act 1977
s 2 (1) . . . . . **6:202** [10]; **8:109** [3]
s 2 (2) . . . . . **8:109** [3]
s 11 . . . . . **1:302** [3]
s 11 (1) . . . . . **4:118** [3]
s 11 (5) . . . . . **6:201** [19]; **6:202** [4]–[5]

Unsolicited Goods and Services Act 1971
s 1 . . . . . **2:204** [16]

UNITED STATES OF AMERICA

Restatement (Second) of Contracts 1981
§ 45 . . . . . **2:202** [6]
§ 161 (b) . . . . . **2:401** [5]
§ 161 (d) . . . . . **2:401** [11]
§ 178 . . . . . **15:102** [28]
§ 178 (2)(a) . . . . . **15:102** [31]
§ 178 (3)(d) . . . . . **15:102** [31]
§ 201 . . . . . **5:101** [8]
§ 205 . . . . . **1:201** [7], [10]
§ 234 . . . . . **7:104** [9]
§ 302 . . . . . **6:110** [7]

Uniform Commercial Code
§§ 1-101–1-310 . . . . . **Intro before Art 1:101** [1]
§ 1-103 . . . . . **1:106 (1)** [4]
§ 1-201 (11) . . . . . **1:201** [9]
§ 1-201 (20) . . . . . **1:201** [10]
§ 1-202 (a) . . . . . **1:303** [11]
§ 1-202 (d) . . . . . **1:303** [11]
§ 1-202 (e) . . . . . **1:303**; **1:303** [27]
§ 1-203 . . . . . **1:201** [9]
§ 1-205 (1) . . . . . **1:105** [8]
§ 1-303 (b) . . . . . **1:105** [8]
§ 1-303 (d) . . . . . **1:105** [8]
§ 1-304 . . . . . **1:201** [9]
§ 2-103 (1)(b) . . . . . **1:201** [9]–[10]
§ 2-205 . . . . . **2:202** [6]
§ 2-207 . . . . . **2:209** [1], [3]–[4]; **2:210** [1]
§ 2-207 (2) . . . . . **2:208** [4]–[5]; **2:210**; **2:210** [2]
§ 2-207 (2)(a) . . . . . **2:208** [8]; **2:210**
§ 2-207 (2)(b) **2:210**
§ 2-207 (2)(c) **2:210**
§ 2-207 (3) . . . . . **2:209**; **2:209** [3]
§ 2-209 . . . . . **2:106** [5]
§ 2-209 (1) . . . . . **2:106** [5]

§ 2-209 (2) . . . . . **2:106** [5]
§ 2-210 (2) . . . . . **11:301** [4]; **11:302** [2]
§ 2-309 (1) . . . . . **7:102** [3]
§ 2-508 . . . . . **8:104** [7]; **8:104** [9]
§ 2-606 (1) . . . . . **8:104** [12]
§ 2-609 . . . . . **8:105** [3], [10]
§ 9-401 . . . . . **11:301** [10]
§ 9-405 . . . . . **11:308** [1]
§ 9-405 (b)(1) . . . . . **11:308** [2]
§ 9-406 (b)(2) . . . . . **11:301** [4]
§ 9-406 (c) . . . . . **11:303** [22], [24]
§ 9-406 (d) . . . . . **11:301** [4]
§ 9-407 . . . . . **11:301** [4]
§ 9-408 . . . . . **11:301** [4]

Table of European Union Legislation

Treaties and Charters

EU Charter of Fundamental Rights
- Art 16 . . . . . **1:102** [1]

TFEU (Treaty on the Functioning of the European Union)
- Art 26 . . . . . **Intro before Art 2:401** [25]
- Art 57 . . . . . **2:403** [14]
- Art 101 (2) . . . . . **15:102** [17]
- Art 114 . . . . . **Intro before Art 2:401** [25]
- Art 169 . . . . . **Intro before Art 2:401** [5], [25]
- Art 169 (1) . . . . . **Intro before Art 2:401** [26]

Treaty establishing the European Community
- Art 50 . . . . . **2:403** [14]
- Art 153 . . . . . **Intro before Art 2:401** [5]

Directives

Commercial Agents Directive (86/653/EEC) . . . **1:201** [47]; **Intro before Art 3:101** [9]
- Art 4 . . . . . **1:201** [47]
- Art 6 . . . . . **6:104** [11]

Consumer Credit Directive[1987] (87/102/EEC)
- Art 3 (2) . . . . . **Intro before Art 2:401** [13]
- Art 3 (3) . . . . . **Intro before Art 2:401** [13]
- Art 4 . . . . . **2:101 (2)** [14]
- Art 4 (3) . . . . . **2:402** [18]
- Art 6 . . . . . **Intro before Art 2:401** [13]
- Art 9 . . . . . **11:307** [8]
- Annex (1)(i) . . . . . **2:402** [18]

Consumer Credit Directive (2008/48/EC)
- Recital 19 . . . . . **Intro before Art 2:401** [13]
- Art 1 . . . . . **1:301 App**
- Art 1 (2) . . . . . **1:301 App**
- Art 3 (n) . . . . . **2:505** [5]; **19:101** [11]
- Art 4–6 . . . . . **6:206** [14]
- Art 5 (1) . . . . . **2:403** [19]
- Art 5 (1)(p) . . . . . **2:402** [24]
- Art 10 . . . . . **2:101 (2)** [14]; **2:502** [2]
- Art 10–12 . . . . . **6:206** [14]
- Art 10 (2)(p) . . . . . **2:403** [17]
- Art 10 (2)(q)–(r) . . . . . **2:402** [24]
- Art 14 . . . . . **2:502** [3]
- Art 14 (1) . . . . . **2:406** [8]; **Intro before Art 2:501** [11]; **2:501 (1)** [3]
- Art 14 (3) . . . . . **2:503** [3], [9]; **2:504 App** [3]
- Art 14 (3)(a) . . . . . **2:503** [3]
- Art 14 (3)(b) . . . . . **2:501 (1)** [5]
- Art 14 (4) . . . . . **2:505** [3], [5]–[6]
- Art 15 . . . . . **2:505**; **2:505** [3], [6]
- Art 17 (1) . . . . . **11:307** [8]
- Art 23 . . . . . **2:406** [3]
- Annex II . . . . . **2:403** [19]

Consumer Rights Directive (2011/83/EU)
- Recital 2 . . . . . **2:402** [12]
- Recital 5 . . . . . **Intro before 2:401** [1]
- Recitals 5–7 . . . . . **Intro before Art 2.401** [5]
- Recitals 6–7 . . . . . **Intro before Art 2:401** [25]
- Recital 14 . . . . . **Intro before Art 2:101** [6]
- Recital 19 . . . . . **2:402** [6]–[7], [27]
- Recital 20 . . . . . **2:501 App II** [5]–[7], [12]
- Recital 21 . . . . . **2:501 App II** [18]
- Recital 23 . . . . . **2:404** [4]
- Recital 24 . . . . . **2:505 App** [18]
- Recital 25 . . . . . **2:402** [6]
- Recitals 26–31 . . . . . **2:402** [9]
- Recital 27 . . . . . **2:505 App** [22]
- Recital 28 . . . . . **2:403** [6]; **2:505 App** [26]
- Recital 32 . . . . . **2:505 App** [22]
- Recital 34 . . . . . **2:402** [3]
- Recital 36 . . . . . **2:405** [8]
- Recital 37 . . . . . **Intro before Art 2:501** [15]; **2:501 App II** [9], [15], [18]
- Recital 40 . . . . . **Intro before Art 2:501** [23]; **2:501 (2)** [4]
- Recital 41 . . . . . **2:501 (2)** [9]
- Recital 43 . . . . . **2:502** [4]
- Recital 44 . . . . . **Intro before Art 2:501** [23]; **2:503** [3]–[4], [7], [10]
- Recital 46 . . . . . **2:504 App** [8], [10]
- Recital 47 . . . . . **2:504 App** [18]
- Recital 49 . . . . . **2:505 App** [3], [9], [12]–[13], [19]
- Recital 51 (2) . . . . . **9:102 (1)** [38]
- Recital 52 . . . . . **9:303** [7]
- Art 2 . . . . . **1:301 App**; **2:301** [7]; **Intro before Art 2:501** [30]; **2:501 (1)** [1]; **2:505**
- Art 2 (1) . . . . . **1:301 App**
- Art 2 (2) . . . . . **1:301 App**; **2:501 App II** [3]
- Art 2 (3) . . . . . **2:402** [6]
- Art 2 (5) . . . . . **2:402** [6]–[7]
- Art 2 (6) . . . . . **2:402** [6]–[7]
- Art 2 (7) . . . . . **2:402** [4]; **2:403** [3]; **2:501 App II**; **2:501 App II** [4], [7]
- Art 2 (7)–(8) . . . . . **Intro before Art 2:101** [6]
- Art 2 (7)–(9) . . . . . **Intro before Art 2:501** [30]; **2:501 App II** [1]
- Art 2 (8) . . . . . **2:402** [4]; **2:403** [3]; **2:501 App II**; **2:501 App II** [16]–[17], [20]; **2:505 App** [24]
- Art 2 (8)(a) . . . . . **2:501 App II** [19]
- Art 2 (8)(b) . . . . . **2:501 App II** [19], [22]
- Art 2 (8)(c) . . . . . **2:501 App II** [19], [22]
- Art 2 (8)(d) . . . . . **2:501 App II** [20], [22]

Art 2 (9) . . . . . **2:501 App II**; **2:501 App II** [20]
Art 2 (9)(a) . . . . . **2:505 App** [17]
Art 2 (9)(b) . . . . . **2:501 App II** [19]–[20]; **2:505 App** [17]
Art 2 (10) . . . . . **2:101 (2)** [14]; **2:404** [4]
Art 2 (11) . . . . . **2:402** [27]
Art 2 (13) . . . . . **2:403** [7]; **2:505 App** [17]–[18]
Art 2 (15) . . . . . **2:505**; **2:505** [5]
Art 3 (1) . . . . . **2:402** [6]–[8]
Art 3 (2) . . . . . **2:402** [12]; **2:403** [5]
Art 3 (3) . . . . . **2:402** [9]; **2:403** [6]; **2:505 App** [1], [4], [21]–[25]
Art 3 (3)(a) . . . . . **2:505 App** [21]
Art 3 (3)(b) . . . . . **2:505 App** [21]
Art 3 (3)(c) . . . . . **2:505 App** [21]
Art 3 (3)(d) . . . . . **2:505 App** [21]
Art 3 (3)(e) . . . . . **2:505 App** [21]
Art 3 (3)(f) . . . . **2:402** [26]; **2:505 App** [21], [25]
Art 3 (3)(g) . . . . . **2:402** [9]; **2:505 App** [21]
Art 3 (3)(h) . . . . . **2:505 App** [21]
Art 3 (3)(i) . . . . . **2:505 App** [21]
Art 3 (3)(j) . . . . **2:402** [26]; **2:505 App** [21], [23]
Art 3 (3)(k) . . . . . **2:505 App** [19], [21]
Art 3 (3)(l) . . . . . **2:505 App** [21], [24]
Art 3 (3)(m) . . . . . **2:505 App** [21], [23]
Art 3 (4) . . . . . **2:403** [6]; **2:505 App** [26]
Art 3 (5) . . . . . **2:406** [1]
Art 4 . . . . . **7:102-1** [2]; **9:301** [8]
Art 5 . . . . . **Intro before Art 2:401** [20]; **2:402**; **2:402** [1]–[2], [4]–[5], [8], [11]–[12], [14], [17], [20]–[21], [25], [29]–[30]; **2:403**; **2:403** [7]–[8]; **6:206** [14]
Art 5 (1) . . . . . **2:402**; **2:402** [13]
Art 5 (1)(a) . . . . . **2:402** [17]–[18], [27]
Art 5 (1)(b) . . . . . **2:402** [19]
Art 5 (1)(c) . . . . . **1:302** [4]; **2:402** [20]–[21]
Art 5 (1)(d) . . . . . **2:402** [22]–[23]
Art 5 (1)(e) . . . . . **2:402** [23]
Art 5 (1)(f) . . . . . **2:402** [25]; **2:403** [22]
Art 5 (1)(g) . . . . . **2:402** [17]–[18], [26]
Art 5 (1)(h) . . . . **2:401** [12]; **2:402** [17]–[18], [26]
Art 5 (2) . . . . . **2:402**; **2:402** [6], [18]; **2:403** [4]
Art 5 (3) . . . . . **2:402**; **2:402** [4], [10]
Art 5 (4) . . . . . **2:402**; **2:402** [12]
Art 6 . . . . . **2:107** [4], **Intro before Art 2:401** [20]; **2:402** [8]; **2:403** [1], [3], [5], [8], [24], [27]; **2:405** [5]; **6:206** [14]
Art 6–8 . . . . . **2:402** [1]
Art 6 (1) . . . . . **2:101 (2)** [14]; **2:403**; **2:403** [9]; **2:404**; **2:404** [3], [6]; **2:405**; **2:405** [1], [3]–[4], [8], **Intro before Art 2:501** [28]; **2:502** [2]
Art 6 (1)(a) . . . . . **2:403** [12]; **2:404**; **2:405**
Art 6 (1)(b) . . . . . **2:403**; **2:403** [13]; **2:404**; **2:405**
Art 6 (1)(c) . . . **2:403**; **2:403** [7], [13]–[14]; **2:404**
Art 6 (1)(d) . . . . . **2:403**; **2:403** [13]–[14]
Art 6 (1)(e) . . . . . **2:402** [21], [24]; **2:403**; **2:403** [14]; **2:404** [9]; **2:405**
Art 6 (1)(f) . . . . . **2:403** [14]–[15]; **2:404** [9]
Art 6 (1)(g) . . . . . **2:403** [15]–[16]; **2:405** [6]
Art 6 (1)(h) . . . . . **2:403**; **2:403** [16]; **2:404**; **2:405**; **2:502**; **2:502** [3]; **2:503** [8]; **2:504 App** [12], [16]
Art 6 (1)(i) . . . . . **2:403**; **2:403** [16]–[17]; **2:504 App** [20]; **9:306** [46]
Art 6 (1)(j) . . . . . **2:403**; **2:403** [16], [18]; **2:504 App** [12]
Art 6 (1)(k) . . . . . **2:403** [16]–[18]; **2:404**; **2:505 App** [10]–[11]
Art 6 (1)(l) . . . . . **2:402** [24]; **2:403** [19]
Art 6 (1)(m) . . . . . **2:402** [24]; **2:403** [19]
Art 6 (1)(n) . . . . . **2:403** [20]–[21]
Art 6 (1)(o) . . . . . **2:403** [21]–[22]; **2:405**
Art 6 (1)(p) . . . . . **2:403** [21]–[22]; **2:405**
Art 6 (1)(q) . . . . . **2:403** [21], [23]
Art 6 (1)(r) . . . . . **2:403** [12], [23]–[24]
Art 6 (1)(s) . . . . . **2:401** [12]; **2:403** [23]
Art 6 (1)(t) . . . . . **2:403** [25]
Art 6 (2) . . . . . **2:403**; **2:403** [4], [13]
Art 6 (3) . . . . . **2:403**; **2:403** [7]
Art 6 (4) . . . . . **2:403**; **2:403** [19]
Art 6 (5) . . . . . **2:402** [29]; **2:403**; **2:403** [26]; **2:406** [9]
Art 6 (6) . . . . . **2:402** [21]; **2:403**; **2:403** [15]; **2:406** [1], [6], [9]
Art 6 (7) . . . . . **2:403**; **2:403** [11]
Art 6 (8) . . . . . **2:402** [12]; **2:403**; **2:403** [5]; **2:405** [2], [7]
Art 6 (9) . . . . . **2:402** [30]; **2:403**; **2:403** [27]
Art 7 . . . . **2:403** [10], [27]; **2:404**; **2:404** [1], [10]; **6:204** [9]
Art 7 (1) . . . . . **2:101 (2)** [14]; **2:403** [27]; **2:404**; **2:404** [3]–[4]
Art 7 (2) . . . . . **2:101 (2)** [14]; **2:403** [18], [27]; **2:404**; **2:404** [5]–[7]; **2:405** [4]; **2:504 App** [23]
Art 7 (3) . . . . . **2:403** [16]–[18]; **2:404**; **2:404** [7]–[8]; **2:405** [11]; **2:504 App** [12], [21]–[23]
Art 7 (4) . . . . . **2:404**; **2:404** [9]
Art 7 (4)(a) . . . . . **2:101 (2)** [14]
Art 7 (4)(b) . . . . . **2:404** [6]
Art 7 (5) . . . . . **2:404**; **2:404** [10]
Art 8 . . . . . **2:403** [10], [27]; **2:405**; **2:405** [1], [9]
Art 8 (1) . . . . . **2:101 (2)** [14]; **2:405**; **2:405** [1]–[2]
Art 8 (2) . . . . . **2:101 (2)** [14]; **2:402** [7]; **2:405**; **2:405** [1], [4]–[5]; **2:406** [4]; **2:505 App** [21]
Art 8 (3) . . . . . **2:101 (2)** [14]; **2:403** [16]; **2:405**; **2:405** [4], [6]

Art 8 (4) . . . . . **2:403** [13]; **2:405**; **2:405** [1]–[2], [7]–[8]
Art 8 (4)(a) . . . . . **2:402** [21]
Art 8 (5) . . . . . **2:405**; **2:405** [1], [8]–[9]
Art 8 (6) . . . . . **Intro before Art 2:101** [6]; **2:405**; **2:405** [1], [9]–[10]
Art 8 (7) . . . . . **1:302** [4]; **2:101 (2)** [14]; **2:403** [27]; **2:404** [5]–[7]; **2:405**; **2:405** [1], [3]–[4]
Art 8 (7)(a) . . . . . **2:404** [6]; **2:405** [3]
Art 8 (7)(b) . . . . . **2:403** [18]; **2:405** [3]
Art 8 (8) . . . . . **2:403** [16], [18]; **2:405**; **2:405** [10]–[11]; **2:504 App** [12], [21]–[23]
Art 8 (9) . . . . . **2:405**; **2:405** [4], [7]
Art 8 (10) . . . . . **2:405**; **2:405** [11]–[12]
Art 9 . . . . . **2:504 App** [12]
Art 9–10 . . . . . **Intro before Art 2:501** [29]; **2:501 (1)** [2]
Art 9–14 . . . . . **2:505**
Art 9–15 . . . . . **2:404** [5]; **2:504 App** [22]
Art 9–16 . . . . . **Intro before Art 2:501** [28], [30], [36]; **2:501 (1)** [2]; **2:506** [2]
Art 9 (1) . . . . . **Intro before Art 2:501** [11], [13], [30], [37]–[38]; **2:501 (1)**, **2:501 (1)** [1]–[3], [5]; **2:503** [1]; **2:504 App** [13], [25]–[26]; **2:505 App** [17]; **18:307** [7], [9]
Art 9 (2) . . . . . **2:402** [7]; **2:404**; **2:405**; **2:501 (2)**, **2:501 (2)** [1], [6], [10]; **2:501 App II** [24]; **2:502**; **2:502** [3], [5]; **2:503**
Art 9 (2)(a) . . . . . **2:501 (2)** [6]
Art 9 (2)(b) . . . . **2:501 (2)** [6], [8]; **2:505 App** [13]
Art 9 (3) . . . . . **2:501 App I** , **2:501 App I** [1]
Art 10 . . . . . **2:406** [1]; **2:501 (2)** [1]; **2:502**; **2:502** [1], [4]–[7]; **2:503**
Art 10 (1) . . . . . **2:406** [8]; **2:502**; **2:502** [4]–[5]
Art 10 (2) . . . . . **2:406** [8]; **2:502**; **2:502** [3]
Art 11 . . . . . **Intro before Art 2:501** [29]; **2:501 (1)** [2]; **2:503**; **2:503** [1], [8]; **2:504 App** [6], [12]
Art 11 (1) . . . . . **2:403** [16]; **2:503**
Art 11 (1)(b) . . . . . **2:503** [6]
Art 11 (2) . . . . . **1:303** [21]; **2:503**; **2:503** [9]–[10]
Art 11 (3) . . . . . **2:503**; **2:503** [5]
Art 11 (4) . . . . . **2:503**; **2:503** [3], [10]
Art 12 . . . . . **Intro before Art 2:501** [29]; **2:501 (1)** [2]; **2:504**, **2:504** [1]; **2:505** [6]
Art 12–15 . . . . . **2:504** [1]
Art 12 (a) . . . . . **2:504**; **2:504** [2]–[3]
Art 12 (b) . . . . . **2:501 (2)** [8]; **2:504**; **2:504** [4]
Art 13 . . . . . **2:504 App**; **2:504 App** [6]; **9:306 App II** [2]
Art 13–14 . . . . . **Intro before Art 2:501** [29]; **2:501 (1)** [2]; **2:501 App II** [24]; **2:504** [1]; **2:504 App** [1]–[6], **Intro before Art 9:305** [32]
Art 13 (1) . . . . . **2:504 App** [6]
Art 13 (1)(1) . . **2:504 App** [7]–[9], [14]; **9:306** [47]
Art 13 (1)(2) . . . . . **2:504 App** [10]
Art 13 (2) . . . . . **2:501 (1)**, **2:501 (1)** [2], [5]; **2:504 App** [6], [8], [12]; **2:505**; **9:306** [47]
Art 13 (3) . . . . . **2:504 App** [6], [11]
Art 14 . . . . . **2:501 (1)**, **2:501 (1)** [2], [5]; **2:504 App**; **2:504 App** [12]–[13]; **2:505**; **2:505 App** [10], [12]; **9:306** [32]; **9:306 App II** [2]
Art 14 (1) . . . . . **2:403** [17]; **2:504 App** [12]–[13], [21]
Art 14 (1)(1) . . . . . **2:504 App** [14]
Art 14 (1)(2) . . . . . **2:504 App** [20]
Art 14 (1)(3) . . . . . **2:504 App** [20]
Art 14 (2) . . . . . **2:406** [8]; **2:504 App** [12]–[13], [16]–[19]
Art 14 (3) . . . . . **2:403** [16], [18]; **2:404** [8]; **2:405** [11]; **2:504 App** [12]–[13], [21]–[24]; **2:505 App** [5]–[6]
Art 14 (4) . . . . . **2:406** [8]; **2:504 App** [12]–[13], [22]; **2:505 App** [5]
Art 14 (4)(a) . . . . . **2:404** [8]; **2:405** [11]; **2:504 App** [12], [21], [23]
Art 14 (4)(a)(i) . . . . . **2:504 App** [23]
Art 14 (4)(a)(ii) . . . . . **2:504 App** [23]
Art 14 (4)(a)(iii) . . . . . **2:504 App** [23]
Art 14 (4)(b) . . . . . **2:504 App** [12], [22]–[23]
Art 14 (4)(b)(i) . . . . . **2:404** [7]
Art 14 (4)(b)(ii) . . . . . **2:404** [7]
Art 14 (4)(b)(iii) . . . . . **2:404** [7]
Art 14 (5) . . . . . **2:504 App** [12]–[13], [25]–[26]
Art 15 . . . . . **Intro before Art 2:501** [29]; **2:501 (1)** [2]; **2:504** [1]; **2:505**; **2:505** [7]
Art 15 (1) . . . . . **2:505**; **2:505** [6]
Art 15 (2) . . . . . **2:505**; **2:505** [7]
Art 16 . . . . . **2:403** [16]; **2:404** [5], **Intro before Art 2:501** [29]; **2:501 (1)**, **2:501 (1)** [2]; **2:501 App II** [11]; **2:505 App**; **2:505 App** [1], [4]–[20]
Art 16 (a) . . . . . **2:505 App**; **2:505 App** [5], [7], [10]–[12]
Art 16 (b) . . . . . **2:505 App**; **2:505 App** [8]
Art 16 (c) . . . . . **2:505 App**; **2:505 App** [9]
Art 16 (d) . . . . . **2:505 App**; **2:505 App** [10]
Art 16 (e) . . . . . **2:505 App**; **2:505 App** [11], [14]–[15]
Art 16 (f) . . . . . **2:505 App**; **2:505 App** [12]
Art 16 (g) . . . . . **2:505 App**; **2:505 App** [13]
Art 16 (h) . . . . . **2:505 App**; **2:505 App** [14]
Art 16 (i) . . . . . **2:505 App**; **2:505 App** [15]
Art 16 (j) . . . . . **2:505 App**; **2:505 App** [16]
Art 16 (k) . . . . . **2:403** [7]; **2:505 App**; **2:505 App** [17]–[19]

Art 16 (l) . . . . . **2:505 App**; **2:505 App** [19]
Art 16 (m) . . . . . **2:403** [18]; **2:404**; **2:404** [5]–[6]; **2:405**; **2:405** [3]; **2:504 App** [22]; **2:505 App**; **2:505 App** [20]
Art 17 (1) . . . . . **18:301** [16]
Art 18 . . . . . **2:402** [23]; **7:102** [4]; **9:301** [8]
Art 18 (1) . . . . . **7:102-1**; **7:102-1** [1]–[5], **Intro before Art 8:101** [12]
Art 18 (2) . . . . . **8:104** [5]; **9:102 (1)** [38]; **9:301**; **9:301** [8], [21], [34], [43], [46]
Art 18 (4) . . . . . **8:102** [2]
Art 19 . . . . . **2:505 App** [21]; **7:107** [8]
Art 20 . . . . . **18:301** [16]; **18:307**; **18:307** [1], [8]–[11], [13]
Art 22 . . . . . **2:104** [8], **Intro before Art 2:401** [33]; **2:402** [21]; **2:403** [15]; **2:505 App** [21]; **6:206** [17]
Art 24 . . . . . **2:406** [3]
Art 24 (1) . . . . . **2:406** [1]
Art 25 . . . . . **2:503** [8]; **2:506**; **18:307** [9]
Art 27 . . . . . **Intro before Art 2:101** [6]; **2:204**; **2:204** [16]
Annex I(A) . . . . . **2:403**; **2:403** [19]
Annex I(B) . . . . . **2:403** [16]; **2:503**

Consumer Sales Directive (1999/44/EC)
Recital 8 . . . . . **18:203 (2)** [1], [3]
Recital 12 . . . . . **8:104** [5]; **8:109** [8]
Recital 15 . . . . . **9:102 (1) App** [10]
Art 1 . . . . . **1:301 App**
Art 1 (1) **18:101**
Art 1 (2) . . . . . **1:301 App**
Art 1 (2)(b) . . . . . **2:402** [6]; **18:101**; **18:101** [18]
Art 1 (4) . . . . . **18:101**; **18:101** [18]
Art 2 . . . . . **Intro before Art 2:401** [14], [17]; **2:401** [3]; **18:203 (1)** [8]; **18:203 (2)** [3], [8], [14]; **18:203 (3)** [4]
Art 2 (1) . . . . . **Intro before Art 18:201** [7]; **18:203 (1)**, **18:203 (1)** [6]–[7], [10]; **18:203 (2)** [8], [14]; **18:203 (5)** [3]–[5]
Art 2 (2) . . . . . **18:203 (2)**, **18:203 (2)** [1], [3]–[7], [11]
Art 2 (2)(a) . . . . . **18:203 (2)**, **18:203 (2)** [2], [8]–[9]
Art 2 (2)(b) . . . . . **18:203 (2)**, **18:203 (2)** [2], [10]
Art 2 (2)(c) . . . **18:203 (2)**, **18:203 (2)** [2], [11]–[12]
Art 2 (2)(d) . . . . . **1:302** [4]; **6:101** [2], [7]–[8]; **6:108** [7]; **18:203 (2)**, **18:203 (2)** [8], [12]–[14]; **18:203 (4)**, **18:203 (4)** [1]
Art 2 (3) . . . . **1:302** [4], **Intro before Art 2:401** [14]; **18:203 (3)**, **18:203 (3)** [4]–[9], [11]
Art 2 (4) . . . . . **18:203 (4)**, **18:203 (4)** [1]
Art 2 (5) . . . . . **18:203 (5)**, **18:203 (5)** [1]–[3], [5]; **19.101** [5], [20]–[21]
Art 3 . . . . . **8:104** [20]; **9:102 (1)** [21]; **9:102 (2)–(3)** [2], [5], [13], [40]; **9:303** [7], **Intro before Art 14:101** [11]
Art 3 (1) . . . . . **8:101** [3]
Art 3 (2) . . . . . **8:101**; **8:101** [3]; **9:102 (1)**, **9:102 (1)** [37]–[38], [41]–[42], **9:102 (1) App** [5], **Intro before Art 14:101** [11]; **18:204**
Art 3 (3) . . . . . **1:302** [4]; **7:102** [4]; **8:102** [3]; **9:102 (1)**, **9:102 (1) App** [5]; **9:102 (2)–(3)**, **9:102 (2)–(3)** [21]–[22]; **9:502** [4]; **18:204**
Art 3 (4) . . . . . **9:102 (1)** [42]
Art 3 (5) . **1:302** [4]; **8:104** [5]; **9:301**; **9:301** [25], [28], [32], [34], [36], [41], [43], [46]–[47]; **9:401**; **9:401** [2], [11]–[12], [16]; **18:204**
Art 3 (6) . . . . **8:103** [13], [15]; **9:102 (2)–(3)** [24]; **9:301**; **9:301** [7], [21], [25], [29], [32]; **9:302** [2]; **18:204**
Art 4 . . . . . **6:110** [2]
Art 5 . . . . . **Intro before Art 14:101** [11]
Art 5 (1) . . . . . **8:109**; **9:303** [20], **Intro before Art 14:101** [11]; **14:201** [2]; **14:501** [5]
Art 5 (2) . . . . . **9:303** [20]
Art 6 (2) . . . . . **2:402** [23]–[24]; **2:403** [19]
Art 6 (2)–(4) . . . . . **6:206** [14]
Art 6 (3) . . . . . **2:404** [4]
Art 7 . . . . . **6:203** [4]; **8:109** [1]–[2], [4], [8]; **18:203 (2)** [4]
Art 7 (1) . . . . . **1:102** [2]; **8:109**
Art 13 . . . . . **Intro before Art 2:501** [36]
Art 14 . . . . . **Intro before Art 2:501** [36]

Directive 84/450/EEC of 10 Sept 1984 relating to the approximation of the laws regulations, and administrative provisions of the Member States concerning misleading advertising . . . . . **6:101** [7]

Directive 97/5/EC of 27 Jan 1997 on cross-border credit transfers
Art 3 . . . . . **6:204** [9]
Art 6 (3) . . . . . **9:504** [5]

Directive 98/6/EC of 16 Feb 1998 on consumer protection in the indication of the prices of products offered to consumers . . . . . **2:402** [22]

Directive 98/27/EC of 19 May 1998 on injunctions for the protection of consumers' interests . . . . . **2:406** [3]

Directive 98/30/EC of 22 Jun 1998 concerning common rules for the internal market in natural gas . . . . . **6:201** [17]; **6:206** [14]

Directive 98/48/EC of 20 Jul 1998 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations
Art 1 (2)(a) . . . . . **2:405** [9]
Annex V . . . . . **2:405** [9]

Directive 1999/93/EC of 13 Dec 1999 on a Community framework for electronic signatures
Art 5 . . . . . **2:101 (2)** [11]

Directive 2000/43/EC of 29 Jun 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin . . . . . **1:102** [14]
Directive 2001/23/EC of 12 Mar 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses . . . . . **11:302** [3]
Directive 2002/47/EC of 6 Jun 2002 on financial collateral arrangements
Recital 14 . . . . . **Intro before Art 13:101** [21]
Recital 15 . . . . . **Intro before Art 13:101** [21]
Art 2 (1)(n) . . . . . **Intro before Art 13:101** [21]
Art 4 (1)(a) . . . . . **Intro before Art 13:101** [21]
Art 4 (1)(b) . . . . . **Intro before Art 13:101** [21]
Art 5 (2) . . . . . **Intro before Art 13:101** [21]
Art 7 . . . . . **Intro before Art 13:101** [21]
Directive 2002/92/EC of 9 Dec 2002 on insurance mediation
Art 2 (12) . . . . . **2:404** [4]
Directive 2003/55/EC of 26 June 2003 concerning common rules for the internal market in natural gas . . . . . **6:201** [17]; **6:206** [14]
Directive 2004/113/EC of 13 Dec 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services . . . . . **1:102** [14]
Directive 2005/36/EC of 7 Sep 2005 on the recognition of professional qualifications
Art 9 . . . . . **Intro before Art 2:401** [16]
Directive 2007/64/EC of 13 Nov 2007 on payment services in the internal market
Art 52 . . . . . **6:205** [10]
Directive 2009/22/EC of 23 Apr 2009 on injunctions for the protection of consumers' interests . . . . . **2:406** [3], **Intro before Art 8:101** [26]
Directive 2009/101/EC of 16 Sep 2009 on coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies within the meaning of the second paragraph of Article 48 of the Treaty, with a view to making such safeguards equivalent
Art 2 (d)(i) . . . . . **Intro before Art 3:101** [9]
Art 3 (7) . . . . . **3:201** [11]
Art 9 . . . . . **Intro before Art 3:101** [9]; **3:101** [4]
Art 10 (1) . . . . . **3:101** [4]
Art 10 (2) . . . . . **3:101** [4]
Directive 2011/24/EU of 9 Mar 2011 on the application of patients' rights in cross-border healthcare
Art 3 (a) . . . . . **2:505 App** [21]
Directive 2013/11/EU of 21 May 2013 on alternative dispute resolution for consumer disputes . . . . . **2:403** [25], **Intro before Art 8:101** [26]
Recital 49 . . . . . **2:403** [25]
Art 3 (3) . . . . . **2:403** [25]
Art 13 (1) . . . . . **2:403** [25]
Directive 2014/17/EU of 4 Feb 2014 on credit agreements for consumers relating to residential immovable property
Art 11 . . . . . **Intro before Art 2:401** [23]
Art 13 . . . . . **Intro before Art 2:401** [23]
Art 14 . . . . . **Intro before Art 2:401** [23]
Annex II . . . . . **Intro before Art 2:401** [23]; **2:403** [19]
Directive (EU) 2015/2366 of 25 Nov 2015 on payment services in the internal market
Art 62 (1) . . . . . **6:205** [10]
Directive (EU) 2016/943 of 8 Jun 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure. . . . . **2:302** [1], [6], [11]
Art 3 (3) . . . . . **2:302** [1]
Art 5 . . . . . **2:302** [15]
Distance Selling Directive (97/7/EC)
Recital 14 . . . . . **Intro before Art 2:501** [15]; **2:501 App II** [9]
Art 2 . . . . . **1:301 App**; **2:501 App II** [6]
Art 2 (1) . . . . . **Intro before Art 2:101** [6]; **2:501 App II**; **2:501 App II** [4], [7]
Art 2 (2) . . . . . **1:301 App**
Art 2 (3) . . . . . **1:301 App**
Art 2 (4) . . . . . **2:501 App II**; **2:501 App II** [4]
Art 3 (1) . . . . . **2:402** [9]; **2:403** [7]; **2:505 App** [17]–[18], [23]–[25]
Art 3 (2) . . . . . **2:402** [9]; **2:505 App** [19], [23]; **19:101** [5]
Art 4 . . . . . **Intro before Art 2:401** [13], [15]; **2:402** [25]
Art 4 (1) . . . . . **2:402** [25]; **2:403**; **2:403** [9]; **2:502** [2]
Art 4 (1)(a) . . . . . **2:403** [13]
Art 4 (1)(b) . . . . . **2:402** [18], [20]; **2:403** [12]–[13]
Art 4 (1)(c) . . . . . **2:402** [21]; **2:403** [14]
Art 4 (1)(d) . . . . . **2:402** [21]; **2:403** [14]
Art 4 (1)(e) . . . . . **2:403** [15]–[16]
Art 4 (1)(f) . . . . . **2:403** [16]–[17]
Art 4 (1)(g) . . . . . **2:403** [14]–[15]
Art 4 (1)(i) . . . . **2:402** [25]–[26]; **2:403** [21]–[22]
Art 4 (2) . . . **2:402** [14]; **2:403** [10]; **2:405** [1]–[2]
Art 4 (3) . . . . . **2:405** [8]–[9]
Art 5 . . . . . **2:402** [25]; **2:405** [3]; **2:501 (2)**
Art 5 (1) . . . . . **2:402** [20], [23]–[26]; **2:403** [9], [13]–[14], [16]–[17], [19]–[22]; **2:404** [4]; **2:405** [2]–[4]
Art 5 (1)(a)–(f) . . . . . **2:405** [3]

Art 5 (2) . . . . . **2:504** [2]
Art 6 (1) . . **2:406** [8], **Intro before Art 2:501** [11], [38]; **2:501 (1)**, **2:501 (1)** [3], [5]; **2:501 (2)**, **2:502** [3]–[7]; **2:503**; **18:307** [7]
Art 6 (2) . . . . . **2:504 App** [6], [12], [20]
Art 6 (3) . . . . . **2:505 App** [5], [8]–[10], [15]–[16]
Art 6 (4) . . . . . **2:505**; **2:505** [3], [5]–[7]
Art 7 (1) . . . . . **7:102-1**; **7:102-1** [1]–[5]
Art 9 . . . . . **Intro before Art 2:101** [6]; **2:204** [16]
Art 11 (1) . . . . . **2:406** [1]
Art 11 (3)(a) . . . . . **2:403**; **2:403** [27]
Art 12 (1) **2:506**
Art 14 . . . . . **7:102-1** [2]
Annex I . . . . . **2:501 App II** [5]

Doorstep Selling Directive (85/577/EEC)
Recital 4 . . . . . **Intro before Art 2:501** [15]
Recitals 7–10 . . . . . **2:501 App II** [18]
Art 1 . . . . . **2:501 App II**
Art 1 (1) . . . . . **2:501 App II**; **2:501 App II** [16], [19]–[22]; **2:505 App** [14], [24]
Art 1 (2) . . . **2:501 App II**; **2:501 App II** [16], [21]
Art 1 (3) . . . **2:501 App II**; **2:501 App II** [16], [22]
Art 1 (3)–(4) . . . . . **Intro before Art 2:101** [6]
Art 1 (4) . . . . . **2:501 App II**; **2:501 App II** [16]
Art 2 . . . . . **1:301 App**; **2:501 App II** [3]
Art 3 (1)(1) . . . . . **2:505 App** [26]
Art 3 (2) . . . . . **2:402** [9]
Art 3 (2)(a) . . . . . **2:505 App** [25]
Art 3 (2)(b) . . . . . **2:505 App** [23]
Art 3 (3) . . . . **2:501 App II**; **2:501 App II** [16], [21]
Art 4 . . . . . **2:402** [20]; **2:403** [16]; **2:501 (1)**, **2:501 (2)**, **2:502** [2]
Art 4 (1) . . . . . **Intro before Art 2:401** [13]; **2:403** [16]–[17]; **2:404** [2]–[3]
Art 4 (3) . . . . . **2:406** [1]
Art 5 . . . . . **2:502**
Art 5 (1) . . **2:406** [8], **Intro before Art 2:501** [11], [38]; **2:501 (1)**, **2:501 (1)** [2]; **2:501 (2)**, **2:502** [3]; **2:503**; **2:503** [1], [3], [9]
Art 5 (2) . . . . . **2:504**; **2:504** [2]
Art 6 . . . . . **2:506**
Art 6 (1) **2:502**
Art 7 . . . . . **2:504 App** [3], [6], [12]

E-Commerce Directive (2000/31/EC)
Art 2 . . . . . **1:301 App**
Art 2 (a) . . . . . **2:405** [9]
Art 5 . . . . . **2:403** [13]; **2:405** [7]; **6:206** [14]
Art 5 (1) . . . . . **2:403** [13]
Art 5 (1)(a) . . . . . **2:403** [13]
Art 5 (1)(a)–(g) . . . . . **2:403** [14]
Art 5 (1)(b) . . . . . **2:402** [20]; **2:403** [13]
Art 5 (1)(c) . . . . . **2:403** [13]–[14]
Art 5 (1)(d) . . . . . **2:403** [13]–[14]
Art 5 (1)(e) . . . . . **2:403** [13]–[14]
Art 5 (1)(f) . . . . . **2:403** [13]–[14]
Art 5 (1)(g) . . . . . **2:403** [13]–[14]
Art 5 (2) . . . . . **2:402** [22]; **2:403** [14]
Art 6 . . . . . **2:405** [9]; **6:206** [14]
Art 9 . . . . . **2:405**; **2:405** [7]
Art 9 (1) . . . . . **2:101 (2)** [11]
Art 10 . . . . . **2:201** [10]; **2:403** [20]; **2:405**; **2:405** [7]; **6:206** [14]
Art 10 (1) . . . . . **2:403** [10]; **2:405** [7]
Art 10 (2) . . . . . **2:403** [20]–[21]
Art 10 (3) . . . . . **2:104** [14]; **2:404** [4]; **2:405** [2], [7]
Art 10 (4) . . . . . **2:403** [20]
Art 11 . . . . . **Intro before Art 2:101** [6]; **2:201** [10]; **2:205** [5]; **2:405** [7]
Art 11 (1) . . **1:303** [19], [22]; **2:402** [16]; **2:405** [4]

Financial Services Distance Marketing Directive (2002/65/EC)
Recital 20 . . . . . **2:404** [4]
Art 2 . . . . . **2:501 App II** [2]
Art 2 (a) . . . . . **2:501 App II** [8]
Art 2 (b) . . . . . **19:101** [18]
Art 2 (d) . . . . . **1:301 App**
Art 2 (e) . . . . . **2:501 App II** [8]
Art 2 (f) . . . . . **2:404** [4]
Art 3 . . . . . **2:403** [14]; **2:405** [7]; **2:502** [2]
Art 3 (1)(1)(a) . . . . . **2:402** [18], [20]
Art 3 (1)(1)(a)–(e) . . . . . **2:403** [13]–[14]
Art 3 (1)(1)(b) . . . . . **2:403** [14]
Art 3 (1)(1)(c) . . . . . **2:403** [14]
Art 3 (1)(1)(d) . . . . . **2:403** [14]
Art 3 (1)(1)(e) . . . . . **2:403** [14]
Art 3 (1)(2)(a) . . . . . **2:403** [13]
Art 3 (1)(2)(b) . . . . . **2:402** [21]
Art 3 (1)(2)(f) . . . . . **2:403** [15]
Art 3 (1)(3)(a) . . . . . **2:403** [17]
Art 3 (1)(3)(b) . . . . . **2:402** [26]
Art 3 (1)(3)(c) . . . . . **2:402** [26]
Art 3 (1)(4) . . . . . **2:403** [24]
Art 3 (1)(4)(a) . . . . . **2:403** [24]–[25]
Art 3 (2) . . . . . **2:403** [10], [14]
Art 3 (2)(b) . . . . . **2:403** [14]
Art 3 (2)(d) . . . . . **2:403** [14]
Art 3 (2)(g) . . . . . **2:403** [14]
Art 3 (3) . . . . . **2:405** [7]
Art 3 (3)(b) . . . . . **2:405** [7]–[8]
Art 5 . . . . . **2:405** [3]
Art 5 (1) . . . . . **2:404** [4]
Art 5 (3) . . . . . **2:405** [3]
Art 6 . . . . . **2:405** [7]; **2:502** [3]; **2:503** [3]
Art 6 (1) . . **2:406** [8], **Intro before Art 2:501** [11]; **2:501 (1)** [3], [5]; **2:502** [3], [7]
Art 6 (7)(2) . . . . . **2:505** [3], [5]–[6]
Art 7 . . . . . **2:504 App** [3]

Art 7 (1) . . . . . **2:405** [7]
Art 15 (1) . . . . . **2:403**; **2:403** [27]
Late Payment Directive[2000] (2000/35/EC)
Recital 16 . . . . . **9:508** [3]
Recital 17 . . . . . **9:508-2** (**6**)
Art 1 (b)–(d) **9:508-3**
Art 2 . . . . . **9:508-3**
Art 3 (1) **9:508-2** (**2**), **9:508-2** (**3**), **9:508-2** (**5**), **9:508-2** (**7**)
Art 3 (1)(c)(i) . . . . . **9:508-2** (**1**) [5]
Art 3 (1)(c)(ii) . . . . . **7:101** [5]; **9:508-2** (**1**) [4]
Art 3 (1)(d) . . . . . **9:508** [3]; **9:508-2** (**1**) [2]
Art 3 (2) **9:508-2** (**4**)
Art 3 (3) . . . . . **6:201** [5]; **9:508-2** (**1**) [2]; **9:508-3**
Late Payment Directive (2011/7/ EU)
Recital 3 . . . . . **9:508** [6]; **9:508-1** [3]
Recital 12 . . . . . **9:508** [3], [11]; **9:508-1** [3]
Recital 15 . . . . . **9:508-4** [1]
Recital 19 . . . . . **9:508-2** (**6**), **9:508-2** (**7**) [1]
Recital 28 . . . . . **1:201** [5], [47]; **9:508-3** [2]
Art 2 (6) . . . . . **9:508-2** (**5**), **9:508-4**; **9:508-4** [1]
Art 2 (7) . . . . . **9:508** [3]; **9:508-2** (**5**)
Art 3 . . . . . **9:508-2** (**7**) [1]
Art 3 (1) . . . . . **9:201** [5]; **9:508** [9]; **9:508-2** (**1**), **9:508-2** (**1**) [2]
Art 3 (1)(a) . . . . . **9:508-2** (**1**) [5]
Art 3 (1)(b) . . . . . **7:101** [5], [8]; **7:102-1** [1]; **9:508** [10]; **9:508-2** (**1**) [4]
Art 3 (3) **9:508-2** (**2**), **9:508-2** (**3**)
Art 3 (4) . . . . . **9:508-2** (**3**), **9:508-2** (**3**) [1]–[2]
Art 3 (5) . . . . . **9:508-2** (**3**) [1]; **9:508-2** (**4**), **9:508-2** (**4**) [1]; **9:508-3**
Art 4 (3)(a) **9:508-3**
Art 4 (4) **9:508-3**
Art 4 (6) **9:508-3**
Art 6 . . . . . **9:508-2** (**7**), **9:508-2** (**7**) [1]
Art 6 (1) . . . **9:508-2** (**7**), **9:508-2** (**7**) [1]; **9:508-3**
Art 6 (2) . . . . . **9:508-2** (**7**), **9:508-2** (**7**) [1]
Art 6 (3) . . . . . **9:508-2** (**7**), **9:508-2** (**7**) [1]
Art 7 . . . . . **Intro before Art 6:201** [4]; **9:508-2** (**3**), **9:508-2** (**3**) [2]; **9:508-2** (**4**), **9:508-3**
Art 7 (1) . . . . . **9:508-2** (**1**) [2]; **9:508-3**
Art 7 (1)(a) . . . . . **1:201** [5], [47]
Art 7 (2) . . . . . **6:201** [20]; **9:508-3**; **9:508-3** [4]
Art 7 (3) . . . . . **6:201** [20]; **9:508-3**; **9:508-3** [4]
Art 7 (4) . . . . **Intro before Art 6:201** [5]; **9:508-3**
Art 7 (5) . . . . **Intro before Art 6:201** [5]; **9:508-3**
Art 13 (3) . . . . . **9:508-4** [3]
Life Assurance Directive[1990] (90/619/EEC)
Art 15 (1) . . . . . **Intro before Art 2:501** [11]; **2:504** [2]
Art 15 (1)(3) . . . . . **2:504 App** [3]
Art 15 (3) . . . . . **2:503** [3]
Life Assurance Directive (2002/83/EC)
Art 2 . . . . . **2:501 App II** [2]
Art 35 (1) . . . . . **Intro before Art 2:501** [11]; **2:504** [2]
Art 35 (1)(3) . . . . . **2:504 App** [3]
Art 36 (1) . . . . . **2:403** [17]
Annex III(A) . . . . . **2:403** [17]
Mediation Directive
Art 3 (a) . . . . . **14:302** (**3**) [1]
Package Travel Directive[1990] (90/314/EEC)
Art 2 (4) . . . . . **6:110** [2]
Art 3 (2) . . . . . **2:402** [18]; **2:403** [10], [26]; **6:101** [2], [7]
Art 4 (1)(a) . . . . . **2:405** [2]
Package Travel Directive ((EU) 2015/2302)
Art 5 . . . . . **Intro before Art 2:401** [23]
Art 5 (1) . . . . . **2:403** [19]
Art 5 (1)(a) . . . . . **2:402** [18]
Art 5 (1)(g) . . . . . **2:402** [24]
Art 5 (2) . . . . . **2:403** [19]; **9:504** [5]
Art 5 (3) . . . . . **2:403** [10]; **2:404** [5]
Art 6 (1) . . . . . **2:403** [10], [26]
Art 6 (2) . . . . . **2:403** [15]
Art 7 (2)(b) . . . . . **2:402** [24]
Art 7 (2)(h) . . . . . **2:402** [24]
Art 7 (4) . . . . . **2:403** [10]
Art 8 . . . . . **2:403** [27]
Art 11 (1)(c) . . . . . **2:403** [10]
Art 11 (3) . . . . . **2:403** [10]
Art 13 (1) . . . . . **9:401** [2]
Art 13 (3) . . . . . **9:401** [2]
Art 14 (1) . . . . . **9:401** [2], [11], [14]
Art 19 (2) . . . . . **2:403** [10], [19]
Art 25 . . . . . **2:406** [3]
Art 27 (2) . . . . . **2:402** [9]
Annex I . . . . . **Intro before Art 2:401** [23]; **2:402** [24]
Annexes I–II . . . . . **2:403** [19]
Payment Services Directive . . . **2:104** [6]; **6:205** [10]
Product Liability Directive (85/374/EEC)
Art 10 . . . . . **Intro before Art 14:101** [9]–[10]; **14:201** [2]; **14:301** [1]
Art 11 . . . . . **14:203** [3]; **14:307** [2]
Proposal for a Council Directive to protect the consumer in respect of contracts which have been negotiated away from business premises (COM(76) 544 final)
Recital 4 . . . . . **Intro before Art 2:501** [21]; **2:501 App II** [19]
Recital 6 . . . . . **Intro before Art 2:501** [21]
Recital 8 . . . . . **2:504 App** [17]
Art 1 (1) . . . . . **2:501 App II** [2], [17], [19], [22]
Art 2 (a) . . . . . **2:501 App II** [21]
Art 3 . . . . . **2:404** [5]

Art 3 (1) . . . . . **2:404** [3]
Art 3 (2) . . . . . **2:402** [18], [21], [23]; **2:404** [3]
Art 4 . . . . . **2:404** [5]
Art 4 (1) . . . . . **2:404** [3]
Art 4 (2) . . . . . **2:404** [5]
Art 5 . . . . . **2:404** [3], [5]
Art 6 . . . . . **2:501 App I**
Art 6 (1) . . . . . **2:503** [1], [3]
Art 6 (3) . . . . . **2:504** [2]
Art 7 . . . . . **2:503** [4]
Art 8 . . . . . **2:504 App** [3]
Art 8 (1) . . . . . **2:504 App** [20]
Art 9 . . . . . **2:501 App I** , **2:501 App I** [1]; **2:505** [2]
Art 10 (a) . . . . . **2:501 App II** [21]
Art 14 (1) . . . . . **2:503** [3]

Proposal for a Council Directive on unfair terms in consumer contracts (COM(90) 322 final)
Art 1 . . . . . **6:203** [2]
Art 2 . . . . . **6:201** [8]; **6:203** [2]
Annex . . . . . **Intro before Art 6:201** [4]

Proposal for a Council Directive on the protection of consumers in respect of contracts negotiated at a distance (COM(92) 11 final)
Art 6 . . . . . **2:402** [18]
Art 9 . . . . . **7:102-1** [1]
Art 10 (1) . . . . . **2:402** [18]

Amended Proposal for a Council Directive on unfair terms in consumer contracts (COM(92) 66 final)
Art 3 (1) . . . . . **6:201** [8]

Proposal for a Directive on the sale of consumer goods and associated guarantees (COM(1995) 520 final)
Art 2 (3) . . . . . **18:203 (5)** [1]

Proposal for a European Parliament and Council Directive combating late payment in commercial transactions (COM(1998) 126 final)
Art 3 (1)(a) . . . . . **7:102-1** [1]

Proposal for a Directive of the European Parliament and of the Council establishing the European Electronic Communications Code (COM(2016) 590 final)
Art 95 . . . . . **Intro before Art 2:401** [23]

Proposed Consumer Rights Directive (COM(2008) 614 final)
Recital 17 . . . . . **2:402** [11]
Recital 47 . . . . . **6:206** [17]
Art 2 (6) . . . . . **2:501 App II** [6]
Art 2 (15) . . . . . **2:505 App** [18]
Art 2 (20) . . . . . **2:505** [5]
Art 3 (1) . . . . . **2:402** [6]
Art 3 (4) **2:403**
Art 5 . . . . . **2:403**
Art 5 (1) . . . . . **2:402** [13], [25]–[26]
Art 5 (1)(a) . . . . . **2:402** [17]
Art 5 (1)(b) . . . . . **2:402** [19]
Art 5 (1)(c) . . . . . **2:402** [20]
Art 5 (1)(d) . . . . . **2:402** [22]
Art 5 (1)(e) . . . . . **2:402** [23]
Art 5 (1)(f) . . . . . **2:402** [23]
Art 5 (1)(g) . . . . . **2:402** [25]
Art 5 (1)(h) . . . . . **2:402** [25]–[26]
Art 5 (1)(i) . . . . . **2:403** [23]
Art 5 (2) . . . . . **2:403** [7]
Art 5 (3) . . . . . **2:402** [29]
Art 6 (1) . . . . . **2:403** [15]
Art 6 (2) . . . . **Intro before Art 2:401** [19]; **2:406** [7]
Art 6 (4) . . . . . **2:506** [1]
Art 7 . . . . . **2:402** [28]; **2:403**
Art 9 . . . . . **2:403**; **2:403** [23]; **2:404** [3]; **2:502** [2]
Art 9 (a) . . . . . **2:403** [3], [14]
Art 9 (b) . . . . . **2:403** [16]; **2:502** [5]
Art 9 (c) . . . . . **2:403** [14]
Art 9 (e) . . . . . **2:403** [24]
Art 10 . . . . . **2:404** [2]–[3]
Art 10 (1) . . . . . **2:404** [3]; **2:502** [5]
Art 10 (2) . . . . . **2:404** [3]–[4], [7]
Art 10 (3) . . . . . **2:404** [10]
Art 11 . . . . . **2:403**
Art 11 (1) . . . . . **2:405** [2]
Art 11 (3) . . . . . **2:405** [8]
Art 11 (4) . . . . . **2:405** [3]; **2:502** [5]
Art 12 (3) . . . . . **2:503** [9]
Art 13 . . . . . **2:502** [5]–[6]
Art 14 . . . . . **2:503** [1]
Art 14 (2) . . . . . **2:503** [5]
Art 15 (a) . . . . . **2:504** [2]; **2:505** [6]
Art 16 (1) . . . . . **2:504 App** [9]
Art 16 (2) . . . . . **2:504 App** [11]
Art 17 (1) . . . . . **2:504 App** [9]
Art 17 (2) . . . . . **2:504 App** [16]
Art 18 . . . . . **2:505** [3]
Art 18 (1) . . . . . **2:505** [6]
Art 18 (2) . . . . . **2:505** [7]
Art 19 (1)(d) . . . . . **2:505 App** [13]
Art 19 (1)(e) . . . . . **2:505 App** [15]
Art 19 (1)(f) . . . . . **2:505 App** [16]
Art 19 (1)(h) . . . . . **2:505 App** [17]–[18]
Art 19 (2) . . . . . **2:505 App** [14]
Art 19 (2)(a) . . . . . **2:505 App** [23]
Art 19 (2)(c) . . . . . **2:505 App** [14]
Art 20 (1)(a) . . . . . **2:505 App** [25]
Art 20 (1)(b) . . . . . **2:505 App** [24]
Art 20 (1)(c) . . . . . **2:505 App** [23]
Art 20 (3) . . . . . **2:505 App** [19]
Art 26 (2) . . . . . **9:102 (1) App** [7]
Art 31 . . . . . **2:104** [6]
Art 31 (3) . . . . . **2:104** [8]; **6:206** [17]

Art 31 (4) . . . . . **6:206** [13]
Art 34 . . . . . **6:202** [1], [7]
Art 35 . . . . . **6:201** [19]; **6:202** [1], [4]–[5], [12]
Annex I . . . . . **2:403** [16]
Annex I (B) . . . . . **2:404** [3]
Annex II . . . . . **6:202** [1], [7]
Annex II (a) . . . . . **6:202** [10]
Annex III . . . . . **6:202** [1], [5]
Annex III (1) . . . . . **6:202** [12]
Annex III (1)(c) . . . . . **6:202** [7]
Annex III (1)(e) . . . . . **6:202** [7]
Annex III (1)(i) . . . . . **6:202** [12]

Proposed Digital Content Directive (COM(2015) 634 final)
Recital 19 . . . . . **19:101** [23]
Art 2 (3) . . . . . **1:301 App**
Art 2 (4) . . . . . **1:301 App**
Art 5 (2) . . . . . **7:102** [4]
Art 8 . . . . . **18:203 (1)** [8]–[9]
Art 11 . . . . . **9:102 (1)** [38]; **9:301** [34]
Art 12 . . . . . **9:102 (2)–(3)** [2]
Art 12 (1) . . . . **9:102 (1)** [42]; **9:102 (2)–(3)** [23]
Art 12 (3) . . . . . **8:104** [30]; **9:301** [36]; **9:401** [2], [14]
Art 12 (4) . . . . . **9:401** [2]
Art 12 (5) . . . . . **9:301** [32]
Art 13 (1) . . . . . **9:303** [7]
Art 14 . . . . . **9:501 (1)** [6]

Proposed Online Sales Directive (COM(2015) 635 final)
Recital 5 . . . . . **Intro before Art 2:401** [23]
Recital 12 . . . . . **19:101** [23]
Recital 29 . . . . . **9:301** [32]
Art 2 (b) . . . . . **1:301 App**
Art 2 (c) . . . . . **1:301 App**
Art 2 (e) . . . . . **2:501 App II** [4]
Art 5 . . . . . **18:203 (2)** [4]
Art 5 (b) . . . . . **18:203 (2)** [14]
Art 7 . . . . . **18:203 (1)** [8]–[9]
Art 9 (1) . . . . . **9:102 (1)** [41]–[42]; **9:102 (1) App**
Art 9 (2) . . . . . **9:102 (1) App**
Art 9 (3) . . . . . **8:104** [30]; **9:301** [32]–[33], [36]; **9:401** [2]
Art 9 (4) . . . . . **9:201** [5]
Art 9 (5) . . . . . **8:101** [15]
Art 10 . . . . . **9:102 (1) App**
Art 10 (1) . . . . . **9:102 (1) App**; **9:102 (1) App** [8]
Art 10 (2) . . . . . **9:102 (1) App**; **9:102 (1) App** [3]
Art 10 (3) . . . . . **9:102 (1) App**; **9:102 (1) App** [9]
Art 11 . . . . . **9:102 (1) App**; **9:102 (1) App** [5]; **9:102 (2)–(3)** [2]
Art 11 (1) . . . . . **9:102 (2)–(3)** [22]–[23]
Art 11 (a) . . . . . **9:102 (1) App**
Art 11 (b) . . . . . **9:102 (1) App**
Art 11 (c) . . . . . **9:102 (1) App**
Art 12 . . . . . **9:401** [2], [15]
Art 13 (1) . . . . . **9:303** [7]
Art 13 (2) . . . . . **9:302** [5]

Services Directive (2006/123/EC)
Recital 37 . . . . . **2:402** [20]
Art 4 . . . . . **2:403** [14]
Art 4 (5) . . . . . **2:402** [20]
Art 22 . . . . . **Intro before Art 2:401** [16]
Art 22 (1)(a) . . . . . **2:403** [14]
Art 22 (1)(a)–(e) . . . . . **2:403** [13]–[14]
Art 22 (1)(b) . . . . . **2:403** [14]
Art 22 (1)(c) . . . . . **2:403** [14]
Art 22 (1)(d) . . . . . **2:403** [14]
Art 22 (1)(e) . . . . . **2:403** [14]
Art 22 (1)(j) . . . . . **2:402** [11]
Art 22 (3)(d) . . . . . **2:403** [21]
Art 27 (1) . . . . . **2:403** [14]
Art 27 (2) . . . . . **2:402** [30]

Timeshare Directive[1994] (94/47/EC)
Art 2 . . . . . **2:501 App II** [2]
Art 3 (1) . . . . . **2:403** [17]
Art 3 (2) . . . . . **2:403** [26]
Art 4 . . . . . **2:101 (2)** [14]
Art 5 (1) . . . . . **2:406** [8], **Intro before Art 2:501** [11]; **2:501 (1)** [3]; **2:502** [3]–[4], [6]
Art 5 (2) . . . . . **2:503** [1], [3]
Art 5 (3) . . . . . **2:501 (1)** [5]
Art 6 . . . . . **2:501 App I** , **2:501 App I** [1]; **2:504 App** [7]
Art 7 . . . . . **2:505** [2]–[3], [5]–[7]
Annex . . . . . **2:502** [2]
Annex (l) . . . . . **2:403** [17]; **2:503** [8]

Timeshare Directive (2008/122/EC)
Recital 11 . . . . . **Intro before Art 2:501** [15]
Art 2 . . . . . **2:501 App II** [2]
Art 2 (1) . . . . . **1:301 App**
Art 2 (1)(g) . . . . . **2:505** [5]
Art 2 (1)(i) . . . . . **2:403** [21]
Art 4 . . . . . **6:206** [14]
Art 4 (1) . . . . . **2:402** [18]; **2:403** [10], [19], [21]
Art 5 (1) . . . . . **2:101 (2)** [14]
Art 5 (2) . . . . . **2:403** [26]
Art 5 (3) . . . . . **6:206** [14]
Art 5 (4) . . . . . **2:403** [17]; **6:206** [14]
Art 6 (1) . . . . . **Intro before Art 2:501** [11]; **2:501 (1)** [3]
Art 6 (2) . . . . . **2:502** [3]
Art 6 (3) . . . . . **2:502** [3], [5]–[7]
Art 6 (3)(a) . . . . . **2:502** [4]
Art 7 . . . . . **2:503** [3], [9]
Art 8 . . . . . **2:504 App** [3]
Art 8 (1) . . . . . **2:504** [2]
Art 8 (2) . . . . . **2:501 (1)** [5]
Art 9 . . . . . **2:501 App I** [1]
Art 9 (1) . . . . . **2:504 App** [7]

Art 11 . . . . . **2:505** [6]
Art 11 (1) . . . . . **2:505** [3]
Art 11 (2) . . . . . **2:505** [3], [5]
Art 11 (3) . . . . . **2:505** [7]
Art 14 (1) . . . . . **2:403** [21]
Art 15 . . . . . **2:406** [3]
Annexes . . . . . **2:502** [2]
Annex I–IV . . . . . **2:403** [19], [21]
Unfair Commercial Practices Directive (2005/29/EC)
Recital 18 . . . . . **Intro before Art 2:401** [5]; **2:402** [14]
Art 2 . . . . . **2:403** [20]
Art 2 (a) . . . . . **1:301 App**
Art 2 (f) . . . . . **2:403** [21]
Art 3 (2) . . . . . **6:201** [17]
Art 5 (3) . . . . . **2:402** [3]
Art 5 (5) . . . . . **2:201** [9]; **2:204**
Art 6 (1)(g) . . . . . **2:402** [24]
Art 7 . . . . . **Intro before Art 2:401** [17]
Art 7 (1) . . . **Intro before Art 2:401** [5], [15], [18]; **2:402**; **2:402** [14]
Art 7 (3) . . . . . **2:405** [8]
Art 7 (4) . . . . . **Intro before Art 2:401** [15]; **2:402**; **2:402** [2], [11], [18], [25]; **2:403** [1], [13], [16]–[17]
Art 7 (4)(a) . . . . . **2:402** [17]
Art 7 (4)(b) . . . . . **2:402** [19]–[20]; **2:403** [14]
Art 7 (4)(c) . . . . . **2:402** [20]–[21]
Art 7 (4)(d) . . . . . **2:402** [22]; **2:403** [15]
Art 13 . . . . . **2:406** [3]
Art 17 . . . . . **2:403** [21]
Annex I . . . . . **2:201** [9]; **2:204**; **6:202** [3]
Annex I (10) . . . . . **2:402** [24]
Annex II . . . . . **Intro before Art 2:401** [15]
Unfair Contract Terms Directive (93/13/EEC)
Recitals 1–3 . . . . . **Intro before Art 6:201** [4]
Recital 11 . . . . . **6:203** [5]; **6:206** [7]
Recital 13 . . . . . **6:205** [1], [4]
Recital 17 . . . . . **6:201** [19]
Recital 19 . . . . . **6:205** [12]
Recital 20 . . . . . **6:206** [7]
Recital 24 . . . . . **6:204** [6]
Art 1 (1) . . . . . **Intro before Art 6:201** [14]
Art 1 (2) . . . . . **Intro before Art 6:201** [16]; **6:205**; **6:205** [1]–[2], [4]
Art 2 . . . . . **1:301 App**
Art 2 (1) . . . . . **6:205** [1]
Art 2 (b) . . . . . **1:301 App**
Art 3 . . . . . **1:201** [47]; **2:104** [8]; **6:202** [9]; **6:203** [10]; **6:206** [9]
Art 3 (1) . . . . . **1:201** [44]–[45]; **2:104** [6], [9], **Intro before Art 6:201** [16]; **6:201**; **6:201** [8], [12], [19]
Art 3 (2) . . . . . **Intro before Art 6:201** [16]; **6:203**; **6:203** [6], [8], [10]
Art 3 (3) . . . . . **Intro before Art 6:201** [16]; **6:201** [19]; **6:202**
Art 4 (1) . . . . . **Intro before Art 6:201** [16]; **6:201**; **6:201** [8]–[9]
Art 4 (2) . . . . . **2:104** [8]; **2:402** [22]; **2:403** [10], **Intro before Art 6:201** [16]; **6:205**; **6:205** [1], [11], [13]; **6:206** [11]–[12], [14], [17]
Art 5 . . . . **2:104** [8]; **2:402** [22]; **2:403** [10], **Intro before Art 5:101** [2]; **5:103**; **5:103** [3], **Intro before Art 6:201** [16]; **6:206**; **6:206** [1], [3], [7], [9]–[12], [14]; **18:203 (2)** [4]
Art 5 (3) . . . . . **5:103** [6]; **5:106** [7]
Art 6 . . . . . **6:204** [5]
Art 6 (1) . . . . . **Intro before Art 6:201** [16]; **6:204**; **6:204** [3], [5]
Art 7 . . . . . **Intro before Art 6:201** [6]; **6:201**; **6:201** [12]
Art 7 (2) . . . . . **5:103**; **5:103** [6]; **5:106** [7], **Intro before Art 6:201** [5]–[6]; **6:201** [12]; **6:206**
Annex . . . . . **6:202** [7]
Annex (1) . . . . . **Intro before Art 6:201** [16]; **6:201** [8], [15], [19]; **6:201** [19]; **6:202**; **6:202** [1], [4], [8], [10], **Intro before Art 13:101** [16]
Annex (1)(a) . . . . . **6:202**; **6:202** [10]
Annex (1)(b) . . . . . **6:202**; **6:202** [13], **Intro before Art 13:101** [16]; **13:107** [28]
Annex (1)(c) . . . . . **6:201** [8]; **6:202**; **6:202** [13]
Annex (1)(d) **6:202**
Annex (1)(e) . . . . . **6:201** [20]; **6:202**; **9:509** [7]
Annex (1)(f) . . . . . **Intro before Art 2:501** [38]; **6:201** [8]; **6:202**; **6:202** [10]
Annex (1)(g) . . . . . **6:202**; **6:202** [13]
Annex (1)(h) **6:202**
Annex (1)(i) . . . **2:104** [6], [9]; **6:201** [16]; **6:202**; **6:202** [7], [14]
Annex (1)(j) . . . . . **6:201** [16], [20]; **6:202**; **6:202** [13]; **6:205** [13]
Annex (1)(k) **6:202**
Annex (1)(l) . . . . . **6:201** [8]; **6:201** [16], [20]; **6:202**
Annex (1)(m) **6:202**
Annex (1)(n) . . . . . **Intro before Art 3:101** [9]; **6:202**
Annex (1)(o) . . . . . **6:201** [8]; **6:202**; **6:202** [11]
Annex (1)(p) . . . . . **6:202**; **6:202** [12]
Annex (1)(q) . . . . . **6:201** [20]; **6:202**
Annex (2) . . . . . **6:201** [19]; **6:202**; **6:202** [1]
Annex (2)(a) . . . . . **6:201** [16]; **6:202**
Annex (2)(b) . . . . . **6:201** [16], [20]; **6:202**; **6:202** [13]
Annex (2)(c) . . . . . **6:202**; **6:202** [13]
Annex (2)(d) . . . . . **6:201** [20]; **6:202**

Regulations
Brussels I Regulation (EC 44/2001)
Art 5 (1)(b) . . . . . **19:101** [5]
Art 15 (1) . . . . . **Intro before Art 2:101** [6]
Brussels Ia Regulation (EU 1215/2012) . . . . . **9:102 (1)** [5]
Art 7 (1)(b) . . . . . **19:101** [5]
CESL *see* ***Table of International Instruments***
Computation of Time Regulation (EEC, Euratom 1182/71)
Art 2 . . . . . **1:304 (2)**
Art 3 . . . . . **1:304 (2)**
Art 3 (1) . . . . . **1:304 (3)**, **1:304 (3)** [2]–[3], [5]
Art 3 (2) . . . . . **1:304 (3)**, **1:304 (3)** [4]
Art 3 (2)(a) . . . . . **1:304 (3)** [2]
Art 3 (2)(a)–(c) . . . . . **1:304 (3)** [5]–[6]
Art 3 (2)(b)–(c) . . . . . **1:304 (3)** [2]
Art 3 (2)(c) . . . . . **1:304 (3)** [3], [6]
Art 3 (3) . . . . . **1:304 (2)**, **1:304 (2)** [4]
Art 3 (4) . . . . . **1:304 (2)**, **1:304 (2)** [1], [5]
Art 3 (5) . . . . . **1:304 (2)**, **1:304 (2)** [7]
Council Regulation (EC) 974/98 of 3 May 1998 on the introduction of the euro
Recital 15 . . . . . **13:103** [5]
Art 8 (6) . . . . . **13:103** [5]
Council Regulation (EC) 1346/2000 of 29 May 2000 on insolvency proceedings
Recital 26 . . . . . **Intro before Art 13:101** [21]
Recital 27 . . . . . **Intro before Art 13:101** [21]
Art 4 (2)(d) . . . . . **Intro before Art 13:101** [21]
Art 4 (2)(i) . . . . . **Intro before Art 13:101** [21]
Art 6 (1) . . . . . **Intro before Art 13:101** [21]
RegCESL *see* ***Table of International Instruments***
Regulation (EC) 261/2004 of 11 Feb 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights
Art 10 (2) . . . . . **9:401** [14]
Regulation (EC) 2006/2004 of 27 Oct 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws . . . . . **Intro before Art 8:101** [26]
Regulation (EC) 450/2008 of 23 Apr 2008 laying down the Community Customs Code
Art 11 . . . . . **Intro before Art 3:101** [9]
Regulation (EC) 66/2010 of 25 Nov 2009 on the EU Ecolabel . . . . . **Intro before Art 2:401** [16]
Regulation (EU) 492/2011 of 5 Apr 2011 on freedom of movement for workers
Art 7 (4) . . . . . **15:102** [17]
Regulation (EU) 1169/2011 of 25 Oct 2011 on the provision of food information to consumers . . . . . **Intro before Art 2:401** [16]
Regulation (EU) 524/2013 of 31 May 2013 on online dispute resolution for consumer disputes
Art 14 (2) . . . . . **2:403** [25]
Art 14 (3) . . . . . **2:403** [25]
Regulation (EU) 2015/848 of 20 May 2015 on insolvency proceedings
Recital 70 . . . . . **Intro before Art 13:101** [21]
Recital 71 . . . . . **Intro before Art 13:101** [21]
Art 7 (2)(d) . . . . . **Intro before Art 13:101** [21]
Art 7 (2)(i) . . . . . **Intro before Art 13:101** [21]
Art 9 (1) . . . . . **Intro before Art 13:101** [21]
Art 55 (2) . . . . . **Intro before Art 13:101** [21]
Regulations on Passenger Rights . . . . . **9:301** [35]
Rome I Regulation (EC 593/2008)
Recital 13 . . . . . **1:101** [2]
Recital 39 . . . . . **9:508-2 (5)** [6]
Art 1 (2)(g) . . . . . **Intro before Art 3:101** [9]
Art 4 (1) . . . . . **6:110** [26]
Art 6 (2) . . . . . **6:201** [20]; **6:206** [13]
Art 9 . . . . . **15:102** [8], [17]
Art 9 (1) . . . . . **15:102** [5]
Art 9 (2) . . . . . **9:102 (2)–(3)** [13]
Art 9 (3) . . . . . **9:102 (2)–(3)** [13]; **15:102** [5]
Art 11 . . . . . **2:101 (2)** [1]
Art 12 (1)(c) . . . . . **9:102 (1)** [6], [22]
Art 12 (1)(d) . . . . . **14:101** [2]
Art 19 . . . . . **9:508-2 (5)** [6]
Rome II Regulation (EC 864/2007)
Art 10 . . . . . **15:104** [10]
Art 12 . . . . . **Intro before Art 2:301** [9]
Art 23 . . . . . **9:508-2 (5)** [6]

Table of International Instruments

(For EU legislation, see the Table of European Union Legislation)

ACQP[2007] (Acquis Principles: Contract I, 2007)

Art 1:303 . . . . . **2:101 (2)**; **2:101 (2)** [2]
Art 2:207 . . . . **Intro before Art 2:401** [17]; **2:406**; **2:406** [1], [5]
Art 5:105 . . . . . **Intro before Art 9:305** [21]
Art 5:201 . . . . . **2:501 App II** [17]
Art 6:305 . . . . . **Intro before Art 13:101** [16]; **13:107** [28]
Art 6:305 (1)(b) . . . . **Intro before Art 13:101** [16]
Art 8:401 . . . . . **Intro before Art 9:501** [1]

ACQP (Acquis Principles: Contract II, 2009)

Art 1:101–1:308 . . . . . **Intro before Art 1:101** [1]
Art 1:102 . . . . . **1:301** [2]; **1:301 Appendix**
Art 1:201 . . . . . **1:301 Appendix**
Art 1:202 . . . . . **1:301 Appendix**
Art 1:203 . . . . . **18:203 (4)**
Art 1:304 . . . . . **Intro before Art 1:101** [10]; **2:101 (2)**; **2:101 (2)** [2], [17]
Art 1:305 . . . . . **2:101 (2)** [14]; **2:404** [4]
Art 1:307 . . . . . **1:301**
Art 2:101 . . . . . **1:201** [47]–[48]; **2:301**; **2:301** [6]
Art 2:101–2:103 . . . . . **2:301** [6]
Art 2:102 . . . . . **2:301**; **2:301** [1]; **2:402** [2]
Art 2:103 . . . . . **2:301**; **9:502** [6]
Art 2:103 (1) **2:301**
Art 2:103 (2) . . . . . **2:301**; **9:502** [6]
Art 2:103 (3) **2:301**
Art 2:201 . . . . . **Intro before Art 2:401** [17], [26]; **2:401**; **2:401** [2]–[4], [12]–[13]; **2:406**
Art 2:202 . . . . . **Intro before Art 2:401** [17]–[18]; **2:402**; **2:402** [3], [20]; **2:403** [8]
Art 2:202 (1) . . . . . **2:402**; **2:402** [14]
Art 2:202 (2) . . . . . **2:402**; **2:402** [11], [19]
Art 2:202 (2)(a) . . . . . **2:402** [18]–[20], [25]
Art 2:202 (2)(b) . . . . . **2:402** [19]–[20], [22]
Art 2:203 . . . . . **Intro before Art 2:401** [17]; **2:403** [8]; **2:406**
Art 2:203 (1) . . . . **2:403**; **2:403** [9], [13]–[15], [24]
Art 2:203 (1)(a) . . . . . **2:403** [12]
Art 2:203 (2) . . . . **Intro before Art 2:401** [23]; **2:403**
Art 2:204 . . . . . **2:101 (2)** [14]; **2:404** [3]; **2:406**
Art 2:204 (1) . . . . . **2:402** [14]; **2:404** [3]
Art 2:204 (2) . . . **2:404** [3], [5]; **2:405** [3]; **6:204** [9]
Art 2:204 (3) . . . . . **2:404** [2]–[3]
Art 2:204 (4) . . . . . **2:404** [3]; **2:406** [2]
Art 2:205 . . . . . **2:402** [20]; **2:403** [13]
Art 2:205 (1) . . . . . **2:402** [19]; **2:403** [13]
Art 2:205 (1)(a) . . . . . **2:402** [19]; **2:403** [13]
Art 2:205 (1)(b) . . . . . **2:402** [19]; **2:403** [13]
Art 2:205 (1)(c) . . . . . **2:402** [19]; **2:403** [13]–[14]
Art 2:205 (1)(d) . . . . **2:402** [19]–[20]; **2:403** [13]
Art 2:205 (1)(e) . . . . . **2:402** [19]; **2:403** [13]
Art 2:205 (1)(f) . . . . . **2:403** [13]–[14]
Art 2:205 (1)(g) . . . . . **2:403** [13]–[14]
Art 2:205 (1)(h) . . . . . **2:403** [13]–[14]
Art 2:205 (2) . . . . . **2:402** [19]
Art 2:206 . . . . . **2:402** [20]–[21]
Art 2:206 (1) . . . . . **2:402** [20]
Art 2:206 (1)(a) . . . . . **2:402** [20]
Art 2:206 (1)(b) . . . . . **2:402** [20]
Art 2:206 (1)(c) . . . . . **2:402** [20]
Art 2:206 (1)(d) . . . . . **2:402** [20]
Art 2:206 (2) . . . . . **2:402** [20]–[21]
Art 2:206 (3) . . . . . **2:402** [20]
Art 2:207 . . . . . **2:403**; **2:403** [27]
Art 2:208 . . . . . **Intro before Art 2:401** [13], [17]; **2:406**; **2:406** [1], [5], [9], [14]–[15]
Art 2:208 (1) . . . . . **2:406**; **2:406** [8]; **2:502** [7]
Art 2:208 (2) **2:406**
Art 2:208 (3) . . . . . **2:406**; **2:406** [9], [14]–[15]; **9:502** [6]
Art 3:101–3:203 . . . . . **1:102** [14]
Art 4:101 . . . . . **Intro before Art 2:101** [6]; **2:101 (1)**; **2:101 (1)** [3]
Art 4:101 (1) . . . . . **2:101 (1)** [8]
Art 4:102 . . . . . **2:211**; **2:211** [2]
Art 4:102 (1) **2:211**
Art 4:102 (2) **2:211**
Art 4:104 . . . **Intro before Art 2:401** [17]; **2:405** [9]
Art 4:105 . . . . . **Intro before Art 2:401** [17]
Art 4:106 . . . . . **2:204**; **2:204** [16]
Art 4:107 . . . . . **6:101** [4], [11]; **18:203 (4)**; **18:203 (4)** [1]
Art 4:107 (1) . . . . . **6:101**; **18:203 (4)**
Art 4:107 (1)(b) . . . . . **6:101** [11]
Art 4:107 (2) . . . . . **18:203 (4)**
Art 4:108 . . . . . **18:203 (4)**
Art 4:108 (1) **6:101**
Art 4:109 . . . . . **2:107**; **2:107** [4]
Art 4:109 (1) . . . . . **2:107**; **2:107** [4]
Art 4:109 (2) . . . . . **2:107**; **2:107** [4]
Art 5:101 . . . . **Intro before Art 2:501** [11]–[12], [17], [35]; **2:501 App II** [2], [14], [25]; **2:506** [1]

Art 5:102 . . . . . **2:501 (1)** [2]–[3]; **2:502** [3]; **2:503** [1], [3], [6]–[7]
Art 5:103 . . . . . **2:501 (2)** [3], [6], [9]; **2:502** [3]–[6]; **2:503** [10]
Art 5:103 (1) . . . . . **2:406** [8]; **2:502** [3]
Art 5:103 (2) . . . . . **2:503** [9]
Art 5:104 . . . . . **2:403** [16]; **Intro before Art 2:501** [28]; **2:502** [2]; **2:503** [8]
Art 5:105 . . . . . **Intro before Art 2:501** [27]; **2:501 (1)** [5]; **2:504** [3]; **2:504 App** [1]–[2], [20]; **2:505** [6]; **Intro before Art 9:305** [21]; **9:306** [46]
Art 5:105 (1) . . . . . **2:501 (1)** [2]; **2:504** [2]; **2:504 App** [25]
Art 5:105 (2) . . . . . **2:504 App** [16], [18]
Art 5:106 . . . . . **2:505** [1], [3], [5]
Art 5:106 (1) . . . . . **2:505** [6]
Art 5:106 (2) . . . . . **2:505** [5]
Art 5:106 (3) . . . . . **2:505** [5]
Art 5:106 (4) . . . . . **2:505** [6]–[7]
Art 5:A-01 . . . . . **2:402** [9]; **Intro before Art 2:501** [17], [24]; **2:501 (1)** [2]; **2:501 App II** [2], [6], [11], [17], [27]; **2:505 App** [4], [17]–[18], [22], [25]
Art 5:A-01 (1) . . . . . **2:505 App** [4]
Art 5:A-01 (2) . . . . **2:403** [6]; **2:505 App** [4], [26]
Art 5:A-01 (3) . . . . . **2:505 App** [4]
Art 5:A-01 (3)(a) . . . . . **2:505 App** [24]
Art 5:A-01 (3)(b) . . . . . **2:505 App** [23]
Art 5:A-01 (3)(c) . . . . . **2:505 App** [25]
Art 5:A-01 (3)(d) . . . . . **2:505 App** [23]
Art 5:A-01 (3)(e) . . . . . **2:501 App II** [6]
Art 5:A-01 (3)(f) . . . . . **2:505 App** [8]
Art 5:A-01 (3)(g) . . . . . **2:505 App** [17]
Art 5:A-01 (4) . . . . . **2:505 App** [4]
Art 5:A-01 (4)(a) . . . . . **2:505 App** [19]
Art 5:A-01 (4)(b) . . . . . **2:505 App** [5]
Art 5:A-01 (4)(c) . . . . . **2:505 App** [9]–[10]
Art 5:A-01 (4)(d) . . . . . **2:505 App** [15]
Art 5:A-01 (4)(d)(ii) . . . . . **2:505 App** [20]
Art 5:A-01 (4)(e) . . . . . **2:505 App** [16]
Art 5:A-01 (4)(f) . . . . . **2:505 App** [22]
Art 5:A-02 . . . . . **Intro before Art 2:501** [27]
Art 5:C-02 . . . . . **Intro before Art 2:501** [27]
Art 6:101 . . . . . **6:203** [2], [4]
Art 6:101–6:306 . . . . . **Intro before Art 6:201** [15]
Art 6:101 (2) . . . . . **6:203**; **6:203** [10]
Art 6:101 (3) **6:203**
Art 6:101 (4) . . . . . **6:203**; **6:203** [6], [8]
Art 6:201 . . . . . **2:104**; **2:104** [4], [9], [11]–[12], [14]–[16]; **6:202** [14]
Art 6:201 (1) . . . . . **2:104**; **2:104** [7], [13], [15]
Art 6:201 (2) . . . . . **2:104**; **2:104** [7], [12]–[13]
Art 6:201 (3) . . . . . **2:104**; **2:104** [14]
Art 6:201 (4) . . . . . **2:104**; **2:104** [6], [12]–[13]
Art 6:202 . . . . . **5:104**; **5:104** [2]
Art 6:203 . . . . . **Intro before Art 5:101** [2]; **5:103**; **5:103** [4]–[6]
Art 6:203 (1) **5:103**
Art 6:203 (2) **5:103**
Art 6:301 . . . . . **6:201** [3], [5], [8]
Art 6:301 (1) **6:201**
Art 6:301 (2) . . . . . **6:201** [5]
Art 6:302 . . . . . **6:201** [16]; **6:205** [14]; **6:206**; **6:206** [5]–[7], [9], [13]
Art 6:303 . . . . . **6:205**; **6:205** [1], [3]–[5], [8]
Art 6:303 (1) . . . . . **6:205**; **6:205** [3]
Art 6:303 (2) . . . . . **6:205**; **6:205** [14]
Art 6:304 . . . . . **6:201** [20]; **6:202**; **6:202** [1], [7], [9]
Art 6:305 . . . . . **2:104** [6]; **6:201** [19]; **6:202**; **6:202** [1], [5], [7], [10], [14]; **Intro before Art 13:101** [16]
Art 6:305 (1) **6:202**
Art 6:305 (1)(a) . . . . . **6:202** [10]
Art 6:305 (1)(b) . . . . . **Intro before Art 13:101** [16]; **13:107** [28]
Art 6:305 (1)(c) . . . . . **6:201** [8]
Art 6:305 (1)(d) . . . . . **6:201** [8]
Art 6:305 (1)(f) . . . . . **6:201** [8]; **6:202** [10]
Art 6:305 (1)(g) . . . . . **6:202** [13]
Art 6:305 (1)(i) . . . . . **6:202** [13]
Art 6:305 (1)(k) . . . . . **6:201** [8]
Art 6:305 (1)(n) . . . . . **6:201** [8]; **6:202** [11]
Art 6:305 (1)(o) . . . . . **6:202** [12]
Art 6:305 (2) **6:202**
Art 6:306 . . . . . **6:204**
Art 6:306 (1) . . . . . **6:204**; **6:204** [1]
Art 6:306 (2) . . . . . **6:204**; **6:204** [3], [5]
Art 7:101 . . . . . **1:201** [48]
Art 7:102 . . . . . **1:201** [48]
Art 7:103 . . . . . **1:201** [48]
Art 7:104 . . . . . **Intro before Art 1:101** [6]; **1:201** [48]; **1:202** [1]
Art 7:201 . . . . . **9:501 (1)** [13]; **14:203** [2]
Art 7:201 (1) . . . . . **7:102**; **7:102** [4]
Art 7:201 (2) . . . . . **7:102-1**; **7:102-1** [1], [3]
Art 7:201 (3) . . . . . **7:102-1** [3]
Art 7:201 (5) . . . . . **7:102-1** [5]
Art 8:101 . . . . . **1:301**; **Intro before Art 8:101** [12]; **8:101** [13], [21]; **9:102 (2)–(3)** [10]
Art 8:102 . . . . . **8:101**; **8:101** [11], [13], [15], [19], [21]; **9:102 (2)–(3)** [10]; **9:201** [16]; **9:504** [9]
Art 8:201 . . . . . **Intro before Art 9:101** [3]; **9:101**; **9:101** [6]
Art 8:201 (1) . . . . . **9:101** [6]
Art 8:201 (2) **9:101**
Art 8:201 (2)(b) . . . . . **9:101** [20]
Art 8:202 . . . . . **Intro before Art 9:101** [3]; **9:102 (1)** [38]; **9:102 (2)–(3)** [45]
Art 8:202 (1) . . . . . **9:102 (1)**

Art 8:202 (2) . . . . . **9:102 (1)**; **9:102 (1)** [42]; **9:102 (1) App**
Art 8:202 (3) . . . . . **9:102 (1) App**; **9:102 (2)–(3)**
Art 8:202 (3)(c) . . . . . **9:102 (2)–(3)** [29]
Art 8:202 (4) . . **9:102 (2)–(3)**; **9:102 (2)–(3)** [41]
Art 8:301 . . . . **8:102** [5]; **8:104** [8]; **9:301**; **9:301** [35]–[37], [41]; **9:302** [10]; **9:401** [1], [10], [14]
Art 8:301 (1) . . . . . **9:301**; **9:301** [35]; **9:302**; **9:401**; **9:401** [16]
Art 8:301 (1)(a) . . . . . **9:401** [3]
Art 8:301 (2) . . . . . **8:104** [24]; **9:301**; **9:301** [35]; **9:302**
Art 8:301 (3) . . . . . **9:302**; **9:302** [10]
Art 8:301 (4) . . . . . **8:102** [5]; **9:401**
Art 8:301 (5) . . . . . **8:102**; **8:102** [2]; **9:401**; **9:401** [17]
Art 8:302 . . . . . **9:303** [7]
Art 8:303 (2) . . . . . **Intro before Art 9:305** [21]
Art 8:304 (1) **9:201**
Art 8:304 (4) **9:201**
Art 8:401 . . . . . **8:108** [17]; **9:102 (2)–(3)** [10]; **9:501 (1)** [6]; **9:502**; **9:508-2 (1)**
Art 8:401–8:403 . . . . . **Intro before Art 9:501** [1]
Art 8:401 (1) . . . . . **9:501 (1)**; **9:501 (1)** [12]
Art 8:401 (2) . . . . **8:108**; **8:108** [17]; **9:501 (1)** [6]; **9:508-2 (1)** [4]
Art 8:402 . . . . . **Intro before Art 9:501** [1]; **9:501 (2)** [8]; **9:502** [1], [15]
Art 8:402 (1) . . . . . **9:502**; **9:502** [1]
Art 8:402 (2) . . . . **9:501 (1)** [1]; **9:502**; **9:502** [1]
Art 8:402 (3) **9:502**
Art 8:402 (4) . . . . . **9:501 (1)** [1]; **9:501 (2)**; **9:501 (2)** [8]; **9:502**
Art 8:403 . . . . . **9:504**; **9:504** [9], [11], [20]
Art 8:404 . . . . . **9:508**; **9:508** [9]
Art 8:405 . . . . . **9:508-2 (1)** [5]
Art 8:405–8:407 . . . . . **Intro before Art 9:501** [1]
Art 8:406 . . . . . **9:508-2 (5)** [3]
Art 8:406 (1) . . . . **9:508-2 (1)**; **9:508-2 (1)** [2]–[3]
Art 8:406 (2) . . . . . **9:508-2 (2)**; **9:508-2 (2)** [1]
Art 8:406 (2)(b) **9:508-3**
Art 8:406 (2)(c) . . . . . **9:508-2 (3)**; **9:508-3**
Art 8:406 (3) . . . . . **9:508-2 (3)**; **9:508-3**
Art 8:406 (4) . . . . . **9:508-2 (1)**; **9:508-2 (5)**; **9:508-3**
Art 8:406 (5) . . . . . **9:508-2 (6)**
Art 8:407 . . . . . **9:508-3**; **9:508-3** [1]
Art 8:407 (1) . . . . . **9:508-2 (1)** [2]; **9:508-3**
Art 8:407 (2) **9:508-3**
Art 8:407 (3) **9:508-3**
Art 8:B-04 . . . . . **9:102 (1)** [41]; **9:102 (1) App**; **9:102 (1) App** [5]; **9:102 (2)–(3)** [23]
Art 8:B-05 . . . . . **9:102 (1) App**
Art 8:B-05 (1) . . . . . **9:102 (1) App**; **9:102 (1) App** [8]
Art 8:B-05 (2) . . . . . **9:102 (1) App**; **9:102 (1) App** [9]–[10]

Acquis Principles: Contract I (2007) *see* ACQP[2007]

Acquis Principles: Contract II (2009) *see* ACQP

Benelux Convention relative à la clause pénale of 26 November 1973
Art 2 (1) . . . . . **9:509**; **9:509** [15]
Art 2 (2) . . . . . **9:509**; **9:509** [14]
Art 2 (3) . . . . . **9:509** [10]
Art 4 . . . . . **9:509** [17]

CAISG (Convention on Agency in the International Sale of Goods of 17 February 1983)
Art 1 . . . . . **Intro before Art 3:101** [2]; **3:101**
Art 1 (1) . . . . . **3:101**; **3:101** [2]–[3], [6]
Art 1 (2) . . . . . **3:101**; **3:101** [3]
Art 1 (3) . . . . . **3:101**; **3:101** [2]
Art 1 (4) . . . . . **3:101**; **3:101** [5]
Art 3 (1) . . . . . **3:101** [4]
Art 3 (1)(1)-(e) . . . . . **3:101** [4]
Art 4 . . . . . **3:101** [4]
Art 4 (a) . . . . . **3:101** [4]
Art 4 (b) . . . . . **3:101** [4]
Art 9 . . . . . **3:201**
Art 9 (1) . . . . . **3:201**; **3:201** [2]
Art 9 (2) . . . . . **3:201**; **3:201** [6]
Art 10 . . . . . **3:201**; **3:201** [4]
Art 12 . . . . . **3:102**; **3:102** [7]; **3:202** [1]
Art 13 . . . . . **3:302** [7]–[8]; **3:304**
Art 13 (1) . . . . . **3:301**; **3:302** [7]
Art 13 (2) . . . . . **3:302** [7]
Art 13 (2)–(7) . . . . . **3:302** [7]
Art 13 (2)(a) **3:302**
Art 13 (2)(b) . . . . . **3:303**; **3:303** [3]
Art 13 (3) . . . . . **3:302** [7]; **3:304**
Art 13 (4) **3:303**
Art 13 (5) . . . . . **3:302**; **3:302** [7]
Art 13 (6) . . . . . **3:302**; **3:302** [7]
Art 13 (7) **3:302**; **3:303**
Art 14 . . . . . **3:201**
Art 14 (1) . . . . . **3:201**; **3:201** [11]
Art 14 (2) . . . . . **3:201**; **3:201** [9]–[11]
Art 15 (1) . . . . . **3:207**; **3:207** [1]
Art 15 (2) . . . . . **3:208**; **3:208** [1]–[2]
Art 15 (3) **3:208**
Art 15 (4) . . . . . **3:207**; **3:207** [4]
Art 15 (5) . . . . . **3:207**; **3:207** [2]
Art 15 (6) **3:207**
Art 15 (7) **3:207**
Art 15 (8) . . . . . **3:207**; **3:207** [2]
Art 16 . . . . . **3:204**
Art 16 (1) . . . . . **3:204**; **3:204** [1]–[3], [5]
Art 16 (2) . . . . . **3:204**; **3:204** [4]
Art 17 . . . . . **3:209**; **3:209** [1]

Art 17 (a) **3:209**
Art 17 (b) **3:209**
Art 17 (c) . . . . . **3:209**; **3:209** [3]
Art 18 . . . . . **3:209**; **3:209** [1]
Art 19 . . . . . **3:209**; **3:209** [2]
Art 20 . . . . . **3:209**; **3:209** [4]

CARIT (UN Convention on the Assignment of Receivables in International Trade of 12 December 2001)
Art 1 (1) . . . . . **Intro before Art 11:101** [3]
Art 1 (5) . . . . . **11:401** [3]
Art 2 (a) . . . . **Intro before Art 11:101** [3]; **11:101**
Art 4 . . . . . **11:101** [14]
Art 4 (1) . . . . . **11:101** [14]
Art 4 (1)(a) . . . . . **11:101** [14]
Art 4 (1)(b) . . . . . **11:101** [16]
Art 4 (2) . . . . . **11:101** [14]
Art 4 (3) . . . . . **11:101** [14]
Art 4 (3)–(5) . . . . . **11:101** [14]
Art 4 (4) . . . . . **11:101** [14]; **11:307** [8]
Art 4 (5) . . . . . **11:101** [14]
Art 4 (5)(ii) . . . . . **Intro before Art 11:101** [17]
Art 5 (b) . . . . . **11:102** [4], [7]
Art 5 (c) . . . . . **11:307** [8]
Art 5 (d) . . . . . **11:102** [10]; **11:303** [9], [17], [20]
Art 5 (j) . . . . . **11:203** [6]
Art 6 . . . . . **11:201** [7]
Art 8 . . . . . **11:102**; **11:102** [1]
Art 8 (1) . . . . . **11:102**; **11:102** [4]; **11:103** [1]
Art 8 (1)(b) . . . . . **11:102** [14]
Art 8 (2) . . . . . **11:102**; **11:102** [4], [11]
Art 8 (3) . . . . . **Intro before Art 11:101** [24]
Art 9 . . . . . **11:102** [1]; **11:301** [8]; **11:307**
Art 9 (1) **11:301**
Art 9 (2) . . . . . **11:301**; **11:301** [5]; **11:307** [1]
Art 9 (3) . . . . . **11:301**; **11:302** [4]
Art 10 . . . . . **11:201**; **11:307**
Art 10 (1) . . . . . **11:201**; **11:201** [7]–[8]
Art 10 (2) . . . . . **11:201**; **11:201** [7]
Art 10 (3) **11:201**
Art 10 (4) **11:201**
Art 10 (5) **11:201**
Art 10 (6) **11:201**
Art 11–14 . . . . . **Intro before Art 11:101** [15]
Art 12 . . . . . **11:204**; **11:204** [1], [9]
Art 12 (1) . . . . . **11:101** [11]; **11:204**; **11:204** [1]
Art 12 (2) . . . . . **11:204**; **11:204** [6]
Art 13 . . . . . **11:303** [10], [21]
Art 13 (1) . . . . . **11:303** [10]
Art 13 (2) . . . . . **11:303** [10], [21]
Art 14 . . . . . **11:203** [5]–[6]
Art 14 (1) . . . . . **11:104** [7]; **11:203**
Art 14 (1)(b) . . . . . **11:203**; **11:203** [4]
Art 15–21 . . . . . **Intro before Art 11:101** [15]
Art 15 (2)(a) . . . . . **11:306** [10]
Art 15 (2)(b) . . . . . **11:306** [5]
Art 16 (1) . . . . . **11:303** [19]
Art 16 (2) . . . . . **11:303** [17]
Art 17 . . . . . **11:303** [9]–[10]
Art 17 (1) . . . . . **11:303**; **11:303** [9], [11]
Art 17 (2) . . . . . **11:303** [9], [11], [18]; **11:304**
Art 17 (3) **11:303**
Art 17 (4) . . . . . **11:305**; **11:305** [3], [7], [9]–[10]
Art 17 (5) **11:303**
Art 17 (6) . . . . . **11:103** [4]; **11:303**
Art 17 (7) . . . . **Intro before Art 11:101** [15]; **11:303**; **11:303** [9], [23]–[24]; **11:305** [10]
Art 18 . . . . . **11:307**; **11:307** [8]
Art 18 (1) . . . . . **11:307**; **11:307** [7]
Art 18 (2) . . . . . **11:306** [4]; **11:307**; **11:307** [5]
Art 18 (3) . . . . . **11:301** [5]; **11:307**; **11:307** [1]
Art 19 . . . . . **11:307** [8]
Art 19 (1) . . . . . **11:307** [8]
Art 19 (2) . . . . . **11:307** [8]
Art 19 (3) . . . . . **11:307** [8]
Art 20 . . . . . **11:303** [9]
Art 20 (2) . . . . . **11:307** [8]; **11:308** [1]
Art 20 (2)(b) . . . . . **11:308** [1]–[2]
Art 21 . . . . . **11:307** [2]
Art 22–25 . . . . . **Intro before Art 11:101** [15]
Art 24 (2) . . . . . **11:101** [6]; **11:203** [5]
Art 25 . . . . . **11:102** [13]
Art 27 . . . . . **11:104** [6]
Art 42 . . . . . **11:401** [3]
Annex . . . . . **11:401** [3]
Art 9 . . . . . **11:305**

CESL (Proposal for a Common European Sales Law, 2011)
Recital 1 . . . . . **1:106 (1)** [10]
Recital 8 . . . . . **1:106 (1)** [10]
Recital 26 . . . . . **2:101 (2)** [5]
Recital 27 . . . . . **1:106 (2)** [4]; **6:110** [26]; **9:102 (2)–(3)** [13]
Recital 29 . . . . . **1:106 (1)** [14]; **1:106 (2)** [3], [5]
Recital 31 . . . . . **1:201** [66], [77]
Recital 32 . . . . . **1:106 (1)** [12]
Art 1 . . . . . **Intro before Art 1:101** [6]; **1:102**; **1:102** [2]–[3]; **1:106 (1)** [12]; **1:201** [81]; **1:202** [11]; **9:509** [1]
Art 1–12 . . . . . **Intro before Art 1:101** [1]
Art 1 (1) . . . . . **1:102**; **1:102** [2], [22]–[24]; **6:110** [31]
Art 1 (2) . . . . . **1:102**; **1:102** [2], [22]; **7:102** [8]; **7:104** [4]; **7:106** [7]; **7:107** [8]
Art 2 . . . . . **Intro before Art 1:101** [6], [10]; **1:106 (1)** [12]; **1:201**; **1:201** [11], [65], [68], [77], [100]; **1:202** [3], [9], [11]; **14:304** [1]
Art 2 (1) . . . . . **1:201**; **1:201** [11], [65], [68]; **2:105** [3]

Art 2 (2) . . . . . **1:201**; **1:201** [65], [67], [69], [76], [100]; **2:401** [3]; **4:105** [4]; **9:303** [20]; **18:203 (3)** [8]
Art 2 (3) . . . . . **1:201**; **1:201** [96]; **2:401** [13]
Art 3 . . . . . **Intro before Art 1:101** [6]; **1:106 (1)** [12]; **1:202**; **1:202** [2]–[11]; **1:302** [1]; **19:302** [1], [4]–[5]
Art 4 . . . . . **Intro before Art 1:101** [8]; **1:102** [2]; **1:106 (1)** [1]; **1:106 (2)** [1]–[2], [5]; **Intro before Art 5:101** [12]; **9:508-2 (1)** [8]
Art 4 (1) . . . . . **1:106 (1)**; **1:106 (1)** [5]–[6], [8]–[14]; **1:106 (2)** [1], [3], [5]
Art 4 (2) . . . . **1:106 (1)** [14]; **1:106 (2)**; **1:106 (2)** [1]–[3], [5]–[6]; **2:101 (2)** [5]
Art 4 (3) . . . **1:106 (1)**; **1:106 (1)** [5], [7]; **5:105** [10]
Art 5 . . . . . **Intro before Art 1:101** [8]; **1:106 (1)** [12]; **1:302**; **1:302** [5], [7], [9]; **19:202** [6]; **19:302** [6]
Art 5 (1) . . . . . **1:302**; **5:102** [7]
Art 5 (2) . . . . . **1:107** [21]; **1:202** [7]; **1:302**; **1:302** [1]; **2:401** [3]
Art 6 . . . . . **Intro before Art 1:101** [6], [9]; **1:106 (1)** [12]; **1:303** [15]; **2:101 (2)**; **2:101 (2)** [5], [15], [17]; **14:401** [2]
Art 7 . . . . . **5:103**; **Intro before Art 6:201** [15]; **6:201**; **6:202**; **6:203**
Art 7–10 . . . . . **1:302** [9]
Art 7 (1) **6:203**
Art 7 (2) . . . . . **6:203**; **6:203** [9]
Art 7 (3) . . . . . **6:203**; **6:203** [6], [8]
Art 7 (4) **6:203**
Art 7 (5) . . . . . **6:203**; **6:203** [10]
Art 8 . . . . . **4:115** [1]; **6:111**; **6:202**; **Intro before Art 9:305** [6], [9], [14]; **9:305**; **9:305** [1], [10]–[12]
Art 8 (1) **9:305**
Art 8 (2) . . . . . **8:102**; **8:102** [2]; **Intro before Art 9:305** [14]; **9:305**; **9:305** [11]; **9:306** [8], [10]
Art 8 (3) . . . . . **Intro before Art 9:305** [6], [9]; **9:305**; **9:305** [11]
Art 9 . . . . . **9:302**; **9:302** [14]; **19:301** [8]
Art 9 (1) . . . . . **9:302**; **9:302** [6]
Art 9 (2) **1:104**; **9:302**
Art 9 (2)–(4) . . . . . **9:302** [6]
Art 9 (3) **9:302**
Art 9 (4) **9:302**
Art 10 . . . . . **Intro before Art 1:101** [8]; **1:107** [7], [28]–[29]; **1:201** [78]; **1:303**; **1:303** [7]–[8], [10], [14]–[16], [23], [28], [30]; **4:112** [4]
Art 10 (1) . . . . . **1:107** [28]; **1:303**; **1:303** [7]–[8]
Art 10 (2) . . . . . **1:303**; **1:303** [32]
Art 10 (3) . . . . . **1:303**; **1:303** [8], [13], [19], [22]; **Intro before Art 2:501** [38]
Art 10 (4) . . . . **1:303**; **1:303** [22], [25]; **2:205** [4]
Art 10 (4)(a) . . . . . **1:303** [28]
Art 10 (4)(a)–(c) . . . . . **1:303** [24], [26]
Art 10 (4)(c) . . . . . **1:303** [22], [24]; **2:205** [5]
Art 10 (4)(d) . . . . . **1:303** [22], [24], [26]
Art 10 (5) . . . . . **1:303**; **2:205** [4]
Art 10 (6) . . . . . **1:303**; **1:303** [33]
Art 11 . . . . . **Intro before Art 1:101** [8]; **1:107** [29]; **1:304 (3)**
Art 11 (1) . . . . . **1:303** [7]
Art 11 (2) . . . . . **1:304 (3)**; **1:304 (3)** [4]–[5]
Art 11 (2)(a) . . . . . **1:304 (3)** [6]
Art 11 (2)(a)–(b) . . . . . **1:304 (3)** [2], [6]
Art 11 (2)(b) . . . . . **1:304 (3)** [6]
Art 11 (3) . . . . **1:304 (1)** [6]; **1:304 (3)**; **1:304 (3)** [2]–[3], [5]–[6]; **14:203** [2]
Art 11 (4) . . . . . **1:304 (2)**; **1:304 (2)** [4]
Art 11 (5) . . . . . **1:304 (2)**; **1:304 (2)** [5]–[6]
Art 11 (6) . . . . . **1:304 (1)**; **1:304 (1)** [9]–[10]; **2:206** [3]
Art 11 (7) . . . . . **1:304 (2)**
Art 12 . . . . . **Intro before Art 1:101** [8]; **1:107**; **1:107** [18], [20], [23], [25]–[26], [28]–[29]; **1:303** [14]; **2:102** [3]
Art 12 (1) . . . . **1:107**; **1:107** [7], [21], [22], [25], [27]
Art 12 (1)–(2) . . . . . **1:107** [30]
Art 12 (1)–(3) . . . . . **1:107** [18], [23], [29]
Art 12 (2) . . . . . **1:107**; **1:107** [7], [21], [25]
Art 12 (3) . . . . . **1:107**; **1:107** [8], [10], [26], [31]; **Intro before Art 5:101** [14]
Art 12 (4) . . . . **1:107**; **1:107** [8], [10], [18], [29], [31]
Art 12 (5) . . . . . **1:107**; **1:107** [4], [29]
Art 13 . . . . . **1:107** [4], [28]; **2:403** [3], [6], [8], [24]; **2:404** [6]; **2:405** [1], [4], [7]
Art 13–19 . . . . . **2:402** [4]
Art 13–28 . . . . . **2:401** [3]; **2:406** [4]; **4:103** [15]
Art 13–29 . . . . . **1:201** [68]
Art 13 (1) . . . . . **2:403**; **2:403** [9], [16], [19]
Art 13 (1)(a) . . . . . **2:403** [12]–[13]; **2:405** [4], [7]
Art 13 (1)(b) . . . . . **2:403** [14]
Art 13 (1)(c) . . . . . **2:403** [13]–[14]
Art 13 (1)(d) . . . **2:402** [22]; **2:403** [15], [20]–[23]
Art 13 (1)(f) . . . . . **2:403** [19]–[20]
Art 13 (1)(g) . . . . . **2:403** [24]
Art 13 (1)(h) . . . . . **2:403** [23]
Art 13 (1)(j) . . . . . **2:401** [12]; **2:403** [23]
Art 13 (2) . . . . . **2:403**; **2:403** [26]; **2:406** [9], [15]
Art 13 (3) . . . . . **1:303** [1], [7]; **2:405** [1], [7]–[8]
Art 13 (3)(a) . . . . . **1:303** [7]; **2:405** [1]–[2]
Art 13 (3)(b) . . . **1:303** [15]; **2:101 (2)** [14]; **2:405** [1]
Art 13 (3)(c) . . . . . **2:405** [1]
Art 13 (4) . . . . . **2:404** [1]–[3]
Art 13 (4)(a) . . . . . **2:101 (2)** [14]
Art 13 (4)(b) . . . . . **2:101 (2)** [14]
Art 13 (5) . . . . . **2:402** [9]; **2:403** [6]
Art 14 . . . . . **2:406**; **4:106**
Art 14 (1) . . . . . **2:402** [20]; **2:405** [4], [7]

Art 14 (1)–(3) . . . . . **2:403** [14]
Art 14 (1)(b) . . . . . **2:402** [21]
Art 14 (2) . . . . . **2:405** [4], [7]
Art 14 (3) . . . . . **2:403** [15]
Art 15 (a) . . . . . **2:405** [7]
Art 15 (a)–(e) . . . . . **2:403** [13]
Art 15 (d) . . . . . **2:403** [14]
Art 15 (e) . . . . . **2:403** [14]
Art 16 . . . . . **2:402** [22]–[23]; **2:403** [21]
Art 16 (a) . . . . . **2:402** [22]; **2:403** [15]–[16]
Art 16 (b) . . . . . **2:402** [22], [25]–[26]; **2:403** [21]–[22]; **2:405** [4], [7]
Art 16 (c) . . . . . **2:403** [21], [23]
Art 16 (d) . . . . . **2:403** [20]
Art 17 . . . . . **2:502** [2]
Art 17 (1) . . . . . **2:403** [16]
Art 17 (2) . . . . . **2:403** [17]; **2:406**; **4:106**
Art 17 (3) . . . . . **2:403** [16], [18]
Art 17 (4) . . . . . **2:403**; **2:403** [19]
Art 17 (5) . . . . . **1:107** [28]; **2:403** [16]–[18]
Art 18 . . . . . **2:404** [1]–[2]
Art 18 (1) . . . . . **2:101 (2)** [14]; **2:404** [5], [6]
Art 18 (2) . . . . . **2:403** [18]; **2:404** [8]
Art 19 . . . . . **1:303** [1], [7]; **2:405** [1], [7]
Art 19 (1) . . . . . **2:405** [9]
Art 19 (2) . . . . . **2:405** [7]–[8]
Art 19 (3) . . . . . **2:405** [7]–[8]
Art 19 (3)(a) . . . . . **2:405** [7]
Art 19 (3)(b) . . . . . **2:405** [7]
Art 19 (3)(c) . . . . . **2:405** [7]
Art 19 (3)(d) . . . . . **2:405** [7]
Art 19 (3)(e) . . . . . **2:405** [7]
Art 19 (4) . . . . . **2:101 (2)** [14]; **2:405** [9]–[10]; **Intro before Art 9:305** [26]
Art 19 (5) . . . . . **2:101 (2)** [14]; **2:403** [18]; **2:404** [6]; **2:405** [3]–[4]
Art 19 (6) . . . . . **2:403** [18]; **2:405** [10]–[11]
Art 20 . . . . . **1:303** [1], [7]; **2:402**; **2:402** [2], [4]–[5], [9], [11], [14], [20], [29]
Art 20 (1) . . . . . **2:402**; **2:402** [13], [25]–[26]
Art 20 (1)(a) . . . . . **2:402** [18]
Art 20 (1)(b) . . . . . **2:402** [20]
Art 20 (1)(c) . . . . . **2:402** [19]
Art 20 (1)(d) . . . . . **2:402** [22]–[23], [25]
Art 20 (1)(e) . . . . . **2:402** [23]
Art 20 (1)(f) . . . . . **2:402** [26]
Art 20 (1)(g) . . . . . **2:401** [12]; **2:402** [26]
Art 20 (2) . . . . . **2:402**; **2:402** [10]
Art 20 (2)(i) . . . . . **2:505 App** [19]
Art 21 . . . . . **2:402** [30]; **2:403**; **2:403** [27]
Art 21 (1)(b) . . . . . **2:402** [20]
Art 22 . . . . . **2:401** [13]; **2:402** [12]; **2:403** [5]; **2:404** [10]; **2:405** [12]
Art 23 . . . . . **Intro before Art 2:401** [11], [26]; **2:401**; **2:401** [3], [7]; **4:103** [14]
Art 23 (1) . . . . . **2:101 (2)** [14]; **2:401**; **2:401** [12]; **2:402** [13]
Art 23 (2) . . . . . **2:401**; **2:401** [9]–[10]; **4:103** [13], [15]–[16]
Art 24 . . . . . **2:405** [7]; **2:406** [2]
Art 24 (4) . . . . . **2:101 (2)** [14]; **2:104** [14]
Art 24 (5) . . . . . **2:101 (2)** [14]
Art 25 . . . . . **2:405** [4]
Art 25 (1) . . . . . **2:101 (2)** [14]; **2:405** [4]–[5]
Art 25 (2) . . . . . **2:405** [4]–[5]; **2:406** [4]
Art 25 (3) . . . . . **2:101 (2)** [14]; **2:403** [16]; **2:405** [6]
Art 27 . . . . . **2:401** [13]
Art 28 . . . . . **2:401** [13]; **2:406** [2]
Art 28 (1) . . . . . **2:406** [2], [14]
Art 29 . . . . . **1:201** [67]; **2:403** [15]; **2:406**; **2:406** [6], [15]; **4:103** [15]; **4:106**; **4:106** [1]; **4:117** [6]
Art 29 (1) . . . . . **2:406**; **2:406** [2], [14]–[15]; **4:106**; **9:502** [6]
Art 29 (2) . . . . . **2:403**; **2:406**; **2:406** [6], [9]; **4:106**
Art 29 (3) **2:406**; **4:106**
Art 29 (4) . . . . . **2:406**; **2:406** [18]; **4:106**
Art 30 . . . . . **2:101 (1)** [3], [18]; **6:110** [29]
Art 30 (1) . . . . . **2:101 (1)**
Art 30 (1)(c) . . . . . **2:103** [1]–[2]; **2:406** [4]
Art 30 (2) . . . . . **2:211** [3]
Art 30 (3) . . . . . **2:102**; **2:102** [3]
Art 30 (4) . . . . . **2:103**; **2:103** [5]–[7]
Art 31 . . . . . **2:101 (1)** [5]; **2:201**
Art 31 (1) . . . . . **2:201**; **2:201** [3]; **2:205** [3]
Art 31 (1)(b) . . . . . **2:406** [4]
Art 31 (2) . . . . . **2:201**; **2:201** [3], [8]
Art 31 (3) . . . . . **2:201**; **2:201** [3], [8], [10]; **2:202**
Art 32 . . . . . **2:202**; **2:202** [11]–[12], [19]
Art 32 (1) **2:202**
Art 32 (2) **2:202**
Art 32 (3) . . . . . **2:202**; **2:202** [15]
Art 33 . . . . . **1:303** [9]; **2:203** [1]
Art 34 . . . . . **2:204** [1]
Art 34 (1) . . . . . **2:211** [3]
Art 34 (2) . . . . . **2:204** [1]
Art 35 . . . . . **2:205**
Art 35 (1) . . . . . **1:303** [9]; **2:205**; **2:205** [5]
Art 35 (2) **2:205**
Art 35 (3) **2:205**
Art 36 . . . . . **2:206**
Art 36 (1) **2:206**
Art 36 (2) **2:206**
Art 36 (3) **2:206**
Art 37 . . . . . **2:207**
Art 37 (1) . . . . . **2:207**; **2:207** [1]
Art 37 (2) . . . . . **2:207**; **2:207** [1]
Art 38 . . . . . **2:208**
Art 38 (1) **2:208**

Art 38 (2) . . . . . **1:301**; **2:208**; **2:208** [5]
Art 38 (3) . . . . . **2:208**; **2:208** [3]
Art 38 (4) . . . . . **2:208**; **2:208** [8]
Art 38 (4)(c) . . . . . **2:208** [10]
Art 39 . . . . . **2:209**; **2:209** [4]; **Intro before Art 6:201** [15]
Art 39 (1) . . . . . **2:209**; **2:209** [4]
Art 39 (2) . . . . . **2:209**; **14:101** [9]
Art 39 (2)(a) **2:209**
Art 39 (2)(b) **2:209**
Art 40 . . . . . **Intro before Art 2:501** [37]; **Intro before Art 9:305** [9]
Art 40 (1) . . . . . **Intro before Art 2:501** [13]; **2:501 (1)** [2]–[3], [5]
Art 40 (1)(b) . . . . . **2:403** [6]; **2:505 App** [26]
Art 40 (2) . . . . . **2:505 App** [4]–[5]
Art 40 (2)(a) . . . . . **2:505 App** [4], [24]
Art 40 (2)(b) . . . . . **2:505 App** [23]
Art 40 (2)(b)–(g) . . . . . **2:505 App** [4]
Art 40 (2)(c) . . . . . **2:505 App** [8]
Art 40 (2)(d) . . . . . **2:505 App** [9]
Art 40 (2)(e) . . . . . **2:505 App** [10]
Art 40 (2)(f) . . . . . **2:505 App** [13]
Art 40 (2)(g) . . . . . **2:505 App** [16]–[17]
Art 40 (2)(h) . . . . . **2:403** [7]; **2:505 App** [4]
Art 40 (2)(i) . . . . . **2:505 App** [4]
Art 40 (3) . . . . . **2:505 App** [4]–[5]
Art 40 (3)(a) . . . . . **2:505 App** [11]
Art 40 (3)(a)–(d) . . . . . **2:505 App** [4]
Art 40 (3)(c) . . . . . **2:505 App** [15]
Art 40 (3)(d) . . . . . **2:403** [18]; **2:505 App** [20]
Art 40 (3)(e) . . . . . **2:505 App** [4], [14]
Art 40 (4) . . . . . **2:501 (2)** [8]
Art 41 . . . . . **1:107** [1]; **1:303** [1]; **2:503** [3]
Art 41 (2) . . . . . **2:503** [1]
Art 41 (3) . . . . . **2:101 (2)** [14]; **2:503** [5]
Art 41 (4) . . . . . **Intro before Art 2:501** [38]
Art 41 (5) . . . . . **2:503** [9]
Art 42 (2) . . . . . **2:405** [10]; **2:406**; **2:406** [8]; **2:502** [7]; **4:106**
Art 42 (2)(a) . . . . . **2:502** [5]–[6]
Art 43 . . . . . **1:303** [3]; **2:505** [6]; **Intro before Art 9:305** [9]; **9:305** [3]–[4]
Art 43–46 . . . . . **Intro before Art 9:305** [9]
Art 43 (a) . . . . . **2:504** [2]; **2:505** [6]
Art 43 (b) . . . . . **2:504** [4]
Art 44 . . . . . **9:306 App I** [4]; **9:306 App II** [2]
Art 44–45 . . . . . **Intro before Art 2:501** [38]
Art 44 (1) . . . . . **2:504 App** [10]
Art 44 (2) . . . . . **2:504 App** [8]
Art 44 (3) . . . . . **2:504 App** [11]
Art 45 . . . . . **Intro before Art 9:305** [26], [32]; **9:306** [8], [32], [39]; **9:306 App I** [4]; **9:306 App II** [2]
Art 45 (1) . . . . . **8:107** [7]
Art 45 (2) . . . . . **2:403** [17]; **9:306** [46]
Art 45 (3) . . . . . **2:504 App** [16]; **9:306** [23], [28]; **9:306 App I** [4]; **18:307** [9]
Art 45 (4) . . . . . **2:504 App** [19]; **9:306 App I** [4]
Art 45 (5) . . . . . **2:403** [18]; **2:404** [8]; **2:405** [11]; **2:504 App** [24]; **2:505 App** [5]
Art 45 (6) . . . . . **2:404** [8]; **2:405** [11]; **2:504 App** [22]; **2:505 App** [5]
Art 46 . . . . . **2:505** [3]
Art 46 (1) . . . . . **2:505** [5]–[6]
Art 46 (2) . . . . . **2:505** [6]–[7]
Art 47 . . . . . **Intro before Art 2:501** [37]; **2:506**; **2:506** [1]
Art 48 . . . . . **2:406**; **4:103** [12], [24]; **4:106**; **Intro before Art 9:305** [9]
Art 48–57 . . . . . **1:201** [67]
Art 48 (1) **4:103**
Art 48 (1)(a) . . . . . **2:406** [11]; **4:103** [21]
Art 48 (1)(b) . . . . . **4:103** [16]
Art 48 (1)(b)(i) . . . . . **4:103** [10], [12]
Art 48 (1)(b)(ii) . . . . . **Intro before Art 2:401** [21]; **2:406** [11]; **4:103** [12]–[13], [15]
Art 48 (1)(b)(iii) . . . . . **1:201** [2]; **Intro before Art 2:401** [21]; **2:401** [1]; **2:406** [11]; **4:103**; **4:103** [12]–[15]
Art 48 (2) . . . . . **4:103**; **4:105** [4]
Art 48 (3) . . . . . **4:104**; **4:104** [5]
Art 49 . . . . . **2:406**; **2:406** [12]; **4:103** [10]; **4:106**; **4:107**; **Intro before Art 9:305** [9]
Art 49 (1) . . . . . **1:201** [2]; **4:107**; **4:107** [5], [7]
Art 49 (2) . . . . . **4:107**; **4:107** [6]
Art 49 (3) . . . . . **1:201** [2]; **2:401** [9]; **4:103** [13]–[14], [16]; **4:107**
Art 49 (3)(c) . . . . . **4:107** [5]
Art 49 (3)(d) . . . . . **4:107** [5]
Art 49 (3)(f) . . . . . **2:401** [10]; **4:107** [5]
Art 50 . . . . . **4:108**; **4:108** [4]–[8]; **Intro before Art 9:305** [9]
Art 51 . . . . . **4:104** [3]; **4:109** [6]; **Intro before Art 9:305** [9], [32]
Art 51 (a) . . . . . **4:104** [3]
Art 51 (b) . . . . . **4:104** [3]
Art 52 (1) . . . . . **4:112**; **4:112** [4]
Art 52 (2) . . . **4:113**; **4:113** [1], [3]–[4]; **4:114** [6]
Art 53 . . . . . **4:114**; **4:114** [3]–[6]
Art 54 . . . . . **4:115**; **Intro before Art 9:305** [9]; **9:305** [1],3
Art 54 (1) . . . . . **4:115**; **4:115** [1]
Art 54 (2) . . . . . **4:115**; **4:116**; **4:116** [1]
Art 54 (3) **4:115**
Art 55 . . . . . **2:406** [15]; **4:117**; **4:117** [1], [4], [6]; **9:502** [6]
Art 56 . . . . . **4:118**; **4:118** [1]
Art 56 (1) . . . . . **4:118**; **4:118** [2]
Art 56 (2) . . . . . **4:118**; **4:118** [4]

Art 57 . . . . . **4:119** [1]–[3]
Art 58 . . . . . **1:107** [25]; **Intro before Art 5:101** [4]; **5:101**
Art 58 (1) . . . . . **1:107** [27]; **5:101**; **5:101** [11]; **5:102** [6]
Art 58 (2) . . . . **Intro before Art 5:101** [19]; **5:101**; **5:101** [8]
Art 58 (3) . . . . . **2:406** [9]; **5:101**; **5:101** [9]
Art 59 . . . . . **1:107** [26]; **Intro before Art 5:101** [17]; **5:102**; **5:105** [11]
Art 59–60 . . . . . **Intro before Art 5:101** [4]
Art 59–65 . . . . . **1:107**
Art 59 (a) . . . . . **5:102**; **7:106** [7]
Art 59 (b) . . . . . **5:102**; **7:106** [7]
Art 59 (c) **5:102**
Art 59 (d) **5:102**
Art 59 (e) **5:102**
Art 59 (f) **5:102**
Art 59 (g) **5:102**
Art 59 (h) . . . . . **1:201** [2]; **5:102**
Art 60 . . . . . **5:105**; **5:105** [11]
Art 61 . . . . . **1:107** [26]; **5:107**; **5:107** [2]
Art 61–65 . . . . . **Intro before Art 5:101** [4]
Art 62 . . . . . **1:107** [26]; **5:104**; **Intro before Art 6:201** [15]
Art 63 . . . . . **5:106**
Art 64 . . . . . **2:402** [22]; **Intro before Art 5:101** [3]; **5:103**; **5:103** [4]
Art 64 (1) **5:103**
Art 64 (2) **5:103**
Art 65 . . . . . **1:107** [26]; **5:103**; **5:103** [4]; **Intro before Art 6:201** [15]
Art 66 . . . . . **6:102**
Art 66–69 . . . . . **Intro before 6:101** [2]
Art 66–77 . . . . . **2:201** [6]
Art 66 (a) **6:102**
Art 66 (b) **6:102**
Art 66 (c) **6:102**
Art 66 (d) **6:102**
Art 67 . . . . . **Intro before Art 1:101** [8]; **1:105**; **1:105** [1], [8]; **2:103** [2]; **Intro before 6:101** [2]; **6:102**
Art 67 (1) . . . . . **1:105**; **1:105** [15]
Art 67 (2) . . . . . **1:105**; **1:105** [13], [15]
Art 67 (3) . . . . . **1:105**; **1:105** [15]
Art 68 . . . . . **6:102**; **9:501 (1)** [8]–[9]
Art 68 (1) . . . . . **Intro before Art 5:101** [16]–[17]; **6:102**; **6:102** [18]
Art 68 (1)(c) . . . . . **1:201** [2]
Art 68 (2) . . . . . **6:102**; **6:102** [18]
Art 68 (3) **6:102**
Art 69 . . . . . **1:107** [28]; **2:406** [9]; **6:101**; **6:101** [11]; **18:203 (2)**; **18:203 (2)** [13]; **18:203 (4)** [1]
Art 69 (1) **6:101**
Art 69 (1)(b) . . . . . **6:101** [11]
Art 69 (2) . . . . . **6:101**; **8:107** [7]
Art 69 (3) . . . . . **6:101**; **8:107** [7]
Art 69 (4) **6:101**
Art 70 . . . . . **2:104** [5], [7]; **Intro before Art 6:201** [15]; **6:202** [14]; **6:204** [1]
Art 70 (1) . . . . . **2:104**; **2:104** [6], [15]
Art 70 (2) . . . . . **2:104**; **2:104** [12]–[13]
Art 70 (3) . . . . . **2:104**; **2:104** [16]
Art 71 . . . . . **2:104** [8]; **2:402** [21]; **2:403** [15]; **6:206** [17]
Art 72 . . . . . **2:105**; **2:105** [3]
Art 72 (1) **2:105**
Art 72 (2) . . . . . **2:105**; **2:105** [3]
Art 72 (3) **2:105**
Art 72 (4) **2:105**
Art 73 . . . . . **1:302** [1]; **2:402** [21]; **6:104**; **6:104** [11]; **18:201** [4]
Art 74 . . . . . **6:105**; **6:105** [6]
Art 74 (1) **6:105**
Art 74 (2) **6:105**
Art 75 (1) **6:106**
Art 75 (2) **6:106**
Art 75 (3) **6:106**
Art 77 . . . . . **1:107** [1]; **1:303** [1]; **6:109** [1]; **Intro before Art 9:305** [6]
Art 77 (1) . . . . . **6:109**; **Intro before Art 9:305** [6], [19]
Art 78 . . . . . **6:110**; **6:110** [2], [4]–[7], [20], [26]
Art 78 (1) . . . . . **6:110**; **6:110** [4], [9], [17]–[18], [20], [24]
Art 78 (2) . . . . . **6:110**; **6:110** [4], [23], [31], [35], [38]
Art 78 (3) . . . . . **6:110**; **6:110** [7]
Art 78 (3)(a) . . . . . **6:110** [4], [33]–[35]
Art 78 (3)(b) . . . . . **6:110** [4], [7], [54]
Art 78 (4) . . . **1:107** [1]; **6:110**; **6:110** [4], [19], [42]
Art 78 (5) . . . . . **6:110**; **6:110** [4], [46], [50]–[51]
Art 79 (1) . . . . . **6:204**; **7:102-1** [5]
Art 79 (2) . . . . . **6:204**; **6:204** [5]; **8:108** [17]
Art 80 . . . . . **6:205**
Art 80 (1) . . . . . **6:205**; **6:205** [3]
Art 80 (2) **6:205**
Art 80 (3) . . . . . **6:205**; **6:205** [14]
Art 81 . . . . . **Intro before Art 6:201** [16]; **6:207**
Art 82 . . . . . **2:101 (2)** [14]; **6:201**; **6:206**; **6:206** [6], [9], [12]
Art 83 . . . . . **Intro before Art 2:501** [38]; **6:201**; **6:202** [14]; **7:101** [12]; **7:106** [7]; **9:508-1**; **9:508-1** [5]
Art 83 (1) . . . . . **1:201** [2]; **6:201**
Art 83 (2) **6:201**
Art 84 . . . . . **Intro before Art 6:201** [9]; **6:202**; **6:202** [10]; **9:508-3** [4]
Art 84 (a) . . . . . **6:202**; **6:202** [10]

Art 84 (b) . . . . . **6:202**; **6:202** [10]
Art 84 (c) **6:202**
Art 84 (d) . . . . . **6:202**; **6:202** [9]
Art 84 (e) . . . . . **6:202**; **6:202** [9]
Art 84 (f) **6:202**
Art 84 (g) . . . . . **6:202**; **6:202** [13]
Art 84 (h) . . . . . **6:202**; **6:202** [10]
Art 84 (i) . . . . . **6:201** [8]; **6:202**; **6:202** [10]
Art 84 (j) . . . . . **6:202**; **6:202** [11]
Art 84 (k) . . . . . **6:202**; **6:202** [14]
Art 85 . . . . . **Intro before Art 2:501** [37]; **6:201** [19]; **6:202**; **6:202** [3], [5], [7]; **9:508-3** [4]; **Intro before Art 13:101** [16]
Art 85 (a) **6:202**
Art 85 (b) . . . . . **6:202**; **6:202** [5], [13]
Art 85 (c) . . . **6:202**; **6:202** [7], [13]; **Intro before Art 13:101** [16]; **13:107** [28]
Art 85 (d) . . . . . **6:201** [8]; **6:202**
Art 85 (e) . . . . . **6:202**; **6:202** [7]; **9:509** [7]–[8]
Art 85 (f) . . . . . **Intro before Art 2:501** [37]–[38]; **6:201** [8]; **6:202**; **Intro before Art 9:305** [6], [19]
Art 85 (g) . . . . . **6:202**; **6:202** [7], [13]
Art 85 (h) . . . . . **6:202**; **6:202** [7]
Art 85 (i) . . . . . **6:202**; **6:202** [7], [13]
Art 85 (j) . . . . . **6:202**; **6:202** [7]
Art 85 (k) . . . . . **Intro before Art 2:501** [37]; **6:201** [8]; **6:202**; **6:202** [11]
Art 85 (l) . . . . . **6:201** [8]; **6:202**; **6:202** [11]
Art 85 (m) . . . . . **6:202**; **6:202** [12]; **8:107** [8]
Art 85 (n) **6:202**
Art 85 (o) . . . . . **6:202**; **6:202** [7]
Art 85 (p) . . . . . **6:202**; **6:202** [7]; **7:102-1** [5]
Art 85 (q) . . . . . **6:202**; **6:202** [7]
Art 85 (r) . . . . . **6:202**; **6:202** [7]
Art 85 (s) . . . . . **6:202** [7], [11]
Art 85 (t) . . . . . **6:202** [7]
Art 85 (u) . . . . . **6:202** [7]
Art 85 (v) . . . . . **6:109** [8]
Art 85 (w) . . . . . **6:202** [1]
Art 86 . . . . . **6:201** [5]; **7:101** [12]; **7:106** [7]; **8:107** [8]; **9:508-1** [5]; **9:508-3** [3]
Art 86 (1) . . . . . **6:201** [5]
Art 86 (1)(a) . . . . . **6:201** [5]
Art 86 (1)(b) . . . . . **1:201** [2]; **6:201** [5]
Art 86 (2) . . . . . **6:201** [5]
Art 86 (2)(a) . . . . . **6:201** [5]
Art 86 (2)(b) . . . . . **6:201** [5]
Art 86 (2)(c) . . . . . **6:201** [5]
Art 86 (2)(d) . . . . . **6:201** [5]
Art 87 . . . . . **Intro before Art 8:101** [15]
Art 87 (1) . . . . **1:301**; **Intro before Art 8:101** [15]; **8:101** [4]; **9:102 (1)** [27]; **9:401** [12]
Art 87 (2) . . . . . **8:103**; **8:103** [13], [17]; **8:104** [23]; **9:301** [20]; **9:501 (1)** [11]
Art 87 (2)(b) . . . . . **9:301** [37]; **9:302** [15]
Art 88 . . . . . **8:108**; **9:101** [12]; **9:102 (1) App** [4]; **9:102 (2)–(3)** [8]; **9:501 (1)** [6]; **9:502** [11]; **9:504** [9]; **9:508-2 (1)**; **9:508-2 (1)** [4]; **18:307**
Art 88 (1) **8:108**
Art 88 (2) . . . . . **8:108**; **9:102 (2)–(3)** [15]
Art 88 (3) **8:108**
Art 89 . . . . . **6:111**; **6:111** [17]; **Intro before Art 9:305** [6]
Art 89 (1) . . . . **Intro before Art 1:101** [6]; **6:111**; **Intro before Art 9:305** [6]
Art 89 (2) **6:111**
Art 89 (2)(b) . . . . . **Intro before Art 9:305** [6]; **9:306** [24]
Art 89 (3) **6:111**
Art 89 (3)(a) . . . . . **9:305** [4]
Art 89 (4) **6:111**
Art 90 (1) . . . . . **8:107** [4]
Art 91 . . . . . **18:202**; **18:202** [3]
Art 91 (a) **18:202**
Art 91 (b) **18:202**
Art 91 (c) . . . . . **18:203 (1)**; **18:203 (1)** [7]
Art 91 (e) . . . . . **18:202**; **18:202** [3]
Art 92 . . . . . **7:106** [9]
Art 92 (1) . . . . . **7:106**; **7:106** [5]–[9]
Art 92 (1)(a) . . . . . **7:101** [12]
Art 92 (2) . . . . . **8:107**; **8:107** [4]–[5], [8]
Art 92 (3) . . . . . **8:107**; **8:107** [8]
Art 93 . . . . . **7:101**; **7:101** [6], [11]; **18:202** [4]
Art 93 (1) . . . . . **7:101**; **7:101** [6]
Art 93 (1)(a) . . . . . **7:101** [6]–[7], [11]–[13]
Art 93 (1)(b) . . . . . **7:101** [13]
Art 93 (1)(b)(i) . . . . . **7:101** [7], [11], [13]
Art 93 (1)(b)(ii) . . . . . **7:101** [7], [11]
Art 93 (2) . . . . . **7:101**; **7:101** [10]
Art 94 . . . . . **18:202** [4]
Art 95 . . . . . **7:102-1** [4]; **9:501 (1)** [13]; **18:202** [4]
Art 95 (1) . . . . . **7:102**; **7:102** [4]–[5]; **7:102-1** [4]–[5]
Art 95 (2) . . . . . **7:102-1**; **7:102-1** [1], [3]–[5]; **9:501 (1)** [11]
Art 95 (m) . . . . . **6:202** [12]
Art 97 . . . . . **7:110**; **7.110** [10]
Art 97 (1) . . . . . **7:110**; **7:110** [6]
Art 97 (2) **7:110**
Art 97 (2)(a) . . . . . **7.110** [9]
Art 97 (3) **7:110**
Art 99 (1) . . . . . **2:406** [15]
Art 99 (1)(a) . . . . . **Intro before Art 7:101** [13]
Art 99 (2) . . . . . **2:406** [15]; **18:203 (2)** [3]
Art 99 (3) . . . . . **Intro before Art 2:401** [21]; **18:203 (3)**; **18:203 (3)** [4]–[5]
Art 99 (3)–(4) . . . . . **18:203 (2)** [4]

Art 100 . . . . . **9:502** [11]; **18:203 (2)**; **18:203 (2)** [2]–[6]; **18:203 (3)**; **18:203 (3)** [5]
Art 100 (a) . . . . . **18:203 (2)**; **18:203 (2)** [2], [10]
Art 100 (b) . . . . . **18:203 (2)**; **18:203 (2)** [2], [11]
Art 100 (c) . . . . . **18:203 (2)**; **18:203 (2)** [2], [9]
Art 100 (d) . . . . . **18:203 (2)**; **18:203 (2)** [2], [14]
Art 100 (e) . . . . . **18:202** [3]; **18:203 (2)**
Art 100 (f) . . . . . **2:406** [9], [15]; **6:101** [7], [11]; **18:203 (2)**; **18:203 (2)** [7], [13]
Art 100 (g) . . . . . **2:406** [15]; **18:203 (2)**; **18:203 (2)** [6], [12]
Art 101 . . . **18:203 (5)**; **18:203 (5)** [1]–[3]; **19:201**
Art 101 (1) . . . . . **18:203 (5)**; **19:101** [20]
Art 101 (2) . . . . . **18:203 (5)**
Art 102 . . . . . **18:203 (1)** [9]; **18:203 (3)**; **18:203 (3)** [5], [10]
Art 102 (1) . . . . . **18:203 (1)** [8]
Art 102 (2) . . . . . **18:203 (3)**; **18:203 (3)** [10]
Art 102 (3) . . . . . **18:203 (3)**; **18:203 (3)** [4], [10]
Art 102 (4) . . . . . **18:203 (3)**; **18:203 (3)** [4]
Art 103 . . . . . **18:203 (3)**
Art 104 . . . . . **Intro before Art 2:401** [21]; **18:203 (3)**; **18:203 (3)** [4]–[5], [8]–[10]
Art 104 (4) . . . . . **18:203 (3)** [5]
Art 105 (1) . . . . . **18:301** [4]
Art 106 . . . . . **1:201** [67]; **2:406** [15]
Art 106 (1) . . . . . **8:101**; **8:101** [2]; **9:306** [40]; **18:204**
Art 106 (1)(a) . . . . . **9:102 (1)** [24]; **9:502** [4]
Art 106 (1)(c) . . . . . **Intro before Art 9:305** [6]
Art 106 (1)(e) . . . . . **2:406** [14]
Art 106 (2) . . . . . **8:101**; **9:401** [16]
Art 106 (2)(a) . . . . **8:101** [7]; **8:102** [15]; **8:104** [22]
Art 106 (3) . . . . . **8:101**; **9:401** [16]
Art 106 (3)(a) . . . . . **8:104** [11], [15], [29]
Art 106 (4) . . . . . **8:101**; **8:101** [10]; **9:102 (2)–(3)** [8], [11]; **9:401** [3]; **18:204**
Art 106 (5) . . . . . **8:101**; **8:101** [12]; **9:201** [16]; **9:301** [53]; **9:504** [9]; **18:204**; **18:301** [3]
Art 106 (6) . . . . . **8:101** [7]; **8:102**; **8:102** [1], [17]; **18:204**
Art 108 . . . . . **1:102** [2]; **8:104** [29]; **8:109**; **8:109** [4], [8]
Art 109 . . . . . **8:102** [4], [15]; **8:104**; **8:104** [3], [11], [31]; **9:401** [16]
Art 109 (1) . . . . . **8:104**; **8:104** [9]–[10]
Art 109 (2) . . . . . **8:104**; **8:104** [9], [12]–[15]
Art 109 (3) . . . . . **8:104**; **8:104** [22], [25]
Art 109 (4) . . . . . **8:104**; **8:104** [23]
Art 109 (4)(a) . . . . . **8:104** [17], [23]
Art 109 (4)(b) . . . . . **8:104** [17], [23]
Art 109 (4)(c) . . . . . **8:104** [17], [23]
Art 109 (5) . . . . . **8:104**; **8:104** [13], [17]
Art 109 (6) . . . . . **8:102** [4]; **8:104**; **8:104** [22], [25]–[27]
Art 109 (7) . . . . . **8:104**; **8:104** [28]
Art 110 . . . . . **Intro before Art 9:101** [3]; **9:101** [7]; **9:102 (1)** [4], [21]–[22], [24]; **9:102 (2)–(3)** [7], [34]–[35]
Art 110 (1) . . . . . **9:102 (1)**; **9:102 (1)** [25]
Art 110 (2) . . . . . **8:104** [3]; **9:102 (1)**; **9:102 (1)** [25], [42]; **9:102 (1) App**
Art 110 (3) . . . . **9:102 (2)–(3)** ; **9:102 (2)–(3)** [7]
Art 110 (3)(a) . . . . . **9:102 (2)–(3)** [2], [13]–[14], [34]
Art 110 (3)(b) . . . . . **9:102 (2)–(3)** [6], [18]–[20], [23]
Art 111 (1) . . . . . **9:102 (1)** [41]; **9:102 (1) App**; **9:102 (1) App** [5]–[6]; **9:102 (2)–(3)** [23]
Art 111 (2) . . . . . **8:102**; **8:102** [4], [15]–[17]; **8:104** [29]
Art 112 . . . . . **9:102 (1) App**; **9:102 (1) App** [3]
Art 112 (1) . . . . . **9:102 (1) App**; **9:102 (1) App** [8]
Art 112 (2) . . . . . **9:102 (1) App**; **9:102 (1) App** [3]–[4], [9]
Art 112 (3) . . . . . **9:102 (1) App**
Art 113 . . . . . **9:201** [5], [9], [11]–[12], [14]; **9:306** [15]; **9:508-2 (1)** [5]; **18:304**
Art 113 (1) . . . . . **7:104** [1]; **9:201**; **9:201** [10]
Art 113 (2) . . . . . **9:201**; **9:201** [13]
Art 113 (3) . . . . . **9:201**; **9:201** [14]–[15]
Art 114 . . . . . **9:301**; **9:301** [21]
Art 114–119 . . . . . **Intro before Art 9:305** [6]
Art 114 (1) . . . . . **9:301** [15], [31]; **9:501 (1)** [11]
Art 114 (2) . . . . . **9:301** [21], [30]–[31]; **9:302** [7], [10]; **9:304** [8]
Art 115 . . . . . **8:104** [12]; **8:106** [4]; **9:301**; **9:301** [19], [21], [31], [56]; **Intro before Art 9:305** [6]
Art 115 (1) . . . . . **9:301**; **9:301** [16], [21], [43]
Art 115 (2) . . . . . **9:301** [21]
Art 115 (3) . . . . . **9:301** [47]; **Intro before Art 9:305** [6]
Art 116 . . . . . **9:302** [15]; **9:304**; **9:304** [4], [8]
Art 117 . . . . . **9:302**; **9:302** [1], [6], [13]–[14]; **Intro before Art 9:305** [14]; **9:305** [11]; **9:306** [8], [10]
Art 117 (1) . . . . . **9:302**; **9:302** [7]–[8], [15]
Art 117 (2) . . . . . **9:302**; **9:302** [9], [11]
Art 117 (3) . . . . . **9:302**; **9:302** [7]
Art 118 . . . . . **1:107** [1]; **1:303** [1]; **9:303**; **9:303** [6]
Art 119 . . . . . **9:301** [51]; **9:303**; **14:101** [8]; **14:501** [2]
Art 119 (1) . . . . **9:303**; **9:303** [19]–[20], [24]–[25]
Art 119 (2) **9:303**
Art 119 (2)(a) . . . . . **9:303** [20]
Art 119 (2)(b) . . . . . **9:303** [23]
Art 120 . . . . . **9:401**; **9:401** [1], [3], [10], [12]
Art 120 (1) . . . . . **9:401**; **9:401** [11]
Art 120 (2) . . . . . **9:401**; **9:401** [11], [15]

Art 120 (3) . . . . . **8:102**; **8:102** [2], [6]; **9:401**; **9:401** [17]
Art 122 . . . . . **1:303** [1]; **14:201** [2]
Art 122 (1) . . . . . **14:101** [9]
Art 122 (2) . . . **14:101** [9]; **14:201** [2]; **14:501** [2]
Art 123 . . . . . **18:201**
Art 123 (1) **18:201**
Art 123 (1)(a) . . . . . **18:201**; **19:301** [6]
Art 123 (1)(b) . . . . . **1:202** [1]
Art 123 (2) **18:201**
Art 124 . . . . . **7:107**; **7:107** [8]
Art 124 (1) . . . . . **7:107**; **7:107** [4]–[5], [7]
Art 124 (2) . . . . . **7:107**; **7:107** [6]
Art 124 (3) . . . . . **7:107**; **7:107** [6]
Art 124 (4) . . . . . **7:107**; **7:107** [8]
Art 125 . . . . . **7:101** [11]; **7:108** [4]
Art 125 (1) . . . . . **7:101**; **7:101** [8]; **9:508-2 (5)** [6]
Art 126 . . . . . **7:102** [8]; **7:104** [4]; **9:501 (1)** [11], [13]
Art 126 (1) . . . . . **7:102**; **7:102** [8]; **7:103** [7]; **7:104**; **7:104** [4], [7]; **19:301** [8]
Art 126 (2) . . . . . **7:103**; **7:103** [6]
Art 127 . . . . . **7:106**; **7:106** [7], [11]
Art 127 (1) . . . . . **7:106**; **7:106** [6]–[8]; **8:107**; **8:107** [4]–[5]
Art 127 (2) . . . . . **7:106**; **7:106** [8], [12]
Art 127 (2)(a) . . . . . **7:106** [6]–[8]
Art 127 (2)(b) . . . . . **7:106** [5], [9]
Art 127 (3) . . . . . **7:106**; **7:106** [8]
Art 127 (4) . . . . . **7:106**; **7:106** [12]
Art 128 . . . . . **7:109**; **7:109** [1], [10]
Art 128 (1) **7:109**
Art 128 (2) **7:109**
Art 128 (3) **7:109**
Art 128 (4) **7:109**
Art 128 (5) . . . . . **7:109**; **7:109** [10]
Art 128 (5) . . . . . **7:109** [10]
Art 128 (6) . . . . . **7:109**; **7:109** [14]
Art 129 . . . . . **1:202** [1]; **18:201**; **18:201** [7]–[8]
Art 129 (a) . . . . . **18:201**; **18:307** [12]
Art 129 (b) **18:201**
Art 130 (1) . . . . . **7:103**; **7:103** [4]–[5]
Art 130 (3)–(5) . . . . . **2:204** [17]
Art 131–139 . . . . . **7:110** [6]
Art 131 (1) . . . . . **8:101**; **8:101** [2]
Art 131 (1)(c) . . . . . **Intro before Art 9:305** [6]
Art 131 (2) . . . . . **8:101**; **8:101** [10]; **9:101** [12]; **9:102 (2)–(3)** [8], [11]
Art 131 (3) . . . . . **8:101**; **8:101** [12]; **9:201** [16]; **9:301** [53]; **9:504** [9]
Art 131 (4) . . . . . **8:101** [7]; **8:102**; **8:102** [1], [17]
Art 132 . . . . . **Intro before Art 9:101** [3]; **9:101**; **9:102 (2)–(3)** [2]
Art 132 (1) . . . . . **9:101** [6]–[7]
Art 132 (2) . . . . . **9:101** [15], [20]
Art 133 . . . . . **7:104** [7]–[8]; **9:201** [9], [11]–[12], [14]; **9:306** [15]
Art 133 (1) . . . . . **7:104** [1]; **9:201**
Art 133 (2) . . . . . **8:105**; **8:105** [5], [7]–[10]; **9:201** [13]
Art 133 (3) . . . . . **8:105**; **9:201**; **9:201** [14]–[15]
Art 134 . . . . . **9:301**; **9:301** [21]; **9:501 (1)** [11]
Art 134–139 . . . . . **Intro before Art 9:305** [6]
Art 134 (1) . . . . . **9:301** [15]
Art 135 . . . . **1:107** [4], [28]; **1:303** [1]; **8:106** [4]; **9:301**; **9:301** [21], [43]; **Intro before Art 9:305** [6]
Art 135 (1) . . . . . **9:301** [16], [21], [43]
Art 135 (2) . . . . . **9:301** [21], [43]
Art 135 (3) . . . . . **9:301** [47]; **Intro before Art 9:305** [6]
Art 135 (4) . . . . . **9:301** [21], [56]
Art 136 . . . . . **8:105** [12]; **9:301** [21]; **9:302** [15]; **9:303**; **9:304**; **9:304** [4], [8]
Art 137 . . . . . **9:301** [21]; **9:302**; **9:302** [1], [6], [13]–[14]; **Intro before Art 9:305** [14]; **9:305** [11]; **9:306** [8], [10]
Art 137 (1) . . . . . **9:302**; **9:302** [6]–[8], [15]
Art 137 (2) . . . . . **9:302**; **9:302** [9]–[11]
Art 137 (3) . . . . . **9:302**; **9:302** [7]
Art 138 . . . . . **9:303**; **9:303** [6]
Art 139 . . . . . **9:301** [51]; **9:303**; **9:303** [21]; **14:501** [2]
Art 139 (1) . . . . . **9:303**; **9:303** [19], [24]
Art 139 (2) . . . . . **9:303**; **9:303** [25]
Art 139 (3) . . . . . **9:303**; **9:303** [23]
Art 140 . . . . . **18:301**; **19:301** [1], [11]
Art 141 . . . . . **1:303** [10]; **18:302**; **18:302** [8]; **18:304** [10]
Art 142 . . . . . **18:307**; **18:307** [9], [12]
Art 142 (1) . . . . . **18:307**; **18:307** [9]
Art 142 (2) . . . . . **18:307**; **18:307** [9]
Art 142 (3) . . . . . **18:307**; **18:307** [9]
Art 142 (4) . . . . . **18:307**; **18:307** [9], [11]
Art 142 (5) **18:307**
Art 143 . . . . . **18:303**; **18:303** [18], [20]
Art 143 (1) **18:303**
Art 143 (2) . . . . . **18:303**; **18:303** [20]
Art 144 . . . . . **18:303**; **18:304**
Art 144 (1) **18:304**
Art 144 (2) **18:304**
Art 145 . . . . . **18:303**; **18:303** [20]; **18:305**; **18:305** [9]; **18:306** [6]
Art 145 (1) **18:305**
Art 145 (2) **18:305**
Art 145 (3) **18:305**
Art 145 (4) **18:305**
Art 146 . . . **18:303**; **18:303** [20]; **18:306**; **18:306** [1]
Art 146 (1) **18:306**
Art 146 (2) . . . . . **9:509** [14]; **18:306**

Art 146 (3) **18:306**
Art 147 . . . . . **9:302** [6]; **Intro before Art 19.101** [2]
Art 147–158 . . . . . **Intro before Art 19.101** [2]; **19.101** [1]
Art 147 (1) . . . . . **8:107** [4]
Art 147 (2) **9:305**
Art 148 . . . . . **6:108** [7]; **19:201**; **19:201** [5]–[6], [8]
Art 148–152 . . . . . **Intro before Art 19.101** [2]
Art 148 (1) . . . . . **19:201**; **19:201** [7]
Art 148 (1)–(3) . . . . . **19:201** [10]
Art 148 (2) . . . . . **9:501 (1)** [8]; **19:201**; **19:201** [7], [9]
Art 148 (3) . . . . . **19:201**; **19:201** [8]; **19:202** [6]
Art 148 (3)(b) . . . . . **19:201** [8]
Art 148 (4) . . . . . **19:201**; **19:201** [6]
Art 148 (5) . . . . . **19:201**; **19:201** [9]
Art 149 . . . . . **19:202**; **19:202** [2], [5]–[7], [9]–[10], [13]
Art 150 (1) . . . . . **7:106**; **7:106** [5]–[9]
Art 150 (2) . . . . . **8:107**; **8:107** [4]–[5], [8]
Art 150 (3) . . . . . **8:107** [8]
Art 151 . . . . . **2:101 (2)** [14]; **19:203**; **19:203** [1], [4]–[6]
Art 152 . . . . . **19:204**; **19:204** [1], [9]
Art 152 (1) . . . . . **19:204**; **19:204** [6]–[8]
Art 152 (1)(a) . . . . . **19:204** [5]
Art 152 (1)(b) . . . . . **19:204** [5]
Art 152 (2) . . . . . **19:204**; **19:204** [5], [7]–[8]; **19:301** [6]
Art 153 . . . . . **19:301**; **19:301** [5], [11]
Art 153–154 . . . . . **Intro before Art 19.101** [2]
Art 153 (1) . . . . . **19:301**; **19:301** [5]–[7]
Art 153 (2) . . **19:203** [5]; **19:301**; **19:301** [5], [8]
Art 154 . . . . . **1:202** [6]; **19:302**; **19:302** [1], [4]–[5], [7]
Art 155 . . . . . **9:302** [6]
Art 155–158 . . . . . **Intro before Art 8:101** [24]; **Intro before Art 19.101** [2]
Art 155 (1)(b) . . . . . **19:203** [5]
Art 155 (1)(c) . . . . . **Intro before Art 9:305** [6]; **19:203** [5]
Art 155 (1)(d) . . . . . **19:203** [5]
Art 155 (2) . . . . . **8:104** [29]; **19:203** [5]
Art 155 (3) . . . . . **8:104** [29]
Art 155 (4) . . . . . **19:203** [5]
Art 157 . . . . . **9:302** [6]; **19:204** [8]; **19:302** [8]
Art 157 (1)(c) . . . . . **Intro before Art 9:305** [6]
Art 157 (2) . . . . . **9:101** [15], [18]
Art 158 . . . . . **9:101** [15], [18]; **19:204** [8]
Art 158 (2)(b) . . . . . **19:204** [8]; **19:302** [9]
Art 159 . . . . . **1:201** [67]; **9:501 (1)** [6]
Art 159–163 . . . . . **9:507** [9]
Art 159–171 . . . . . **Intro before Art 9:501** [1]
Art 159 (1) . . . . . **9:306** [27]; **9:501 (1)**; **9:501 (1)** [6], [12]
Art 159 (2) . . . . . **9:501 (2)**; **9:501 (2)** [10]
Art 160 . . . . . **9:502**; **9:502** [1]
Art 161 . . . . . **2:406** [14]; **9:501 (2)** [10]; **9:503**; **9:503** [6], [12]
Art 161–163 . . . . . **1:201** [67]
Art 162 . . . . . **2:406** [14]; **4:117** [5]; **8:101** [18]; **9:504**; **9:504** [5], [9]–[11], [15]
Art 163 . . . . . **2:406** [14]; **9:102 (2)–(3)** [42]; **9:504**; **9:504** [15]
Art 163 (1) **9:504**
Art 163 (2) **9:504**
Art 164 . . . . . **9:506**; **9:506** [5]
Art 165 . . . . . **9:506**; **9:507**; **9:507** [6], [9]–[10]
Art 166 . . . . . **9:508**; **9:508** [6]–[9], [11]; **9:508-1**; **9:508-1** [1], [4]; **9:508-4** [1]
Art 166 (1) **9:508**
Art 166 (2) . . . **9:508**; **9:508** [10]; **9:508-2 (5)** [6]
Art 166 (3) **9:508**
Art 167 . . . . . **9:508** [7]–[8]; **9:508-1**; **9:508-1** [1], [3]; **9:508-3**; **9:508-3** [5]; **9:508-4** [1]
Art 167 (1) **9:508-1**
Art 167 (2) . . . . . **9:301** [21], [43]; **9:508** [10]; **9:508-1**; **9:508-1** [2]–[3]
Art 167 (3) . . . . . **9:508-1**; **9:508-1** [5]–[6]
Art 167 (4) . . . . . **9:508-1**; **9:508-4**; **9:508-4** [1]; **9:508-4** [6]
Art 167 (5) . . . . . **9:508-1**; **9:508-1** [6]
Art 168 . . . . . **9:508** [7]–[8]; **9:508-2 (1)** [1], [8]; **9:508-2 (5)** [5]–[6]; **9:508-2 (7)**; **9:508-2 (7)** [1]; **9:508-3**; **9:508-3** [4]–[5]; **9:508-4** [1]
Art 168–170 . . . . . **9:508-3** [5]; **9:508-4** [1]
Art 168 (1) . . . **9:508** [10]; **9:508-1** [2]; **9:508-2 (1)**; **9:508-2 (1)** [2]–[4], [8]; **9:508-3** [5]
Art 168 (1)–(5) . . . . . **9:508-2 (7)** [1]
Art 168 (2) . . . . . **9:508** [10]–[11]; **9:508-1** [2]; **9:508-2 (1)** [8]; **9:508-2 (2)**; **9:508-2 (2)** [1]; **9:508-2 (3)** [1]; **9:508-2 (4)**
Art 168 (2)(b) . . . . . **9:508-2 (3)**
Art 168 (3) . . . . . **9:508-2 (3)**; **9:508-2 (3)** [1]–[2]
Art 168 (4) . . . . . **9:508-2 (3)** [1]–[2]; **9:508-2 (4)**; **9:508-2 (4)** [1]
Art 168 (5) . . . . . **9:508-2 (1)**; **9:508-2 (1)** [8]; **9:508-2 (5)**
Art 168 (6) . . . . . **9:508-2 (1)** [8]; **9:508-2 (6)**; **9:508-2 (7)** [1]
Art 169 . . . . **9:508** [7]–[8]; **9:508-2 (7)** [1]; **9:508-3**
Art 169 (1) . . . . . **9:508-2 (7)**; **9:508-2 (7)** [1]
Art 169 (2) . . . . . **9:508-2 (7)**; **9:508-2 (7)** [1]
Art 170 . . . **1:201** [2]; **9:508-2 (3)**; **9:508-2 (3)** [2]; **9:508-2 (4)**; **9:508-3**; **9:508-3** [2], [4]–[5]
Art 170 (1) . . . . . **9:508-3**; **9:508-3** [1], [3]
Art 170 (2) . . . . **9:508-1** [5]; **9:508-3**; **9:508-3** [4]
Art 170 (3) . . . . . **9:508-3**; **9:508-3** [4]

Art 171 . . . . . **9:508-1** [6]; **9:508-2 (1)** [2]; **9:508-2 (5)** [3]; **9:508-3** [5]
Art 172 . . . **Intro before Art 9:305** [6]; **9:305** [11], [13]; **9:306**; **9:306** [15]
Art 172–177 . . . . . **Intro before Art 9:305** [14], [26], [32]; **9:306** [8]
Art 172 (1) . . . . . **4:115**; **9:305** [13]; **9:306**; **9:306** [8]; **9:306 App I** [5]
Art 172 (2) . . . . . **9:306**; **9:306 App I**; **9:306 App I** [4]–[5]; **9:508-2 (1)** [8]
Art 172 (3) . . . . . **9:302** [14]; **Intro before Art 9:305** [14]; **9:305** [11], [13]; **9:306**; **9:306** [8], [10]
Art 173 . . . . . **9:306**; **9:306** [23], [32]–[33], [40]
Art 173 (1) . . . . . **9:306**; **9:306** [23]
Art 173 (2) . . . . . **4:115**; **9:306**; **9:306** [34], [36]
Art 173 (3) . . . . . **9:306**; **9:306** [34]
Art 173 (4) . . . . . **9:306**; **9:306** [34]
Art 173 (5) . . . . . **9:306**; **9:306** [39], [41]
Art 173 (6) **9:306**
Art 174 . . . . . **9:306 App I**
Art 174 (1) . . . . . **9:306 App I**; **9:306 App I** [4]
Art 174 (2) . . . . . **9:306 App I**; **9:306 App I** [4]
Art 174 (3) . . . . . **9:306 App I**
Art 175 . . . . . **9:306 App I**; **9:306 App I** [4]
Art 175 (1) . . . . . **9:306 App I**
Art 175 (2) . . . . . **9:306 App I**; **9:306 App I** [4]
Art 176 . . . . . **9:306**; **9:306** [11]–[12], [23], [48]
Art 178 . . . . . **9:401** [11]; **14:101**; **14:101** [5]–[7]
Art 178–186 . . . . . **Intro before Art 14:101** [11]; **14:101** [5]
Art 179 . . . . . **14:301** [3]; **14:302 (1)–(2)** [4]; **14:304** [1]; **14:307** [1]; **14:401** [3]
Art 179 (1) . . . . . **14:201**; **14:307**; **14:307** [2]; **14:501** [4]
Art 179 (2) . . . . . **14:201**; **14:307**; **14:307** [2]
Art 180 (1) **14:203**; **14:301**
Art 180 (2) . . . . . **14:203**; **14:203** [2]
Art 180 (3) . . . . . **14:203**; **14:203** [4]
Art 181 . . . . . **Intro before Art 14:301** [1]
Art 181–183 . . . . . **Intro before Art 14:301** [1]
Art 181 (1) . . . . . **14:302 (1)–(2)**; **14:302 (1)–(2)** [4]; **14:302 (3)**
Art 181 (2) . . . . . **14:302 (1)–(2)**; **14:302 (3)**
Art 181 (3) . . . . . **14:302 (3)**
Art 181 (4) . . . . . **14:302 (3)**
Art 182 . . . . . **Intro before Art 14:301** [1]; **14:304**; **14:304** [1]–[3]
Art 183 . . . . . **14:305**; **14:305** [2]
Art 184 . . . . . **Intro before Art 13:101** [15]; **Intro before Art 14:301** [1]; **14:401**
Art 185 (1) . . . . . **9:401** [11]; **14:101** [7]–[8], [10]; **14:201** [2]; **14:501**; **14:501** [2], [7]
Art 185 (2) **14:501**
Art 185 (3) . . . . . **14:101** [7]; **14:502**
Art 186 . . . . . **14:601**
Art 186 (1) **14:601**
Art 186 (2) . . . . . **14:601**; **14:601** [3]
Art 186 (3) . . . . . **14:601**; **14:601** [3]
Art 186 (4) . . . . . **14:601**; **14:601** [3]
Art 186 (5) . . . . . **14:601**; **14:601** [3]
Appendix 1 . . . . . **2:403** [17], [19]

CESL-ELI[2012] (Common European Sales Law, as revised by a Working Party of the European Law Institute in 2012)
Art 3 (a) . . . . . **2:402** [22]
Art 3 (b) . . . . . **2:403** [21]
Art 3 (c) . . . . . **2:403** [21]
Art 3 (g) . . . . . **2:403** [20]–[21]
Art 5 (2)(g) . . . . . **Intro before Art 13:101** [18]
Art 15 . . . . . **2:405** [7]
Art 16–18 . . . . . **2:402** [4]
Art 17 . . . . . **2:401** [3]; **2:402** [19]
Art 17–20 . . . . . **2:403** [3]
Art 17 (1)(a) . . . . . **2:402** [17]; **2:403** [12]
Art 17 (1)(b) . . . . . **2:402** [19]
Art 17 (3) . . . . . **2:402** [27]
Art 18 . . . . . **2:405** [7]
Art 18 (3) . . . . . **2:405** [7]
Art 19 . . . . . **2:402** [4]; **2:403** [19]
Art 19 (1) **2:402**
Art 19 (1)(b) . . **2:402** [20], [22]–[23], [25]; **2:403** [20]–[21]
Art 19 (2) . . . . . **2:402** [21]; **2:403** [15]
Art 19 (3)(b) . . . . . **2:402** [25]
Art 19 (3)(d) . . . . . **2:402** [23]
Art 19 (3)(e) . . . . . **2:402** [23]; **2:403** [19]–[20]
Art 19 (3)(f) . . . . . **2:403** [24]
Art 19 (4) . . . . . **2:402**, **2:402** [10]
Art 20 . . . . . **2:402** [4]; **2:403** [19]
Art 20 (1)(a) . . . . . **2:403** [13]
Art 20 (2)(a)–(f) . . . . . **2:403** [13]
Art 20 (2)(c) . . . . . **2:403** [14]
Art 20 (2)(e) . . . . . **2:403** [14]
Art 20 (2)(f) . . . . . **2:403** [14]
Art 20 (3) . . . . . **2:404** [5]
Art 20 (3)(a) . . . . . **2:403** [17]
Art 20 (6) . . . . . **2:403** [6]
Art 21 . . . . . **2:402**, **2:402** [13]; **2:404** [3]
Art 21 (3) . . . . . **2:402** [11]; **2:403** [8]
Art 22 (1) . . . . . **2:404** [3]
Art 22 (2) . . . . . **2:404** [5]–[6]
Art 24 (5) . . . . . **2:405** [7]
Art 25 (1) . . . . . **2:402** [11]
Art 26 . . . . . **2:402** [23]
Art 83 . . . . . **Intro before Art 13:101** [16]; **13:107** [28]
Art 83 (c) . . . . . **Intro before Art 13:101** [16]
Art 167 . . . . . **Intro before Art 13:101** [15]
Art 202 . . . . . **4:108** [7]

CESL-ELI (Common European Sales Law, as revised by a Working Party of the European Law Institute in 2014)
Art 5 (2)(g) . . . . . **Intro before Art 13:101** [18]
Art 7 (1) . . . . . **1:106 (1)**
Art 7 (2) . . . . . **1:106 (2)**
Art 7 (3) . . . . . **1:106 (1)**
Art 8 (1)(c) . . . . . **Intro before Art 2:401** [22]; **2:403** [3]
Art 8 (1)(j) . . . . . **9:501 (2)** [8]
Art 9 (1) . . . . . **1:304 (3)** [3], [5]
Art 9 (3) . . . . . **1:304 (2)**
Art 9 (5) . . . . . **1:304 (1)**
Art 11 (2) . . . . . **1:304 (3)** [6]
Art 14 (2) . . . . . **2:405** [7]
Art 19 . . . . . **Intro before Art 2:401** [22]; **2:402** [13]–[14]; **2:403** [19]
Art 19 (1) . . . . . **2:403** [12]
Art 19 (1)(c) . . . . . **2:403** [9]
Art 19 (2) . . . . . **2:405** [3]
Art 19 (3) . . . . . **2:403** [19]–[20]
Art 19 (3)(a) . . . . . **2:403** [19]–[20]
Art 19 (3)(b) . . . . . **2:403** [20]–[21]
Art 19 (3)(c) . . . . . **2:403** [24]–[25]
Art 20 . . . . . **2:401** [3]–[4], [17], [19]
Art 20 (1) . . . . . **2:402** [17]
Art 20 (2)(c) . . . . . **2:401** [7]
Art 20 (3) . . . . . **2:402** [26]–[27]
Art 20 (3)(a) . . . . . **2:402** [26]
Art 20 (3)(b) . . . . . **2:402** [26]
Art 20 (3)(c) . . . . . **2:402** [26]
Art 21 . . . . . **2:402** [20]; **2:403** [13]
Art 21–24 . . . . . **2:402** [4]
Art 21 (1)(b) . . . . . **2:403** [14]
Art 21 (1)(c) . . . . . **2:403** [14]
Art 21 (1)(d) . . . . . **2:403** [14]
Art 21 (2) . . . . . **2:403** [14]
Art 22 . . . . . **2:403** [14]
Art 22 (1) . . . . . **2:402** [21]; **2:403** [21]
Art 22 (1)(d) . . . . . **2:403** [23]
Art 23 . . . . **Intro before Art 2:401** [22]; **2:406** [9]
Art 23 (1) . . . **Intro before Art 2:401** [27]; **2:406** [9]
Art 23 (2) . . . . . **2:403** [21]
Art 23 (2)(a) . . . . . **2:402** [23]; **2:403** [15]
Art 23 (2)(b) . . . . . **2:403** [15]
Art 23 (2)(c) . . . . . **2:403** [22]
Art 23 (3) . . . . . **Intro before Art 2:401** [27]; **2:403** [15]; **2:406** [9]
Art 24 . . . . . **2:403** [16], [19]
Art 24 (1) . . . . . **2:403** [16]–[17]
Art 24 (1)(a) . . . . . **2:403** [16]
Art 24 (1)(b) . . . . . **2:403** [16]–[17]
Art 24 (1)(c) . . . . . **2:403** [16]
Art 24 (2) . . . . . **2:403** [18]
Art 24 (4) . . . . . **2:403** [19]
Art 25 . . . . . **2:402** [23]
Art 25 (1) . . . . . **2:405** [7]
Art 25 (1)(c) . . . . . **2:403** [15]
Art 25 (3) . . . . . **2:405** [5]–[6]
Art 25 (4) . . . . . **2:405** [7]
Art 26 . . . . . **2:406**, **2:406** [17]
Art 26 (1) . . . . . **2:406**, **2:406** [2], [14]
Art 26 (2) **2:406**
Art 26 (2)(a) **2:406**
Art 26 (2)(b) **2:406**
Art 26 (2)(c) **2:406**
Art 26 (3) **2:406**
Art 40 (2)(j) . . . . . **2:505 App** [22]
Art 41 (2) **2:406**
Art 44 (6) **2:406**
Art 44 (7) **2:406**
Art 74 (1) **16:101**
Art 74 (2) **16:102**
Art 74 (3) **16:105**
Art 77 . . . . . **9:508-1**
Art 77 (1) . . . . . **6:203** [2]
Art 77 (b) . . . . . **6:202** [14]
Art 78 (c) . . . . . **6:202** [10]
Art 79 . . . **Intro before Art 13:101** [16]; **13:107** [28]
Art 79 (b) . . . . . **Intro before Art 13:101** [16]
Art 80 . . . . . **9:508-3**
Art 80 (1) . . . . . **9:508-3** [3]
Art 81 . . . . . **9:508-3**
Art 81 (1) **9:508-3**
Art 81 (2) **9:508-3**
Art 81 (3) **9:508-3**
Art 83 . . . . . **18:307**
Art 83 (1)(a) **18:307**
Art 83 (1)(c) **18:307**
Art 83 (2) **18:307**
Art 96 . . . . . **18:307**
Art 96 (1) **18:307**
Art 96 (2) **18:307**
Art 99 (2) . . . . . **18:307** [9]
Art 113 . . . . . **9:201** [11]
Art 119 . . . . . **18:307**
Art 121 . . . . . **8:101**, **8:101** [20]
Art 123 . . . . . **8:101** [2], [9]
Art 124 . . . . . **9:505** [9]
Art 125 . . . . . **8:101** [9]; **9:102 (2)–(3)** [11]
Art 125 (1) . . . . . **8:101** [2]
Art 125 (2)(a) . . . . . **8:104** [31]
Art 129 (1) . . . . . **9:102 (1)** [25]
Art 129 (2)(c) . . . . . **9:102 (2)–(3)** [34]
Art 133 . . . . . **18:307**
Art 137 . . . . . **9:302** [9]
Art 137 (2) . . . . . **9:302** [5]
Art 139 . . . . . **9:303** [20], [28]
Art 139 (1) . . . . . **9:303** [28]
Art 139 (2) . . . . . **9:303** [28]

Art 147 (2) . . . . . **9:508-2 (5)** [1]; **9:509**
Art 147 (4) . . . . . **9:508-2 (6)**
Art 148 . . . . **9:508** [7], [10]; **9:508-1**, **9:508-1** [6]; **9:508-3**, **9:508-3** [5]; **9:508-4** [1]
Art 148 (1) **9:508**
Art 148 (2) . . . . . **9:508**, **9:508** [10]–[11]
Art 148 (3) . . . . . **9:508**, **9:508** [10]; **9:508-4**
Art 148 (4) . . . **9:508**, **9:508-2 (7)**, **9:508-2 (7)** [1]
Art 148 (5) . . . . . **9:508**, **9:508-4**, **9:508-4** [6]
Art 148 (6) **9:508**, **9:508-4**
Art 149 . . . . . **9:508** [7]; **9:508-1**, **9:508-1** [2]
Art 149 (1) **9:508-1**
Art 149 (2) **9:508-1**
Art 150 . . . . . **9:508** [7], [10]–[11]; **9:508-2 (2)**, **9:508-2 (3)**, **9:508-2 (7)** [1]; **9:509** [7]
Art 150 (1) . . **9:508-2 (1)**, **9:508-2 (1)** [4]; **9:508 App**, **9:509** [7]
Art 150 (3) . . . . . **9:509** [7]
Art 150 (4) . . . . . **9:508-2 (7)**, **9:508-3**
Art 152 . . . . . **9:508-1** [2]
Art 157 . . . . . **14:101**
Art 157 (4) . . . . . **9:306** [42]
Art 158 (1) **14:201**
Art 158 (2) **14:201**
Art 158 (3) . . . . . **14:307** [1]
Art 163 . . . . . **Intro before Art 13:101** [15]; **14:401**
Art 164 (1) **14:202**
Art 164 (2) **14:202**
Art 164 (3) **14:402**
Appendix 1 . . . . . **2:403** [19]

CISG (UN Convention on Contracts for the International Sale of Goods of 11 April 1980)
Art 1 . . . . . **1:102** [5]
Art 1–6 . . . . . **Intro before Art 1:101** [1]
Art 1 (1) . . . . **Intro before Art 5:101** [12]; **18:101**
Art 2 . . . . . **Intro before Art 2:501** [13]
Art 2 (a) . . . . . **9:301** [13]; **18:101**
Art 2 (b) **18:101**
Art 2 (c) **18:101**
Art 2 (d) . . . . . **18:101**; **18:101** [18]
Art 2 (e) **18:101**
Art 2 (f) . . . . . **18:101**; **18:101** [18]
Art 3 . . . . . **18:101**; **18:101** [25]
Art 3 (1) . . . . . **18:101**; **18:101** [18]
Art 3 (2) . . . . **18:101**; **Intro before Art 19.101** [1]; **19.101**; **19.101** [1], [6]
Art 4 . . . . . **1:106 (2)** [4]; **6:110** [2]
Art 4 (a) . . . . . **Intro before Art 6:201** [13]
Art 4 (b) . . . . . **1:107** [8], **Intro before Art 18:201** [4]; **18:202** [3]
Art 5 . . . . . **1:106 (2)** [4]; **9:501 (1)** [8]; **9:501 (2)** [9]
Art 6 . . . . . **1:102** [5]; **1:106 (1)** [12]; **6:104** [10]; **6:110** [2]; **8:109**; **8:109** [4], [7]
Art 7 . . . . . **1:106 (1)** [1], [5]; **1:106 (2)** [1]–[2]; **7:103** [4]; **19:101** [6]
Art 7–13 . . . . . **Intro before Art 1:101** [1]
Art 7 (1) . . . . . **1:106 (1)**; **1:106 (1)** [5], [9]–[12], [14]; **1:106 (2)** [1]; **1:201** [1], [5], [53], [75], [78]; **1:303** [30]; **Intro before Art 2:301** [14]; **Intro before Art 2:401** [11]; **8:104** [13]; **8:109** [7]
Art 7 (2) . . . . . **1:106 (1)** [11]–[12]; **1:106 (2)**; **1:106 (2)** [1], [3]–[4], [6]; **2:211** [2]; **9:302** [8]; **19.101**
Art 8 . . . . . **1:107** [4], [8], [19], [21], [27]–[28], [30]; **1:303** [31]; **2:105** [3]; **2:201** [5]; **Intro before Art 5:101** [3], [6], [11], [14], [18]; **5:101** [2]; **5:104** [2]; **5:105** [6]; **5:106** [5]; **Intro before Art 6:201** [13]
Art 8 (1) . . . . . **1:107**; **1:107** [21]; **Intro before Art 5:101** [3]–[4], [19]; **5:101**; **5:101** [2], [8], [10]; **6:103** [2]
Art 8 (2) . . . . . **1:107**; **1:107** [21]–[22], [27]; **Intro before Art 5:101** [3]–[4]; **5:101**; **5:101** [2]
Art 8 (3) . . . . . **Intro before Art 5:101** [3]–[4]; **5:102**; **5:102** [1], [5]
Art 9 . . . . . **1:105**; **1:105** [1], [3]; **1:106 (1)** [12]
Art 9 (1) . . . . . **1:105**; **1:105** [11]; **2:210** [4]
Art 9 (2) . . . . . **1:105**; **1:105** [12], [14]–[15]; **2:210** [4]
Art 10 (a) . . . . . **7:101** [10]
Art 10 (b) . . . . . **7:101** [9]
Art 11 . . . . . **Intro before Art 1:101** [7]; **1:106 (1)** [12]; **2:101 (2)** [5]
Art 12 . . . . . **1:102** [5]; **2:101 (2)** [5]; **8:109**; **8:109** [4]
Art 13 . . . . . **1:301**
Art 14 . . . . . **2:101 (1)** [5]; **2:201**; **2:201** [3]; **6:104** [10]
Art 14 (1) . . . . . **2:201**; **2:201** [3], [6]; **6:104**; **18:201** [4]
Art 14 (2) . . . . . **2:201**; **2:201** [3], [8], [10]–[11]
Art 15 (1) . . . . . **1:303** [7]; **2:202** [19]
Art 15 (2) . . . . . **2:202** [19]
Art 16 . . . . . **2:202**; **2:202** [11]–[12]; **Intro before Art 2:301** [15]
Art 16 (1) . . . . . **2:202**; **2:202** [6]
Art 16 (2) . . . . . **2:202**; **2:202** [15]; **Intro before Art 2:301** [15]
Art 17 . . . . . **2:203**; **2:203** [1]
Art 18 . . . . . **2:204**
Art 18 (1) . . . . . **2:204**; **2:204** [11]
Art 18 (2) . . . . **1:303** [7]; **2:205**; **2:206**; **2:206** [2]
Art 18 (3) . . . . . **2:205**; **2:205** [9]
Art 19 . . . . . **2:207** [1]; **2:208**; **2:208** [3]
Art 19 (1) . . . . . **2:208**; **2:208** [2]
Art 19 (2) . . . . . **2:208**; **2:208** [3]–[4]

Art 19 (3) **1:301**; **2:208**
Art 20 (1) . . . . . **1:304 (1)**; **1:304 (1)** [9]–[10]; **2:206** [3]
Art 20 (2) . . . . . **1:304 (2)**; **1:304 (2)** [4]
Art 21 . . . . . **2:207**
Art 21 (1) . . . . . **1:303** [7]; **2:207**; **2:207** [1]
Art 21 (2) . . . . . **2:207**; **2:207** [2]
Art 22 (1) . . . . . **2:204** [5]
Art 24 . . . **1:107** [7]; **1:201** [78]; **1:303**; **1:303** [7], [13], [22]–[23], [25]–[26], [28]–[30]
Art 25 . . . **8:103**; **8:103** [13], [15]–[17]; **9:301** [18], [20], [22], [35]; **9:501 (1)** [11]
Art 26 . . . . . **9:303**; **9:303** [6]
Art 27 . . . . . **1:303** [7], [21]; **9:303** [12]
Art 28 . . . . . **Intro before Art 9:101** [8]; **9:101** [6]–[7], [9], [15]; **9:102 (1)** [6], [22]; **9:102 (2)–(3)**; **9:102 (2)–(3)** [1], [9], [36]
Art 29 . . . . . **Intro before Art 9:301** [2]
Art 29 (1) . . . . . **Intro before Art 9:305** [3]
Art 29 (2) . . . . . **2:106**; **2:106** [6]
Art 30 . . . . . **18:202**; **18:202** [3]
Art 31 . . . . . **7:101**; **7:101** [11]; **9:306** [45]; **18:202** [4]
Art 31–34 . . . . . **18:303** [18]
Art 31 (a) . . . . . **7:101**; **7:101** [13]
Art 31 (b) **7:101**
Art 31 (c) . . . . . **7:101**; **7:101** [7]
Art 32 . . . . . **7:101** [13]; **18:202** [4]
Art 33 . . . . . **7:102**; **9:501 (1)** [13]; **18:202** [4]
Art 33 (a) . . . . . **7:102**; **7:102** [5]
Art 33 (b) . . . . . **7:102**; **7:102** [7]
Art 33 (c) . . . . . **7:102**; **7:102** [4]
Art 34 . . . . . **8:104**; **8:104** [9]–[10]
Art 35 . . . . . **Intro before Art 2:401** [11], [14], [17]; **2:401** [3]; **18:203 (1)** [10]; **18:203 (2)** [6]; **18:203 (5)** [5]; **18:204** [10]
Art 35 (1) . . . . . **Intro before Art 7:101** [13]; **18:203 (1)**; **18:203 (1)** [5]–[7]; **18:203 (3)** [4], [9]
Art 35 (2) . . . . . **Intro before Art 2:401** [14]; **18:203 (1)** [6]; **18:203 (2)**; **18:203 (2)** [2]–[3], [5]–[7]; **18:203 (3)** [4], [9]
Art 35 (2)(a) . **18:203 (2)**; **18:203 (2)** [2], [7], [11]
Art 35 (2)(b) . **18:203 (2)**; **18:203 (2)** [2], [7], [10]
Art 35 (2)(c) . . . . . **18:203 (2)**; **18:203 (2)** [2], [9]
Art 35 (2)(d) . . . . . **18:203 (2)**; **18:203 (2)** [14]
Art 35 (3) . . . . **18:203 (3)**; **18:203 (3)** [4], [8]–[9]
Art 36 . . . . . **18:301** [4]
Art 37 . . . . . **8:104**; **8:104** [9]–[10], [15]; **9:401**
Art 38 . . . . . **9:301** [52]; **9:306**
Art 39 . . . . . **9:102 (2)–(3)**; **9:102 (2)–(3)** [45]
Art 39 (1) . . . . . **1:302** [1]
Art 39 (2) . . . . . **14:501** [2]
Art 41 . . . . . **6:110** [7]
Art 42 . . . . . **18:203 (1)** [8]; **18:203 (1)** [8]–[9]
Art 42 (1) . . . . . **18:203 (1)** [8]
Art 42 (2) . . . . . **18:203 (3)** [4]
Art 42 (3) . . . . . **18:203 (3)**
Art 45 . . . . . **Intro before Art 8:101** [15]; **8:101** [4]; **Intro before Art 9:301** [1]
Art 45–52 . . . . . **Intro before Art 8:101** [20]; **18:204** [10]
Art 45 (1) **8:101**
Art 45 (1)(b) . . . . . **8:101** [4]; **9:501 (1)** [6]
Art 45 (2) . . . . . **8:102**; **8:102** [1]
Art 45 (3) . . . . . **9:301** [50]
Art 46 . . . . . **Intro before Art 9:101** [3]; **9:102 (1)**; **9:102 (1) App** [6]; **9:102 (2)–(3)** [9], [17]; **9:103** [4]
Art 46–50 . . . . . **9:302**; **9:302** [6]
Art 46–52 . . . . . **8:101**
Art 46 (1) . . . . . **8:102** [10]; **9:102 (1)**
Art 46 (2) . . . . . **9:102 (1)**; **9:102 (1)** [25], [39], [41], [43]; **9:102 (1) App** [6]; **9:102 (2)–(3)**; **9:102 (2)–(3)** [1], [24], [46]; **9:301** [13], [20]; **9:302** [6]
Art 46 (3) . . . . . **9:102 (1)**; **9:102 (1)** [25], [39], [41], [43]; **9:102 (2)–(3)**; **9:102 (2)–(3)** [1], [23], [46]; **9:302** [6]; **18:204** [11]
Art 47 . . . . . **1:107** [28]; **8:106**; **8:106** [4]; **9:301** [18], [46]
Art 47 (1) . . . . . **8:106**; **8:106** [4]–[6]; **9:301**; **9:301** [43]; **9:303**
Art 47 (2) . . . . . **8:102** [4], [16]; **8:106**; **8:106** [4], [8]–[9]; **9:301** [45], [48]
Art 48 . . . . . **8:104**; **8:104** [2]; **8:104** [3], [9]–[12], [14]; **9:401**
Art 48 (1) . . . . . **8:104**; **8:104** [12]–[15], [17], [21], [28], [30]
Art 48 (2) . . . . . **8:102** [16]; **8:104**; **8:104** [14]; **9:303**; **9:303** [26]
Art 48 (2)–(4) . . . . . **8:104** [14]; **9:301** [49]
Art 48 (3) **8:104**
Art 48 (4) **8:104**
Art 49 . . . . . **Intro before Art 9:301** [1]; **9:301** [13], [18], [21]; **9:303** [16]; **Intro before Art 9:305** [3]
Art 49 (1) . . . . . **9:301**; **9:501 (1)** [11]
Art 49 (1)(a) . . . . . **9:301** [13], [29]; **9:302** [5]
Art 49 (1)(b) . . . . . **8:106** [4]; **9:301** [13]–[14], [21], [25]; **9:302** [8]
Art 49 (2) . . . . . **8:102** [8]; **9:301** [51]; **9:303**; **9:303** [16], [18], [23]
Art 49 (2)(a) . . . . . **9:303** [18]
Art 49 (2)(b) . . . . . **9:303** [24]
Art 49 (2)(b)(ii) . . . . . **8:106** [7]
Art 49 (2)(b)(iii) . . . . . **8:106** [7]; **9:303** [26]
Art 50 . . . . . **8:104** [25]; **9:401**; **9:401** [1], [10]–[11], [15], [17]
Art 50 (1) . . . . . **9:401** [11]

Art 51 . . . **9:102 (2)–(3)** [1]; **9:302**; **9:302** [2], [5], [7]–[8], [11]–[13]; **Intro before Art 9:305** [3], [13]; **9:306** [6]; **9:401** [10]
Art 51 (1) . . . . . **9:302**; **9:302** [6]–[8], [12]
Art 51 (2) . . . . **Intro before Art 7:101** [14]; **9:302**; **9:302** [5]–[6], [9]–[10], [14]
Art 52 (1) . . . . . **7:103**; **7:103** [4]
Art 53 . . . . . **1:202** [1]; **18:201**
Art 55 . . . . . **2:402** [21]; **6:104**; **6:104** [10]–[11]; **18:201** [4]; **19:203** [1], [4]; **19:301**; **19:301** [5], [7]
Art 57 . . . . . **7:101**; **7:108** [4]
Art 57 (1) **7:101**
Art 57 (1)(a) . . . . . **7:101** [8], [11]
Art 57 (2) . . . . . **7:101**; **7:101** [11]; **11:306** [2], [5]
Art 58 . . . . . **7:102**; **7:102** [8]; **7:104**; **9:501 (1)** [13]
Art 58 (1) . . . . . **7:102**; **7:104**; **7:104** [4], [7]
Art 58 (2) . . . . . **7:102**; **7:104**; **7:104** [4]
Art 58 (3) . . . . **7:102**; **7:102** [8]; **7:104**; **7:104** [4]
Art 59 . . . . . **7:102**
Art 60 . . . . . **18:201**; **18:201** [7]
Art 60 (a) **18:201**
Art 60 (b) **18:201**
Art 61 . . . . . **Intro before Art 8:101** [15]; **8:101** [4]; **Intro before Art 9:301** [1]
Art 61–65 . . . . . **Intro before Art 8:101** [20]
Art 61 (1) **8:101**
Art 61 (1)(b) . . . . . **8:101** [4]; **9:501 (1)** [6]
Art 61 (2) . . . . . **8:102**; **8:102** [1]
Art 61 (3) . . . . . **9:301** [50]
Art 62 . . . . . **8:102**; **Intro before Art 9:101** [3]; **9:101**; **9:101** [6]–[7], [11], [15], [22]; **9:102 (2)–(3)** [9], [40]
Art 62–65 . . . . . **8:101**
Art 63 . . . . . **8:106**; **8:106** [4]; **9:301** [18]
Art 63 (1) . . . . . **8:106**; **8:106** [4]; **9:301**; **9:303**
Art 63 (2) . . . . . **8:106**; **9:301** [48]
Art 64 . . . . . **1:107** [1]; **Intro before Art 9:301** [1]; **9:301** [13], [18], [21]; **9:303** [16]; **Intro before Art 9:305** [3]
Art 64 (1) **9:301**
Art 64 (1)(a) . . . . . **9:301** [13]; **9:501 (1)** [11]
Art 64 (1)(b) . . . . . **8:106** [4]; **9:301** [13], [21]; **9:302** [8]
Art 64 (2) . . . . . **9:301** [51]; **9:303**; **9:303** [21], [23]
Art 64 (2)(b) . . . . . **9:303** [24]
Art 65 . . . . . **7:105**; **7:105** [1], [5], [7]
Art 65 (1) . . . . . **1:202** [7]; **7:105**; **7:105** [6]
Art 65 (2) . . . . . **7:105**; **7:105** [6]
Art 66 . . . . . **18:301**; **18:301** [11]–[14], [16]
Art 66–69 . . . . . **9:102 (2)–(3)** [4]
Art 67 . . . . . **18:303**; **18:304**; **18:305** [9], [11], [13]
Art 67 (1) **18:305**
Art 67 (2) . . . . . **18:302**; **18:302** [10]
Art 68 . . . . . **18:303**; **18:304**; **18:306**; **18:306** [1]–[2], [4], [6]
Art 69 . . . . . **18:303** [18], [20]
Art 69 (1) . . . . . **1:202** [5]; **18:303**; **18:304**
Art 69 (2) **18:304**
Art 69 (3) . . . . . **18:302**; **18:304** [10]
Art 70 . . . . . **18:301** [4]
Art 71 . . . . . **8:105**; **8:105** [8], [10]–[11], [14]; **9:201**; **9:201** [5], [9], [12]; **9:304** [7], [9]
Art 71 (1) . . . . . **8:105**; **8:105** [5]–[7]; **9:201**; **9:201** [13]–[14]
Art 71 (1)(a) . . . . . **8:105** [6]
Art 71 (1)(b) . . . . . **8:105** [6]
Art 71 (2) **8:105**; **9:201**
Art 71 (3) . . . . . **8:105**; **8:105** [9]; **9:201**
Art 72 . . . . . **1:107** [1]; **8:105**; **8:105** [12]; **9:302** [12]; **9:304**; **9:304** [2], [9], [11]; **Intro before Art 9:305** [3]
Art 72 (1) . . . . . **8:103**; **8:105**; **8:105** [4], [8], [12]; **9:304**; **9:304** [3], [7]
Art 72 (2) . . . . . **8:103** [13]; **8:105**; **8:105** [4], [12]; **9:304**; **9:304** [9]
Art 72 (3) . . . . . **8:105**; **9:304**; **9:304** [9]
Art 73 . . . . . **9:302**; **9:302** [5], [7]–[8], [12], [14]–[15]; **9:303** [25]; **Intro before Art 9:305** [3], [13]
Art 73 (1) . . . . . **9:302**; **9:302** [8], [12]
Art 73 (2) . . . . . **8:105** [8]; **9:302**; **9:302** [12]–[14]
Art 73 (3) . . . . . **9:302**; **9:302** [12], [14]
Art 74 . . . . . **9:501 (1)** [12]; **9:501 (2)** [9]–[10]; **9:502**; **9:502** [1]–[2], [4], [14]–[15]; **9:503**; **9:503** [5]–[6]; **9:508-2 (6)**
Art 74–77 . . . . . **Intro before Art 8:101** [20]; **8:101**; **8:101** [4]
Art 74–78 . . . . . **Intro before Art 9:501** [1]
Art 75 . . . . . **9:506**; **9:506** [4]–[5]; **9:507** [9]
Art 76 . . . . . **9:507**; **9:507** [4], [8]
Art 76 (1) **9:507**
Art 76 (2) **9:507**
Art 77 . . . . . **7:104** [8]; **8:101** [18]; **8:104** [2]; **9:101** [15]–[16]; **9:504**; **9:504** [13]–[14]; **9:507** [5]
Art 78 . . . . . **1:106 (2)** [4]; **9:508**; **9:508** [4]; **9:508-2 (6)**; **9:508-2 (6)** [1]
Art 79 . . . . . **6:111** [17]; **Intro before Art 8:101** [13]; **8:101** [4], [10]; **8:107**; **8:108** [20], [22]–[23], [28]; **9:102 (2)–(3)** [8]–[9]; **9:103** [4]; **9:501 (1)** [6]–[8]; **9:502** [11]; **14:303** [1]
Art 79–88 . . . . . **Intro before Art 8:101** [20]
Art 79 (1) . . . . . **1:302** [1]; **1:305** [14]; **8:107**; **8:108**; **9:102 (2)–(3)** [17]; **9:103** [4]; **9:501 (1)** [9]
Art 79 (2) . . . . **Intro before Art 1:101** [8]; **1:305** [3], [12], [14]; **8:107**; **8:107** [4]–[5]; **8:108** [21]
Art 79 (3) . . . . . **8:108**; **9:102 (2)–(3)** [15]

Art 79 (4) . . . . . **1:202** [10]; **8:108**
Art 79 (5) . . . . . **8:101**; **8:108**; **9:101** [13]; **9:102 (2)–(3)** [9]; **9:301** [37]
Art 80 . . . . . **1:202** [1], [5]; **8:101**; **8:101** [4], [12]–[14], [16], [18]; **9:102 (2)–(3)** [10]; **9:301** [53]; **9:504**; **9:504** [6], [8], [10], [18]
Art 81 . . . . . **Intro before Art 9:305** [3], [13]; **9:305** [3], [12]–[13]; **9:306** [48]
Art 81 (1) . . . . . **2:302** [9]; **4:115** [1]; **9:305**; **9:305** [1], [10], [12]
Art 81 (2) . . . . . **9:302** [14]; **Intro before Art 9:305** [13]; **9:306**; **9:306** [15]
Art 82 . . . . . **9:103** [4]; **9:301** [52]; **9:306**; **9:306** [20]
Art 82 (1) . . . **9:301** [52]; **9:306**; **9:306** [20], [31]–[32]
Art 82 (2) . . . . . **9:301** [52]; **9:306**
Art 82 (2)(a) . . . . . **9:306** [20]
Art 83 . . . . . **9:103**; **9:103** [4]
Art 84 . . . **9:306 App I**; **9:306 App I** [2]; **9:508** [4]
Art 84 (1) . . . **9:306 App I**; **9:508**; **9:508-2 (6)** [1]
Art 84 (2) . . . . . **9:102 (1) App** [9]; **9:102 (2)–(3)** [16]; **9:306 App I**; **9:306 App I** [2]; **9:508**
Art 84 (2)(b) . . . . . **9:306** [39]
Art 85 . . . . . **7:110**; **7:110** [7]; **9:306 App I** [2]
Art 85–88 . . . . . **9:101** [15]
Art 86 . . . . . **7:110**; **7:110** [7]; **9:306 App I** [2]
Art 86 (1) **7:110**
Art 86 (2) **7:110**
Art 87 . . . . . **7:110**; **7.110** [9]; **9:101** [22]
Art 88 . . . . . **7:110**; **9:101** [22]
Art 88 (1) . . . . . **7:110**; **7.110** [10]
Art 88 (2) . . . . . **7:110**; **7.110** [11]
Art 88 (3) **7:110**
Art 96 . . . . . **2:101 (2)** [5]

Code Européen des Contrats: *Avant-projet* (Gandolfi), 2004/2007
Art 2 . . . . . **1:102** [1]
Art 4 . . . . . **1:107** [8]; **Intro before Art 5:101** [14]
Art 32 . . . . . **Intro before Art 5:101** [16]
Art 39 . . . . . **5:101** [10]; **5:102** [1]
Art 39 (1) . . . . . **5:105** [6]
Art 40 (2) . . . . . **5:106** [5]
Art 40 (3) . . . . . **5:103** [4]
Art 72–74 . . . . . **6:110** [4]
Art 72 (1) . . . . . **6:110** [9], [19]–[20]
Art 72 (2) . . . . . **6:110** [17]
Art 72 (3)(1) . . . . . **6:110** [9], [29]
Art 72 (3)(2) . . . . . **6:110** [42]
Art 72 (3)(3) . . . . . **6:110** [42]
Art 72 (4) . . . . . **6:110** [46], [48], [50]
Art 73 (1) . . . . . **6:110** [39]
Art 73 (1)(2) . . . . . **6:110** [33]
Art 73 (2) . . . . . **6:110** [54]
Art 75 (4) . . . . . **7.112** [3]
Art 77 (1) . . . . . **Intro before Art 7:101** [14]
Art 78 (1) . . . . . **Intro before Art 7:101** [13]
Art 80 . . . . . **Intro before Art 7:101** [10]
Art 81 (1) . . . . . **Intro before Art 7:101** [12]
Art 84 (3) . . . . . **7:109** [8]
Art 87 (2) **7:105**
Art 87 (3) . . . . . **7:105**; **7:105** [4]–[5], [7]
Art 87 (4) . . . . . **7:105**; **7:105** [6]
Art 87 (5) . . . . . **7:105**; **7:105** [1], [8]
Art 88 . . . . . **Intro before Art 7:101** [10]; **Intro before Art 10:101** [1]; **10:101** [5]
Art 88 (1) . . . . . **10:102** [2]
Art 88 (2) . . . . . **10:106** [2]–[3]
Art 88 (3) . . . . . **Intro before Art 10:201** [4], [8]; **10:201** [9]; **10:204** [1]–[2]; **10:205** [4]
Art 88 (4) . . . . . **10:101** [12]; **10:108** [4]; **10:110** [2]; **10:205** [7]
Art 88 (5) . . . . . **10:101** [1]
Art 113 (1) . . . . . **9:401** [3]
Art 118–120 . . . . . **12:201** [4]
Art 118 (2) . . . . . **12:201** [4]
Art 120 (4) . . . . . **12:201** [8]
Art 132 . . . . . **Intro before Art 13:101** [17]
Art 132 (1) . . . . . **13:101** [5]; **13:104** [8]
Art 132 (2) . . . . . **13:101** [5], [10], [15], [20], [25]; **13:102** [4]; **13:104** [8]
Art 132 (3) . . . . . **13:104** [8]; **13:106** [5]
Art 132 (4) . . . . . **13:107** [5], [15], [20]
Art 132 (5) . . . . . **13:101** [5], [10]
Art 132 (6) . . . . . **Intro before Art 13:101** [19]; **13:101** [25]; **13:102** [4]
Art 140–144 . . . . . **Intro before Art 15:101** [3]
Art 140 (1) . . . . . **15:101** [4], [8], [11]–[12]; **15:102** [3], [22]–[23]
Art 140 (1)(a) . . . . . **15:103** [4]
Art 140 (1)(b) . . . . . **15:103** [4]
Art 140 (2) . . . . . **15:103** [4]
Art 140 (4) . . . . . **15:102** [30]
Art 140 (5) . . . . . **15:102** [13]
Art 141 . . . . . **15:102** [22], [27]
Art 141 (1) . . . . . **15:101** [11]–[12]
Art 142 . . . . . **15:102** [15]
Art 143 . . . . . **15:102** [23]; **15:103** [4]
Art 144 . . . . . **15:103** [4]
Art 151 (1)(b) . . . . . **5:101** [10]
Art 160 . . . . . **Intro before Art 9:305** [26]
Art 160–161 . . . . . **Intro before Art 15:101** [3]
Art 160 (1) . . . . . **15:104** [6]
Art 160 (9) . . . . . **15:104** [6]
Art 161 . . . . . **15:105** [3]
Art 162 . . . . . **9:501 (1)** [9]
Art 170 . . . . . **9:509** [7], [15]
Art 170 (1) . . . . . **9:509** [14]
Art 170 (4) . . . . . **9:509** [17]–[18]
Art 201 . . . . . **18:203 (1)** [1]
Art 404 . . . . . **9:501 (1)** [9]

Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes of 7 June 1930
Art 41 . . . . . **7:108**; **7:108** [4]
Art 41 (3) . . . . . **7:108** [6]

Convention Providing a Uniform Law for Cheques of 19 March 1934
Art 36 . . . . . **7:108**; **7:108** [4]

Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods *see* ULF

Convention Relating to a Uniform Law on the International Sale of Goods *see* ULIS

DCFR (Draft Common Frame of Reference, Full Edition 2009)
Principles . . . . . **Gen Intro** 18; **1:201** [64]
Principle 1 . . . . . **1:102** [2]
Principle 3 . . . . . **1:102** [1]
Principle 11 . . . . . **2:106** [4]; **2:302** [33]; **Intro before Art 2:401** [33]
Principle 55 . . . . . **Intro before Art 13:101** [26]; **14:401** [2]
Principle 57–99 . . . . . **1:106 (1)** [12]
Art I.-1:101 . . . . . **Intro before Art 1:101** [9]; **1:107** [9]
Art I.-1:101–1:110 . . . . . **Intro before Art 1:101** [1]
Art I.-1:101 (2)(b) . . . . **Intro before Art 5:101** [12]
Art I.-1:101 (2)(e) . . . . . **1:102** [12]
Art I.-1:101 (2)(g) . . . . **Intro before Art 5:101** [12]
Art I.-1:101 (2)(h) . . . . . **10:101** [3]
Art I.-1:102 . . . . . **Intro before Art 1:101** [4], [8]; **1:102** [2]; **1:106 (1)** [1], [5], [7], [10], [12]; **1:106 (2)** [3]; **1:201** [62], [75]; **Intro before Art 5:101** [12], [18]
Art I.-1:102 (1) . . . . . **1:106 (1)**; **1:106 (1)** [5], [9]–[12], [14]; **1:106 (2)** [1], [5]; **1:201** [62]
Art I.-1:102 (2) . . . . . **1:106 (1)**; **1:106 (1)** [5], [7]
Art I.-1:102 (3) . . . . . **1:106 (1)**; **1:106 (1)** [5]
Art I.-1:102 (3)(a) . . . . . **1:106 (1)** [10]
Art I.-1:102 (3)(b) . . . . . **1:106 (1)** [10]; **1:201** [2]
Art I.-1:102 (3)(c) . . . . . **1:106 (1)** [10]
Art I.-1:102 (4) . . . . . **1:106 (2)**; **1:106 (2)** [1], [3], [5]–[6]; **1:201** [62]
Art I.-1:102 (5) . . . . . **1:106 (1)**; **1:106 (1)** [5], [7]; **5:105** [10]
Art I.-1:103 . . . . . **Intro before Art 1:101** [6], [10]; **1:106 (1)** [12]; **2:401** [5]; **9:102 (2)–(3)** [45]
Art I.-1:103 (1) . . . . . **1:201** [8], [79]
Art I.-1:103 (2) . . . . . **1:201** [93]
Art I.-1:104 . . . . . **Intro before Art 1:101** [8]; **1:106 (1)** [12]; **1:302**; **1:302** [4], [6]–[7]; **5:102** [7]; **19:202** [6]; **19:302** [6]
Art I.-1:105–1:108 . . . . . **1:106 (1)** [1]
Art I.-1:105 (1) . . . . . **1:301 Appendix**
Art I.-1:105 (2) . . . . . **1:301 Appendix**
Art I.-1:105 (3) . . . . . **1:301 Appendix**
Art I.-1:106 . . . . . **2:404** [4]
Art I.-1:106 (1) **1:301**
Art I.-1:106 (2) . . . . . **2:101 (2)** [14]
Art I.-1:108 . . . . . **Intro before Art 1:101** [8]; **1:102** [12]; **1:201** [8], [60]; **1:202** [1]; **15:101** [11]; **15:102** [26]; **15:104** [12]
Art I.-1:108 (1) . . . **1:301**; **1:301** [1]; **9:501 (1)** [1]; **14:101** [4]; **16:101** [1]
Art I.-1:109 . . . . . **Intro before Art 1:101** [8]; **1:107** [7]; **1:303**; **1:303** [9], [15], [17], [19], [24], [28], [30]
Art I.-1:109 (1) . . . . . **1:303** [7]–[8]
Art I.-1:109 (3) . . . . . **1:303** [8], [13], [19]
Art I.-1:109 (4) . . . . . **1:303**; **1:303** [7], [24]; **2:205** [4]
Art I.-1:109 (4)(a) . . . . . **1:303** [28]
Art I.-1:109 (4)(c) . . . . **1:303** [22], [24]; **2:205** [5]
Art I.-1:109 (4)(d) . . . . . **1:303** [22], [24], [26]
Art I.-1:109 (5) . . . . . **1:303** [32]; **2:205** [4]
Art I.-1:109 (6) . . . . . **1:303**; **1:303** [34]
Art I.-1:109 (7) . . . . . **1:303**; **1:303** [33]
Art I.-1:110 . . . . . **Intro before Art 1:101** [8]; **1:304 (1)** [6]
Art I.-1:110 (2) . . . . . **1:304 (3)**; **1:304 (3)** [4]
Art I.-1:110 (2)(a) . . . . . **1:304 (1)** [6]; **1:304 (3)**; **1:304 (3)** [2]
Art I.-1:110 (2)(a)–(b) . . . . . **1:304 (3)** [6]
Art I.-1:110 (2)(a)–(c) . . . . . **1:304 (3)** [5], [6]
Art I.-1:110 (2)(b)–(c) . . . . . **1:304 (3)** [2]
Art I.-1:110 (2)(c) . . . . . **1:304 (3)** [6]
Art I.-1:110 (2)(d) . . . . . **1:304 (3)**
Art I.-1:110 (3) . . . . . **1:304 (3)**; **1:304 (3)** [3]
Art I.-1:110 (3)–(4) . . . . . **1:304 (1)** [6]
Art I.-1:110 (3)(a) . . . . . **1:304 (1)** [6]; **1:304 (3)** [2]
Art I.-1:110 (3)(a)–(b) . . . . . **1:304 (3)** [5]
Art I.-1:110 (3)(b) . . . . . **1:304 (3)** [2]; **14:203** [2]
Art I.-1:110 (4) . . . . . **1:304 (3)**; **1:304 (3)** [3]
Art I.-1:110 (4)(a) . . . . . **1:304 (1)** [6]; **1:304 (3)**; **1:304 (3)** [2], [5]
Art I.-1:110 (4)(b) . . . . . **1:304 (3)** [2]
Art I.-1:110 (4)(c) . . . . . **1:304 (3)**
Art I.-1:110 (5) . . . . . **1:304 (2)**; **1:304 (2)** [4]
Art I.-1:110 (6) . . . . . **1:304 (2)**; **1:304 (2)** [5]–[6]
Art I.-1:110 (7) . . . . . **1:304 (1)** [6]; **1:304 (2)**; **1:304 (2)** [7]
Art I.-1:110 (8) . . . . **1:304 (1)**; **1:304 (1)** [9]–[10]; **2:206** [3]
Art I.-1:110 (9) . . . . . **1:304 (2)**
Art II.-1:101–1:110 . . . . . **Intro before Art 1:101** [1]
Art II.-1:101 (1) . . . . . **Gen Intro** 16

Art II.-1:101 (2) . . . . . **Intro before Art 1:101** [8]; **1:107**; **1:107** [4], [9]
Art II.-1:101 (5) . . . . . **6:203** [10]
Art II.-1:102 . . . . . **Intro before Art 1:101** [6], [10]; **1:102**; **1:102** [1]–[2], [22]–[23]; **1:106 (1)** [12]; **1:107** [9], [16]
Art II.-1:102 (1) . **1:102**; **1:102** [2]; **6:110** [21], [31]
Art II.-1:102 (2) . . . . . **1:102**; **1:102** [2], [22]
Art II.-1:102 (3) . . . . . **1:102**; **1:102** [2]
Art II.-1:103 . . . . . **Intro before Art 1:101** [6]; **1:106 (1)** [12]; **1:107** [1]; **1:303** [1]; **2:107** [4]; **6:110** [15]; **10:102** [3]
Art II.-1:103 (2) . . . . . **2:107**; **2:107** [6]; **6:110** [19], [22]
Art II.-1:103 (3) . . . . . **6:110** [23]
Art II.-1:104 . . . . . **Intro before Art 1:101** [4], [8]; **1:105**; **1:105** [8], [13]; **1:106 (1)** [12]
Art II.-1:104 (1) **1:105**
Art II.-1:104 (2) . . . . . **1:105**; **1:105** [13], [15]
Art II.-1:104 (3) . . . . . **1:105**; **1:107** [8]
Art II.-1:105 . . . . . **Intro before Art 1:101** [8]; **1:107** [9], [16]; **1:305**; **1:305** [1]–[3], [6], [12]–[13], [16]; **8:107** [7]
Art II.-1:105 (a) . . . . . **1:305**; **1:305** [5]–[8]
Art II.-1:105 (b) . . . . . **1:305**; **1:305** [11]
Art II.-1:106 . . . . . **1:106 (1)** [12]; **1:107** [9], [16]; **1:303** [15]; **2:101 (2)**; **2:101 (2)** [1]–[2], [5], [17]
Art II.-1:106 (1) . . . . . **2:101 (2)**
Art II.-1:106 (2) . . . . . **1:201** [76]; **2:101 (2)**; **2:101 (2)** [5], [13]
Art II.-1:106 (3) . . . . . **2:101 (2)** [14]
Art II.-1:108 . . . . . **1:107** [9], [16]
Art II.-1:109 . . . . . **Intro before Art 6:201** [15]; **6:203**; **6:203** [6]
Art II.-1:110 . . . . . **6:203**; **6:203** [5], [9]–[10]
Art II.-1:110 (1) **6:203**
Art II.-1:110 (2) . . . . . **6:203**; **6:203** [9]
Art II.-1:110 (3) **6:203**
Art II.-1:110 (4) **6:203**
Art II.-1:110 (5) **6:203**
Art II.-1:306 (2) . . . . . **2:402** [14]
Art II.-2:101 . . . . . **1:102** [14]; **1:107** [9]
Art II.-2:101–2:105 . . . . . **1:102** [14]
Art II.-2:103 . . . . . **2:104** [6]
Art II.-3:101 . . . . . **Intro before Art 2:401** [18], [26]; **2:401**; **2:401** [2], [4]
Art II.-3:101–3:108 . . . . . **4:103** [15]
Art II.-3:101–3:109 . . . **Intro before Art 2:401** [18]
Art II.-3:101 (1) . . . . . **2:401** [3], [12]
Art II.-3:101 (2) . . . . . **2:401** [3]
Art II.-3:102 . . . . . **2:402** [2]–[3], [20]
Art II.-3:102 (1) . . . . **Intro before Art 2:401** [18]; **2:402**; **2:402** [2], [14]
Art II.-3:102 (2) . . . . . **2:402**; **2:402** [2]
Art II.-3:102 (2)(a) . . . . . **2:402** [18]–[20], [22], [25]
Art II.-3:103 . . . . . **2:403**; **2:403** [8], [27]; **2:406**
Art II.-3:103 (1) . . **2:403**; **2:403** [9], [13]–[15], [24]
Art II.-3:103 (1)(a) . . . . . **2:403** [12]
Art II.-3:103 (2) **2:403**
Art II.-3:104 . . . . . **2:405** [8]–[9]
Art II.-3:104 (1) . . . . . **2:405** [8]
Art II.-3:104 (2) . . . . . **2:405** [8]
Art II.-3:106 . . **2:101 (2)** [14]; **2:402** [14]; **2:404** [3]
Art II.-3:106 (2) . . . . . **2:101 (2)** [14]
Art II.-3:106 (3) . . . . . **2:404** [2]
Art II.-3:106 (4) . . . . . **2:404** [5]; **2:405** [3]
Art II.-3:107 . . . . . **2:402** [20]
Art II.-3:107 (b) . . . . . **2:402** [21]
Art II.-3:108 . . . . . **2:402** [19]–[20]
Art II.-3:108 (1) . . . . . **2:403** [13]
Art II.-3:108 (1)(c) . . . . . **2:403** [14]
Art II.-3:108 (1)(d) . . . . . **2:402** [20]
Art II.-3:108 (1)(g) . . . . . **2:403** [14]
Art II.-3:108 (1)(h) . . . . . **2:403** [14]
Art II.-3:109 . . . . . **2:406**; **2:406** [6]
Art II.-3:109 (1) . . . . . **2:406**; **2:406** [8]; **2:502** [7]
Art II.-3:109 (1)(f) . . . . . **2:403** [14]
Art II.-3:109 (2) . . . . . **2:406**; **2:406** [9], [15]
Art II.-3:109 (3) . . . . . **2:406**; **2:406** [14]–[15]
Art II.-3:109 (4) **2:406**
Art II.-3:109 (5) . . . . . **2:406**; **2:406** [18]
Art II.-3:202 (1) . . . . . **2:101 (2)** [14]
Art II.-3:204 . . . . . **2:204** [1]
Art II.-3:301 . . . . . **1:201** [2]; **2:301**; **2:301** [1]; **9:502** [6]; **16:104** [4]
Art II.-3:301 (1) **2:301**
Art II.-3:301 (2) . . . . . **2:301**; **2:301** [1]; **9:502** [6]
Art II.-3:301 (3) . . . . . **2:301**; **9:502** [6]
Art II.-3:301 (4) . . . . . **2:301**; **2:301** [5]
Art II.-3:302 . . . . . **2:302**; **2:302** [8], [17]–[18]
Art II.-3:302 (1) . . . . . **2:302**; **2:302** [8]
Art II.-3:302 (2) . . . . . **2:302**; **2:302** [10]
Art II.-3:302 (3) . . . . . **2:302**; **2:302** [16], [19]
Art II.-3:302 (4) . . . . . **2:302**; **2:302** [16]
Art II.-3:401 . . . . . **2:204**; **2:204** [16]
Art II.-3:401 (1) **2:204**
Art II.-3:401 (2) **2:204**
Art II.-3:401 (3) **2:204**
Art II.-3:401 (4) **2:204**
Art II.-3:501 . **1:106 (1)** [9]; **2:406** [14]; **9:502** [6]
Art II.-4:101 . . . . . **2:101 (1)**; **2:101 (1)** [3], [5], [8], [18]; **6:110** [19], [29]
Art II.-4:101–4:211 . . . **Intro before Art 2:101** [5]
Art II.-4:101 (a) . . . . . **2:101 (1)**
Art II.-4:101 (b) . . . . . **2:101 (1)**
Art II.-4:102 . . . **1:107** [17], [19]; **2:102**; **2:102** [3]
Art II.-4:103 . . . . . **2:103**; **2:103** [2], [5]–[6]
Art II.-4:103 (1) . . . . . **2:103**; **2:103** [1]
Art II.-4:103 (1)(b) . . . . . **2:103** [2]

Art II.-4:103 (2) **2:103**
Art II.-4:104 . . . . . **2:105**; **2:105** [3]
Art II.-4:104 (1) **2:105**
Art II.-4:104 (2) **2:105**
Art II.-4:104 (3) . . . . . **2:105**; **2:105** [3]
Art II.-4:104 (4) . . . . . **2:105**; **2:105** [3]
Art II.-4:105 . . . . . **2:106**; **2:106** [6]; **6:110** [21]
Art II.-4:105 (1) . . . . . **2:106**; **2:106** [6]
Art II.-4:105 (2) . . . . . **2:106**; **2:106** [6]
Art II.-4:201 . . . . . **1:303** [9]; **2:201**; **2:201** [3]; **10:201** [4]
Art II.-4:201 (1) **2:201**
Art II.-4:201 (2) . . . . . **2:201**; **2:201** [7]–[8]
Art II.-4:201 (3) . . . . . **2:201**; **2:201** [9]
Art II.-4:202 . . . . . **2:202**; **2:202** [19]
Art II.-4:202 (1) . . . . **2:202**; **2:202** [12]; **2:205** [3]
Art II.-4:202 (2) **2:202**
Art II.-4:202 (3) . . . . . **2:202**; **2:202** [15]
Art II.-4:202 (4) **2:202**
Art II.-4:203 . . . . . **2:203** [1]
Art II.-4:205 . . . . . **1:303** [11]; **2:205**
Art II.-4:205 (1) . . . . . **1:107** [17]; **1:303** [7], [9], [24]
Art II.-4:206 . . . . . **2:206**
Art II.-4:207 . . . . . **2:207**; **2:207** [1]
Art II.-4:208 . . . . . **2:208**; **2:208** [5]
Art II.-4:208 (3) . . . . . **2:208** [8]
Art II.-4:209 . . . . . **2:209**; **Intro before Art 6:201** [15]; **6:204** [4]
Art II.-4:210 . . . . . **2:210**; **2:210** [1]
Art II.-4:210 (a) **2:210**
Art II.-4:210 (b) **2:210**
Art II.-4:211 . . . . . **2:211**; **2:211** [2]; **2:301** [10]
Art II.-4:301 . . . . . **1:107** [7], [30]; **1:303** [17]
Art II.-4:301 (c) . . . . . **1:107** [17]; **1:303** [2]
Art II.-4:302 . . . . . **1:107** [7], [17]
Art II.-4:303 . . . . . **1:107** [1], [19]; **1:303** [2]
Art II.-5:101 . . . . . **Intro before Art 2:501** [12], [17], [26]–[27], [35], [38]; **2:501 App II** [2], [14], [25]
Art II.-5:101 (2) **2:506**
Art II.-5:102 . . . . . **1:107** [1]; **1:303** [1]–[2]; **2:501 (1)** [2]; **2:503**; **2:503** [3]
Art II.-5:102 (1) . . . . **2:501 (1)**; **2:501 (1)** [2]–[3]; **2:503**; **2:503** [1]
Art II.-5:102 (2) . . . . . **2:503**; **2:503** [7]
Art II.-5:103 . . . . . **2:501 (2)** [3]–[4], [6]; **2:502** [3]–[4]; **2:503** [10]
Art II.-5:103 (1) . . . . . **2:501 (2)**; **2:501 (2)** [8]
Art II.-5:103 (2) . . . . . **2:406** [8]; **2:501 (2)**; **2:502**; **2:502** [3]
Art II.-5:103 (2)(b) . . . . . **2:406** [8]; **2:502** [3]
Art II.-5:103 (3) . **2:501 (2)**; **2:502**; **2:502** [5]–[6]
Art II.-5:103 (4) . . . . **1:303** [21]; **2:503**; **2:503** [9]
Art II.-5:104 . . . . . **2:403** [16]–[17]; **Intro before Art 2:501** [28]; **2:502** [2]; **2:503** [8]
Art II.-5:105 . . . . **2:504** [2]; **2:504 App** [11]–[12]; **2:505** [6]; **Intro before Art 9:305** [21], [26]; **9:305** [4]; **9:306** [8], [10], [16], [22], [46]; **9:306 App I** [3]; **9:306 App II** [2]
Art II.-5:105 (1) . . . **2:504**, **2:504** [2]–[3]; **9:306** [10]
Art II.-5:105 (2) . . . . . **2:504 App** [5]–[6], [12]; **Intro before Art 9:305** [9], [32]; **9:306** [10]; **9:306 App I** [3]
Art II.-5:105 (3) . . . . . **2:504 App** [6], [11]; **Intro before Art 9:305** [21]; **9:306** [16]
Art II.-5:105 (3)–(7) . . . . . **2:504 App** [5]; **Intro before Art 9:305** [32]
Art II.-5:105 (4) . . . . . **2:504 App** [12]
Art II.-5:105 (4)(a) . . . . . **2:504 App** [12], [16]
Art II.-5:105 (4)(b) . . . . . **2:504 App** [12], [18]; **9:306** [22], [28]
Art II.-5:105 (5) . . . . **2:504 App** [12], [16]; **9:306 App I** [3]
Art II.-5:105 (6) . . . . . **2:501 (1)**; **2:501 (1)** [2], [5]; **2:504 App** [12]
Art II.-5:105 (7) . . . . . **2:504 App** [12]
Art II.-5:106 . . . . . **2:505**; **2:505** [3], [5]
Art II.-5:106 (1) . . . . . **2:505**; **2:505** [6]
Art II.-5:106 (2) **2:505**
Art II.-5:106 (3) . . . . . **2:505**; **2:505** [6]–[7]
Art II.-5:106 (4) **2:505**
Art II.-5:201 . . . . . **2:402** [9]; **Intro before Art 2:501** [17], [24]; **2:501 App II** [11], [17], [27]; **2:505 App** [2], [15], [17], [22]
Art II.-5:201 (1) . . . . . **2:501 (1)**; **2:501 (1)** [2], [5]; **2:501 App II** [2]
Art II.-5:201 (2)(a) . . . . . **2:505 App** [24]
Art II.-5:201 (2)(b) . . . . . **2:505 App** [23]
Art II.-5:201 (2)(c) . . . . . **2:505 App** [25]
Art II.-5:201 (2)(d) . . . . . **2:505 App** [23]
Art II.-5:201 (2)(f) . . . . . **2:505 App** [8]
Art II.-5:201 (2)(g) . . . . . **2:505 App** [17]
Art II.-5:201 (3)(a) . . . . . **2:505 App** [19]
Art II.-5:201 (3)(b) . . . . . **2:505 App** [5]
Art II.-5:201 (3)(c) . . . . . **2:505 App** [9]–[10]
Art II.-5:201 (3)(d) . . . . . **2:505 App** [15]
Art II.-5:201 (3)(d)(ii) . . . . . **2:505 App** [20]
Art II.-5:201 (3)(e) . . . . . **2:505 App** [16]
Art II.-5:201 (3)(f) . . . . . **2:505 App** [22]
Art II.-5:208 (3)(c) . . . . . **2:208** [10]
Art II.-6:101 . . . . . **Intro before Art 3:101** [2]; **3:101**; **3:101** [4]
Art II.-6:101 (1) . . . . . **3:101**; **3:101** [2]
Art II.-6:101 (1)(a) **3:101**
Art II.-6:101 (1)(b) **3:101**
Art II.-6:101 (2) **3:101**
Art II.-6:101 (3) . . . . . **1:106 (2)** [4]; **3:101**
Art II.-6:102 . . . . . **Intro before Art 3:101** [2]; **3:101** [3]; **3:204** [2]
Art II.-6:102 (1) . . . . . **3:101**; **3:101** [3]

Art II.-6:102 (2) . . . . . **3:101**; **3:101** [3]
Art II.-6:102 (3) . . . . . **3:101**; **3:201** [2]
Art II.-6:102 (4) . . . . . **3:101**; **3:204**; **3:204** [2]
Art II.-6:102 (5) **3:101**
Art II.-6:103 . . . . . **1:107** [1]; **1:201** [7]–[8]; **3:201**; **3:201** [11]
Art II.-6:103 (1) . . . . . **3:101**; **3:101** [4]; **3:201**; **3:201** [7]
Art II.-6:103 (2) . . . . . **3:201**; **3:201** [2]
Art II.-6:103 (3) . . . . . **3:201**; **3:201** [9]–[11]
Art II.-6:104 . . . . . **3:206** [2]
Art II.-6:104 (1) . . . . . **3:201**; **3:201** [6]
Art II.-6:104 (2) . . . . . **3:201**; **3:201** [6]
Art II.-6:104 (3) . . . **3:201** [6]; **3:206**; **3:206** [2]–[4]
Art II.-6:105 . . . . **3:102**; **3:102** [9]–[10]; **3:202** [1]
Art II.-6:105 (a) **3:102**
Art II.-6:105 (b) **3:102**
Art II.-6:106 . . . . . **3:102** [12]; **3:301**; **3:301** [1]; **3:302** [9]
Art II.-6:106 (1) . . . . . **3:201** [4]
Art II.-6:107 . . . . . **3:204**; **3:204** [2]
Art II.-6:107 (1) . . . . . **3:204**; **3:204** [2]
Art II.-6:107 (2) . . . . . **3:204**; **3:204** [1], [3]–[5]
Art II.-6:107 (3) **3:204**
Art II.-6:108 . . . . . **3:102** [9], [11]; **3:203**
Art II.-6:109 . . . . . **3:205**
Art II.-6:109 (1) . . . . . **3:205**; **3:205** [2]–[5], [7]
Art II.-6:109 (2) . . . . . **3:205**; **3:205** [2]
Art II.-6:109 (3) . . . . . **3:205**; **3:205** [5]–[6]
Art II.-6:109 (3)(b) . . . . . **3:205** [5]
Art II.-6:109 (3)(d) . . . . . **3:205** [5]
Art II.-6:110 . . . . . **3:206**
Art II.-6:111 . . . . . **3:207** [4]
Art II.-6:111 (1) . . . . . **3:204** [2]; **3:207**
Art II.-6:111 (2) . . . . . **3:207**; **3:207** [1]
Art II.-6:111 (3) . . . . . **3:208**; **3:208** [1]–[2]
Art II.-6:112 . . . . . **3:209**; **3:209** [2]
Art II.-6:112 (1) . . . . . **3:201** [2]; **3:209**; **3:209** [2]
Art II.-6:112 (2) . . . . . **3:209**; **3:209** [3]
Art II.-6:112 (3) . . . . . **3:201** [3]; **3:209**; **3:209** [2]
Art II.-6:112 (4) . . . . . **3:209**; **3:209** [4]
Art II.-7:101 . . . . . **1:107** [16]; **4:101**; **4:101** [1]
Art II.-7:101 (1) **4:101**
Art II.-7:101 (2) **4:101**
Art II.-7:101 (3) . . . . . **Intro before Art 1:101** [8]; **1:107**; **1:107** [8], [10], [18], [29]; **4:101**
Art II.-7:101 (3)(c) . . . . . **1:107** [30]
Art II.-7:102 . . . . . **4:102**; **4:102** [3]; **4:104**; **9:102 (2)–(3)** [14]; **10:101** [4]; **Intro before Art 16:101** [12]; **16:101** [9]
Art II.-7:201 . . . . . **1:107** [12]; **2:401** [1]; **2:406**; **4:102** [5], [7]; **4:103**; **4:103** [12], [20]–[24]; **12:101** [6]; **16:101** [9]
Art II.-7:201 (1) **4:103**
Art II.-7:201 (1)(a) . . . . . **2:406** [11]; **4:103** [21]
Art II.-7:201 (1)(b) . . . . . **4:103** [16]
Art II.-7:201 (1)(b)(i) . . . . . **4:103** [10]
Art II.-7:201 (1)(b)(ii) . . **2:406** [11]; **4:103** [12]–[14]
Art II.-7:201 (1)(b)(iii) . . . . . **2:406** [11]; **4:103** [12]–[13], [15]
Art II.-7:201 (2) **4:103**
Art II.-7:201 (2)(a) . . . . . **4:103** [24]
Art II.-7:201 (2)(b) . . . . . **4:102** [5]
Art II.-7:201–7:205 . . . . . **12:101** [15]
Art II.-7:202 . . . . . **4:104** [2]–[3], [8]–[9]
Art II.-7:203 . . . . **1:107** [16]; **4:105**; **4:105** [1], [5]
Art II.-7:203 (1) **4:105**
Art II.-7:203 (2) **4:105**
Art II.-7:203 (3) . . . . . **4:105**; **4:105** [7]
Art II.-7:204 . . . . . **2:406** [6], [14]; **4:106**; **4:106** [1], [3]–[7]
Art II.-7:204 (1) **4:106**
Art II.-7:204 (1)(a) . . . . . **4:106** [6]
Art II.-7:204 (1)(b) . . . . . **4:106** [6]
Art II.-7:204 (2) **4:106**
Art II.-7:205 . . . **1:107** [12]; **2:401** [1]; **2:406** [12]; **4:103** [10]; **4:107**; **4:107** [5]; **12:101** [6]
Art II.-7:205 (1) . . . . . **4:107**; **4:107** [5], [7]
Art II.-7:205 (2) **4:107**
Art II.-7:205 (3) **4:107**
Art II.-7:205 (3)(c) . . . . . **2:401** [8]
Art II.-7:206 . . . . . **4:108**; **4:108** [4]–[9]
Art II.-7:206 (1) . . . . . **4:108**; **4:108** [4], [8]
Art II.-7:206 (2) . . . . . **4:108**; **4:108** [6]
Art II.-7:207 . . . . . **4:109**; **4:109** [1]; **Intro before Art 9:305** [32]; **15:101** [6]
Art II.-7:207 (1) **4:109**
Art II.-7:207 (2) . . . . . **4:109**; **15:103** [11]
Art II.-7:207 (3) . . . . . **4:109**; **15:103** [11]
Art II.-7:208 . . . . . **4:111**; **4:111** [6]–[7]
Art II.-7:208 (1) . . . . . **4:111**; **4:111** [6]
Art II.-7:208 (2) **4:111**
Art II.-7:209 . . . . . **1:107** [1]; **1:303** [1]–[2]; **4:112**; **4:114** [6]
Art II.-7:209–7:213 . . . . . **3:205**
Art II.-7:210 . . . . . **4:113**; **4:113** [3]–[4]
Art II.-7:211 . . . . . **4:114**; **4:114** [1], [3], [5]
Art II.-7:212 . . . . . **4:115**; **9:305** [1], [5]; **9:306** [8]
Art II.-7:212 (1) . . . . . **4:115**; **4:115** [1]
Art II.-7:212 (2) **4:115**
Art II.-7:212 (3) **4:115**
Art II.-7:213 . . . . . **4:116**; **4:116** [1]
Art II.-7:214 . . . . . **4:103** [23]; **4:117**; **4:117** [3]–[4], [6]; **9:502** [6]
Art II.-7:214 (1) . . . . **4:102** [5]; **4:117**; **4:117** [1], [4]
Art II.-7:214 (2) . . . . . **4:117**; **4:117** [1], [4]
Art II.-7:214 (3) . . . . . **4:117**; **4:117** [5]
Art II.-7:215 . . . . . **4:118**; **4:118** [1]
Art II.-7:215 (1) **4:118**
Art II.-7:215 (2) . . . . . **4:118**; **4:118** [4]

Art II.-7:216 . . . . . **4:119**; **4:119** [1]–[3]
Art II.-7:301 . . . . . **Intro before Art 15:101** [5]; **15:101**; **15:101** [8], [12]–[13]; **15:103** [7], [11]; **15:104**; **Intro before Art 16:101** [13]
Art II.-7:301 (a) . . . . . **15:101**; **15:103** [7]
Art II.-7:301 (b) . . . . **15:101**; **15:101** [15]; **15:103** [7]
Art II.-7:302 . . . . . **15:101** [12]; **15:102** [7], [9], [11], [13], [15], [27]–[29], [31]; **15:103** [5], [11]; **Intro before Art 16:101** [13]
Art II.-7:302 (1) . . . . . **15:101** [12]; **15:102**
Art II.-7:302 (2) **15:102**
Art II.-7:302 (2)(b) . . . . . **15:103** [5]
Art II.-7:302 (2)(c) . . . . . **15:103** [11]
Art II.-7:302 (3) . . . . . **15:102**; **15:102** [28]; **15:103** [6]; **15:104** [11]
Art II.-7:302 (3)(b) . . . **Intro before Art 9:305** [32]
Art II.-7:303 . . . . . **Intro before Art 9:305** [26]; **9:306** [8]; **15:104** [8]–[9]
Art II.-7:303 (1) . . . . **15:104**; **15:104** [8]–[9], [12]
Art II.-7:303 (3) . . . . . **15:104**; **15:104** [12]
Art II.-7:304 . . . . **15:102** [7]; **15:105**; **15:105** [5]
Art II.-7:304 (1) **15:105**
Art II.-7:304 (2) . . . . . **9:502** [6]; **15:105**
Art II.-8:101 . . . . . **1:107** [25]; **Intro before Art 5:101** [1], [21]–[22]; **5:101**; **5:101** [4], [8], [10], [14]–[15]
Art II.-8:101–8:202 . . . . . **1:106 (1)** [1]
Art II.-8:101 (1) . . . . **1:107** [27]; **5:101**; **5:101** [4], [10]–[11]; **5:102** [6]
Art II.-8:101 (2) . . . . . **1:107** [25]; **Intro before Art 5:101** [19]; **5:101**; **5:101** [8], [10]; **6:103** [2]
Art II.-8:101 (3) . . . . . **1:107** [25]; **5:101**
Art II.-8:101 (3)(a) . . . . . **5:101** [9]
Art II.-8:102 . . . . . **1:107** [26]; **Intro before Art 5:101** [17]; **5:102**
Art II.-8:102 (1) **5:102**
Art II.-8:102 (2) . . . . . **1:107** [24]; **5:102**
Art II.-8:103 . . . . . **5:103**; **5:103** [4]–[5]; **Intro before Art 6:201** [15]
Art II.-8:103 (1) **5:103**
Art II.-8:103 (2) . . . . . **Intro before Art 5:101** [3]; **5:103**; **5:103** [4]
Art II.-8:104 . . . . . **5:103** [4]; **5:104**; **5:104** [2]
Art II.-8:104–8:107 . . . **Intro before Art 5:101** [3]
Art II.-8:105 . . **5:105**; **5:105** [1]–[2], [4], [7], [10]
Art II.-8:106 . . . . . **5:106**; **5:106** [3]
Art II.-8:107 . . . . . **5:107**; **5:107** [2]
Art II.-8:201 . . . . . **Intro before Art 1:101** [8]; **1:107**; **1:107** [7], [11], [18], [21], [24], [29]–[30]; **1:303** [10]; **Intro before Art 5:101** [14]
Art II.-8:201 (1) . . . . . **1:107**; **1:107** [19], [22], [25], [27]; **1:302** [1]
Art II.-8:201 (2) . . . **1:107**; **1:107** [21], [24]–[25]; **Intro before Art 5:101** [19]; **5:101** [10]
Art II.-8:201 (3) . . . . **1:107**; **1:107** [21], [24], [31]
Art II.-8:201 (3)(a) . . . . . **1:107** [24]
Art II.-8:201 (3)(b) . . . . . **1:107** [24], [30]
Art II.-8:202 . . . . . **Intro before Art 1:101** [8]; **1:107**; **1:107** [8], [11], [17], [26]; **Intro before Art 5:101** [14]
Art II.-9:101 . . . . . **1:201** [60], [75]; **Intro before Art 5:101** [16]; **6:102**; **6:102** [18]
Art II.-9:101 (1) . . . . . **Intro before Art 5:101** [17]; **6:102**
Art II.-9:101 (2) . . . . . **Intro before Art 5:101** [16]–[18]; **6:102**; **6:102** [18]; **9:501 (1)** [8]
Art II.-9:101 (2)(c) . . . . . **1:201** [60]
Art II.-9:101 (3) . . . . **Intro before Art 5:101** [18]; **6:102**; **6:102** [18]
Art II.-9:101 (3)–(4) . . . . . **6:102** [16]
Art II.-9:101 (4) . . . . . **6:102**; **6:102** [18]
Art II.-9:102 . . . **2:406** [15]; **6:101**; **6:101** [1]–[2], [4], [7], [11]; **18:203 (2)**
Art II.-9:102 (1) . . . . . **6:101**; **6:101** [3], [11]
Art II.-9:102 (2) . . . . . **6:101**; **6:101** [11]; **18:203 (4)** [1]
Art II.-9:102 (2)(b) . . . . . **6:101** [11]
Art II.-9:102 (3) **6:101**
Art II.-9:102 (4) . . . . . **6:101**; **6:101** [11]; **18:203 (4)** [1]
Art II.-9:102 (5) . . . . . **6:101**; **6:101** [11]
Art II.-9:102 (6) **6:101**
Art II.-9:103 . . . . **2:104**; **2:104** [4], [7], [12], [16]; **Intro before Art 6:201** [15]; **6:202** [14]
Art II.-9:103 (1) . . . . . **2:104**; **2:104** [15]
Art II.-9:103 (2) **2:104**
Art II.-9:103 (3) **2:104**
Art II.-9:103 (3)(b) . . . . . **2:104** [12]
Art II.-9:104 . . . . . **6:104**; **6:104** [11]; **6:105** [6]; **7:108** [7]; **18:201** [4]
Art II.-9:105 . . . . . **6:105**; **6:105** [4], [6]
Art II.-9:106 . . . . . **6:106**
Art II.-9:106 (1) **6:106**
Art II.-9:106 (2) **6:106**
Art II.-9:107 . . . . . **6:107**
Art II.-9:108 . . . . . **6:108**; **6:108** [1], [4], [7]
Art II.-9:201 . . . . . **5:101** [10]; **6:103**; **6:103** [1], [7], [10]
Art II.-9:201 (1) **6:103**
Art II.-9:201 (2) **6:103**
Art II.-9:301 . . . . . **6:110**; **6:110** [4], [16]–[17], [21]–[22], [26], [39]
Art II.-9:301 (1) . . . . . **6:110**; **6:110** [7], [9], [17]–[18], [21], [24], [38]
Art II.-9:301 (2) . . . . . **6:110**; **6:110** [31], [35]
Art II.-9:301 (3) . . . . . **6:110**; **6:110** [38]
Art II.-9:302 . . . . . **6:110**; **6:110** [5], [7], [21], [34], [54], [57]
Art II.-9:302 (a) . **6:110**; **6:110** [4], [33]–[35], [51]

Art II.-9:302 (b) . . . . . **6:110**; **6:110** [7], [54]
Art II.-9:303 . . . . . **6:110**; **6:110** [5], [21], [51]
Art II.-9:303 (1) . . . . . **6:110**; **6:110** [19], [42]; **12:101** [10]–[11]
Art II.-9:303 (2) . . . . . **6:110**; **6:110** [22], [46], [50]–[51]; **10:108** [2]
Art II.-9:303 (3) . . . . . **6:110**; **6:110** [50]–[51]
Art II.-9:401 . . . . . **6:207**
Art II.-9:401–II.-9:410 . . . . . **Intro before Art 6:201** [15]
Art II.-9:402 . . . . . **6:201**; **6:205** [14]; **6:206**; **6:206** [9]
Art II.-9:402 (1) **6:206**
Art II.-9:402 (2) . . . . . **6:206**; **6:206** [6]
Art II.-9:403 . . . . . **6:201**; **6:201** [13]; **6:203** [2]
Art II.-9:404 . . . . . **6:201** [5]
Art II.-9:405 . . . . . **6:201** [5]
Art II.-9:406 . . . . . **6:205**; **6:205** [4], [8]
Art II.-9:406 (1) **6:205**
Art II.-9:406 (2) . . . . . **6:205**; **6:205** [14]
Art II.-9:407 . . . . . **6:201**; **6:201** [9]; **6:202** [14]
Art II.-9:407 (1) **6:201**
Art II.-9:407 (2) . . . . **2:104** [6]; **6:201**; **6:202** [14]
Art II.-9:408 . . . . . **6:204**
Art II.-9:408 (1) **6:204**
Art II.-9:408 (2) . . . . . **4:116** [5]; **6:204**; **6:204** [5]
Art II.-9:409 . . . . . **6:202** [1], [7], [9]
Art II.-9:409 (2) . . . . . **6:202** [9]
Art II.-9:410 . . . . **6:202** [1], [3], [5], [7], [9], [14]; **Intro before Art 13:101** [16]
Art II.-9:410 (1) . . . . . **6:202** [1]
Art II.-9:410 (1)(b) . . . . . **6:202** [7]; **Intro before Art 13:101** [12], [16]; **13:107** [28]
Art II.-9:410 (1)(e) . . . . . **6:202** [7]
Art II.-9:410 (1)(f) . . **Intro before Art 2:501** [38]
Art II.-9:410 (1)(g) . . . . . **6:202** [7]
Art II.-9:410 (1)(h) . . . . . **6:202** [7]
Art II.-9:410 (1)(i) . . . . . **6:202** [7]
Art II.-9:410 (1)(j) . . . . . **6:202** [7]
Art II.-9:410 (1)(k) . . **Intro before Art 2:501** [38]
Art II.-9:410 (1)(o) . . . . . **6:202** [12]
Art II.-9:410 (1)(p) . . . . . **6:202** [7]
Art II.-9:410 (1)(q) . . **Intro before Art 2:501** [38]
Art III.-1:101 . . . . . **Intro before Art 8:101** [4]; **16:103** [2]
Art III.-1:101–1:111 . . . . . **Intro before Art 1:101** [1]
Art III.-1:101 (2) . . . . . **16:103** [2]
Art III.-1:102 . . . . **Intro before Art 8:101** [14]–[15]
Art III.-1:102 (2) . . . . . **7:107** [4]; **7:108** [5]; **7:109** [5]; **7:112** [7]
Art III.-1:102 (3) . . . **1:301**; **Intro before Art 8:101** [15]; **9:102 (1)** [27]; **9:401** [12]
Art III.-1:102 (4) . . . . . **9:201** [9]
Art III.-1:103 . . . . . **Intro before Art 1:101** [4], [6]; **1:201**; **1:201** [2], [11], [43], [52], [58]–[60], [63], [65]–[66], [75], [92], [96], [100]; **1:202** [1], [10]–[11]; **14:304** [1]
Art III.-1:103 (1) . . . **1:201**; **1:201** [58], [65], [100]
Art III.-1:103 (2) . . . . . **1:201**; **1:201** [95]
Art III.-1:103 (3) . . . . . **1:201**; **1:201** [58]–[61], [65]–[66], [100]; **8:101** [4]
Art III.-1:104 . . . . . **Intro before Art 1:101** [6]; **1:201** [60], [75]; **1:202**; **1:202** [3]–[8], [10]; **1:302** [1]; **9:101** [14]; **9:102 (2)–(3)** [43]; **19:302** [1], [4]–[5]
Art III.-1:105 . . . . . **7:106** [5]
Art III.-1:106 . . . . . **Intro before Art 16:101** [8], [17]; **16:101** [1]–[2], [5], [10]; **16:102** [1], [4], [7]; **16:103** [6]; **16:104** [1]; **16:105** [1]–[2], [4]
Art III.-1:106 (1) . . . . . **16:101**; **16:103** [1]
Art III.-1:106 (2) **16:103**
Art III.-1:106 (3) **16:103**
Art III.-1:106 (4) **16:102**
Art III.-1:106 (5) . . . . . **9:306 App II** [2]; **16:105**; **16:105** [2]
Art III.-1:108 . . . . . **6:110** [21]; **Intro before Art 9:305** [5]; **9:305** [1], [3], [8], [10]
Art III.-1:108–1:109 . . . . . **9:305** [11]
Art III.-1:108 (2) . . . . . **9:305** [12]
Art III.-1:109 . . . . **6:109** [8]; **6:112** [1]; **9:301** [56]; **Intro before Art 9:305** [19]; **9:305** [1], [3], [8]
Art III.-1:109 (1) . . . . . **Intro before Art 9:305** [5]
Art III.-1:109 (2) . . **6:109**; **Intro before Art 9:305** [5]
Art III.-1:109 (3) . . . . . **9:305** [12]
Art III.-1:110 . . . . . **6:111**; **6:111** [17]–[18]; **9:102 (2)–(3)** [27]
Art III.-1:110 (1) **6:111**
Art III.-1:110 (2) . . . . . **1:107** [16]; **6:111**
Art III.-1:110 (2)(a) . . . . . **15:103** [11]
Art III.-1:110 (2)(b) . . . . . **Intro before Art 9:305** [5]–[6]; **9:306** [24]
Art III.-1:110 (3) **6:111**
Art III.-1:110 (3)(b) . . . . . **1:302** [1]
Art III.-1:110 (3)(d) . . . . . **1:201** [2]
Art III.-2:101 . . . . . **7:101**; **18:202** [4]
Art III.-2:101 (1) . . . . . **7:101**; **7:101** [6]
Art III.-2:101 (1)(a) . . . . . **7:101** [8], [11]; **9:508-2 (5)** [6]
Art III.-2:101 (1)(b) . . . . . **7:101** [7], [11]
Art III.-2:101 (2) **7:101**
Art III.-2:101 (2)(a) . . . . . **7:101** [10]
Art III.-2:101 (2)(b) . . . . . **7:101** [9]
Art III.-2:101 (3) . . . . . **7:101**; **7:101** [11]; **11:306** [7]
Art III.-2:102 . . . . . **7:102** [4], [8]; **7:102-1** [2]; **9:501 (1)** [13]; **14:203** [2]; **18:202** [4]
Art III.-2:102 (1) . . . . . **7:102**; **7:102** [5], [8]
Art III.-2:102 (2) . . . . . **7:102**; **7:102** [7]
Art III.-2:102 (3) . . **7:102-1**; **7:102-1** [1], [3], [5]

Art III.-2:102 (4) . . . . . **7:102-1** [3]
Art III.-2:103 . . . . . **7:103**; **7:103** [4], [6]
Art III.-2:103 (1) . . . . . **7:103**; **7:103** [4]–[5]
Art III.-2:103 (2) . . . . . **7:103**; **7:103** [7]
Art III.-2:104 . . . . . **7:104**; **7:104** [4], [6]–[9]; **16:101** [4]; **19:301** [5]
Art III.-2:104 (1) . . . . . **9:201** [10]
Art III.-2:104 (2) . . . . . **9:201** [10]
Art III.-2:105 . . . . . **7:105**; **7:105** [1], [7]
Art III.-2:105 (1) . . . . . **7:105**; **7:105** [4], [5]; **9:102 (1) App** [6]
Art III.-2:105 (1)(b) . . . . . **7:105** [6]
Art III.-2:105 (2) **7:105**
Art III.-2:105 (2)(b) . . . . . **7:105** [6]
Art III.-2:106 . . . . . **1:305** [12]; **7:106** [5]; **8:107**; **8:107** [5]; **8:108** [17]
Art III.-2:107 . . . . . **7:106**; **7:106** [7], [9]–[10]
Art III.-2:107 (1) . . . . . **7:106**; **7:106** [8]
Art III.-2:107 (1)(a) . . . . . **7:106** [6], [8]
Art III.-2:107 (1)(b) . . . . . **7:106** [9]; **10:101** [12]
Art III.-2:107 (2) . . . . . **7:106**; **7:106** [10]
Art III.-2:107 (3) . . . . . **7:106**; **7:106** [12]
Art III.-2:108 . . . . . **7:107**
Art III.-2:108 (1) . . . . . **7:107**; **7:107** [4]–[5],7
Art III.-2:108 (2) . . . . . **7:107**; **7:107** [6]
Art III.-2:109 . . . . . **7:108**; **7:108** [4]–[5], [9]; **9:510** [1]
Art III.-2:109 (1) . . . . . **7:108**; **7:108** [5]–[6]
Art III.-2:109 (2) . . . . . **7:108**; **7:108** [9]–[10]
Art III.-2:109 (3) . . . . . **7:108**; **7:108** [10]
Art III.-2:109 (4) . . . . . **7:108**; **7:108** [7]
Art III.-2:110 (1) . . . . . **7:109** [14]
Art III.-2:110 (2) . . . . . **7:109** [7]
Art III.-2:110 (3) . . . . . **7:109** [7]
Art III.-2:111 . . . . . **7:110**; **7:110** [7]; **9:101** [21]; **10:203**
Art III.-2:111 (1) . . . . . **7:110**; **7:110** [7]
Art III.-2:111 (2) **7:110**
Art III.-2:111 (2)(a) . . . . . **7.110** [9]
Art III.-2:111 (3) . . . . . **7:110**; **7.110** [11]
Art III.-2:111 (4) **7:110**
Art III.-2:112 . . . . . **7:111**; **7:111** [1], [4]; **10:203**
Art III.-2:112 (1) . . . . . **7:111**; **7:111** [4]
Art III.-2:112 (2) . . . . . **7:111**; **7:111** [4]
Art III.-2:113 . . . . . **7.112**; **7.112** [4], [6]–[7]
Art III.-2:113 (1) . . . . . **7.112**; **7.112** [4]–[5]
Art III.-2:113 (2) . . . . . **7.112**; **7.112** [4]
Art III.-3:101 . . . . . **8:101** [11], [13], [15], [17]; **9:504** [8]
Art III.-3:101–3:711 . . . . . **19:101** [6]
Art III.-3:101 (1) . . . . . **8:101**; **8:101** [4]
Art III.-3:101 (2) . . . . . **8:101**; **8:101** [10]; **9:102 (2)–(3)** [8]; **9:401** [3]
Art III.-3:101 (3) . . . **8:101**; **8:101** [12]–[13]; **9:102 (2)–(3)** [10]; **9:201** [16]; **9:301** [53]; **9:504** [9]
Art III.-3:102 . . . . . **8:102**; **8:102** [1], [5], [9], [16]–[17]; **9:303** [13]
Art III.-3:103 . . . . . **8:106**; **8:106** [4], [10]; **9:301** [16], [18]; **10:101** [12]
Art III.-3:103 (1) . . . . . **8:106**; **8:106** [10]
Art III.-3:103 (2) . . . . . **8:102** [4], [16]; **8:106**; **8:106** [10]; **9:301** [48]
Art III.-3:103 (3) . . . . . **8:106**; **8:106** [9]–[10]
Art III.-3:104 . . . . . **4:102** [5]; **8:108**; **9:101** [12]; **9:102 (2)–(3)** [8]; **9:301** [39]; **9:303** [11]; **9:501 (1)** [6]; **9:508-2 (1)** [4]; **10:101** [11]; **10:104** [1]; **14:303** [1]; **18:307**; **19:301**
Art III.-3:104 (1) **8:108**
Art III.-3:104 (2) **8:108**
Art III.-3:104 (3) . . . . . **8:108**; **9:102 (2)–(3)** [15]
Art III.-3:104 (4) . . . . . **8:108**; **8:108** [17]; **9:301** [39]; **9:303**; **9:303** [11]
Art III.-3:104 (5) **8:108**
Art III.-3:105 . . . . . **1:107** [9]; **8:109**; **8:109** [4], [7]
Art III.-3:105 (1) . . . . . **8:109**; **8:109** [4], [7]
Art III.-3:105 (2) . . . . . **8:109**; **8:109** [4], [7]
Art III.-3:106 . . . . . **1:303** [21]
Art III.-3:107 . . . . . **14:101** [9]
Art III.-3:201 . . **8:104**; **8:104** [12], [17], [20], [22]
Art III.-3:201–3:205 . . . . . **8:104** [3]
Art III.-3:202 . . . . . **8:104**; **8:104** [8], [15], [27]; **9:303**; **9:303** [19]
Art III.-3:202 (1) . . . . . **8:104**; **8:104** [9]–[10]
Art III.-3:202 (2) . . . **8:102** [4]; **8:104**; **8:104** [9], [11], [17], [25]–[28]; **9:303** [19]
Art III.-3:202 (3) **8:104**
Art III.-3:203 . . . . . **8:104**; **8:104** [17]
Art III.-3:203 (a) . . . . . **8:104**; **8:104** [17], [23]
Art III.-3:203 (b) . . . . . **8:104**; **8:104** [17], [23]
Art III.-3:203 (c) . . . . . **8:104**; **8:104** [17], [23]
Art III.-3:203 (d) . . . . . **8:104**; **8:104** [17], [23]
Art III.-3:204 . . . . . **8:104**; **8:104** [23]
Art III.-3:204 (1) . . . . . **8:102** [4]; **8:104**; **8:104** [11], [22], [25]–[27]
Art III.-3:204 (2) **8:104**
Art III.-3:204 (3) . . . . . **8:104**; **8:104** [28]
Art III.-3:205 . . . . **8:104**; **9:102 (1) App** [1], [3], [8]
Art III.-3:205 (1) **8:104**
Art III.-3:205 (2) . . . . . **8:104**; **9:102 (1) App** [9]
Art III.-3:301 . . . . . **8:104** [12]; **Intro before Art 9:101** [3]; **9:101**; **9:101** [6], [9], [16], [21]; **9:102 (1)** [3], [40]; **9:103** [4]
Art III.-3:301 (1) . . . . . **9:101**; **9:101** [6]
Art III.-3:301 (2) . . . **9:101**; **9:101** [12], [14], [18]
Art III.-3:301 (2)(a) . . . . . **9:101** [14]–[15]; **9:102 (2)–(3)** [40]
Art III.-3:301 (2)(b) . . . . . **9:101** [20]; **9:103** [4]
Art III.-3:302 . . **Intro before Art 9:101** [3]; **9:102 (1)** [3], [10], [20], [22], [41], [43]; **9:102 (2)–(3)**

[1]–[2], [5]–[6], [13], [15], [18], [27], [29]–[30], [32]–[33], [41], [43], [45]; **9:103** [4]; **10:101** [3]
Art III.-3:302 (1) . . . . . **9:102 (1)**; **9:102 (1)** [24]–[25]; **9:103** [4]
Art III.-3:302 (2) . . . **8:104** [3], [13]; **Intro before Art 9:101** [6]; **9:101** [10]; **9:102 (1)**; **9:102 (1)** [42]
Art III.-3:302 (3) . . . . . **9:101** [14]; **9:102 (2)–(3)**
Art III.-3:302 (3)(a) . . . . . **9:102 (2)–(3)** [2], [13]; **18:203 (1)** [5]
Art III.-3:302 (3)(b) . . . . . **1:201** [100]; **9:102 (2)–(3)** [6], [20], [27]
Art III.-3:302 (3)(c) . . . . **9:102 (2)–(3)** [29], [32]
Art III.-3:302 (4) . . . . . **9:102 (2)–(3)**
Art III.-3:302 (5) . . . . . **9:102 (2)–(3)**; **9:102 (2)–(3)** [41]
Art III.-3:303 . . . . . **9:102 (2)–(3)** [1]; **9:103**; **9:103** [2], [4]–[6]
Art III.-3:401 . . . . . **9:201** [5], [9], [11]–[12], [14]; **9:306** [15]–[16]; **9:508-2 (1)** [5]; **18:304**
Art III.-3:401 (1) . . . . . **7:104** [1], [8]; **9:201**
Art III.-3:401 (2) . . . . . **8:105**; **8:105** [5], [7]–[9]; **9:201**; **9:201** [13]; **9:306** [15]
Art III.-3:401 (3) **8:105**; **9:201**
Art III.-3:401 (4) . . . . **8:105**; **9:201**; **9:201** [14]–[15]
Art III.-3:501 . . . . . **Intro before Art 8:101** [4]; **Intro before Art 9:301** [8], [12]; **9:301**; **9:301** [16], [50]
Art III.-3:501–3:514 . . **Intro before Art 9:305** [5]
Art III.-3:501 (1) . . . . . **Intro before Art 9:301** [8]; **9:301**
Art III.-3:501 (2) . . . **Intro before Art 9:301** [12]; **9:301**; **9:305** [12]
Art III.-3:502 . . . . . **6:112** [10]; **8:103** [13]; **8:104** [2], [10], [22]–[23]; **Intro before Art 9:301** [3]–[4]; **9:301** [19], [30], [56]
Art III.-3:502 (1) . . . . . **9:301**; **9:301** [15]
Art III.-3:502 (2) . . . **7:105** [6]; **8:103**; **9:301** [20]
Art III.-3:502 (2)(a) . . . . . **9:302** [8]
Art III.-3:502 (2)(b) . . . . . **8:104** [23]; **9:301** [37]; **9:302** [15]
Art III.-3:503 . . . . . **6:112** [13]; **8:104** [12], [23]; **8:106** [4]; **9:301**; **9:301** [16], [18]–[19], [37], [42]–[43], [46]–[47]; **9:303**; **10:101** [12]
Art III.-3:503 (1) . . . . . **9:301**; **9:301** [16]
Art III.-3:503 (2) . . . . . **9:301**; **9:301** [44]
Art III.-3:504 . . . . . **9:302** [15]; **9:303**; **9:303** [24]–[25]; **9:304**; **9:304** [1], [4], [6]–[7], [10]–[11]
Art III.-3:505 . . . . . **8:105**; **8:105** [5], [12]; **9:303**
Art III.-3:506 . . . . . **9:302**; **9:302** [1]–[2], [5]–[7], [9], [13]–[15]; **Intro before Art 9:305** [13]; **9:306** [10]
Art III.-3:506 (1) . . . . . **9:302**; **9:302** [7]
Art III.-3:506 (2) . . . . . **9:302**; **9:302** [5], [7]
Art III.-3:506 (2)(a) . . . . . **9:302** [7]–[8], [15]; **10:103** [2]
Art III.-3:506 (2)(b) . . . . . **9:301** [39]; **9:302** [9]–[10], [14]
Art III.-3:507 . . . . . **9:303**; **9:303** [5]–[6], [9]
Art III.-3:507 (1) . . . . . **9:303**; **9:303** [6]–[7]
Art III.-3:507 (2) . . . . . **9:301**; **9:301** [47]; **9:303**
Art III.-3:508 . . . . . **9:102 (2)–(3)** [43]; **9:301** [51]–[52], [55]; **9:303**; **9:303** [14], [17], [21], [23]; **9:401** [11]; **14:101** [8]
Art III.-3:508 (1) . . . . . **9:303**; **9:303** [16], [19], [23]–[24], [28]
Art III.-3:508 (2) . . **8:106** [7]; **9:301** [51]; **9:303**; **9:303** [19]
Art III.-3:508 (3) . . . . . **9:303**; **9:303** [19], [23]–[25], [28]
Art III.-3:509 . . . . . **4:115** [1]; **Intro before Art 9:305** [10]; **9:305**; **9:305** [1], [3], [10]–[12]; **15:104** [12]
Art III.-3:509 (1) **9:305**
Art III.-3:509 (2) **9:305**
Art III.-3:509 (3) . . . **8:102** [2]; **9:304** [11]; **9:305**
Art III.-3:510 . . . . . **9:306**; **9:306** [8]
Art III.-3:510–3:514 . . . . **Intro before Art 9:305** [9], [26], [32]; **9:306** [8], [10]; **9:306 App I** [3]; **16:105** [2]
Art III.-3:510 (1) . . . . . **9:306** [8], [15]–[16]
Art III.-3:510 (2) . . . . . **9:306** [8]
Art III.-3:510 (3) . . . . . **9:306** [8]
Art III.-3:510 (4) . . . . . **9:306** [8]
Art III.-3:510 (5) . . . **9:306 App I**; **9:306 App I** [3]
Art III.-3:511 . . . . . **9:302** [14]; **Intro before Art 9:305** [13]; **9:306**; **9:306** [8], [10]
Art III.-3:511 (1) . . . . **Intro before Art 9:305** [13]; **9:306** [8]
Art III.-3:511 (2) . . . . . **9:302** [14]; **9:306** [8]
Art III.-3:511 (3) . . . . . **9:306** [8], [34]
Art III.-3:512 . . . . . **9:306**; **9:306** [8], [22], [32], [34]; **9:306 App I** [3]
Art III.-3:512 (1) . . . . . **9:306** [22]; **9:306 App I**
Art III.-3:512 (1)(a) . . . . . **9:306** [34]
Art III.-3:512 (2) . . . . . **2:504 App** [24]; **9:306** [22], [34]
Art III.-3:512 (3) . . . . . **9:306** [22]
Art III.-3:512 (4) . . . . . **9:306** [22], [29]
Art III.-3:513 . . . . . **9:306 App I**
Art III.-3:513 (1) . . . **2:504 App** [19]; **9:306 App I**; **9:306 App I** [3]
Art III.-3:513 (2) . . . **9:306 App I**; **9:306 App I** [3]
Art III.-3:514 . . . . . **9:306**; **9:306** [43]
Art III.-3:514 (1) . . . . . **9:306** [43]
Art III.-3:514 (2) . . . . . **9:306** [43]
Art III.-3:514 (3) . . . . . **9:306** [43]
Art III.-3:601 . . . . . **Intro before Art 8:101** [4]; **9:401** [1], [3], [10], [12]–[14], [16]

Art III.-3:601 (1) . . . . . **9:401** [11], [15]
Art III.-3:601 (1)–(3) **9:401**
Art III.-3:601 (2) . . . . . **9:401** [11]
Art III.-3:601 (3) . . . . . **8:102** [2]; **9:401** [17]
Art III.-3:601 (4) . . . . . **9:401**; **9:401** [14]
Art III.-3:701 . . **4:102** [5]; **9:501 (1)** [6]; **9:501 (2)** [8], [13]; **9:502** [14]–[15]; **10:101** [11]
Art III.-3:701–3:703 . . **Intro before Art 9:501** [3]
Art III.-3:701–3:713 . . . **Intro before Art 9:501** [1]
Art III.-3:701 (1) . . . . . **9:501 (1)**; **9:501 (1)** [6], [12]; **9:503** [12]
Art III.-3:701 (2) . . . . . **9:501 (2)**; **9:501 (2)** [10]
Art III.-3:701 (3) . . . . . **9:501 (1)** [1]; **9:501 (2)**; **9:501 (2)** [8]
Art III.-3:702 . . . . . **9:502**; **9:502** [6], [10]–[11]
Art III.-3:703 . . . . . **9:503**; **9:503** [6], [12]
Art III.-3:704 . . . . **9:504**; **9:504** [5], [7]–[12], [15]
Art III.-3:705 . . . . . **9:102 (2)–(3)** [41]; **9:504**; **9:504** [15]
Art III.-3:706 . . . . . **9:506**; **9:506** [5]
Art III.-3:707 . . . . . **9:507**
Art III.-3:708 . . . . . **9:508**; **9:508** [6], [9]; **9:508-2 (6)** [1]
Art III.-3:708–3:711 . . . **Intro before Art 9:501** [1]
Art III.-3:708 (1) . . . . . **9:508**; **9:508-2 (1)** [4]; **9:508-2 (5)** [6]
Art III.-3:708 (2) . . . . . **9:508-2 (6)** [1]
Art III.-3:709 . . . . . **Intro before Art 9:501** [1]; **9:508-4**; **9:508-4** [1]–[3], [5]
Art III.-3:710 . . . **9:508-2 (1)** [2]–[3]; **9:508-2 (5)** [3]
Art III.-3:710 (1) . . . . . **9:508-2 (1)**; **9:508-2 (1)** [2]–[3]
Art III.-3:710 (2) . . . **9:508-2 (2)**; **9:508-2 (2)** [1]
Art III.-3:710 (3) . . . . . **9:508-2 (3)**
Art III.-3:710 (4) . . . . . **9:508-2 (1)**; **9:508-2 (5)**; **9:508-2 (5)** [3]
Art III.-3:710 (5) . . . . . **9:508-2 (6)**
Art III.-3:711 . . . . . **9:508-3**; **9:508-3** [1]
Art III.-3:711 (1) . . . . . **9:508-2 (1)** [2]; **9:508-3**
Art III.-3:711 (2) **9:508-3**
Art III.-3:711 (3) **9:508-3**
Art III.-3:712 . . . . . **9:509**; **9:509** [1], [7], [14], [18]–[19], [21]
Art III.-3:712 (1) . . . . . **9:509**; **9:509** [7]
Art III.-3:712 (2) . . . . . **9:509**; **9:509** [17]
Art III.-3:713 . . . **7:108** [7]; **9:510**; **9:510** [2]–[3]
Art III.-4:101 . . . . **10:101** [7]; **10:102**; **10:102** [3]
Art III.-4:102 . . **10:101**; **10:101** [2]–[3], [7], [12]; **10:103** [2]; **10:104** [1]; **Intro before Art 10:201** [6]
Art III.-4:102 (1) **10:101**
Art III.-4:102 (2) **10:101**
Art III.-4:102 (3) **10:101**; **10:104**
Art III.-4:103 . . . . . **10:102**; **10:102** [5]–[7]
Art III.-4:103 (1) **10:102**
Art III.-4:103 (2) . . . . . **Intro before Art 10:101** [13]; **10:101** [1]; **10:102**
Art III.-4:103 (3) . . . . . **10:102**; **10:102** [5]
Art III.-4:104 . . . . . **10:103**
Art III.-4:105 . . . . **10:101** [3]; **10:104**; **10:104** [1]
Art III.-4:106 . . . . . **10:105**; **10:105** [2]
Art III.-4:106 (1) . . . . . **10:105**; **10:105** [2]–[3]
Art III.-4:106 (2) . . . . . **10:105**; **10:105** [3]
Art III.-4:107 . . . . . **10:106**; **10:106** [1], [5]
Art III.-4:107 (1) **10:106**
Art III.-4:107 (2) . . . . . **10:106**; **10:106** [6]
Art III.-4:107 (3) . . . **10:106**; **10:106** [13]; **10:108**
Art III.-4:108 . . . . . **10:107**
Art III.-4:108 (1) . . . . . **10:205** [4]; **Intro before Art 13:101** [12]–[13]; **13:101** [5]
Art III.-4:108 (2) . . . . . **10:205** [5]
Art III.-4:109 . . . . . **10:108**; **10:108** [2]
Art III.-4:109 (1) . . . . . **10:108**; **10:108** [3], [5]
Art III.-4:109 (2) . . . . . **10:108**; **10:108** [7]
Art III.-4:109 (3) . . . **10:108**; **10:108** [3], [5]–[6]
Art III.-4:110 . . . . . **10:109**; **10:205** [9]
Art III.-4:111 . . . . . **10:110**; **10:110** [2], [4]; **10:205** [10]
Art III.-4:112 . . . . . **10:111**; **10:111** [1]
Art III.-4:112 (2) . . . . . **10:205** [11]
Art III.-4:201 . . . . . **10:201**
Art III.-4:202 . . . . . **10:201**; **10:201** [6]–[10]; **10:203** [3]; **10:205** [3]
Art III.-4:202 (1) **10:201**
Art III.-4:202 (2) **10:201**
Art III.-4:202 (3) **10:201**
Art III.-4:203 . . . . . **10:201**; **10:201** [9]
Art III.-4:203 (1) . . . . . **10:201**; **10:201** [9]
Art III.-4:203 (2) . . . . . **10:201**; **10:202** [1]
Art III.-4:204 . . . . . **10:202**
Art III.-4:205 . . . . . **10:203**
Art III.-4:206 . . . . . **10:204**
Art III.-4:206 (1) **10:204**
Art III.-4:206 (2) **10:204**
Art III.-4:207 . . . . . **10:204** [2]; **10:205**; **10:205** [2], [5]–[6], [8], [11]
Art III.-4:207 (1) . . . . . **10:205** [6]
Art III.-4:207 (2) . . . . . **10:205** [4]–[5], [9]–[11]; **Intro before Art 13:101** [12]–[13]; **13:101** [5]
Art III.-5:101 . . . . . **11:101**; **11:101** [4], [13]
Art III.-5:101 (1) **11:101**
Art III.-5:101 (2) **11:101**
Art III.-5:102 . . . . . **11:101**; **11:101** [12]
Art III.-5:102 (1) **11:101**
Art III.-5:102 (2) **11:101**
Art III.-5:102 (3) **11:101**
Art III.-5:103 (1) . . . . . **11:101** [2], [9]
Art III.-5:103 (2) . . . . . **11:101** [12]
Art III.-5:104 . . . . . **Intro before Art 11:101** [19]

Art III.-5:104 (1) . . . . . **11:102**; **11:102** [6]
Art III.-5:104 (1)(a) . . . . . **11:102** [6]
Art III.-5:104 (1)(d) . . **Intro before Art 11:101** [18]
Art III.-5:104 (1)(e) . . **Intro before Art 11:101** [18]
Art III.-5:104 (4) . . . **11:104**; **11:104** [6]; **12:201** [9]
Art III.-5:105 (1) . . . . . **11:102**; **11:102** [1]
Art III.-5:105 (2) . . . . . **11:101** [4]
Art III.-5:106 . . . . . **11:102** [7], [9]
Art III.-5:106 (1) . . . . . **11:102**; **11:102** [6]
Art III.-5:106 (2) **11:102**
Art III.-5:107 . . . . . **11:103**; **11:306** [2]
Art III.-5:107 (1) . . . . . **11:103**; **11:103** [3]
Art III.-5:107 (2) **11:103**
Art III.-5:107 (3) . . . . . **11:103**; **11:306** [2]
Art III.-5:108 . . . . . **11:301**; **11:301** [1], [8], [12]
Art III.-5:108 (1) . . . . . **11:301**; **11:301** [6]
Art III.-5:108 (2) . . . . . **11:301**; **11:301** [6]; **Intro before Art 13:101** [12], [14]; **13:101** [5]
Art III.-5:108 (2)(a) . . . . . **11:101** [6]
Art III.-5:108 (3) . . . . . **11:301**; **11:301** [6]
Art III.-5:108 (3)(b) . . . . . **11:301** [6], [11]
Art III.-5:108 (3)(c) . . . . . **11:301** [10]
Art III.-5:109 . . . **11:203** [4]; **11:302**; **11:302** [3]
Art III.-5:109 (1) **11:302**
Art III.-5:109 (2) **11:302**
Art III.-5:110 . . . . . **11:104** [6]
Art III.-5:110 (1) . . . . . **11:104** [6]
Art III.-5:110 (2) . . . . . **11:104** [6]
Art III.-5:110 (3) . . . . . **11:104** [6]
Art III.-5:110 (3)(a) . . . . . **9:305** [4]
Art III.-5:112 . . . . . **11:204**; **11:204** [1]–[2], [6]
Art III.-5:112 (1) **11:204**
Art III.-5:112 (2) . . . . . **11:204**; **11:204** [1]; **Intro before Art 13:101** [12], [14]; **13:101** [5]
Art III.-5:112 (2)(a) . . . . . **11:204** [4]
Art III.-5:112 (2)(b) . . . . . **11:204** [5]
Art III.-5:112 (2)(c) . . . . . **11:204** [4]
Art III.-5:112 (2)(d) . . . . . **11:204** [4]
Art III.-5:112 (2)(e) . . . . . **11:204** [5]
Art III.-5:112 (3) . . . . . **11:204**; **11:204** [1]
Art III.-5:112 (4) . . . **11:204**; **11:204** [1]; **11:308** [2]
Art III.-5:112 (5) **11:204**
Art III.-5:112 (6) **11:204**
Art III.-5:112 (7) . . . . . **11:204**; **11:204** [6]
Art III.-5:113 . . . . . **Intro before Art 11:101** [15]; **11:303** [12]; **11:305** [3]
Art III.-5:114 . . . . **11:102** [12]; **11:202**; **11:305** [3]
Art III.-5:114 (1) **11:202**
Art III.-5:114 (2) . . . . . **11:102** [6]; **11:202**
Art III.-5:114 (3) **11:202**
Art III.-5:115 . . . . . **11:201**; **11:201** [7]
Art III.-5:115 (1) . . . . . **11:201**; **11:201** [6]
Art III.-5:115 (2) . . . **11:201**; **11:201** [1]; **12:201** [9]
Art III.-5:116 . . . . . **11:307**; **11:307** [5], [8]
Art III.-5:116 (1) **11:307**
Art III.-5:116 (2) **11:307**
Art III.-5:116 (2)(a) . . . . . **11:307** [3]–[4], [8]
Art III.-5:116 (2)(b) . . . . . **11:301** [12]
Art III.-5:116 (3) . . . . . **11:307**; **12:102** [5]; **Intro before Art 13:101** [12], [14]; **13:101** [5]
Art III.-5:116 (a) . . . . . **11:307** [5]–[6]
Art III.-5:116 (b) . . . . . **11:307** [7]
Art III.-5:117 . . . . . **11:306**; **11:306** [3], [9]
Art III.-5:117 (2) . . . . . **11:306** [3]
Art III.-5:118 . . . . . **9:305** [13]; **Intro before Art 11:101** [18]–[19]
Art III.-5:118 (1) . . . . **Intro before Art 11:101** [18]
Art III.-5:118 (2) . . . . **Intro before Art 11:101** [18]
Art III.-5:118 (3) . . . . **Intro before Art 11:101** [18]
Art III.-5:118 (4) . . . . . **9:305** [13]; **Intro before Art 11:101** [18]
Art III.-5:118 (5) . . . . **Intro before Art 11:101** [18]
Art III.-5:119 . . . . . **Intro before Art 11:101** [15]; **11:303** [12]; **11:307** [6]
Art III.-5:119 (1) . . . **11:101** [6]; **11:303**; **11:303** [24]
Art III.-5:119 (2) . . . . . **Intro before Art 11:101** [20]; **11:304**
Art III.-5:119 (3) . . . . . **Intro before Art 11:101** [20]; **11:304**
Art III.-5:120 . . . . . **11:303**
Art III.-5:120 (1) **11:303**
Art III.-5:120 (2) . . . . . **11:303**; **11:303** [20]
Art III.-5:120 (3) . . . . . **11:303**; **11:303** [23]
Art III.-5:120 (4) . . . . . **11:303**; **11:303** [20], [23]
Art III.-5:121 . . . . **11:305**; **11:305** [3]–[4], [6]–[7]
Art III.-5:121 (1) **11:305**
Art III.-5:121 (2) . . . . . **11:305**; **11:305** [7]
Art III.-5:122 . . . . . **11:101** [6]; **11:203** [1], [5]; **11:301**; **11:301** [9]
Art III.-5:201 . . . . . **12:101** [2]
Art III.-5:202 . . . . . **Intro before Art 12:101** [1]; **12:101**; **12:101** [12]–[13]
Art III.-5:202 (1) **12:101**
Art III.-5:202 (1)(b) . . . . . **12:101** [12]
Art III.-5:202 (1)(c) . . . . . **12:101** [12]
Art III.-5:202 (2) **12:101**
Art III.-5:203 . . . . . **12:101** [5]–[6]; **12:201** [9]
Art III.-5:203 (1) **12:101**
Art III.-5:203 (2) . . . . . **12:101**; **12:101** [5]
Art III.-5:204 . . . . . **12:101**; **12:101** [4], [7]
Art III.-5:205 . . . . . **12:102**; **12:102** [1]
Art III.-5:205 (1) . . . . . **12:102** [2]
Art III.-5:205 (2) . . **12:102**; **12:102** [5]; **Intro before Art 13:101** [12], [14]; **13:101** [5]
Art III.-5:205 (3) . . . . . **12:102** [4]
Art III.-5:205 (4) . . . . . **12:102**; **12:102** [8]
Art III.-5:205 (5) . . . . . **12:102** [8]
Art III.-5:207 (1) . . . **Intro before Art 13:101** [12], [14]; **13:101** [5]

Art III.-5:301 . . . . . **12:201** [5]
Art III.-5:302 . . . **11:201**; **12:201**; **12:201** [3], [7]
Art III.-5:302 (1) . . . . . **12:201**; **12:201** [6]–[7]
Art III.-5:302 (2) . . . . . **12:201**; **12:201** [6]
Art III.-5:302 (3) . . . . . **12:201**; **12:201** [8]; **Intro before Art 13:101** [12], [14]; **13:101** [5]
Art III.-5:401 . . . . . **3:302**; **3:302** [9]; **3:304**
Art III.-5:401 (1) **3:302**
Art III.-5:401 (2) . . . . . **3:302**; **3:302** [9]
Art III.-5:401 (3) **3:302**
Art III.-5:402 . . . . . **3:303**; **3:303** [3]; **3:304**
Art III.-6:101 . . . . . **Intro before Art 13:101** [21]
Art III.-6:101–6:108 . . . . . **Intro before Art 13:101** [12]
Art III.-6:101 (1) . . . . . **Intro before Art 13:101** [12], [25]
Art III.-6:101 (2) . . . . . **Intro before Art 13:101** [12], [21]
Art III.-6:102 . . . . . **10:111** [5]; **Intro before Art 13:101** [27]; **13:101**; **13:101** [10], [25], [32]
Art III.-6:102 (a) **13:101**
Art III.-6:102 (b) **13:101**
Art III.-6:102 (c) **13:101**
Art III.-6:103 . . . . . **13:101** [26]; **13:102**; **13:102** [4]–[5]
Art III.-6:103 (1) **13:102**
Art III.-6:103 (2) **13:102**
Art III.-6:104 . . . . . **13:103**; **13:103** [4]–[5]
Art III.-6:105 . . . . . **Intro before Art 13:101** [19]; **13:104**; **13:104** [8]
Art III.-6:106 . . . . . **Intro before Art 13:101** [27]; **13:105**; **13:105** [4]–[5]
Art III.-6:106 (1) **13:105**
Art III.-6:106 (2) **13:105**
Art III.-6:107 . . . . . **13:106**; **13:106** [6]–[7]; **14:503** [2]
Art III.-6:108 . . . . . **13:107**; **13:107** [5], [10], [15], [30]
Art III.-6:108 (a) **13:107**
Art III.-6:108 (b) **13:107**
Art III.-6:108 (c) **13:107**
Art III.-6:201 . . . . . **10:107** [3]
Art III.-7:101 . . . . . **9:401** [11]; **Intro before Art 14:101** [1]; **14:101**; **14:101** [3]–[4], [6], [8]; **14:304** [1]; **14:501** [7]
Art III.-7:101–7:601 . . . **Intro before Art 14:101** [11]
Art III.-7:201 . . . . . **14:201**; **14:307** [1]
Art III.-7:202 . . . . **14:202**; **14:202** [1]–[2]; **14:203**; **14:302 (1)–(2)** [4]; **14:401**
Art III.-7:202 (1) **14:202**
Art III.-7:202 (2) **14:202**
Art III.-7:203 . . . **14:203**; **14:203** [2]–[4]; **14:601**
Art III.-7:203 (1) . . . . **14:203** [1]–[2]; **14:307** [1]
Art III.-7:203 (2) . . . . . **14:203** [4]
Art III.-7:301 . . . . . **14:203** [1]; **Intro before Art 14:301** [1]; **14:301**; **14:301** [1], [3]; **14:307** [1]–[2]; **14:401** [1]
Art III.-7:301–7:303 . . . **Intro before Art 14:301** [1]
Art III.-7:301–7:307 . . . **Intro before Art 14:301** [1]
Art III.-7:302 . . . . . **14:302 (1)–(2)**; **14:302 (1)–(2)** [1], [3]–[4]; **14:302 (3)** [1]
Art III.-7:302 (1) . . . . . **14:302 (1)–(2)**; **14:302 (1)–(2)** [4]
Art III.-7:302 (2) . . . . . **14:302 (1)–(2)**
Art III.-7:302 (3) . . . . . **14:302 (3)**; **14:302 (3)** [1]
Art III.-7:302 (4) . . . . . **14:302 (3)**
Art III.-7:303 . . . . . **14:303**; **14:303** [1]–[3]
Art III.-7:303 (1) **14:303**
Art III.-7:303 (2) . . . . . **14:303**; **14:303** [2]
Art III.-7:303 (3) . . . . . **14:303**; **14:303** [2]
Art III.-7:303 (4) . . . . . **14:303**; **14:303** [2]
Art III.-7:304 . . . . . **14:304**; **14:304** [1], [3]–[4]
Art III.-7:304–7:306 . . . . . **Intro before Art 14:301** [1]; **14:303** [3]
Art III.-7:305 . . . . . **14:305**; **14:305** [1]–[2], [4]
Art III.-7:306 . . . . . **14:306**; **14:306** [1]
Art III.-7:307 . . . . . **14:203** [1]; **14:303** [3]; **14:304** [1]; **14:307**; **14:307** [2]–[3]
Art III.-7:401 . . . . . **Intro before Art 14:301** [1]; **14:401**; **14:401** [1]–[2]
Art III.-7:401 (1) . . . . . **Intro before Art 13:101** [12], [15]
Art III.-7:401 (2) **14:401**
Art III.-7:402 . . . . . **Intro before Art 14:301** [1]; **14:402** [1]
Art III.-7:501 . . . . . **14:501**; **14:501** [1]
Art III.-7:501 (1) . . . . . **14:501** [2], [4]
Art III.-7:501 (2) **14:501**
Art III.-7:502 . . . . . **14:502**; **14:502** [1]
Art III.-7:503 . . . **Intro before Art 13:101** [12], [15]; **14:503**; **14:503** [2]
Art III.-7:601 . . . . . **14:601**; **14:601** [1]–[3]
Art III.-9:601 (3) . . . . . **8:102** [6]
Art IV.A.-1:101 . . . . . **18:101**
Art IV.A.-1:101 (1) **18:101**
Art IV.A.-1:101 (2) . . . . . **18:101**; **18:101** [24]–[25]
Art IV.A.-1:101 (2)(b) . . . . . **18:101** [23]
Art IV.A.-1:101 (2)(c) . . . . **11:204** [2]; **18:101** [23]
Art IV.A.-1:101 (2)(d) . . . . . **18:101** [20]
Art IV.A.-1:101 (2)(e) . . . . . **18:101** [18]
Art IV.A.-1:101 (3) **18:101**
Art IV.A.-1:102 . . . . **18:101**; **18:101** [18]; **18:202** [5]
Art IV.A.-1:202 . . . . . **9:306** [34]
Art IV.A.-1:203 . . . . . **9:306** [34]; **18:201** [3]
Art IV.A.-2:101 . . . . . **18:202**; **18:202** [3]
Art IV.A.-2:101 (a) **18:202**
Art IV.A.-2:101 (b) **18:202**
Art IV.A.-2:101 (c) . . . . . **18:202**; **18:202** [3]
Art IV.A.-2:101 (d) . . . **18:203 (1)**; **18:203 (1)** [7]

Art IV.A.-2:104 . . . . . **7:106** [6]
Art IV.A.-2:202 (1) . . . . . **18:202** [4]
Art IV.A.-2:203 . . . . . **8:104**; **8:104** [10]
Art IV.A.-2:203 (1) . . . . . **8:104**; **8:104** [10]
Art IV.A.-2:203 (2) . . . . . **8:104**; **8:104** [10]
Art IV.A.-2:203 (3) **8:104**
Art IV.A.-2:204 . . . . . **18:202** [4]
Art IV.A.-2:301 . . . . . **2:406** [15]; **Intro before Art 7:101** [13]; **18:203 (3)** [4], [9]
Art IV.A.-2:301 (a) . . . . . **9:302** [2]
Art IV.A.-2:302 . . . . . **18:203 (2)**; **18:203 (2)** [3], [5]–[6]; **18:203 (3)**; **18:203 (3)** [4], [9]
Art IV.A.-2:302 (a) . . . . . **18:203 (2)**; **18:203 (2)** [2], [10]
Art IV.A.-2:302 (b) . . . . . **18:203 (2)**; **18:203 (2)** [2], [11]
Art IV.A.-2:302 (c) . . . . . **18:203 (2)**; **18:203 (2)** [2], [9]
Art IV.A.-2:302 (d) . . . . . **18:203 (2)**; **18:203 (2)** [2], [14]
Art IV.A.-2:302 (e) . . . . . **18:202** [3]; **18:203 (2)**; **18:203 (2)** [7]
Art IV.A.-2:302 (f) . . . . . **2:406** [15]; **18:203 (2)**; **18:203 (2)** [6], [12]
Art IV.A.-2:303 . . . . . **6:101** [7]; **18:203 (2)**; **18:203 (2)** [13]
Art IV.A.-2:304 . . . . . **18:203 (3)**; **18:203 (5)**; **18:203 (5)** [1]
Art IV.A.-2:304 (a) . . . . . **18:203 (5)**
Art IV.A.-2:304 (b) . . . . . **18:203 (5)**
Art IV.A.-2:305 . . . . . **11:204** [2]; **18:203 (3)**
Art IV.A.-2:306 . . . . . **18:203 (1)** [9]; **18:203 (3)**
Art IV.A.-2:306 (1) . . . . . **18:203 (1)** [8]
Art IV.A.-2:307 . . . . . **11:204** [2]; **18:203 (3)**; **18:203 (3)** [4]–[5], [7]–[8]
Art IV.A.-2:307 (1) . . . **18:203 (3)**; **18:203 (3)** [9]
Art IV.A.-2:307 (2) . . . . . **18:203 (3)**
Art IV.A.-3:101 . . . . . **7:102** [8]; **18:201**
Art IV.A.-3:101 (a) **18:201**
Art IV.A.-3:101 (b) **18:201**
Art IV.A.-3:101 (c) **18:201**
Art IV.A.-3:104 . . . . . **18:201**; **18:201** [7]–[8]
Art IV.A.-3:104 (a) **18:201**
Art IV.A.-3:104 (b) **18:201**
Art IV.A.-4:101 . . . . . **8:109**; **8:109** [4], [8]; **9:102 (1) App** [1]
Art IV.A.-4:102 . . . . . **9:102 (1) App** [1]
Art IV.A.-4:201 . . . . . **Intro before Art 8:101** [23]; **9:102 (1) App** [6]; **9:301**; **9:301** [16], [30], [33]; **Intro before Art 9:305** [5]
Art IV.A.-4:302 . . . . . **14:501** [2]
Art IV.A.-5:101 . . . . . **18:301**; **18:301** [1], [16]
Art IV.A.-5:102 . . . . . **18:303** [18], [20]
Art IV.A.-5:102 (1) **18:303**
Art IV.A.-5:102 (2) . . . . . **18:302**; **18:302** [8]
Art IV.A.-5:102 (3) **18:303**
Art IV.A.-5:103 . . . . . **18:307**
Art IV.A.-5:103 (1) . . . . . **18:307**; **18:307** [7]
Art IV.A.-5:103 (2) **18:307**
Art IV.A.-5:103 (3) **18:307**
Art IV.A.-5:103 (4) **18:307**
Art IV.A.-5:201 . . . . . **1:202** [5]; **18:304**; **18:307**
Art IV.A.-5:201 (1) **18:304**
Art IV.A.-5:201 (2) **18:304**
Art IV.A.-5:202 . . . . . **18:305**; **18:305** [9]
Art IV.A.-5:202 (1) **18:305**
Art IV.A.-5:202 (2) **18:305**
Art IV.A.-5:202 (3) **18:305**
Art IV.A.-5:202 (4) **18:305**
Art IV.A.-5:203 . . . . . **18:306**; **18:306** [1], [5]–[6]
Art IV.A.-5:203 (1) **18:306**
Art IV.A.-5:203 (2) **18:306**
Art IV.A.-5:203 (3) **18:306**
Art IV.B.-1:101 . . . . . **1:102** [12]
Art IV.B.-2:102 (2) . . . **Intro before Art 9:305** [5]
Art IV.B.-4:102 . . . . . **9:401** [13]
Art IV.B.-4:104 (3)(a) . . . **Intro before Art 9:305** [5]
Art IV.B.-7:101 . . . . . **12:201** [4]
Art IV.C.-1:101 . . . . . **Intro before Art 19.101** [2]; **19.101**; **19:101** [9]
Art IV.C.-1:101 (1) **19.101**
Art IV.C.-1:101 (2) **19.101**
Art IV.C.-1:102 . . . **19.101**; **19:101** [10], [15], [18]
Art IV.C.-1:103 . . . . . **19:302** [4]–[5]
Art IV.C.-2:101 . . . . . **19:301**
Art IV.C.-2:102 . . . . . **Intro before Art 2:401** [18]; **19:101** [15]
Art IV.C.-2:103 . . . . . **1:202** [7]; **19:302**; **19:302** [1], [7]
Art IV.C.-2:104 . . . . . **7:106**
Art IV.C.-2:104 (1) **7:106**; **8:107**
Art IV.C.-2:104 (2) . . . . . **7:106**; **8:107**; **8:107** [4]
Art IV.C.-2:105 . . . . . **6:108** [7]; **19:201** [5]; **19:202** [4], [9]
Art IV.C.-2:105 (1) **19:201**
Art IV.C.-2:105 (5) . . . . . **19:202**; **19:202** [6]
Art IV.C.-2:106 . . . . . **19:201**; **19:201** [5]–[6]
Art IV.C.-2:108 . . . . . **19:204**; **19:204** [4]
Art IV.C.-2:108 (1)(c) . . . . . **19:204** [4]
Art IV.C.-2:108 (4) . . . . . **19:204** [4]
Art IV.C.-2:109 . . . . . **19:204**
Art IV.C.-2:109 (1) . . . . . **19:204** [4]
Art IV.C.-2:109 (2)(c) . . . . . **19:204** [4]
Art IV.C.-2:109 (4) . . . . . **19:204** [4]
Art IV.C.-2:109 (6) . . . . . **19:204** [4]
Art IV.C.-2:111 . . . . . **9:101** [18]
Art IV.C.-2:111 (1) . . . . . **19:204** [4]
Art IV.C.-2:111 (4) . . . . . **19:204** [4]
Art IV.C.-2:111 (5) . . . . . **19:204** [4]
Art IV.C.-2:201 . . . . . **19:301** [5]–[6]

Art IV.C.-3:102 . . . . **1:202** [7]; **19:302**; **19:302** [4]
Art IV.C.-3:107 . . . . . **19:301** [5], [8]
Art IV.C.-3:107 (1) **19:301**
Art IV.C.-3:108 . . . . . **19:301** [5], [9]
Art IV.C.-3:108 (1) **19:301**
Art IV.C.-3:108 (2) **19:301**
Art IV.C.-3:108 (4) **19:301**
Art IV.C.-3:108 (5) **19:301**
Art IV.C.-4:101 . . . . . **19:101** [5]; **19:101** [10]
Art IV.C.-4:102 . . . . **1:202** [7]; **19:302**; **19:302** [4]
Art IV.C.-4:103 . . . . . **19:202**; **19:202** [4]–[10]
Art IV.C.-4:106 . . . . . **19:301**; **19:301** [5], [8]
Art IV.C.-4:107 . . . . . **19:301**; **19:301** [5], [9]
Art IV.C.-5:106 . . . . . **19:301**; **19:301** [5], [8]
Art IV.C.-5:108 . . . . . **19:301**; **19:301** [5], [9]
Art IV.C.-6:103 . . . . . **6:108** [7]
Art IV.C.-7:102 . . . . . **19:101** [6]
Art IV.C.-7:104 . . . . . **6:108** [7]
Art IV.C.-8:102 . . . . . **19:101** [6]
Art IV.C.-8:104 . . . . . **6:108** [7]
Art IV.C.-8:105 . . . . . **Intro before Art 2:401** [18]
Art IV.D.-1:101–7:103 . . . . . **3:101** [2]
Art IV.D.-1:102 . . . . . **3:302** [9]
Art IV.D.-1:104 . . . . . **3:209** [3]
Art IV.D.-2:101 . . . . . **1:202** [7]
Art IV.D.-5:101 . . . . . **3:205**; **3:205** [5]
Art IV.D.-5:101 (1) **3:205**
Art IV.D.-5:101 (2) **3:205**
Art IV.D.-5:101 (2)(b)(ii) . . . . . **3:205** [5]
Art IV.D.-5:101 (2)(d) . . . . . **3:205** [5]
Art IV.D.-5:101 (3) **3:205**
Art IV.D.-5:101 (4) **3:205**
Art IV.D.-5:101 (5) **3:205**
Art IV.D.-5:102 . . . . . **3:205**
Art IV.D.-5:102 (1) **3:205**
Art IV.D.-5:102 (2) **3:205**
Art IV.D.-5:102 (3) **3:205**
Art IV.D.-5:102 (4) **3:205**
Art IV.D.-5:102 (5) **3:205**
Art IV.D.-6:101 . . . . . **9:101** [18]
Art IV.D.-6:101–7:103 . . . . . **3:209** [1]
Art IV.E.-2:101 . . . . . **Intro before Art 2:401** [18]
Art IV.E.-2:201 . . . . . **1:202** [7]
Art IV.E.-2:202 . . . . . **Intro before Art 2:401** [18]
Art IV.E.-2:402 . . . . . **2:101 (2)** [14]
Art IV.E.-3:203 . . . . . **Intro before Art 2:401** [18]
Art IV.E.-4:102 . . . . . **Intro before Art 2:401** [18]
Art IV.E.-4:205 . . . . . **Intro before Art 2:401** [18]
Art IV.E.-5:202 . . . . . **Intro before Art 2:401** [18]
Art IV.F.-1:101 . . . . . **9:508** [1]
Art IV.G.-1:101 . . . . . **2:101 (2)** [13]
Art IV.G.-1:104–1:108 . . . . . **Intro before Art 10:101** [13]
Art IV.G.-2:103 (5) . . . . . **Intro before Art 13:101** [12], [17]; **13:101** [5]
Art IV.G.-2:113 . . . . . **10:106** [10]
Art IV.G.-4:104 . . . . . **2:101 (2)** [13]
Art IV.G.-4:106 . . . . . **Intro before Art 2:401** [18]
Art IV.H.-2:101 . . . . . **2:101 (2)** [13]
Art IV.H.-2:102 (b) . . . . . **2:101 (2)** [13]
Art IV.H.-3:204 . . . . . **9:501 (1)** [8]
Art VI.-2:101 . . . . . **9:501 (2)** [13]
Art VI.-2:204 . . . . . **Intro before Art 2:401** [18]
Art VI.-2:207 . . . . . **Intro before Art 2:401** [18]
Art VI.-6:101 (2) . . . . . **9:502** [2]
Art VI.-6:101 (4) . . . . . **9:502** [14]
Art VI.-6:104 . . . . . **Intro before Art 10:201** [8]
Art VI.-6:105 . . . . . **Intro before Art 10:101** [13]; **10:102** [3]
Art VII.-1:101 . . . . . **15:104** [8]
Art VII.-2:101 . . . . . **9:306** [8]; **15:104** [12]
Art VII.-2:101 (2) . . . . . **9:306** [8]
Art VII.-2:201 (1) . . . . . **15:104** [8]
Art VII.-2:201 (2) . . . . . **15:104** [8]
Art VII.-5:101 (3) . . . . . **9:306** [22]
Art VII.-5:101 (4) . . . . . **9:306** [39]
Art VII.-5:102 . . . . . **9:306** [22]
Art VII.-5:102 (3) . . . . . **9:306** [22]
Art VII.-5:104 . . . . . **9:306 App I** [3]
Art VII.-5:104 (1) . . . . . **9:306 App I** [3]
Art VII.-5:104 (2) . . . . . **9:306 App I** [3]
Art VII.-6:101 . . . . . **9:306** [22]; **9:306 App I** [3]
Art VII.-6:101 (2)(a) . . . . . **9:306** [39]
Art VII.-6:101 (2)(b)(i) . . . . . **9:306 App I** [3]
Art VII.-6:103 . . . . . **9:306** [8]; **15:104**; **15:104** [8], [11]
Art VIII.-1:101 (d) . . . . . **18:202** [5]
Art VIII.-1:207 . . . . . **18:303** [11]
Art VIII.-2:101 . . . . . **3:302** [9]
Art VIII.-2:101 (1)(e) . . . . . **18:303** [19]
Art VIII.-2:101 (d) . . . . . **Intro before Art 18:201** [4]; **18:202** [5]
Art VIII.-2:202 . . . . . **Intro before Art 18:201** [4]; **18:202** [5]
Art VIII.-2:302 . . . . . **3:302** [9]–[10]; **3:303** [3]
Art VIII.-2:302 (1) . . . . . **3:302** [9]
Art VIII.-2:302 (2) . . . . . **3:302** [9]
Art VIII.-2:302 (3) . . . . . **3:302** [9]
Art VIII.-6:102 (1) . . **Intro before Art 9:305** [26]
Art VIII.-6:102 (2) . . . . . **9:306** [15]–[16]
Art VIII.-7:102 . . . . . **9:306** [22]
Art VIII.-7:103 . . . . . **9:306 App I** [3]
Art VIII.-7:104 . . . . . **9:306 App I** [3]
Art X.-6:109 (2) . . . . . **Intro before Art 13:101** [12], [17]; **13:101** [5]
Art X.-10:302 . . . . . **Intro before Art 13:101** [12], [17]; **13:101** [5]
Annex . . . . . **1:106 (1)** [1]; **1:201** [8]; **1:301** [1], **Appendix**

DCFR[Interim] (Draft Common Frame of Reference, Interim Outline Edition 2008)
Art II.-1:102 . . . . . **1:102**; **1:102** [2], [23]
Art II.-1:102 (1) **1:102**
Art II.-1:102 (2) **1:102**
Art II.-1:102 (3) **1:102**
Art II.-1:107 . . . . . **2:101 (2)** [5]
Art II.-1:107 (1) . . . . . **2:101 (2)**
Art II.-1:107 (2) . . . . . **2:101 (2)**; **2:101 (2)** [17]
Art II.-3:102 (1) **2:402**
Art II.-3:107 . . . . . **2:406** [6]
Art II.-3:107 (2) . . . . . **2:406** [15]
Art II.-9:411 . . . . . **Intro before Art 13:101** [16]; **13:107** [28]
Art II.-9:411 (1)(b) . . **Intro before Art 13:101** [16]
Art III.-3:302 . . . . . **18:204**
Art III.-3:401 . . . . . **18:204**
Art III.-3:706 . . . . . **9:506**
Art III.-4:103 (3) . . . . . **10:102** [7]
Art III.-4:108 (1) . . . . **Intro before Art 13:101** [13]
Art III.-4:207 (2) . . . **Intro before Art 13:101** [13]
Art III.-5:108 . . . . . **11:301**
Art III.-5:108 (2) . . . **Intro before Art 13:101** [14]
Art III.-5:108 (3) **11:301**
Art III.-5:108 (4) **11:301**
Art III.-5:108 (5) **11:301**
Art III.-5:112 (2) . . . . **Intro before Art 13:101** [14]
Art III.-5:116 . . . . . **11:301**
Art III.-5:116 (3) . . . . **Intro before Art 13:101** [14]
Art III.-5:301 (2) . . **Intro before Art 13:101** [14]; **13:101** [5]
Art III.-6:101–6:108 . . . . . **Intro before Art 13:101** [12]
Art III.-6:101 (1) . . . . . **Intro before Art 13:101** [12], [25]
Art III.-6:101 (2) . . . . . **Intro before Art 13:101** [12], [25]
Art III.-6:102 . . . . . **13:101**
Art III.-6:102 (a) **13:101**
Art III.-6:102 (b) **13:101**
Art III.-6:105 . . . . . **13:104**
Art III.-7:401 (1) . . . . **Intro before Art 13:101** [15]
Art III.-7:503 . . . . . **Intro before Art 13:101** [15]
Art IV.A.-4:201 . . . . . **9:102 (1) App** [1]; **18:204**
Art IV.A.-4:201 (a) **18:204**
Art IV.A.-4:201 (b) **18:204**
Art IV.A.-4:201 (c) **18:204**
Art IV.A.-4:201 (d) **18:204**
Art IV.A.-4:201 (e) **18:204**
Art IV.G.-2:103 (5) . . . . . **Intro before Art 13:101** [17]

DCFR[Outline] (Draft Common Frame of Reference, Outline Edition 2009)
Art III.-6:102 . . . . . **13:101** [20], [32]

Draft Common Frame of Reference *see* DCFR

ECHR (European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950)
Art 4 (1) . . . . . **6:109** [2]
Art 14 . . . . . **5:102** [6]

European contract law for consumers and businesses: Feasibility Study *see* FS

European Convention on the Calculation of Time-Limits of 16 May 1972
Art 1 (1) . . . . . **1:304 (2)** [6]
Art 2 (1) . . . . . **1:304 (3)** [4]
Art 3 . . . . . **1:304 (3)**
Art 3 (1) . . . . . **1:304 (3)**; **1:304 (3)** [2]–[3], [5]–[6]
Art 3 (2) . . . . . **1:304 (3)**
Art 4 . . . . . **1:304 (3)**
Art 4 (1) . . . . . **1:304 (3)**; **1:304 (3)** [6]
Art 4 (2) . . . . . **1:304 (3)**; **1:304 (3)** [6]
Art 4 (3) . . . . . **1:304 (3)**
Art 5 . . . . . **1:304 (2)**; **1:304 (2)** [1]

European Convention on Foreign Money Liabilities of 11 December 1967
Art 1 . . . . . **7:108** [6], [8]
Art 1 (2) . . . . . **7:108** [8]
Art 3 . . . . . **7:108** [9]
Art 4 . . . . . **7:108** [10]

FS (A European contract law for consumers and businesses: Feasibility Study, 3 May 2011)
Art 1 . . . . . **Intro before Art 1:101** [8]
Art 1–12 . . . . . **Intro before Art 1:101** [1]
Art 1 (1) . . . . . **1:106 (1)**; **1:106 (1)** [1], [5]
Art 1 (2) . . . . . **1:106 (2)**; **1:106 (2)** [3]
Art 1 (3) . . . . . **1:106 (1)**
Art 2 . . . . . **Intro before Art 1:101** [8]; **2:501 App II** [2]; **9:501 (2)**
Art 2 (1) . . . . . **6:203** [6]
Art 2 (8) . . . . . **2:501 App II** [4], [6]–[7]
Art 2 (9) . . . . . **2:404** [4]
Art 2 (10) . . . . . **2:401** [5]
Art 2 (11) . . . . . **Intro before Art 12:101** [2]
Art 2 (12) . . . . . **9:501 (1)** [1]
Art 2 (13) . . . . . **2:501 App II** [17], [22]
Art 2 (15) . . . . . **Intro before Art 12:101** [2]
Art 2 (16) . . . . . **Intro before Art 12:101** [2]
Art 2 (17) . . . . **Intro before Art 6:201** [15]; **6:203**
Art 3 (2) **9:302**
Art 4 . . . . . **Intro before Art 1:101** [8]; **1:302**; **1:302** [7]
Art 4 (1) **1:302**
Art 4 (2) . . . . . **1:302**; **1:302** [7]; **2:401** [3]
Art 5 . . . . . **Intro before Art 6:201** [15]; **6:203**
Art 6 (1)–(3) **9:305**
Art 6 (4) **9:305**
Art 7 . . . . . **Intro before Art 1:101** [6]; **1:102**

Art 7–9 . . . . . **1:202** [11]
Art 8 . . . . . **Intro before Art 1:101** [6]; **1:201**; **14:304** [1]
Art 9 . . . . . **2:101 (2)**
Art 10 . . . . . **Intro before Art 1:101** [6], [8]; **1:303**
Art 10 (4) **1:303**
Art 10 (6) . . . . . **1:303**; **1:303** [33]
Art 11 . . . . . **Intro before Art 1:101** [8]; **1:304 (3)**
Art 11 (2)(c) . . . . . **1:304 (3)**
Art 11 (3) . . . . . **1:304 (3)**
Art 11 (4) . . . . . **1:304 (2)**
Art 11 (5) . . . . . **1:304 (2)**
Art 11 (7) . . . . . **1:304 (1)**; **2:206** [3]
Art 11 (8) . . . . . **1:304 (2)**
Art 12 . . . . . **Intro before Art 1:101** [8]; **2:102**; **2:102** [3]
Art 13 . . . . . **2:402** [2], [9], [17], [23]
Art 13 (1) . . . . . **2:402** [13], [17]
Art 13 (1)(a) . . . . . **2:402** [11]
Art 13 (1)(b) . . . . . **2:402** [20]
Art 13 (1)(d) . . . . . **2:402** [25]–[26]
Art 13 (1)(e) . . . . . **2:402** [19]
Art 13 (2) . . . . . **2:402** [29]; **2:406** [9]
Art 14 . . . . . **2:502** [2]
Art 14 (1) . . . . . **2:402** [13]; **2:403**; **2:403** [16]
Art 14 (1)(a) . . . . . **2:403** [12]
Art 14 (1)(b) . . . . . **2:403** [14]
Art 14 (1)(c) . . . . . **2:403** [13]–[14]
Art 14 (1)(d) . . . . . **2:403** [15]
Art 14 (1)(f) . . . . . **2:403** [19]–[20]
Art 14 (2) . . . . . **2:403**; **2:406** [9]
Art 14 (3) . . . . . **2:402** [9]; **2:403** [6]
Art 15 (1) . . . . . **2:405** [4]
Art 15 (1)–(2) . . . . . **2:403** [14]
Art 15 (2) . . . . . **2:405** [4]
Art 15 (3) . . . . . **2:403**; **2:403** [15]
Art 16 . . . . . **2:402** [19]–[20]
Art 16 (a)–(e) . . . . . **2:403** [13]
Art 16 (b) . . . . . **2:402** [20]
Art 16 (d) . . . . . **2:403** [14]
Art 16 (e) . . . . . **2:403** [14]
Art 17 (1)(a) . . . . . **2:403** [15]
Art 17 (1)(b) . . . . . **2:403** [15]
Art 17 (1)(c) . . . . . **2:403** [21]–[22]; **2:405** [4]
Art 17 (1)(d) . . . . . **2:403** [21], [23]
Art 17 (2) . . . . . **2:402** [24]; **2:403** [19]
Art 18 (1) . . . . . **2:403**; **2:403** [16]
Art 18 (2) . . . . . **2:403**; **2:403** [19]
Art 18 (3) . . . . . **2:403** [16]–[17]
Art 19 . . . . . **2:404** [2]–[3]
Art 20 . . . . . **2:405** [4]–[5]
Art 20 (1) . . . . . **2:403** [14]–[15]; **2:405** [4]
Art 20 (3) . . . . . **2:405** [1]
Art 20 (4) . . . . . **2:405** [8]
Art 20 (5) . . . . . **2:405** [4]
Art 20 (6) . . . . . **2:405** [9]
Art 20 (7) . . . . . **2:405** [3]
Art 21 . . . . . **2:402** [30]; **2:403**; **2:403** [27]
Art 23 . . . . . **2:401**; **2:401** [3], [7]
Art 23 (2) . . . . . **2:401** [9]–[10]
Art 24 . . . . . **2:406** [2]
Art 24 (1) . . . . . **2:406** [14]
Art 25 . . . . . **2:406**
Art 25 (1) . . . . . **2:406** [9], [15]
Art 25 (2) . . . . . **2:406** [2], [6], [14]
Art 25 (4) . . . . . **2:406** [18]
Art 26 . . . . . **2:405** [7]; **2:406** [2]
Art 26 (4) . . . . . **2:104** [14]
Art 27 . . . . . **2:301**; **2:301** [1]
Art 27 (2) . . . . . **2:301** [1]
Art 28 . . . . . **2:302**
Art 28 (1) **2:302**
Art 28 (2) **2:302**
Art 29 . . . . . **2:101 (1)** [3], [18]
Art 29 (1) . . . . . **2:101 (1)**
Art 29 (1)(c) . . . . . **2:101 (1)**; **2:103** [1]
Art 29 (2) . . . **2:101 (1)** [6]; **2:211**; **2:211** [2]–[3]
Art 29 (3) . . . . . **2:102**; **2:102** [3]
Art 29 (4) . . . . . **2:103**; **2:103** [5]–[6]
Art 30 . . . . . **2:101 (1)** [5]; **2:201** [3]
Art 30 (1) . . . . . **2:201**; **2:205** [3]
Art 30 (2) . . . . . **2:201**; **2:201** [7]–[8]
Art 30 (3) . . . . . **2:201**; **2:201** [9], [11]
Art 31 . . . . . **2:202**; **2:202** [19]
Art 31 (2) **2:202**
Art 32 . . . . . **2:203** [1]
Art 33 . . . . . **2:204** [1]
Art 33 (2) . . . . . **2:204** [1]
Art 34 . . . . . **2:205**
Art 35 . . . . . **2:206**
Art 36 . . . . . **2:207**
Art 37 . . . . . **2:208**
Art 37 (3) . . . . . **2:208** [8]
Art 37 (3)(c) . . . . . **2:208** [10]
Art 38 . . . . . **2:209**
Art 39 . . . . . **2:204** [16]
Art 39 (1) **2:204**
Art 40 (1) . . . . . **2:501 (1)** [2]–[3], [5]
Art 40 (1)(b) . . . . . **2:403** [6]; **2:505 App** [26]
Art 40 (2)(a) . . . . . **2:505 App** [24]
Art 40 (2)(b) . . . . . **2:505 App** [23]
Art 40 (2)(c) . . . . . **2:505 App** [8]
Art 40 (2)(d) . . . . . **2:505 App** [9]
Art 40 (2)(e) . . . . . **2:505 App** [10]
Art 40 (2)(f) . . . . . **2:505 App** [13]
Art 40 (2)(g) . . . . . **2:505 App** [16]
Art 40 (2)(h) . . . . . **2:505 App** [19]
Art 40 (3)(a) . . . . . **2:505 App** [11]
Art 40 (3)(b) . . . . . **2:505 App** [12]
Art 40 (3)(c) . . . . . **2:505 App** [15]
Art 40 (4) **2:504**

Art 41 (1)(a) . . . . . **2:504** [2]
Art 41 (2) . . . . . **2:503** [1]
Art 41 (3) . . . . . **2:503** [5]
Art 42 (3) . . . . . **2:406** [6], [8]; **2:502** [5]–[7]
Art 42 (4) . . . . . **2:503** [9]
Art 43 (1) . . . . . **2:504**; **2:505** [6]
Art 43 (1)(b) . . . . . **2:504** [4]
Art 43 (3) . . . . . **2:504 App** [11]
Art 43 (7) . . . . . **2:504 App** [16]
Art 43 (8) . . . . . **2:504 App** [19]
Art 43 (9) . . . . . **2:505 App** [5]
Art 44 . . . . . **2:505** [3]
Art 44 (1) . . . . . **2:505** [5]–[6]
Art 44 (2) . . . . . **2:505** [7]
Art 45 . . . . . **2:406** [11]; **4:104** [5]
Art 45 (1)(a) . . . . . **2:406** [11]
Art 45 (1)(b)(i) **4:103**
Art 45 (1)(b)(ii) . . . . . **2:406** [11]
Art 45 (1)(b)(iii) . . . . . **2:406** [11]
Art 45 (3) . . . . . **2:406** [11]; **4:103**; **4:103** [13]
Art 45 (4) **4:103**
Art 46 . . . . . **2:406** [12]
Art 47 . . . . . **4:108**; **4:108** [5]–[6], [8]
Art 49 . . . . . **4:111**; **4:111** [6]–[7]; **8:107** [7]
Art 52 . . . . . **4:115**
Art 55 . . . . . **4:119** [1]
Art 56 . . . . . **Intro before Art 5:101** [3]; **5:101**
Art 57 . . . . . **5:102**
Art 58 . . . . . **5:105**
Art 59 . . . . . **5:107**
Art 60 . . . . . **5:104**; **Intro before Art 6:201** [15]
Art 61 . . . . . **5:106**
Art 62 . . . . . **5:103**
Art 63 . . . . . **5:103**; **Intro before Art 6:201** [15]
Art 65 . . . . . **Intro before Art 1:101** [8]
Art 66 . . . . . **9:501 (1)** [8]
Art 68 . . . . . **2:105**; **2:105** [3]
Art 68 (1) **2:105**
Art 68 (2) . . . . . **2:105**; **2:105** [3]
Art 68 (3) **2:105**
Art 69 . . . . . **2:106**; **2:106** [6]
Art 76 . . . . . **6:110**; **6:110** [4]–[5]
Art 76 (1) . . . . . **6:110**; **6:110** [17]
Art 76 (3) . . . . . **6:110**; **6:110** [33]
Art 76 (4) . . . . . **6:110**; **6:110** [42]
Art 77–88 . . . . . **Intro before Art 6:201** [15]
Art 77 (1) **6:204**
Art 77 (2) . . . . . **6:204**; **6:204** [5]
Art 78 . . . . . **6:205**
Art 78 (1) . . . . . **6:205**; **6:205** [3]
Art 78 (2) **6:205**
Art 78 (3) . . . . . **6:205**; **6:205** [14]
Art 79 . . . . . **6:207**
Art 80 . . . . . **6:206**; **6:206** [6], [9], [12]–[13]
Art 81 . . . . . **6:201**
Art 81 (1) **6:201**
Art 81 (2) **6:201**
Art 82 . . . . . **6:201**; **6:206** [12]
Art 83 . . . . . **6:202** [7], [10]
Art 83 (a) . . . . . **6:202** [10]
Art 83 (b) . . . . . **6:202** [10], [13]
Art 83 (c) . . . . . **6:202** [13]
Art 83 (d) . . . . . **6:202** [9]
Art 83 (e) . . . . . **6:202** [9]
Art 83 (g) . . . . . **6:202** [13]
Art 83 (h) . . . . . **6:202** [1]
Art 83 (i) . . . . . **6:202** [10]
Art 83 (j) . . . . . **6:202** [10]
Art 83 (k) . . . . . **6:202** [11]
Art 83 (l) . . . . . **6:202** [14]
Art 84 . . . . **6:202** [5]; **Intro before Art 13:101** [16]
Art 84 (c) . . . . . **6:202** [7]; **Intro before Art 13:101** [16]; **13:107** [28]
Art 84 (e) . . . . . **6:202** [7]
Art 84 (g) . . . . . **6:202** [7]
Art 84 (h) . . . . . **6:202** [7]
Art 84 (i) . . . . . **6:202** [7]
Art 84 (j) . . . . . **6:202** [7]
Art 84 (l) . . . . . **6:202** [13]
Art 84 (m) . . . . . **6:202** [12]
Art 84 (o) . . . . . **6:202** [7]
Art 84 (p) . . . . . **6:202** [7]
Art 84 (q) . . . . . **6:202** [7]
Art 84 (r) . . . . . **6:202** [7]
Art 84 (s) . . . . . **6:202** [7]
Art 84 (t) . . . . . **6:202** [7]
Art 84 (u) . . . . . **6:202** [7]
Art 86 . . . . . **2:104** [1], [6]; **6:202** [14]
Art 86–88 . . . . . **2:104** [1]
Art 86 (1) . . . . . **2:104** [1], [6]
Art 86 (2) . . . . . **2:104** [1], [6]
Art 87 . . . . . **2:104** [1]; **6:202** [14]
Art 88 . . . . . **2:104** [1]; **2:402** [21]; **6:202** [14]
Art 89 . . . . . **Intro before Art 1:101** [6]; **1:202**; **1:202** [11]
Art 90 (2) . . . . . **9:301** [20]
Art 91 . . . . . **2:406** [14]; **9:501 (1)** [6]
Art 92 (1) . . . . . **Intro before Art 1:101** [6]
Art 95 (1) **7:106**
Art 96 . . . . . **7:101**
Art 96 (1)(a) . . . . . **7:101** [12]
Art 98 . . . . . **7:102**; **9:501 (1)** [13]
Art 100 . . . . . **7:110**
Art 103 (g) . . . . . **18:203 (2)** [12]
Art 108 . . . . . **8:101**
Art 108 (1)–(4) **8:101**
Art 108 (1)(a) . . . . . **9:102 (1)** [24]
Art 108 (3)(a) . . . . . **8:104** [29]
Art 108 (4) . . . . . **8:104** [29]
Art 108 (5) . . . . . **8:101**; **9:301** [53]

Art 108 (6) . . . . . **8:101**; **9:504** [9]
Art 108 (7) **8:102**
Art 109 . . . . . **9:303** [20]
Art 110 . . . . . **8:104**
Art 110 (2) . . . . . **8:104** [13]
Art 110 (3) **8:104**
Art 110 (4) **8:104**
Art 110 (8) . . . . . **8:104**; **8:104** [29]
Art 111 . . . . . **Intro before Art 9:101** [3]; **9:102 (1) App**
Art 111 (1) . . . . . **9:102 (1)**; **9:102 (1) App**
Art 111 (2) . . . . . **9:102 (1)**; **9:102 (1)** [25], [42]
Art 111 (3) . . . . . **9:102 (2)–(3)**
Art 111 (3)(a) . . . . . **9:102 (2)–(3)** [13]
Art 111 (3)(b) . . . . . **9:102 (2)–(3)** [18]
Art 112 (1) . . . . . **9:102 (1)** [41]; **9:102 (1) App**; **9:102 (1) App** [5]
Art 112 (2) . . . . . **8:102** [15]
Art 113 (1) . . **9:102 (1) App**; **9:102 (1) App** [8], [10]
Art 113 (2) . . . . **9:102 (1) App**; **9:102 (1) App** [9]
Art 114 . . . . . **9:201** [12]; **9:508-2 (1)** [5]
Art 114 (1) **9:201**
Art 114 (3) . . . . . **9:201**; **9:201** [14]–[15]
Art 115 . . . . . **9:301**; **9:301** [21]
Art 115 (1) . . . . . **9:301**; **9:301** [15]
Art 115 (2) . . . . . **9:301**; **9:301** [31], [44]
Art 116 . . . . **8:106** [4]; **9:301**; **9:301** [16], [19], [21]
Art 116 (1) . . . . . **9:301**; **9:301** [16], [21], [43]–[44]
Art 116 (2) . . . . . **9:301**; **9:301** [21], [44]
Art 116 (3) . . . . . **9:301**; **9:301** [47]
Art 116 (4) . . . . . **9:301**; **9:301** [21], [56]
Art 117 . . . . . **9:304**; **9:304** [8]
Art 118 . . . . . **8:105** [12]
Art 119 . . . . . **9:302**
Art 119 (1) . . . . . **9:302** [11]
Art 120 . . . . . **9:303**; **9:303** [6]
Art 121 . . . . . **9:301** [51]
Art 121 (1) **9:303**
Art 121 (2) **9:303**
Art 121 (2)(a) . . . . . **9:303** [20]
Art 121 (2)(b) . . . . . **9:303** [23]
Art 121 (3) . . . . . **9:303**; **9:303** [20]
Art 122 . . . . . **9:401**; **9:401** [1], [3]
Art 122 (3) . . . . . **8:102**; **9:401** [17]
Art 126 (1) **7:107**
Art 126 (2) **7:107**
Art 126 (3) . . . . . **7:107**; **7:107** [6]
Art 126 (3)(a) . . . . . **7:107** [6]
Art 126 (3)(b) . . . . . **7:107** [6]
Art 126 (3)(c) . . . . . **7:107** [6]
Art 127 . . . . . **7:101**
Art 128 . . . . . **7:103**; **9:501 (1)** [13]
Art 128 (1) **7:102**; **7:104**
Art 129 . . . . . **7:106**
Art 130 . . . . . **7:109**
Art 130 (2) **7:109**
Art 130 (4) **7:109**
Art 130 (5) **7:109**
Art 132 (1) **7:103**
Art 133 . . . . . **8:101**
Art 133 (1) **8:101**
Art 133 (2) **8:101**
Art 133 (3) . . . . . **8:101**; **9:301** [53]; **9:504** [9]
Art 133 (4) **8:102**
Art 134 . . . . . **Intro before Art 9:101** [3]; **9:101**
Art 134 (1) . . . . . **9:101**; **9:101** [6]
Art 134 (2) **9:101**
Art 134 (2)(b) . . . . . **9:101** [20]
Art 135 . . . . . **9:201** [12]
Art 135 (1) **9:201**
Art 135 (2) . . . . . **9:301** [44]
Art 135 (3) . . . . . **9:201**; **9:201** [14]
Art 136 . . . . . **9:301**; **9:301** [15], [21]
Art 137 . . . . . **8:106** [4]; **9:301**; **9:301** [21]
Art 137 (1) . . . . . **9:301** [16], [21], [43]–[44]
Art 137 (2) . . . . . **9:301** [21], [43]–[44]
Art 137 (3) . . . . . **9:301** [47]
Art 137 (4) . . . . . **9:301** [21], [56]
Art 138 . . . . . **9:303**; **9:304**; **9:304** [8]
Art 139 . . . . . **9:303**
Art 140 . . . . . **9:302**
Art 140 (1) . . . . . **9:302** [11]
Art 141 . . . . . **9:303**; **9:303** [6]
Art 142 . . . . . **9:301** [51]; **9:303**
Art 142 (1) **9:303**
Art 142 (2) **9:303**
Art 142 (3) . . . . . **9:303**; **9:303** [23]
Art 150 . . . . . **19:101** [8]
Art 150 (1) . . . . . **19:101** [10]
Art 150 (3) . . . . . **19:101** [12]
Art 153 . . . . . **19:202**
Art 154 (1) **7:106**
Art 155 . . . . . **19:203**; **19:204**
Art 157 . . . . . **19:301**
Art 157 (1) . . . . . **19:301**; **19:301** [5]
Art 157 (2) . . . . . **19:301**; **19:301** [5]
Art 157 (3) . . . . . **19:301**; **19:301** [5], [10]–[11]
Art 158 . . . . . **19:302**
Art 159 (2) . . . . . **8:104** [29]
Art 163 . . . . . **9:501 (1)** [12]
Art 163–175 . . . . . **Intro before Art 9:501** [1]
Art 163 (1) . . **2:406** [14]; **9:501 (1)**; **9:501 (1)** [6]
Art 163 (2) . . . . . **9:501 (2)**; **9:501 (2)** [10]
Art 164 . . . . . **9:502**; **9:502** [11]
Art 165 . . . . . **2:406** [14]; **9:503**; **9:503** [6]
Art 166 . . . . . **2:406** [14]; **9:504**; **9:504** [5], [9], [11]
Art 167 . . . . . **2:406** [14]; **9:504**
Art 168 . . . . . **9:506**; **9:506** [5]
Art 169 . . . . . **9:506**; **9:507**
Art 170 . . . . . **9:509**; **9:509** [1], [7]

Art 170 (1) . . . . . **9:509**; **9:509** [7]
Art 170 (2) . . . . . **9:509**; **9:509** [17]
Art 171 . . . . . **9:508**; **9:508** [6]
Art 171 (1) **9:508**
Art 172 . . . . . **9:508** [9]; **9:508-1**; **9:508-1** [1]
Art 172 (4) **9:508-4**
Art 173 . . . . . **9:508-2 (1)**; **9:508-2 (1)** [3]; **9:508-3**
Art 173–175 . . . . . **9:508-4** [1]
Art 173 (1) . . . . . **9:508-2 (1)**; **9:508-2 (1)** [2]
Art 173 (2) . . . . . **9:508-2 (2)**; **9:508-2 (2)** [1]
Art 173 (3) . . . . . **9:508-2 (3)**
Art 173 (4) . . . . . **9:508-2 (4)**
Art 173 (5) . . . . . **9:508-2 (5)**
Art 173 (6) . . . . . **9:508-2 (6)**
Art 174 . . . . . **9:508-2 (7)**; **9:508-3**
Art 175 . . . . . **9:508-3**
Art 175 (1) . . . . . **9:508-3**; **9:508-3** [2]
Art 175 (2) **9:508-3**
Art 175 (3) **9:508-3**
Art 175 (4) **9:508-3**
Art 176 . . . . . **9:306**
Art 176 (1) **4:115**
Art 177 . . . . . **9:306**
Art 180 . . . . . **9:306**
Art 181 . . . . . **14:101**; **14:101** [5], [7]
Art 181–189 . . . . . **Intro before Art 14:101** [11]
Art 182 . . . . . **14:201**; **14:304** [1]; **14:307**; **14:401** [3]
Art 183 . . . . . **14:203**; **14:301**
Art 183 (2) . . . . . **14:203** [2]
Art 183 (3) . . . . . **14:203** [4]
Art 184 . . . . . **Intro before Art 14:301** [1]
Art 184–186 . . . . . **Intro before Art 14:301** [1]
Art 184 (1) . . . . . **14:302 (1)–(2)**
Art 184 (2) . . . . . **14:302 (1)–(2)**
Art 184 (3) . . . . . **14:302 (3)**
Art 184 (4) . . . . . **14:302 (3)**
Art 185 . . . . . **Intro before Art 14:301** [1]; **14:304**; **14:304** [1]
Art 186 . . . . . **14:305**
Art 187 . . . . . **Intro before Art 13:101** [15]; **Intro before Art 14:301** [1]; **14:401**
Art 188 (1) . . . . . **14:501**; **14:501** [2]
Art 188 (2) . . . . . **Intro before Art 13:101** [15]; **13:101** [15]; **14:501**; **14:501** [7]; **14:503**; **14:503** [2]
Art 188 (3) **14:501**
Art 188 (4) **14:502**
Art 189 . . . . . **14:601**
Art 189 (1) **14:601**
Art 189 (2) **14:601**
Art 189 (3) **14:601**
Art 189 (4) . . . . . **14:601**; **14:601** [3]
Annex IA . . . . . **2:403** [19]

FS 2nd (Revised version of the FS, published as Contract Law, Work in Progress, Version of 19 August 2011)
Art 2 (9) . . . . . **2:404** [4]
Art 5 . . . . . **2:501 App II** [2]
Art 5 (17) . . . . . **2:501 App II** [6]–[7]
Art 5 (18) . . . . . **2:501 App II** [22]
Art 14 (1) **2:403**
Art 14 (5) . . . . . **2:403** [6]
Art 18 (3) . . . . . **2:403** [17]
Art 19 . . . . . **2:404** [2]
Art 19 (1) . . . . . **2:404** [5]
Art 20 (3) . . . . . **2:405** [9]
Art 30 . . . . . **2:406**; **2:406** [6]
Art 41 (1)(2) . . . . . **2:403** [6]; **2:505 App** [26]
Art 41 (2)(h) . . . . . **2:505 App** [17]
Art 41 (3)(4) . . . . . **2:505 App** [20]
Art 41 (3)(5) . . . . . **2:505 App** [14]
Art 43 (2) . . . . . **2:502** [7]
Art 43 (2)(1) . . . . . **2:502** [6]
Art 45 (1) . . . . . **2:504 App** [10]
Art 45 (2) . . . . . **2:504 App** [8]; **9:306** [47]
Art 46 (5) . . . . . **2:504 App** [22], [24]
Art 46 (6) . . . . . **2:504 App** [22]
Art 72 . . . . . **2:402** [21]
Art 79 (1) **6:110**
Art 86 . . . . . **Intro before Art 13:101** [16]
Art 86 (3) . . . . . **Intro before Art 13:101** [16]; **13:107** [28]
Art 185 . . . . . **Intro before Art 13:101** [15]
Art 186 (2) . . . . . **Intro before Art 13:101** [15]; **13:101** [15]

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Art 2.1 (b) . . . . . **2:205** [5]
Art 2.2 . . . . . **2:205** [5]

International Chamber of Commerce Model International Franchising Contract, 2011
Art 26 . . . . . **6:112** [16]

International Law of the Sale of Goods, 1935
Art 11 . . . . . **1:106 (1)** [11], [13]; **1:106 (2)**

Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA) Uniform Act of Contract Law (preliminary draft), 2004
Art 10/2 . . . . . **16:101** [9]–[10]

PCC (*Principes Contractuels Communs*, 2008)
Art 0:101 . . . . . **1:102** [1]
Art 0:101 (1) . . . . . **1:102** [1]
Art 0:101 (2) . . . . . **1:102** [1]; **2:101 (2)** [2], [5]
Art 0:101 (3) . . . . . **1:102** [1]
Art 0:202 . . . . . **9:102 (1)** [20]

Art 0:301 . . . . . **2:301** [13]
Art 0:301–0:304 . . . . . **1:201** [64]; **Intro before Art 2:401** [12]
Art 0:302 . . . . . **2:301** [13]
Art 0:303 . . . . . **1:202** [7]–[8], [11]
Art 0:304 . . . . . **1:201** [93]
Art 2:101 . . . . . **2:301**; **2:301** [4], [14], [24]; **2:302** [10]
Art 2:101 (1) . . . . . **2:301**; **2:301** [2], [18]
Art 2:101 (2) . . . . . **2:301**; **2:301** [15]–[16]
Art 2:101 (3) . . . . . **2:301**; **2:301** [2], [5], [15], [18], [20]
Art 2:102 . . . . . **2:401**; **4:103** [14]
Art 2:102 (1) . . . . . **Intro before 2:401** [2]; **2:401**; **2:401** [4]
Art 2:102 (1)–(3) . . . . . **2:401** [3]
Art 2:102 (2) . . **Intro before Art 2:401** [12]; **2:401**
Art 2:102 (3) . . . . . **2:401**; **2:401** [7]
Art 2:102 (4) . . . . . **2:401**; **2:406** [5]
Art 2:103 . . . . . **2:302**; **2:302** [8]
Art 2:203 . . . . . **2:103** [3]
Art 2:302 . . . . . **2:301** [2]
Art 4:101–4:106 . . . . . **15:102** [27]
Art 4:202 . . . . . **4:103** [14]
Art 4:208 . . . . . **Intro before Art 6:201** [3]
Art 4:208 (1) . . . . . **Intro before Art 6:201** [3]
Art 4:208 (2) . . . . . **Intro before Art 6:201** [3]
Art 4:301 . . . . . **15:101** [11], [13]–[14]; **15:103** [7]
Art 4:301–4:309 . . . . **Intro before Art 15:101** [3]
Art 4:302 . . . . . **15:101** [11]; **15:103** [7]
Art 4:302 (1) . . . . . **15:101** [14]
Art 4:302 (2) . . . . . **15:102** [15]
Art 4:303 . . . . . **15:102** [9]
Art 4:304 . . . . . **15:102** [28]; **15:103** [5]
Art 4:304 (1) . . . . . **15:102** [17]
Art 4:305 . . . . . **15:103** [5]
Art 4:305 (1) . . . . . **15:102** [15], [26]
Art 4:305 (2) . . . . . **15:102** [28]
Art 4:306 . . . . . **15:103** [5]
Art 4:307 . . . . . **15:103** [11]
Art 4:411 . . . . . **15:101** [11]
Art 4:412 . . . . . **15:101** [11]
Art 4:503 . . . . . **15:104** [8]
Art 4:503–4:504 . . . . . **Intro before Art 9:305** [31]
Art 4:504 . . . . . **15:104** [8]
Art 4:506 (1) . . . . . **15:105** [5]
Art 5:103 (2) . . . . . **1:107** [20]
Art 5:105 . . . . . **5:103** [4]
Art 8:107 . . . . . **7:102** [6]
Art 8:401 . . . . . **7:101** [11]
Art 8:401 (3) . . . . . **7:101** [11]
Art 8:402 . . . . . **7:104** [6]
Art 8:403 (3) . . . . . **7:105** [6]
Art 8:404 . . . . . **7:106**
Art 8:404 (1)(a) . . . . . **7:106** [7]
Art 8:405 . . . . . **7:107**; **7:107** [6]
Art 8:406 . . . . . **7:108** [9]
Art 8:406 (2) . . . . . **7:108** [4], [7]
Art 8:407 . . . . . **7:109** [7]
Art 8:407 (3) . . . . . **7:109** [7]
Art 8:407 (4) . . . . . **7:109** [10]
Art 8:408 (5) **7:111**
Art 8:409 . . . . . **7:105**
Art 9:101 (1) . . . . . **8:101**; **8:101** [4]; **9:303** [12]
Art 9:101 (2) **8:101**
Art 9:101 (3) . . . . . **8:101**; **8:101** [12]; **9:301** [53]
Art 9:102 . . . . . **8:102**; **8:102** [1], [17]
Art 9:104 (2) . . . . . **8:104** [27]
Art 9:105 . . . . . **9:304**
Art 9:106 (1) . . . . . **8:106**; **8:106** [6]
Art 9:106 (2) . . . . . **8:106**; **8:106** [8]; **9:303** [19]
Art 9:106 (3) . . . . . **9:301**; **9:301** [16], [18], [43]–[44], [47]
Art 9:106 (4) . . . . . **9:301**; **9:301** [17], [25], [35]
Art 9:106 (5) . . . . . **9:301**; **9:301** [43], [50]
Art 9:108 . . . . . **8:101**; **8:101** [12]
Art 10:101 . . . . **Intro before Art 9:101** [3]; **9:101**; **9:102 (1)** [20]
Art 10:101 (1) . . . . . **9:101** [6]
Art 10:102 . . . . . **Intro before Art 9:101** [3]; **9:102 (1)** [20]
Art 10:102 (1) . . . . . **Intro before Art 9:101** [5]; **9:102 (1)**; **9:102 (1)** [25]
Art 10:102 (2) . . . . . **9:102 (2)–(3)**
Art 10:102 (2)(c) . . . . . **9:102 (2)–(3)**; **9:102 (2)–(3)** [31]
Art 10:103 . . . . . **9:103**
Art 10:107 (1) . . . . . **9:303** [24]
Art 10:301 . . . . . **9:301**
Art 10:301 (1) . . . . . **9:301**; **9:301** [15]
Art 10:301 (2) . . . . . **9:301**; **9:303** [12]
Art 10:301 (3) . . . . . **9:301**; **9:301** [16], [18]
Art 10:302 . . . . . **9:302**
Art 10:303 . . . . . **9:301**; **9:303**
Art 10:303–10:306 . . . . . **9:303** [12]
Art 10:303 (1) **9:303**
Art 10:303 (2) . . . . . **9:303**; **9:303** [12]
Art 10:303 (3) . . . . . **9:303**; **9:303** [6], [12]
Art 10:304 . . . . . **9:303**; **9:303** [12]
Art 10:305 . . . . . **9:303**; **9:303** [12]
Art 10:306 . . . . . **9:303**; **9:303** [8], [12]
Art 10:307 . . . . . **9:301** [51]; **9:303**
Art 10:307 (1) . . . . . **9:303**; **9:303** [19], [23], [26]
Art 10:307 (2) . . . . . **9:303**; **9:303** [27]
Art 10:307 (3) . . . . . **9:303**; **9:303** [26]
Art 10:308 . . . . . **9:304**; **9:304** [5], [7]
Art 10:308 (1) **9:304**
Art 10:308 (2) . . . . . **9:304**; **9:304** [10]

Art 10:309 . . . . . **9:301** [56]
Art 10:309 (1) . . . . . **9:301** [56]
Art 10:309 (2) . . . . . **9:301** [56]
Art 10:309 (3) . . . . . **9:301** [56]
Art 10:310 . . . . . **8:102** [2]
Art 10:401 . . . . . **9:401** [1]
Art 10:401 (3) . . . . . **8:102** [2]; **9:401** [17]
Art 10:501–10:507 . . . . . **Intro before Art 9:501** [1]
Art 10:504 . . . . . **9:504**
Art 10:505 . . . . . **9:504** [9]
Art 10:506 . . . . . **9:506**
Art 10:507 . . . . . **9:507**
Art 10:507 (1) . . . . . **9:507**; **9:507** [8]
Art 10:507 (2) **9:507**
Art 10:509 (2) . . . . . **9:509** [20]
Art 10:510 . . . . . **9:510**; **9.510** [2]

PECL[1995] (Principles of European Contract Law, 1995)
Art 3:109 . . . . . **8:109**
Art 4:504 . . . . . **9:504** [15]

PECL (Principles of European Contract Law, 1995–2000)
Art 1:101 . . . **Intro before Art 1:101** [5], [9]; **1:101**
Art 1:101–1:305 . . . . . **Intro before Art 1:101** [1]
Art 1:101 (1) . . . **1:101**; **Intro before Art 5:101** [12]
Art 1:101 (2) **1:101**
Art 1:101 (3) **1:101**
Art 1:101 (3)(a) **1:101**
Art 1:101 (3)(b) **1:101**
Art 1:101 (4) **1:101**
Art 1:102 . . . . . **Intro before Art 1:101** [9]–[10]; **1:102**; **1:102** [1]–[5], [23]; **1:106 (1)** [12]; **1:202** [11]; **1:302** [9]; **2:105** [2]; **8:108** [27]; **8:109** [1], [5]; **9:509** [1]; **19:302**
Art 1:102 (1) . . . . . **1:102**; **1:102** [2]; **3:102** [8]; **6:110** [31]; **7:106** [7]
Art 1:102 (2) . . . **1:102**; **1:102** [2], [22]; **7:107** [4]; **7:108** [5]; **7:109** [5]; **7:112** [7]
Art 1:103 . . . . . **Intro before Art 1:101** [5]; **1:103**; **1:301** [1]; **15:101** [8]; **15:102**; **15:102** [4]–[5]
Art 1:103 (1) . . . . . **1:103**; **15:102** [4]
Art 1:103 (2) . . . . . **1:103**; **15:102** [5], [8]
Art 1:104 . . . . . **Intro before Art 1:101** [5]; **1:104**; **19:302**
Art 1:104 (1) **1:104**
Art 1:104 (2) **1:104**
Art 1:105 . . **Intro before Art 1:101** [4], [8]; **1:105**; **1:105** [1], [7]–[8], [13]; **1:106 (1)** [12]; **2:103** [2]; **Intro before 6:101** [2]
Art 1:105 (1) . . . . . **1:105**; **1:105** [8]–[10]
Art 1:105 (2) . . . . . **1:105**; **1:105** [10], [13], [15]
Art 1:106 . . . . . **Intro before Art 1:101** [4], [8]; **1:102** [2]; **1:106 (1)**; **1:106 (1)** [1], [5], [10]; **1:201** [85]; **Intro before Art 5:101** [12], [18]; **7:108**
Art 1:106 (1) . . . . . **1:106 (1)**; **1:106 (1)** [5], [9]–[11], [14]; **1:106 (2)** [1], [3]–[5]; **1:201** [2]
Art 1:106 (2) . . . . . **1:106 (1)** [11]; **1:106 (2)**; **1:106 (2)** [1], [3]–[6]
Art 1:107 . . . . . **Intro before Art 1:101** [8]; **1:107**; **1:107** [2], [4]–[5], [8]–[11], [13], [15]–[17], [19], [28], [30]–[31]; **1:303** [1], [4], [10], [14]–[15], [17], [31]; **1:305** [5]; **Intro before Art 5:101** [14]; **6:110** [19]; **Intro before Art 16:101** [10]; **16:103** [2]
Art 1:201 . . . . . **Intro before Art 1:101** [4], [10]; **1:102** [2]; **1:106 (1)** [12]; **1:201**; **1:201** [2], [7], [11], [26], [34], [39], [45], [49], [52]–[60], [62], [70], [73], [76], [78], [84], [92]–[93], [96], [100]; **1:202** [8], [10]–[11]; **1:302** [9]; **1:303** [30]; **2:301** [13]; **Intro before Art 2:401** [11]; **2:401** [5]; **9:102 (2)–(3)** [45]; **10:110** [4]; **14:304** [1]; **15:105** [3]; **16:102** [2]; **18:301** [16]
Art 1:201 (1) . . . . . **1:201**; **1:201** [65]; **1:305** [15]; **9:301** [25]
Art 1:201 (2) . . . . **1:201**; **1:201** [54], [95]; **16:102** [1]
Art 1:202 . . . . . **Intro before Art 1:101** [6]; **1:106 (1)** [12]; **1:201** [100]; **1:202**; **1:202** [2]–[8], [10]–[12]; **9:101** [14]; **19:302** [1], [4]–[5]
Art 1:301 . . . . . **Intro before Art 1:101** [8]; **1:301**; **1:301** [1]; **Intro before Art 8:101** [13], [15]–[16]
Art 1:301 (1) . . . . . **1:301**; **4:108** [9]; **8:101** [13]
Art 1:301 (2) . . . . . **1:301**; **1:301** [1]
Art 1:301 (3) **1:301**
Art 1:301 (4) . . . . . **1:301**; **Intro before Art 8:101** [15]; **8:101** [1]–[2]; **8:103** [13]; **9:101** [10], [14]; **9:102 (1)** [20], [27]; **9:301** [26]
Art 1:301 (5) **1:301**
Art 1:301 (6) **1:301**
Art 1:302 . . . **Intro before Art 1:101** [8]; **1:105** [7]; **1:106 (1)** [12]; **1:302**; **1:302** [1], [4]–[5], [7]–[9]; **2:206** [4]; **2:301** [14]; **5:102** [7]; **6:104** [1]; **6:108** [7]; **16:101** [10]; **16:102** [2]–[3]
Art 1:303 . . . . **Intro before Art 1:101** [8]; **1:107**; **1:107** [7], [15], [20], [28], [31]; **1:201** [78]; **1:303**; **1:303** [1]–[3], [5], [7], [9]–[15], [19], [21]–[22], [24], [28], [30]–[32]; **2:205** [4]; **4:112** [4]; **9:303** [12]; **11:303** [17]; **13:104** [8]
Art 1:303 (1) . . . . . **1:303**; **1:303** [1], [15]–[16], [26]; **3:201** [4]
Art 1:303 (2) . . . . . **1:303**; **1:303** [7]–[8], [13]; **2:203** [4]; **2:205** [4]
Art 1:303 (2)–(3) . . . . . **2:202** [19]

Art 1:303 (3) . . . . . **1:303**; **1:303** [7], [11], [22]
Art 1:303 (4) . . . . . **1:303**; **1:303** [21]; **2:205** [4]
Art 1:303 (5) . . . . . **1:303**; **1:303** [21], [28], [32]; **2:202** [19]; **2:204** [5]; **2:205** [4]
Art 1:303 (6) . . . . . **1:303**; **1:303** [7]–[8], [11]
Art 1:304 . . . . . **Intro before Art 1:101** [8]; **1:106 (1)** [10]; **1:304 (1)** [6]; **1:304 (2)** [1], [4]; **1:304 (3)** [6]
Art 1:304 (1) . . . . . **1:304 (1)**; **1:304 (1)** [9]–[10]; **1:304 (3)**; **1:304 (3)** [3]; **2:206** [3]
Art 1:304 (2) . . . . . **1:304 (2)**
Art 1:304 (3) . . . **1:304 (1)** [5]; **1:304 (3)**; **1:304 (3)** [1]–[5], [7]; **14:203** [2]
Art 1:305 . . . . **Intro before Art 1:101** [8]; **1:305**; **1:305** [1]–[3], [6], [8], [11]–[13], [15]–[16]; **2:301** [23]; **7:106** [5]; **8:107** [1], [7]
Art 1:305 (a) . . . . . **1:305** [5]–[8]
Art 1:305 (b) . . . . **1:305** [10]–[11], [15]; **2:301** [23]
Art 2:101 . . . . . **2:101 (1)** [3], [17]–[18], [21]; **2:101 (2)** [1]–[2], [5], [17]; **2:105** [3]
Art 2:101–2:107 . . . . . **2:201** [1]
Art 2:101–2:302 . . . . . **Intro before Art 2:101** [5]
Art 2:101 (1) . . . . . **2:101 (1)**; **6:110** [19], [29]
Art 2:101 (1)(a) . . . . . **2:101 (1)** [8]
Art 2:101 (2) . . . . . **Intro before Art 1:101** [6]; **1:106 (1)** [12]; **1:303** [15]; **2:101 (2)**; **2:101 (2)** [17]; **2:106** [2]; **3:201** [4]; **Intro before Art 5:101** [21]
Art 2:101 (3) . . . . . **2:201** [9]
Art 2:102 . . . . . **1:107** [19]; **1:303** [17]; **2:102**; **2:102** [1], [3]; **2:201** [5], [7]; **2:203** [3]; **2:204** [3], [8]–[9]; **2:206** [2]; **2:301** [17]; **Intro before Art 2:401** [12]
Art 2:102 (1) . . . . . **2:104** [7]; **Intro before Art 2:401** [12]
Art 2:102 (2) . . . . . **2:104** [7]
Art 2:103 . . . . . **2:103**; **2:103** [5]–[6]; **2:301** [25]; **6:104** [11]
Art 2:103 (1) . . . . . **2:103**; **2:103** [1]
Art 2:103 (1)(b) . . . . . **2:103** [2]
Art 2:103 (2) . . . . . **2:103**; **2:103** [5]
Art 2:104 . . . . . **2:104**; **2:104** [4]–[5], [7], [9]–[10], [14]–[16]; **2:406** [9]; **5:105** [9]; **Intro before Art 6:201** [13], [15]; **6:202** [14]; **6:203** [1]; **6:204** [1]; **6:206** [9]
Art 2:104 (1) . . . . . **2:104**; **2:104** [10]; **2:406** [9]
Art 2:104 (2) . . . . . **2:104**; **2:104** [12]
Art 2:104 (3) . . . . . **6:203** [1]
Art 2:105 . . . . . **2:105**; **2:105** [2]–[3]
Art 2:105 (1) **2:105**
Art 2:105 (2) **2:105**
Art 2:105 (3) . . . . . **2:105**; **2:105** [3]
Art 2:105 (4) . . . . . **2:105**; **2:105** [3]
Art 2:106 . . . . . **2:106**; **2:106** [6]
Art 2:106 (1) **2:106**
Art 2:106 (2) **2:106**
Art 2:107 . . . . . **1:107** [1], [5]; **1:303** [1]; **2:107**; **2:107** [4]–[6]; **6:110** [6], [19]; **Intro before Art 7:101** [8]; **10:102** [3]
Art 2:201 . . . . . **1:303** [7], [9]; **2:201**; **2:201** [1]–[2], [8], [10]
Art 2:201–2:211 . . . . . **2:201** [1]
Art 2:201 (1) . . . . . **2:201**; **2:201** [3]; **2:202** [12]
Art 2:201 (1)(a)–(b) . . . . . **2:201** [2]
Art 2:201 (2) . . . . . **2:201**; **2:201** [3], [7]–[8]
Art 2:201 (3) . . . . . **2:201**; **2:201** [3], [8], [11]
Art 2:202 . . . . . **1:303** [32]; **2:202**; **2:202** [1], [11], [14]–[17], [19]; **2:301** [18]
Art 2:202 (1) . . . . . **2:202**; **2:202** [12], [17], [19]; **2:205** [3]–[4], [8]
Art 2:202 (2) . . . . . **2:202**; **2:202** [17]–[18]
Art 2:202 (3) . . . . . **2:202**; **2:202** [15]
Art 2:202 (3)(b) . . . . . **2:202** [15]
Art 2:202 (3)(c) . . . . . **2:301** [18]
Art 2:203 . . . . . **1:303** [9]; **2:203**; **2:203** [1], [4]
Art 2:203 (5) . . . . . **2:203** [4]
Art 2:204 . . . . . **2:204**; **2:204** [12]; **11:101** [12]
Art 2:204 (1) **2:204**
Art 2:204 (2) . . . . . **2:204**; **2:204** [11], [17]
Art 2:205 . . . . . **1:105** [7]; **1:303** [11]; **2:205**
Art 2:205 (1) . . . . . **1:303** [9]; **2:204** [9]; **2:205**; **2:205** [3]
Art 2:205 (2) . . . . . **1:303** [1], [8], [11]; **2:204** [9]; **2:205**; **2:205** [8]
Art 2:205 (3) . . . . . **1:303** [2]; **2:204** [9]; **2:205**; **2:205** [9]
Art 2:206 . . . . . **2:206**
Art 2:206 (1) **2:206**
Art 2:206 (2) . . . . . **1:302** [1]; **2:203** [5]; **2:206**
Art 2:206 (3) **2:206**
Art 2:207 . . . . . **2:203** [5]; **2:207**; **2:207** [1]
Art 2:207 (1) . . . . . **2:207**; **2:207** [2]
Art 2:207 (2) . . . . . **2:207**; **2:207** [2]
Art 2:208 . . . . . **2:208**; **2:208** [1]–[3], [5], [10]; **2:209** [1]
Art 2:208 (1) . . . . . **2:208**; **2:208** [2]
Art 2:208 (2) . . . . . **2:208**; **2:208** [3]–[4], [6]–[7]
Art 2:208 (3) . . . . . **2:208**; **2:208** [8]; **2:209** [1]
Art 2:208 (3)(c) . . . . . **2:208** [7], [10]
Art 2:209 . . . . . **2:208** [1]; **2:209**; **2:209** [4], [6]; **Intro before Art 6:201** [13], [15]; **6:203** [6]; **6:204** [4]
Art 2:209 (1) . . . . . **2:209**; **2:209** [4]
Art 2:209 (2) . . . . . **2:209**; **6:204** [4]
Art 2:209 (2)(a) **2:209**
Art 2:209 (2)(b) **2:209**
Art 2:209 (3) . . . . . **2:209**; **6:203**; **6:203** [6]
Art 2:210 . . . . . **2:208** [1]; **2:210**; **2:210** [1]–[2]
Art 2:210 (a) **2:210**
Art 2:210 (b) **2:210**

Art 2:211 . . . . . **2:101 (1)** [6]; **2:211**; **2:211** [2]; **2:301** [10]
Art 2:301 . . . . **1:201** [2]; **2:301**; **2:301** [24]–[26]; **6:204** [9]; **9:502** [6]; **16:104** [4]
Art 2:301 (1) . . . . . **2:301**; **2:301** [22]
Art 2:301 (2) . . . . . **1:305** [15]; **2:301**; **2:301** [16], [23]; **9:502** [6]
Art 2:301 (3) . . . . . **2:301**; **2:301** [5], [24]
Art 2:301 (4) . . . . . **2:301** [16]
Art 2:302 . . . . **2:302**; **2:302** [1], [6], [8], [11], [18]
Art 3:101 . . . . . **Intro before Art 3:101** [2]; **3:101**; **3:101** [4]
Art 3:101 (1) . . . . . **3:101**; **3:101** [2]
Art 3:101 (2) . . . . . **3:101**; **3:101** [2], [4]
Art 3:101 (3) . . . . . **3:101**; **3:101** [6]
Art 3:102 . . . . **Intro before Art 3:101** [2]; **3:102**; **3:102** [8], [12]; **3:202** [1]; **3:302** [10]; **19:202** [6]; **19:302** [6]
Art 3:102 (1) . . . . . **3:102**; **3:102** [8]
Art 3:102 (2) . . . . . **3:102**; **3:102** [8]
Art 3:201 . . . . . **3:201**; **3:201** [11]; **3:202**
Art 3:201 (1) . . . . . **3:201**; **3:201** [2]–[3]
Art 3:201 (2) . . . . . **3:201**; **3:201** [6]
Art 3:201 (3) . . **1:201** [7]–[8]; **3:201**; **3:201** [9]–[11]
Art 3:202 . . . . . **3:201** [1]; **3:202**; **3:202** [1]
Art 3:203 . . . . . **3:102** [8]–[9], [11]; **3:203**
Art 3:204 . . . . . **3:204**
Art 3:204 (1) . . . . . **3:204**; **3:204** [2]
Art 3:204 (2) . . . . . **3:204**; **3:204** [1], [3]–[5]
Art 3:205 . . . . . **3:205**; **15:102** [12]
Art 3:205 (1) . . . . . **3:205**; **3:205** [2]–[5], [7]
Art 3:205 (2) . . . . . **3:205**; **3:205** [2]
Art 3:205 (3) . . . . . **3:205**; **3:205** [6]
Art 3:206 . . . . . **3:201** [6]; **3:206**; **3:206** [2]–[4]
Art 3:207 . . . . . **3:204**; **3:207**; **3:207** [4]
Art 3:207 (1) **3:207**
Art 3:207 (2) . . . . . **3:207**; **3:207** [1]
Art 3:208 . . . . . **3:207** [3]; **3:208**; **3:208** [1]–[2]
Art 3:209 . . . . . **3:209**
Art 3:209 (1) . . . . . **3:209**; **3:209** [1]–[2]
Art 3:209 (2) . . . . . **3:209**; **3:209** [2]
Art 3:209 (3) . . . . . **3:209**; **3:209** [4]
Art 3:301 . . . . . **3:102** [12]; **3:301**; **3:302** [1], [7]
Art 3:301–3:304 . . . . **Intro before Art 13:101** [17]
Art 3:301 (1) . . . . . **3:102** [8]; **3:301**; **3:301** [1]
Art 3:301 (1)(b) . . . . . **3:301** [1]
Art 3:301 (2) **3:301**
Art 3:301 (2)–3:304 . . . . . **3:302** [7]
Art 3:302 . . . . . **3:302**; **3:304**
Art 3:302–3:304 . . . . . **3:301**
Art 3:302 (a) . . . . . **3:302**; **3:302** [7]
Art 3:302 (b) . . . . . **3:302**; **3:302** [7]
Art 3:303 . . . . . **3:303**; **3:303** [4]; **3:304**
Art 3:303 (a) **3:303**
Art 3:303 (b) . . . . . **3:303**; **3:303** [3]
Art 3:304 . . . . . **3:302** [7]; **3:304**
Art 4:101 . . . . . **Intro before 4:101** [1]; **4:101**; **4:101** [1]; **4:116** [2]; **Intro before Art 9:305** [16]; **Intro before Art 15:101** [3]
Art 4:102 . . . **4:102**; **4:102** [1]; **9:102 (2)–(3)** [14]; **10:101** [4]; **Intro before Art 16:101** [12]; **16:101** [9]; **18:306** [6]
Art 4:103 . . . . **1:305** [1]; **2:301** [17]; **Intro before Art 2:401** [11]; **2:406** [5]; **Intro before4:101** [1]; **4:103**; **4:103** [1], [9]–[10], [14], [20]–[24]; **4:104**; **4:104** [1]–[2], [8]–[10]; **4:106**; **4:106** [4]; **4:107** [5], [7]; **4:111** [7]; **4:112** [2]; **6:111** [20]; **8:108** [22]; **12:101** [6]; **16:101** [9]
Art 4:103–4:105 . . . . . **6:201** [12]
Art 4:103–4:107 . . . . . **12:101** [15]
Art 4:103 (1) **4:103**
Art 4:103 (1)(a) . . . . . **1:107** [12]; **2:406** [11]; **4:103** [14], [16]
Art 4:103 (1)(a)(i) . . . . **4:103** [10], [12], [16]; **Intro before Art 9:305** [19], [22]
Art 4:103 (1)(a)(ii) . . . . . **1:201** [2]; **4:103** [12]; **4:104** [9]; **4:111** [7]
Art 4:103 (1)(a)(iii) . . . **Intro before Art 9:305** [19]
Art 4:103 (1)(b) . . . . . **4:103** [21]
Art 4:103 (2) **4:103**
Art 4:103 (2)(a) . . . . . **4:103** [24]; **4:117** [5]
Art 4:103 (2)(b) . . . . . **4:102** [5]
Art 4:104 . . . . . **4:104**; **4:104** [1]–[3], [7]-9; **4:105** [5]; **4:106** [7]
Art 4:105 . . . . . **4:105**; **4:105** [1]
Art 4:105 (1) . . . . . **4:105**; **4:105** [4]–[6]
Art 4:105 (2) **4:105**
Art 4:105 (3) . . . . . **2:406** [12]; **4:105**; **4:105** [4]–[5], [7]
Art 4:106 . . . . **Intro before Art 2:401** [11]; **2:406** [5]–[6], [14]–[15]; **4:106**; **4:106** [1], [3]–[7]; **4:117**; **4:117** [1], [5]–[6]
Art 4:107 . . . . . **1:107** [12]; **Intro before Art 2:401** [11]; **2:401** [5]–[6]; **2:406** [12]; **Intro before 4:101** [1]; **4:103** [10]; **4:107**; **4:107** [5]; **4:112** [2]; **6:101** [8]; **12:101** [6]
Art 4:107 (1) . . . . . **1:201** [2]; **4:107**; **4:107** [7]
Art 4:107 (2) . . . . . **1:305** [11]; **4:107**
Art 4:107 (3) . . . . . **1:201** [2]; **Intro before Art 2:401** [11], [31]; **2:401**; **2:401** [1], [3], [6], [9]–[10]; **2:402** [19]; **2:406** [11]; **4:107**
Art 4:108 . . . . . **4:108**; **4:108** [2], [4], [6]–[9]; **4:112** [2]
Art 4:108 (a) . . . . . **4:108**; **4:108** [5]
Art 4:108 (b) . . . . . **4:108**; **4:108** [6]
Art 4:109 . . . **1:305** [1]; **Intro before 4:101** [1], [4]; **4:107** [3]; **4:109**; **4:109** [1]; **6:201** [12]; **Intro before Art 9:305** [32]; **15:101** [6]; **15:103** [11]; **Intro before Art 16:101** [11]

Art 4:109 (1) **4:109**
Art 4:109 (2) . . . . . **4:109**; **4:109** [6]; **15:103** [11]
Art 4:109 (3) . . . . . **4:109**; **4:109** [6]; **15:103** [11]
Art 4:110 . . . **4:110**; **4:113**; **Intro before Art 6:201** [13], [15]–[16]; **6:201** [4]–[5]; **6:202** [1], [4], [6]; **6:203** [6]; **6:205** [14]; **6:206** [3]
Art 4:110 (1) . . . **1:201** [2]; **4:110**; **Intro before Art 6:201** [16]; **6:201**; **6:204**; **6:204** [1]
Art 4:110 (2) . . . . . **4:110**; **Intro before Art 6:201** [16]; **6:205**; **6:205** [8]
Art 4:111 . . . . . **1:305** [11]; **4:111**; **4:111** [6]–[7]; **4:114** [5]; **10:205** [11]
Art 4:111 (1) . . . . . **4:111**; **4:111** [6]
Art 4:111 (2) **4:111**
Art 4:112 . . . . . **1:107** [1]; **1:303** [1], [11]; **4:112**; **4:112** [1], [4]; **14:101** [8]
Art 4:112–4:116 . . . . . **3:205**
Art 4:113 . . . . . **4:113**; **4:113** [1], [3]; **4:117**; **14:101** [8]
Art 4:113 (1) . . . . . **4:113**; **4:113** [4]
Art 4:113 (2) **4:113**
Art 4:113 (3) . . . . . **1:302** [1]
Art 4:114 . . . . . **4:114**; **4:114** [1], [3], [6]; **4:117**; **4:118** [2]
Art 4:115 . . . . . **1:302** [5]; **4:115**; **4:115** [1]–[3]; **Intro before Art 9:305** [1], [16], [19]; **9:306** [6], [15]–[16], [32], [34]; **15:104** [12]; **16:105** [4]
Art 4:116 . . . . . **4:116**; **4:116** [1]; **6:204**; **6:204** [3], [5]; **9:306** [6]; **15:103** [5], [7]
Art 4:117 . . . . . **2:406** [14]; **4:103** [23]; **4:106** [2]; **4:117**; **4:117** [1]–[6]; **9:502** [6]; **15:105** [3]–[4]
Art 4:117 (1) . . . . . **4:117**; **4:117** [1], [4]
Art 4:117 (2) . . . . . **2:406** [5]; **4:102** [5]; **4:106**; **4:106** [7]; **4:117**; **4:117** [1], [4]
Art 4:117 (3) . . . . . **2:406** [5]; **4:106**; **4:106** [7]; **4:117**
Art 4:118 . . . . . **4:118**; **4:118** [1]–[2]
Art 4:118 (1) . . . . . **4:118**; **4:118** [2]
Art 4:118 (2) . . . . . **2:406** [18]; **4:118**; **4:118** [4]
Art 4:119 . . . . . **2:406** [14]; **4:115** [1]; **4:119**; **4:119** [1]–[3]
Art 5:101 . . . . . **1:107** [11], [19], [25]; **1:201** [85]; **1:305** [1]; **2:102** [1]; **2:202** [13]; **2:203** [7]; **Intro before Art 5:101** [3]–[4], [11], [14], [22]; **5:101**; **5:101** [1]–[5], [8]–[10], [14]–[15]; **5:102** [1]
Art 5:101 (1) . . . **1:107** [11]; **2:201** [5]; **5:101**; **5:101** [1]–[4], [10]–[11], [15]; **5:102**; **5:102** [6]
Art 5:101 (2) . . . . . **1:107** [11], [19], [25], [31]; **2:201** [5]; **4:104** [2], [8]; **Intro before Art 5:101** [19]; **5:101**; **5:101** [1]–[2], [8], [10]; **6:103** [2]
Art 5:101 (3) . . . . **1:107** [11]; **1:302** [1]; **2:406** [9]; **5:101**; **5:101** [1]–[3], [5], [10]
Art 5:101 (5) . . . . . **1:107** [25]
Art 5:102 . . . . . **1:105** [7]; **Intro before Art 5:101** [3]–[4], [11]; **5:101** [9], [14]; **5:102**; **5:102** [1]; **5:105** [1], [9], [11]; **5:106** [6]
Art 5:102 (a) . . . . . **5:105** [7]; **7:106** [7]
Art 5:102 (c) . . . . . **7:106** [7]
Art 5:102 (d) . . . . . **5:105** [7]
Art 5:102 (g) . . . . . **1:201** [2]
Art 5:103 . . . . **2:402** [22]; **Intro before Art 5:101** [3]–[4], [11]; **5:103**; **5:103** [1], [4]–[5]; **Intro before Art 6:201** [13], [15]; **8:109** [2]
Art 5:104 . . . **Intro before Art 5:101** [3]–[4], [11]; **5:104**; **5:104** [1]–[2]; **5:105** [9]
Art 5:104–5:107 . . . . . **Intro before Art 5:101** [3]
Art 5:105 . . . . **Intro before Art 5:101** [3]–[4], [11]; **5:102** [6]–[7]; **5:104** [3]; **5:105**; **5:105** [1]–[4], [7]-8, 10-11; **5:106** [6]
Art 5:106 . . . . **Intro before Art 5:101** [3]–[4], [11]; **5:106**; **5:106** [1], [3], [6]–[7]
Art 5:107 . . . . **Intro before Art 5:101** [3]–[4], [11]; **5:107**; **5:107** [1]–[2]
Art 6:101 . . . . . **Intro before 6:101** [2]; **6:101**; **6:101** [1]–[4], [8], [11]
Art 6:101 (1) . . . . . **2:301** [19]; **Intro before 6:101** [1]–[2]; **6:101**; **6:101** [1], [3]–[5],11; **6:110** [9], [18]
Art 6:101 (2) . . . . . **6:101**; **6:101** [2], [7]–[8]; **6:110** [42]
Art 6:101 (3) . . . . . **6:101**; **6:101** [1]–[2], [7]–[8]
Art 6:102 . . . . . **1:201** [85]; **1:202** [8], [10]; **Intro before Art 5:101** [16]; **Intro before 6:101** [2], [4]; **6:101** [3]; **6:102**; **6:102** [6], [16]–[18]; **6:201** [12], [18]; **9:501 (1)** [8]–[9]
Art 6:102 (a) **6:102**
Art 6:102 (b) **6:102**
Art 6:102 (c) . . . . . **1:201** [2]; **6:102**
Art 6:103 . . . . . **5:101** [10]; **6:103**; **6:103** [1]–[2], [7], [10]; **6:104** [1]
Art 6:104 . . . . **1:302** [1]; **2:402** [21]; **Intro before 6:101** [5]; **6:104**; **6:104** [1], [11]; **7:108** [7]; **18:201** [4]
Art 6:104–6:106 . . . . . **Intro before 6:101** [2], [4]; **6:104** [10]
Art 6:104–6:108 . . . . . **6:104** [11]
Art 6:105 . . . . . **1:302** [1], [5]; **6:104** [1]; **6:105**; **6:105** [1], [3], [6]; **6:106** [11]; **16:101** [10]
Art 6:106 . . . . . **6:104** [1]; **6:106**; **6:106** [1], [10]; **6:107** [3]
Art 6:106 (1) **6:106**
Art 6:106 (2) **6:106**
Art 6:107 . . . . . **6:107**; **6:107** [1]–[2]
Art 6:108 . . . . . **Intro before 6:101** [2]; **6:108**; **6:108** [1], [4]–[7]; **18:203 (2)** [2]
Art 6:109 . . . . . **1:107** [1]; **6:109**; **6:109** [1], [5], [8]; **Intro before Art 9:305** [2]

Art 6:110 . . . . . **Intro before 6:101** [1]; **6:110**; **6:110** [4], [6], [9], [19], [22], [26], [33], [45], [50], [57]; **Intro before Art 12:101** [4]; **12:101** [11]
Art 6:110 (1) . . . . . **6:110**; **6:110** [7], [17], [20], [24], [26]
Art 6:110 (2) . . . . . **6:110**; **12:101** [10]
Art 6:110 (3) . . . . . **6:110**; **6:110** [45]–[46]
Art 6:110 (3)(a) . . . . . **6:110** [50]
Art 6:111 . . . . **6:111**; **6:111** [2]–[3], [17], [19]–[25]; **6:201** [8], [12]; **8:103** [15]; **8:105** [1]; **8:108** [19], [25]; **9:102 (2)–(3)** [27]; **Intro before Art 9:305** [2]
Art 6:111 (1) . . . . **Intro before Art 1:101** [6]; **6:111**
Art 6:111 (2) **6:111**
Art 6:111 (2)(b) . . . . . **1:302** [1]
Art 6:111 (3) . . . . . **1:201** [2]; **6:111**
Art 6:111 (3)(a) . . . **Intro before Art 9:305** [2], [19]; **9:306** [24]; **15:103** [11]
Art 6:111 (3)(b) . . . . . **6:111** [24]
Art 7:101 . . . . . **7:101**; **7:101** [7], [9], [11]; **7:104**; **11:306** [7]
Art 7:101 (1) . . . . . **7:101**; **7:101** [6]
Art 7:101 (1)(a) . . . . . **7:101** [8]; **9:508-2 (5)** [6]
Art 7:101 (1)(b) . . . . . **7:101** [7]–[8]
Art 7:101 (2) . . . . . **7:101**; **7:101** [10]
Art 7:101 (3) . . . . . **7:101**; **7:101** [9]
Art 7:102 . . . . . **7:102**; **7:102** [1], [8]; **9:101** [9]; **9:501 (1)** [13]; **14:203** [2]
Art 7:102 (1) . . . . . **7:102**; **7:102** [5]; **9:501 (1)** [11]
Art 7:102 (2) . . . . . **7:102**; **7:102** [6]–[7]; **9:501 (1)** [11]
Art 7:102 (3) . . . . . **7:102**; **7:102** [8]; **7:104** [5]; **9:501 (1)** [11]
Art 7:103 . . . . . **7:102** [1]; **7:103**; **7:103** [5]–[6]; **7:109** [6]
Art 7:103 (1) . . . . . **7:103**; **7:103** [4]
Art 7:103 (2) . . . . . **7:103**; **7:103** [7]
Art 7:104 . . . . **7:104** [1], [4], [6]–[9]; **8:105** [14]; **9:201** [10]; **16:101** [4]; **19:301** [5], [8]
Art 7:105 . . . . . **7:105**; **7:105** [1], [5], [7]; **9:102 (1) App** [6]
Art 7:105 (1) . . . . . **7:105**; **7:105** [4]–[5]
Art 7:105 (2) **7:105**
Art 7:105 (2)(b) . . . . . **7:105** [6]
Art 7:106 . . . . **7:106**; **7:106** [6], [11]; **10:101** [12]; **Intro before Art 12:101** [4]
Art 7:106 (1) . . . . . **7:106**; **7:106** [7], [10]
Art 7:106 (1)(a) . . . . . **7:106** [6]–[8]
Art 7:106 (1)(b) . . . . . **7:106** [9]
Art 7:106 (2) . . . . . **7:106**; **7:106** [10]
Art 7:106 (2)(a) . . . . . **7:106** [9]
Art 7:106 (2)(b) . . . . . **7:106** [9]
Art 7:107 . . . . . **7:107**
Art 7:107 (1) . . . . . **7:107**; **7:107** [4]–[5], [7]
Art 7:107 (2) . . . . . **7:107**; **7:107** [6]
Art 7:108 . . . . . **7:108**; **7:108** [5]; **9:510** [1]
Art 7:108 (1) . . . . . **7:108**; **7:108** [5]–[6]
Art 7:108 (2) . . . . . **7:108**; **7:108** [9]–[10]
Art 7:108 (3) . . . . . **7:105** [5]; **7:108**; **7:108** [10]
Art 7:109 . . . . . **7:105** [5]; **7:109**; **7:109** [1], [7], [14]; **13:105**
Art 7:109 (1) . . . . . **7:109**; **7:109** [14]
Art 7:109 (2) **7:109**
Art 7:109 (2)(b) . . . . . **7:109** [7]
Art 7:109 (3) . . . . . **7:109**; **7:109** [10]
Art 7:109 (4) . . . . . **7:109**; **7:109** [14]
Art 7:110 . . . **1:202** [5]; **7:110**; **7:110** [6]–[7], [12]; **7:111**; **9:101** [5], [21]; **10:203**; **18:202**
Art 7:110–7:111 . . . . . **10:203** [1]
Art 7:110 (1) . . . . . **7:110**; **7:110** [7]–[8]
Art 7:110 (2) **7:110**
Art 7:110 (2)(a) . . . . . **7.110** [9]
Art 7:110 (2)(b) . . . . . **7.110** [10]; **7.110** [13]
Art 7:110 (3) . . . . . **7:110**; **7.110** [11], [13]
Art 7:110 (4) **7:110**
Art 7:111 . . . **1:202** [5]; **7:110**; **7:110** [5], [10], [12]; **7:111**; **7:111** [1], [4]; **9:101** [5]; **10:203**
Art 7:111 (1) . . . . . **7:110** [7]
Art 7:112 . . . **7.112**; **7.112** [5]; **7.112** [7]; **8:104** [15]
Art 8:101 . . . . . **7:110** [5]; **Intro before Art 8:101** [28]; **8:101**; **8:101** [1], [11], [15], [17], [21]; **9:102 (1)** [20]; **9:102 (2)–(3)** [8]; **9:103** [1]; **Intro before Art 9:301** [2]; **9:301** [38]; **9:401** [12]; **9:501 (1)** [6]
Art 8:101 (1) . . . . . **8:101**; **8:101** [2]–[4], [7], [11]; **8:102** [1]; **9:101** [6]; **9:501 (1)** [6]
Art 8:101 (2) . . . . . **8:101**; **8:101** [9]–[10], [12]; **Intro before Art 9:101** [9]; **9:101** [1], [12]; **9:102 (2)–(3)** [8], [11]; **9:103** [2]–[3]; **9:401** [3]
Art 8:101 (3) . . **1:202** [5]; **8:101**; **8:101** [13]–[18]; **9:102 (2)–(3)** [10]; **9:201** [16]; **9:301** [53]; **9:504** [8]–[9]; **18:301** [3]; **18:304** [9]
Art 8:102 . . . . . **Intro before Art 8:101** [28]; **8:101** [21]; **8:102**; **8:102** [1], [3], [5]–[6], [9], [16]–[17]; **9:101** [11]; **9:103** [6], [13]; **9:501 (1)** [6], [10]
Art 8:103 . . . . **6:111** [21]; **7:105** [6]; **Intro before Art 8:101** [28]; **8:103**; **8:103** [1], [8], [13]–[16], [18]–[19]; **Intro before Art 9:301** [8], [11]; **9:301** [18], [20]; **9:501 (1)** [11]
Art 8:103 (a) . . . . . **8:103**; **8:103** [19]
Art 8:103 (b) . . . **8:103**; **8:103** [14]–[15], [17], [19]
Art 8:103 (c) . . . . . **1:305** [11]; **8:103**; **8:103** [18]; **9:301** [37]; **9:302** [15]
Art 8:104 . . . . . **Intro before Art 8:101** [23], [28]; **8:101** [7], [21]; **8:103** [16]; **8:104**; **8:104** [1], [3], [8]–[13], [15], [17], [20], [25], [31]; **8:106** [2]; **9:102 (1)** [45]; **9:102 (2)–(3)** [46]; **9:304** [8]; **9:401** [16]

Art 8:105 . . . . . **Intro before Art 8:101** [28]; **8:105**; **8:105** [1]–[3], [5], [7]–[8], [10], [14]; **9:201** [13]; **Intro before Art 9:301** [11]; **9:304** [7], [9]
Art 8:105 (1) . . . . . **8:105**; **8:105** [8]–[9], [14]; **9:304** [9]
Art 8:105 (2) . . . . . **8:105**; **8:105** [12]–[13]; **9:301** [1]
Art 8:106 . . . . . **1:107** [4], [28]; **1:303** [1]; **Intro before Art 8:101** [16], [28]; **8:101** [21]; **8:106** [1], [3]–[6], [10]; **9:301** [12], [16], [18], [37], [43], [46]–[47]; **10:101** [12]; **10:203** [2]; **10:205** [3]
Art 8:106 (1) . . . . **8:106**; **8:106** [1], [3]; **9:301** [18]
Art 8:106 (2) . . . . . **8:102** [4], [16]; **8:106**; **8:106** [1], [3], [9]; **9:301** [12], [18], [48]
Art 8:106 (3) . . . . . **Intro before Art 8:101** [16]; **8:103** [16]; **8:104** [20]; **8:106** [1], [4]; **Intro before Art 9:301** [11]; **9:301**; **9:301** [18], [43]–[44], [47]; **9:302** [8]; **9:303** [1]
Art 8:107 . . . . . **1:305** [12]; **7:106** [5]; **Intro before Art 8:101** [28]; **8:107**; **8:107** [1]; **8:107** [3], [5]–[6]; **8:108** [17], [21]
Art 8:108 . . . . . **1:202** [10]; **4:102** [5]; **6:111** [21]; **Intro before Art 8:101** [28]; **8:101**; **8:101** [8], [11]; **8:103** [17]; **8:108**; **8:108** [1], [18]–[25], [28]; **9:101** [12]; **9:102 (2)–(3)** [8]–[9], [11], [15], [33]; **9:103** [2], [5]; **9:301** [38]–[39]; **9:303**; **9:303** [1], [11]; **9:501 (1)**; **9:501 (1)** [6]–[8]; **9:504** [9]; **9:508** [9]; **10:101** [11]; **10:104** [1]; **14:303** [1]; **15:102** [15]; **18:304** [8]
Art 8:108 (1) . . . **1:302** [1]; **8:108**; **8:108** [14], [21]; **9:501 (1)** [8]–[9]
Art 8:108 (2) . . . . . **8:108**; **8:108** [1], [26]; **9:102 (2)–(3)** [15]; **9:301** [42]
Art 8:108 (3) . . . . . **8:108**; **8:108** [27]; **9:301** [39]
Art 8:109 . . . . . **Intro before Art 8:101** [3], [28]; **8:109**; **8:109** [1], [4]–[5], [7]
Art 9:101 . . . . . **8:101** [8], [9]; **Intro before Art 9:101** [3]; **9:101**; **9:101** [1], [3], [6], [9], [12], [14]–[16], [19], [21]; **9:501 (1)** [11]
Art 9:101–9:103 . . . . . **14:101** [5]
Art 9:101 (1) . . . . . **9:101**; **9:101** [6], [10], [14]; **9:102 (1)** [3]
Art 9:101 (2) . . . . . **9:101**; **9:101** [1], [21]; **9:103** [1]–[2], [5]
Art 9:101 (2)(a) . . . . . **9:101** [14]–[15], [18], [23]; **9:103** [5]
Art 9:101 (2)(b) . . . . . **9:101** [19]–[20], [23]
Art 9:101 (2)(d) . . . . . **9:101** [15]; **9:103** [5]
Art 9:102 . . . . . **8:101** [8], [9]; **Intro before Art 9:101** [3], [5]; **9:102 (1)** [1], [3], [7]–[8], [10], [20], [22]–[24], [26], [41], [43], [45]; **9:102 (2)–(3)** [1]–[2], [5]–[6], [13]–[15], [18], [27], [29]–[31], [36]–[38], [43], [45]; **9:302** [14]; **10:101** [3]; **16:102** [5]
Art 9:102 (1) . . . . . **Intro before Art 9:101** [6]; **9:101** [10]; **9:102 (1)**; **9:102 (1)** [1], [3], [8], [22]–[25], [40]; **9:301** [12]
Art 9:102 (2) . . . . . **9:101** [14]; **9:102 (1)** [1], [20], [22]–[23]; **9:102 (1) App** [10]; **9:102 (2)–(3)**; **9:103** [1]–[3], [5]; **16:102** [5]
Art 9:102 (2)(a) . . . . . **Intro before Art 8:101** [16]; **9:101** [12]; **9:102 (2)–(3)** [2], [7]–[8], [11], [13]–[14], [37]; **15:101** [15]; **15:102** [11], [15]; **16:102** [5]
Art 9:102 (2)(b) . . . . . **9:102 (2)–(3)** [5]–[6], [18], [27]; **9:103** [1]; **16:102** [5]
Art 9:102 (2)(c) . . . . **9:102 (2)–(3)** [7], [29], [32]; **16:102** [5]
Art 9:102 (2)(d) . . . . . **Intro before Art 9:101** [7]; **9:102 (1)** [45]; **9:102 (2)–(3)** [33], [36], [41]; **16:102** [5]
Art 9:102 (3) . . . . . **9:102 (1)** [1], [22]; **9:102 (2)–(3)**; **9:303** [22]
Art 9:103 . . . . . **Intro before Art 9:101** [9]; **9:101** [14], [19]; **9:102 (2)–(3)** [1], [8]; **9:103**; **9:103** [1]–[2], [5]; **9:301** [12]
Art 9:103 (2) . . . . . **9:301** [12], [18]
Art 9:201 . . . . . **8:105** [6]; **9:101** [4]; **9:201**; **9:201** [5], [9], [11]–[13]; **9:304** [8]; **10:202** [2]; **19:302**
Art 9:201 (1) . . . **7:104** [8]; **8:105** [1], [14]; **9:201**; **9:201** [15]
Art 9:201 (2) . . **8:105** [1], [8]; **9:201**; **9:201** [5], [13]
Art 9:301 . . . . . **6:112** [13]; **8:101** [19]; **8:103** [15]–[16]; **Intro before Art 9:301** [3]–[4]; **9:301**; **9:301** [1], [12], [18], [20], [50], [53]; **Intro before Art 9:305** [2], [13]; **9:306** [10]; **10:101** [12]; **10:202** [2]; **10:205** [3]; **16:102** [7]
Art 9:301–9:304 . . . . **Intro before Art 9:301** [1]–[2]
Art 9:301–9:309 . . . . . **Intro before Art 9:301** [1]
Art 9:301 (1) . . . . . **8:104** [20]; **8:106** [4]; **9:301**; **9:301** [18]; **9:501 (1)** [11]
Art 9:301 (2) . . . . . **8:103** [16]; **8:104** [20]; **8:106** [4]; **9:301**; **9:301** [18]
Art 9:301 (3) . . . . . **8:106** [1], [4]; **9:302** [8]
Art 9:301 (3)(b) . . . . . **8:104** [20]
Art 9:302 . . . . . **6:112** [4]–[5], [13]; **Intro before Art 9:301** [10]; **9:302**; **9:302** [5]–[9], [12]–[13], [15]; **9:304** [8]; **Intro before Art 9:305** [13]; **9:306** [10]; **10:103** [2]; **10:202** [2]
Art 9:303 . . . . . **1:107** [1]; **1:303** [1]; **8:105** [13]; **9:102 (2)–(3)** [8]; **9:103** [6]; **9:301** [39]; **9:303**; **9:303** [1], [9], [14], [17], [22], [24]
Art 9:303 (1) . . . . . **8:105** [13]; **9:303**; **9:303** [1], [6]; **14:101** [8]

Art 9:303 (2) . . . . . **1:305** [6]; **8:105** [13]; **9:102 (2)–(3)** [43]; **9:301** [51]; **9:303**; **9:303** [1], [14], [16], [18], [24]; **14:101** [8]
Art 9:303 (3) . . . . . **9:303**; **9:303** [1], [14], [22]
Art 9:303 (4) . . . . . **Intro before Art 8:101** [16]; **Intro before Art 9:101** [9]; **9:102 (2)–(3)** [12], [15]; **9:103** [5]; **9:301** [39], [42]; **9:303**; **9:303** [1], [11]
Art 9:304 . . . . . **8:103** [18]; **8:105** [1], [8]; **9:101** [19]; **9:201** [13]; **Intro before Art 9:301** [11]; **9:301** [1]; **9:302** [15]; **9:303** [24]; **9:304**; **9:304** [1], [3], [7], [10]–[11]; **16:101** [6]
Art 9:305 . . . . **4:115** [1]; **9:302** [14]; **Intro before Art 9:305** [1], [3]–[4], [7], [10], [13]; **9:305**; **9:305** [1], [3], [10], [12]
Art 9:305–9:309 . . . . . **4:115** [3]; **Intro before Art 9:301** [1]; **Intro before Art 9:305** [1]–[15]
Art 9:305 (1) . . . . . **8:102** [2]; **9:305**
Art 9:305 (2) . . . . . **9:305**; **9:305** [10]
Art 9:306 . . . . . **9:302** [14]; **9:306**; **9:306** [10]
Art 9:306–9:309 . . . . . **Intro before Art 9:305** [16], [19]; **9:305** [10]; **9:306** [2], [6]; **15:104** [12]
Art 9:307 . . . . **9:302** [14]; **Intro before Art 9:305** [13]; **9:306**; **9:306** [10], [15]–[16]; **14:101** [5]
Art 9:308 . . . . . **9:302** [14]; **9:306**; **9:306** [10], [35]; **18:202**
Art 9:309 . . . . . **9:305** [5]; **9:306**; **9:306** [21], [31]–[32], [34], [39]
Art 9:401 . . . . . **Intro before Art 8:101** [16]; **8:104** [12], [25]; **9:401**; **9:401** [1], [3], [10], [12]–[13]
Art 9:401 (1) . . . . . **9:401**; **9:401** [11], [15]
Art 9:401 (2) **9:401**
Art 9:401 (3) . . . . **8:102** [2], [6]; **9:401**; **9:401** [17]
Art 9:501 . . . . **1:305** [1]; **4:102** [5]; **9:501 (1)** [6], [8]–[9]; **9:501 (2)** [8]; **9:502** [2], [14]–[15]; **10:101** [11]
Art 9:501–9:510 . . . . . **Intro before Art 9:501** [1]
Art 9:501 (1) . . . . . **8:101** [8], [9]; **9:501 (1)**; **9:501 (1)** [6]–[7], [12]
Art 9:501 (2) . . . . . **9:501 (2)**
Art 9:501 (2)(a) . . . . . **9:501 (2)** [8]
Art 9:501 (2)(b) . . . . . **9:501 (2)** [10]
Art 9:502 . . . . . **9:501 (1)** [8]; **9:501 (2)** [10]; **9:502**; **9:502** [1]–[2], [5]–[8], [10]–[11]; **9:510** [2]
Art 9:502–9:507 . . . . . **9:501 (1)** [1]
Art 9:503 . . . . . **1:305** [1], [11]; **9:501 (1)** [7]; **9:502**; **9:502** [7]; **9:503**; **9:503** [1], [5]–[6], [12]
Art 9:504 . . . . . **4:117** [5]; **Intro before Art 8:101** [3]; **8:101** [18]; **9:502** [7]; **9:504**; **9:504** [5], [7]–[12], [15], [17]–[20]
Art 9:505 . . . . . **Intro before Art 8:101** [3]; **8:101** [18]; **9:502** [7]; **9:503** [2]; **9:504**; **9:504** [11]–[13], [15], [17]–[20]; **9:505**; **9:506** [4]
Art 9:505 (1) **9:504**; **9:505**
Art 9:505 (2) . . . . . **9:501 (1)** [14]; **9:504**; **9:505**; **9:506** [4]
Art 9:506 . . . . . **9:101** [14]; **9:103** [5]; **9:506**; **9:506** [1], [4]–[5]; **9:507** [1], [5]
Art 9:507 . . . . . **9:507**; **9:507** [4]
Art 9:508 . . . . . **Intro before Art 8:101** [16]; **9:301** [26]; **Intro before Art 9:501** [1]; **9:508**; **9:508** [3], [6], [8]–[10]; **9:508-1** [1]; **9:508-2 (1)** [4]
Art 9:508 (1) . . . . . **9:508**; **9:508** [9]; **9:508-2 (5)** [6]; **9:508-4**
Art 9:508 (2) . . . . . **9:508**; **9:508-2 (6)** [1]
Art 9:509 . . . . . **Intro before Art 9:501** [1]; **9:509**; **9:509** [1], [7], [11], [14], [18]–[19], [21]
Art 9:509 (1) **9:509**
Art 9:509 (2) . . . . . **9:509**; **9:509** [5], [17]
Art 9:510 . . . . . **7:108** [7]; **9:510**; **9:510** [2]–[3]
Art 10:101 . . . . . **10:101**; **10:101** [2]–[3], [12]; **10:103** [2]; **10:104** [1]
Art 10:101 (1) . . . . . **10:101**; **10:101** [1]
Art 10:101 (2) **10:101**
Art 10:101 (3) **10:101**
Art 10:102 . . . . . **10:102**; **10:102** [4], [7]
Art 10:102 (1) **10:102**
Art 10:102 (2) . . . . . **Intro before Art 10:101** [13]; **10:102**; **10:102** [4]
Art 10:102 (3) . . . . . **10:102**; **10:102** [7]
Art 10:103 . . . . . **10:103**
Art 10:103 (1) **10:104**
Art 10:104 . . . . . **10:101** [3]; **10:104**; **10:104** [1]; **10:205** [11]
Art 10:105 . . . . . **10:105**; **10:105** [2]–[3]
Art 10:105 (1) **10:105**
Art 10:105 (2) **10:105**
Art 10:106 . . . . . **10:106**; **10:106** [1], [5]; **10:107** [2]; **10:109**; **10:110**
Art 10:106 (1) **10:106**
Art 10:106 (2) . . . . . **10:106**; **10:106** [6], [10]; **10:107** [1]; **11:101** [13]
Art 10:106 (3) . . . . . **10:106**; **10:106** [3], [13]; **10:107** [3]; **10:108** [7]
Art 10:107 . . . . . **10:106** [10]; **10:107**; **10:205**
Art 10:107 (1) . . . . . **10:107**; **10:205** [4]; **Intro before Art 13:101** [12]–[13]; **13:101** [5]
Art 10:107 (2) . . . . . **10:107**; **10:205** [5]
Art 10:108 . . . . . **10:108**; **10:108** [3]
Art 10:108 (1) . . . . **10:108**; **10:108** [3], [7]; **10:205**

Art 10:108 (2) . . . . . **10:108**; **10:108** [2]
Art 10:108 (3) . . . . . **10:108**; **10:108** [7]
Art 10:109 . . . . . **10:109**; **10:205**; **10:205** [9]
Art 10:109 (a) **10:109**
Art 10:109 (b) **10:109**
Art 10:110 . . . . . **10:110**; **10:110** [4]; **10:205**; **10:205** [10]
Art 10:110 (a) **10:110**
Art 10:110 (b) **10:110**
Art 10:111 . . . . . **10:111**; **10:111** [1]
Art 10:111 (1) . . . . . **10:111**; **10:111** [1]; **10:205**; **10:205** [11]
Art 10:111 (2) . . . . **10:111**; **10:111** [1]; **10:205** [11]
Art 10:201 . . . . . **10:111** [7]; **Intro before Art 10:201** [6]; **10:201**; **10:201** [6]–[10]; **10:203** [3]; **10:205** [3]
Art 10:201 (1) **10:201**
Art 10:201 (2) **10:201**
Art 10:201 (3) **10:201**
Art 10:202 . . . . . **10:202**
Art 10:203 . . . . . **10:203**; **10:203** [3]
Art 10:204 . . . . . **10:204**; **10:204** [2]
Art 10:204 (1) **10:204**
Art 10:204 (2) **10:204**
Art 10:205 . . . . . **10:204** [2]; **10:205**; **10:205** [1]–[6], [8], [11]
Art 10:205 (1) . . . . . **10:205**; **10:205** [6]
Art 10:205 (2) . . . . . **10:205**; **10:205** [4]–[5], [9]–[11]; **Intro before Art 13:101** [12]–[13]; **13:101** [5]
Art 11:101 . . . . . **Intro before Art 11:101** [1], [18], [20], [24]; **11:101**; **11:101** [2], [4]–[5], [9], [12], [15]; **11:102** [6]
Art 11:101 (1) . . . . . **11:101**; **11:101** [3]
Art 11:101 (2) . . . . . **11:101**; **11:102** [1]
Art 11:101 (3) **11:101**
Art 11:101 (3)(a) . . . . . **11:101** [15]
Art 11:101 (3)(b) . . . . . **11:101** [15]
Art 11:101 (4) . . . . . **11:101**; **11:101** [8]
Art 11:101 (5) . . . . . **11:101**; **11:101** [8]
Art 11:102 . . . . . **11:102**; **11:102** [1], [8]–[10]
Art 11:102 (1) . . . . . **6:202** [12]; **11:102**; **11:102** [1]
Art 11:102 (2) . . . . . **11:102**; **11:102** [6], [8], [10]
Art 11:103 . . . . . **11:103**; **11:103** [2]–[5], [9]; **11:306** [2], [7]
Art 11:104 . . . **11:103** [1]; **11:104**; **11:104** [1]–[2], [6]–[7]; **11:306** [4]
Art 11:201 . . . . . **Intro before Art 11:101** [15]; **11:201**; **11:201** [1], [4], [9]
Art 11:201–11:204 . . . **Intro before Art 11:101** [15]
Art 11:201 (1) . . . . . **11:101** [5]; **11:201**
Art 11:201 (1)(b) . . . . . **11:201** [8]
Art 11:201 (2) . . . . **11:201**; **11:201** [1]; **12:201** [9]
Art 11:202 . . . . . **11:101** [13]; **11:102** [8]–[9]; **11:202**; **11:401**
Art 11:202 (1) . . . . . **Intro before Art 11:101** [17]; **11:202**
Art 11:202 (2) . . . . . **11:102** [12]; **11:202**
Art 11:203 . . . . . **11:203**; **11:203** [1], [4]–[6]; **11:301** [9], [14]; **11:302** [4]
Art 11:204 . . . . **1:201** [7]; **11:204**; **11:204** [1]–[6]; **11:308** [2]; **Intro before Art 13:101** [12],14; **13:101** [5]
Art 11:204 (a) **11:204**
Art 11:204 (a)(i) . . . . . **11:204** [5]; **11:301** [14]; **11:302** [9]
Art 11:204 (a)(ii) . . . . . **11:204** [4]
Art 11:204 (a)(iii) . . . . . **11:204** [5]
Art 11:204 (b) . . . . . **11:204**; **11:204** [1], [7]
Art 11:204 (c) . . . . . **11:201** [7]; **11:204**; **11:204** [1], [8]
Art 11:301 . . . . . **11:102**; **11:102** [8]; **11:103** [4]; **11:203** [3]; **11:204** [5]; **11:301**; **11:301** [1], [9]–[10]; **11:303**
Art 11:301–11:308 . . . . . **Intro before Art 11:101** [15]
Art 11:301 (1) . . . . . **6:202** [12]; **11:301**
Art 11:301 (1)(b) . . . . . **11:203** [4]; **11:301** [11]
Art 11:301 (1)(c) . . . . . **11:301** [10]
Art 11:301 (2) . . . . . **11:301**; **11:301** [15]
Art 11:302 . . . . . **11:102**; **11:103** [8]–[9]; **11:203** [3]; **11:204** [5]; **11:301** [14]; **11:302**; **11:302** [1], [3]–[4], [9]; **11:303**; **11:306** [7]–[8]; **11:307** [1]
Art 11:303 . . . . . **11:303**; **11:303** [3], [13], [18], [24]; **11:304**; **11:305** [1], [4]; **11:307** [1], [6]; **11:308** [1]
Art 11:303–11:305 . . . . . **11:303** [1]
Art 11:303 (1) . . . . . **11:303**; **11:303** [13], [18], [20]; **11:307**; **11:308**; **Intro before Art 13:101** [12], [14]; **13:101** [5]
Art 11:303 (2) . . . . . **11:303**; **11:303** [23]
Art 11:303 (3) . . . . . **11:303**; **11:303** [13], [24]
Art 11:303 (4) . . . . . **11:303**; **11:303** [13], [24]
Art 11:304 . . . . . **Intro before Art 11:101** [20]–[21]; **11:303** [3], [13], [17]; **11:304**; **11:305** [1], [4]
Art 11:305 . . . . . **11:303** [3], [18]; **11:305**; **11:305** [1], [3], [9]–[10]
Art 11:306 . . . . . **11:103** [8]; **11:302** [1], [8]; **11:306**; **11:306** [1]–[4], [7], [9]–[10]
Art 11:306 (1) . . . . . **11:306**; **11:306** [2], [4]
Art 11:306 (2) . . . . . **11:306**; **11:306** [3]
Art 11:307 . . . . . **11:303**; **11:303** [16]; **11:307**; **11:307** [1]–[2], [5]; **12:101** [8]; **12:201** [8]
Art 11:307 (1) **11:307**
Art 11:307 (2) . . . . . **11:306** [4]; **11:307**; **12:102** [5]; **Intro before Art 13:101** [12], [14]; **13:101** [5]

Art 11:307 (2)(a) . . . . . **11:307** [4]–[6]
Art 11:307 (2)(b) . . . . . **11:307**; **11:307** [7]
Art 11:308 . . . . . **1:201** [7]; **11:303**; **11:303** [3]; **11:308**; **11:308** [1]–[2]
Art 11:401 . . . . . **Intro before Art 11:101** [15]; **11:102** [12]; **11:303** [7]; **11:305** [4], [6]; **11:401**
Art 11:401 (1) . . . . . **11:305** [3], [5]; **11:401**
Art 11:401 (2) **11:401**
Art 11:401 (3) . . . . . **Intro before Art 11:101** [17]; **11:301** [9]; **11:401**
Art 11:401 (4) . . . . . **Intro before Art 11:101** [17]; **11:301** [9]; **11:401**
Art 12:101 . . . . . **Intro before Art 12:101** [4]; **12:101**; **12:101** [5]–[6], [16]; **12:201** [6]
Art 12:101 (1) . . . . . **12:101**; **12:101** [4], [7], [12]; **12:201** [7], [9]
Art 12:101 (2) . . . . . **12:101**; **12:101** [5]; **12:201** [6]
Art 12:102 . . . . . **Intro before Art 12:101** [11]; **12:102**; **12:102** [1], [5]–[6]; **Intro before Art 13:101** [12], [14]
Art 12:102 (1) . . . . . **12:102**; **12:102** [4]
Art 12:102 (2) . . . . . **12:102**; **12:102** [8]
Art 12:102 (3) . . . . . **12:102**; **12:102** [8]
Art 12:102 (4) . . . . . **12:102**; **12:102** [2]
Art 12:201 . . . . . **1:106 (2)** [4]; **11:201**; **11:201** [1]; **12:201**; **12:201** [3], [8]
Art 12:201 (1) . . . . . **12:201**; **12:201** [6]
Art 12:201 (2) . . . . . **12:201**; **12:201** [8]–[9]; **Intro before Art 13:101** [12], [14]; **13:101** [5]
Art 13:101 . . . . . **9:102 (1)** [2]; **10:107** [2]; **10:111** [5]; **10:205** [12]; **Intro before Art 13:101** [21], [27]; **13:101**; **13:101** [10], [20], [25], [32]
Art 13:101–13:107 . . . **Intro before Art 13:101** [12]
Art 13:101 (a) **13:101**
Art 13:101 (b) **13:101**
Art 13:102 . . . . . **13:101** [26]; **13:102**; **13:102** [4]–[5]
Art 13:102 (1) **13:102**
Art 13:102 (2) **13:102**
Art 13:103 . . . . . **13:103**; **13:103** [4]–[5]
Art 13:104 . . . . . **1:107** [1]; **1:303** [1], [7]–[8], [14]; **9:102 (1)** [2]; **Intro before Art 13:101** [19]; **13:104**; **13:104** [8]; **14:503** [2]
Art 13:105 . . . . . **Intro before Art 13:101** [27]; **13:105**; **13:105** [4]–[5]
Art 13:105 (1) **13:105**
Art 13:105 (2) **13:105**
Art 13:106 . . . . . **1:303** [3]; **13:106**; **13:106** [6]–[7]; **14:503** [2]
Art 13:107 . . . . . **13:107**; **13:107** [5], [10], [15], [30]
Art 13:107 (a) **13:107**
Art 13:107 (b) **13:107**
Art 13:107 (c) **13:107**
Art 14:101 . . . . . **Intro before Art 14:101** [1], [11]; **14:101**; **14:101** [3]–[6], [8]; **14:304** [1]; **14:501** [7]
Art 14:101–14:601 . . . . **Intro before Art 14:101** [11]
Art 14:201 . . . . . **2:301** [23]; **Intro before Art 14:101** [11]; **14:201**; **14:201** [2]; **14:307** [1]
Art 14:202 . . . . . **Intro before Art 14:101** [11]; **14:202**; **14:202** [1]–[2]; **14:203**; **14:203** [4]; **14:302 (1)–(2)** [1]–[2], [4]; **14:401**; **14:401** [3]; **14:402** [1]
Art 14:202 (1) **14:202**
Art 14:202 (2) **14:202**
Art 14:203 . . . . . **2:301** [23]; **Intro before Art 14:101** [11]; **14:203**; **14:203** [2]–[4]
Art 14:203 (1) . . . . . **2:301** [23]; **14:203**; **14:203** [1]–[2]; **14:307** [1]
Art 14:203 (2) . . . . . **14:203**; **14:203** [4]
Art 14:203 (3) **14:203**
Art 14:301 . . . . . **14:203** [1]; **Intro before Art 14:301** [1]; **14:301**; **14:301** [1]–[3]; **14:307** [1]; **14:401** [1]
Art 14:301–14:303 . . . . **Intro before Art 14:301** [1]
Art 14:301–14:307 . . . **Intro before Art 14:101** [11]; **Intro before Art 14:301** [1]
Art 14:301 (a) **14:301**
Art 14:301 (b) **14:301**
Art 14:302 . . . . . **14:302 (1)–(2)** [1], [4]; **14:302 (3)** [1]–[2]; **14:307**
Art 14:302 (1) . . . . . **14:302 (1)–(2)**; **14:302 (1)–(2)** [4]
Art 14:302 (2) . . . . . **14:203** [4]; **14:302 (1)–(2)**
Art 14:302 (3) . . . . . **14:302 (3)**; **14:302 (3)** [1]
Art 14:303 . . . . . **14:303**; **14:303** [1]–[2]; **14:304** [2]
Art 14:303 (1) **14:303**
Art 14:303 (2) **14:303**
Art 14:304 . . . . . **10:110** [3]; **14:302 (3)** [2]; **14:304**; **14:304** [1]–[4]
Art 14:304–14:306 . . . . . **Intro before Art 14:301** [1]; **14:303** [3]
Art 14:305 . . . . . **14:303** [2]; **14:305**; **14:305** [1]–[2], [4]; **14:306** [1]
Art 14:305 (1) **14:305**
Art 14:305 (2) . . . . . **14:305**; **14:305** [4]
Art 14:306 . . . . . **14:306**; **14:306** [1]
Art 14:307 . . . . . **14:201** [1]; **14:203** [1]; **14:302 (1)–(2)** [4]; **14:303** [3]; **14:304** [1]; **14:307**; **14:307** [2]–[3]
Art 14:401 . . . . . **Intro before Art 14:101** [11]; **Intro before Art 14:301** [1]; **14:401**; **14:401** [1]–[2]
Art 14:401 (1) . . . . . **Intro before Art 13:101** [12], [15]; **14:401**
Art 14:401 (2) . . . . . **14:401**; **14:401** [3]

Art 14:402 . . . . . **Intro before Art 14:301** [1]; **14:402**; **14:402** [1]
Art 14:501 . . . . . **14:501**; **14:501** [1]
Art 14:501–14:503 . . . . **Intro before Art 14:101** [11]
Art 14:501 (1) . . . . . **14:501**; **14:501** [2], [4]
Art 14:501 (2) **14:501**
Art 14:502 . . . . . **14:502**; **14:502** [1]
Art 14:503 . . . . . **Intro before Art 13:101** [12], [15]; **13:101** [15]; **14:503**
Art 14:601 . . . . . **Intro before Art 14:101** [11]; **14:601**; **14:601** [1]–[3]
Art 14:601 (1) **14:601**
Art 14:601 (2) **14:601**
Art 15:101 . . . . . **Intro before Art 15:101** [3]; **15:101**; **15:101** [6], [8], [11]–[13], [15]; **15:102** [8]; **15:103** [7]–[8], [11]; **15:104**; **15:104** [9]; **15:105**; **Intro before Art 16:101** [11], [13]; **16:105** [4]
Art 15:102 . . . . . **15:101** [12]–[14]; **15:102**; **15:102** [3], [5], [7], [9], [11], [13], [15]–[16], [22], [27]–[29], [31]; **15:103** [5], [8], [11]; **15:104**; **15:104** [9]; **15:105**; **Intro before Art 16:101** [11], [13]; **16:105** [4]
Art 15:102 (1) . . . . . **15:102**; **15:102** [4]–[5]; **15:104** [10]
Art 15:102 (2) . . . . . **15:102**; **15:102** [16], [28]; **15:103** [5], [11]
Art 15:102 (3) . . . . . **15:102**; **15:102** [16], [28], [32]; **15:103** [5]–[6], [8]; **15:104** [11]; **15:105**; **15:105** [4]
Art 15:102 (3)(a)–(c) . . . . . **15:102** [28]–[29]
Art 15:102 (3)(b) . . . . . **Intro before Art 9:305** [32]
Art 15:102 (3)(d) . . . . . **15:102** [31]
Art 15:102 (3)(d)–(g) . . . . . **15:102** [28], [31]
Art 15:102 (3)(e) . . . . . **15:102** [10], [31]
Art 15:102 (3)(f) . . . . . **15:102** [31]
Art 15:103 . . . . . **4:116** [2]; **15:102** [25]; **15:103**; **15:103** [5]–[8], [11]; **15:104** [9]
Art 15:103 (1) **15:103**
Art 15:103 (2) . . . . . **15:103**; **15:103** [8]; **15:104** [9]; **15:105** [5]
Art 15:104 . . . . . **2:302** [18]; **4:115** [3]; **Intro before Art 9:305** [1], [16], [19], [31]; **9:306** [6], [11]–[12], [15]; **15:101** [10]; **15:103**; **15:104**; **15:104** [8]–[9], [12]; **15:105** [4]; **16:105** [4]
Art 15:104 (1) . . . . . **15:104**; **15:104** [8]–[9], [12]
Art 15:104 (2) . . . . . **9:306** [6]; **15:104**; **15:104** [8], [11]
Art 15:104 (3) . . . . . **9:306** [6]; **15:104**; **15:104** [11]
Art 15:104 (4) . . . . **9:306** [21]; **15:104**; **15:104** [12]
Art 15:105 . . . . . **9:502** [6]; **15:102** [7]; **15:103**; **15:105**; **15:105** [4]–[5]
Art 15:105 (1) . . . . . **15:105**; **15:105** [4]
Art 15:105 (2) . . . . . **15:105**; **15:105** [4]
Art 15:105 (3) . . . . **15:104** [11]; **15:105**; **15:105** [4]
Art 16:101 . . . . . **Intro before Art 16:101** [10]; **16:101**; **16:101** [1]–[6]; **16:103** [1]
Art 16:101–16:103 . . . . . **16:101** [4]; **16:104** [1]
Art 16:102 . . . . . **16:102**; **16:102** [2], [4]–[6]; **16:103** [3]; **16:104** [1]
Art 16:102 (1) **16:102**
Art 16:102 (2) **16:102**
Art 16:103 . . . . . **16:103**; **16:103** [1], [6]; **16:105** [2], [4]
Art 16:103 (1) **16:103**
Art 16:103 (2) **16:103**
Art 17:101 . . . . . **Intro before Art 9:501** [1]; **9:508** [1], [6]; **9:508-4**; **9:508-4** [1]–[3], [5]
Art 17:101 (1) . . . . . **9:508-4**; **9:508-4** [5]
Art 17:101 (2) . . . . . **9:508-4**; **9:508-4** [5]

PEL SC (Principles of European Law, Service Contracts, 2007)
Art 1:101 . . . . . **19:101** [9]–[10], [15], [20]
Art 1:101 (1) . . . . . **19.101**; **19:301** [5]–[6]
Art 1:101 (2) . . . . . **19.101**; **19:301** [5], [7]
Art 1:101 (3) **19.101**
Art 1:101 (4) . . . . . **19.101**; **19:101** [10], [15], [18]
Art 1:101 (5) . . . . . **19.101**; **19:101** [10], [19]
Art 1:102 . . . . . **19:203**; **19:301**
Art 1:102 (1) **19:203**; **19:301**
Art 1:102 (2) . . . . . **19:203**; **19:203** [4]; **19:301**; **19:301** [13]
Art 1:104 . . . . **19:302**; **19:302** [1], [4]–[5], [7]–[8]
Art 1:104 (1) **19:302**
Art 1:104 (1)(a) **19:302**
Art 1:104 (1)(b) **19:302**
Art 1:104 (2) . . . . . **19:302**; **19:302** [8]
Art 1:104 (3) . . . . . **19:302**; **19:302** [8]
Art 1:105 . . . . . **19:101** [6]
Art 1:106 . . . . . **7:106**; **7:106** [6]; **8:107**; **8:107** [4]
Art 1:106 (2) . . . . . **8:107** [4]
Art 1:107 . . . . . **19:201**; **19:201** [5]; **19:202**; **19:202** [4]
Art 1:107 (1) **19:201**
Art 1:107 (2) **19:201**
Art 1:107 (3) **19:201**
Art 1:107 (4) **19:201**
Art 1:107 (5) . . . . . **19:202**; **19:202** [4], [6]
Art 1:108 . . . . . **19:201**; **19:201** [5]
Art 1:108 (a) **19:201**
Art 1:108 (b) **19:201**
Art 1:109 . . . . . **19:204**
Art 1:110 . . . . . **19:204** [4]; **19:302**
Art 1:110 (1) **19:204**
Art 1:110 (1)(c) . . . . . **19:204** [4]
Art 1:110 (2) **19:204**
Art 1:110 (3) **19:204**

Art 1:110 (4) . . . . . **19:204**; **19:204** [4]
Art 1:111 . . . . . **19:204**
Art 1:111 (1) . . . . . **19:204**; **19:204** [4]
Art 1:111 (2)(c) . . . . . **19:204**; **19:204** [4]
Art 1:111 (4) . . . . . **19:204**; **19:204** [4]
Art 1:111 (5) **19:204**
Art 1:111 (6) . . . . . **19:204**; **19:204** [4]
Art 1:115 . . . . . **19:204**
Art 1:115 (1) . . . . . **19:204** [4]
Art 1:115 (2) . . . . . **19:204** [4]
Art 1:115 (3) . . . . . **19:204** [4]
Art 2:102 . . . . . **19:302** [4]
Art 2:102 (a) **19:302**
Art 2:107 . . . . . **19:301**; **19:301** [5], [8]
Art 2:108 . . . . . **19:301**; **19:301** [5], [9]
Art 3:101 . . . . . **19:101** [10], [12]
Art 3:102 . . . . . **19:302** [1], [4]
Art 3:102 (a) **19:302**
Art 3:103 . . . . . **19:101** [6]; **19:202**
Art 3:104 . . . . . **19:202**; **19:202** [4]–[6], [8]–[11], [13]
Art 3:108 . . . . . **19:301**; **19:301** [5], [8]
Art 3:109 . . . . . **19:301**; **19:301** [5], [9]
Art 4:103 . . . . . **19:101** [6]
Art 4:108 . . . . . **19:301**; **19:301** [5], [8]
Art 4:110 . . . . . **19:301**; **19:301** [5], [9]
Art 7:102 . . . . . **19:101** [6]

PETL (Principles of European Tort Law, 2005)
Art 2:104 . . . . . **9:501 (1)** [14]
Art 3:101 . . . . . **9:501 (1)** [12]
Art 3:101–3:106 . . . . . **9:501 (1)** [13]
Art 3:103 . . . . . **9:501 (2)** [12]
Art 3:106 . . . . . **9:501 (2)** [12]
Art 9:101 . . . . . **10:102** [3]
Art 9:102 (2) . . . . . **10:105**; **10:105** [3]
Art 10:101 . . . . . **9:502** [2], [5], [15]
Art 10:103 . . . . . **9:502** [14]
Art 10:104 . . . . . **9:502** [2]
Art 10:301 . . . . . **9:501 (2)** [5]
Art 11:101 . . . . . **11:204** [5]

PICC[1994] (UNIDROIT Principles of International Commercial Contracts, 1994)
Art 2.16 . . . . . **2:302** [1]
Art 3.1 (b) . . . . . **Intro before Art 15:101** [3]
Art 3.5 . . . . . **4:103** [7]
Art 3.7 . . . . . **2:406** [14]

PICC[2004] (UNIDROIT Principles of International Commercial Contracts, 2004)
Art 3.1 (b) . . . . . **Intro before Art 15:101** [3]
Art 8.1 . . . . . **Intro before Art 13:101** [19]; **13:101** [11]
Art 8.1–8.5 . . . . . **Intro before Art 13:101** [12]
Art 8.4 . . . . . **13:105** [4]
Art 8.5 . . . . . **13:106** [7]
Art 9.1.8 . . . . . **Intro before Art 13:101** [14]
Art 9.1.9 . . . . . **Intro before Art 13:101** [14]
Art 9.2.7 (2) . . . . . **Intro before Art 13:101** [14]
Art 9.3.6 . . . . . **Intro before Art 13:101** [14]
Art 10.4 (1) . . . . . **Intro before Art 13:101** [15]
Art 10.5 . . . . . **Intro before Art 13:101** [15]
Art 10.10 . . . . . **Intro before Art 13:101** [15]

PICC[2010] (UNIDROIT Principles of International Commercial Contracts, 2010)
Art 8.1 . . . . . **Intro before Art 13:101** [19]; **13:101** [11]
Art 8.1–8.5 . . . . . **Intro before Art 13:101** [12]
Art 8.4 . . . . . **13:105** [4]
Art 8.5 . . . . . **13:106** [7]
Art 9.1.8 . . . . . **Intro before Art 13:101** [14]
Art 9.1.9 . . . . . **Intro before Art 13:101** [14]
Art 9.2.7 (2) . . . . . **Intro before Art 13:101** [14]
Art 9.3.6 . . . . . **Intro before Art 13:101** [14]
Art 10.4 (1) . . . . . **Intro before Art 13:101** [15]
Art 10.10 . . . . . **Intro before Art 13:101** [15]
Art 11.2.3 (1) . . . . . **Intro before Art 13:101** [13]
Art 11.2.3 (2) . . . . . **Intro before Art 13:101** [13]

PICC (UNIDROIT Principles of International Commercial Contracts, 2016)
Preamble . . . . . **1:101**; **1:106 (2)** [4]; **Intro before Art 5:101** [12]
Art 1.1 . . . . . **Intro before Art 1:101** [6], [10]; **1:102**; **1:102** [2]–[3], [5], [22]–[23]; **6:110** [31]; **9:509** [1]
Art 1.1–1.12 . . . . . **Intro before Art 1:101** [1]
Art 1.2 . . . . . **Intro before Art 1:101** [6]; **1:303** [15]; **2:101 (2)**; **2:101 (2)** [5], [17]; **3:201** [4]; **14:401** [2]
Art 1.3 . . . . . **Intro before Art 1:101** [6]; **1:106 (1)** [12]; **9:102 (1)** [10]; **Intro before Art 9:305** [4], [19]
Art 1.4 . . . **1:102**; **1:102** [2], [22]; **1:103**; **15:101** [9]–[10]; **15:102**; **15:102** [4]–[5], [8]
Art 1.5 . . . **1:102**; **1:102** [2], [22]; **1:106 (1)** [12]; **7:107** [4]; **7:108** [5]; **7:109** [5]; **7:112** [7]
Art 1.6 . . . . **Intro before Art 1:101** [8]; **1:102** [2]; **1:106 (1)** [1], [10]–[12]; **1:106 (2)** [3], [5]; **Intro before Art 5:101** [12], [18]
Art 1.6 (1) . . . . . **1:106 (1)**; **1:106 (1)** [5], [9]–[11], [14]; **1:106 (2)** [5]
Art 1.6 (2) . . . . . **1:106 (1)** [11]–[13]; **1:106 (2)**; **1:106 (2)** [1], [3]–[6]
Art 1.7 . . . . . **Intro before Art 1:101** [6], [9]–[10]; **1:201**; **1:201** [2], [7], [11]–[12], [34], [45], [53]–[55], [58], [78], [79], [85], [88], [96]; **1:202** [12]; **1:303** [30]; **2:301** [1], [4]; **5:102** [5]; **6:104** [11];

8:109 [7]; **9:101** [22]; **9:102 (2)–(3)** [20]; **14:304** [1]; **16:102** [2]
Art 1.7 (1) . . . . . **1:201**; **Intro before Art 2:401** [11]
Art 1.7 (2) . . . . **1:201**; **1:201** [54], [96]; **16:102** [1]
Art 1.8 . . . . . **1:106 (1)** [12]; **1:201** [93], [100]; **1:202** [5]; **1:303** [30]; **2:105** [3]; **2:301** [14]; **9:102 (2)–(3)** [45]; **15:105** [3]; **16:102** [2]
Art 1.9 . . . . . **Intro before Art 1:101** [8]; **1:105**; **1:105** [8], [13]; **9:101** [15], [22]
Art 1.9 (1) . . . . . **1:105**; **1:105** [8]
Art 1.9 (2) . . . . . **1:105**; **1:105** [13], [15]
Art 1.10 . . . . . **Intro before Art 1:101** [8]; **1:107** [7]; **1:303**; **1:303** [1], [7], [15]–[16], [23], [26]–[27], [30]–[32]; **9:303** [13]; **13:104** [8]
Art 1.10 (1) . . . . . **1:303**; **1:303** [15]
Art 1.10 (2) . . . . . **1:303**; **1:303** [8]–[9], [13]
Art 1.10 (3) . . . . . **1:303**; **1:303** [22], [28]
Art 1.10 (4) . . . . . **1:303**; **1:303** [7]–[8]
Art 1.11 . . . . . **Intro before Art 1:101** [8]; **1:106 (1)** [1]; **1:301**; **1:301** [1]; **6:112** [4], [15]; **7:101** [10]; **Intro before Art 9:305** [14]
Art 1.12 . . . . . **Intro before Art 1:101** [8]
Art 1.12 (1) . . . . . **1:304 (2)**; **1:304 (2)** [4]
Art 1.12 (2) . . . . . **1:304 (2)**
Art 2.1.1 . . . . . **2:101 (1)** [5]–[6]; **2:103** [7]; **2:211**; **2:211** [2]; **2:301** [7]
Art 2.1.2 . . . . . **2:201**; **2:201** [3]
Art 2.1.3 . . . . . **1:303** [32]; **2:202** [19]
Art 2.1.3 (1) . . . . . **1:303** [9]
Art 2.1.4 . . . . . **2:202**; **2:202** [12], [15]; **9:303** [13]
Art 2.1.4 (1) . . . . . **2:205** [3]
Art 2.1.4 (3) . . . . . **2:202** [16]
Art 2.1.5 . . . . . **1:303** [9]; **2:203**; **Intro before Art 9:305** [4]
Art 2.1.6 (1) **2:204**
Art 2.1.6 (2) . . . . . **1:303** [9]; **2:205**
Art 2.1.6 (3) **2:205**
Art 2.1.7 . . . . . **2:206**
Art 2.1.7 (1) . . . . . **2:206** [2]
Art 2.1.8 . . . . . **1:304 (1)**; **1:304 (1)** [9]–[10]; **2:206** [3]
Art 2.1.9 . . . . . **2:207**; **6:203** [6]
Art 2.1.9 (1) **2:207**
Art 2.1.9 (2) . . . . . **2:207**; **6:203**; **6:203** [6]
Art 2.1.10 . . . . . **1:303** [32]; **2:204** [5]
Art 2.1.11 . . . . . **2:208**; **2:208** [3]
Art 2.1.11 (1) . . . . . **2:208**; **2:208** [2]
Art 2.1.11 (2) . . . . . **2:208**; **2:208** [4]
Art 2.1.12 . . . . . **2:210**; **2:210** [1]–[2], [4]
Art 2.1.13 . . . . . **2:103**; **2:103** [5]–[7]; **2:204** [7]
Art 2.1.14 . . . . . **2:301** [2]; **6:104**; **6:104** [11]; **6:106** [11]
Art 2.1.14 (1) **6:104**
Art 2.1.14 (2) . . . . . **6:104**; **6:106** [1]
Art 2.1.14 (2)(b) . . . . . **6:106** [11]
Art 2.1.15 . . . . . **2:301**; **2:301** [4], [7], [23], [26]; **9:502** [6]; **16:104** [4]
Art 2.1.15 (1) **2:301**
Art 2.1.15 (2) . . . . . **2:301**; **9:502** [6]
Art 2.1.15 (3) . . . . . **2:301**; **2:301** [5]
Art 2.1.16 . . . . . **2:302**; **2:302** [8], [12]
Art 2.1.17 . . . . . **2:105**; **2:105** [3], [5]
Art 2.1.18 . . . . . **2:106**; **2:106** [6]
Art 2.1.19 . . . . . **2:104**; **2:104** [9], [11], [15]
Art 2.1.19 (1) . . . . . **2:104**; **2:104** [5]
Art 2.1.19 (2) **2:104**
Art 2.1.20 . . . . . **2:104**; **2:104** [4], [7]–[8]; **Intro before Art 6:201** [2]; **6:204** [1]; **8:109** [7]
Art 2.1.20 (1) **2:104**; **6:204**
Art 2.1.20 (2) **2:104**
Art 2.1.21 . . . . . **2:104**; **5:104**; **5:104** [2]–[3]
Art 2.1.22 . . . . . **2:104**; **2:209**; **6:204** [4]
Art 2.2.1 . . . . . **Intro before Art 3:101** [2]; **3:101**; **3:101** [4]
Art 2.2.1 (1) . . . . . **3:101**; **3:101** [2]–[3], [5]–[6]
Art 2.2.1 (2) . . . . . **3:101**; **3:101** [2]
Art 2.2.1 (3) . . . . . **3:101**; **3:101** [4]
Art 2.2.2 . . . . . **1:107** [1]; **3:201**
Art 2.2.2 (1) . . . . . **3:201**; **3:201** [2]–[3]
Art 2.2.2 (2) . . . . . **3:201**; **3:201** [6]
Art 2.2.3 . . . . . **3:102**; **3:102** [7], [12]; **3:302** [8]
Art 2.2.3 (1) . . . . . **3:102**; **3:102** [7], [12]; **3:202** [1]
Art 2.2.3 (2) . . . . . **3:102**; **3:102** [7], [12]
Art 2.2.4 . . . . . **3:302** [8]; **3:303** [3]
Art 2.2.4 (1) . . . . . **3:301**; **3:301** [1]
Art 2.2.4 (2) . . . . . **3:303**; **3:303** [3]–[4]; **3:304** [1]
Art 2.2.5 . . . . . **3:201**; **3:208** [2]
Art 2.2.5 (1) . . . . . **3:201**; **3:201** [11]
Art 2.2.5 (2) . . . . . **3:201**; **3:201** [9]–[11]
Art 2.2.6 . . . . . **1:201** [12]; **3:204**
Art 2.2.6 (1) . . . . . **3:204**; **3:204** [1]–[3], [5]
Art 2.2.6 (2) . . . . . **3:204**; **3:204** [4]
Art 2.2.7 . . . . . **3:205**; **3:205** [2], [6]; **15:102** [12]
Art 2.2.7 (1) . . . . . **3:205**; **3:205** [2]–[5], [7]
Art 2.2.7 (2) . . . . . **3:205**; **3:205** [6]
Art 2.2.7 (2)(a) . . . . . **3:205**; **3:205** [6]
Art 2.2.7 (2)(b) **3:205**
Art 2.2.8 . . . . . **3:201** [6]; **3:206**; **3:206** [2]–[4]
Art 2.2.9 . . . . . **3:207** [3]–[4]
Art 2.2.9 (1) . . . . . **3:207**; **3:207** [1]
Art 2.2.9 (2) . . . . . **3:208**; **3:208** [1]
Art 2.2.9 (3) . . . . . **3:208**; **3:208** [2]
Art 2.2.10 . . . . . **3:209**; **3:209** [2]
Art 2.2.10 (1) . . . . . **3:209**; **3:209** [2]
Art 2.2.10 (2) . . . . . **3:209**; **3:209** [4]
Art 3.1.1 . . . . . **4:116** [2]

Art 3.1.2 . . . . . **6:110** [29]; **Intro before Art 9:305** [4], [19]
Art 3.1.3 . . . . . **4:102**; **9:102 (2)–(3)** [14]; **10:101** [4]; **Intro before Art 16:101** [12]; **16:101** [9]
Art 3.1.3 (1) **4:102**
Art 3.1.3 (2) **4:102**
Art 3.1.4 . . . . . **4:118**; **4:118** [2], [4]
Art 3.2.1 . . . . . **4:103**; **4:115**
Art 3.2.1–3.2.5 . . . . . **12:101** [15]
Art 3.2.2 . . . . . **1:201** [12]; **Intro before Art 2:401** [11]; **4:103**; **4:103** [10], [12], [14]; **4:104** [6]; **12:101** [6]; **16:101** [9]
Art 3.2.2 (1) **4:103**
Art 3.2.2 (1)(a) . . . . . **4:103** [16]
Art 3.2.2 (2) **4:103**
Art 3.2.2 (2)(b) . . . . . **4:102** [5]
Art 3.2.3 . . . . . **4:104**
Art 3.2.4 . . . . . **2:406** [14]; **4:119**; **4:119** [1]
Art 3.2.5 . . **1:201** [12]; **Intro before Art 2:401** [11]; **2:406** [12]; **4:103** [10]; **4:107**; **4:107** [2]–[3], [5], [7]; **12:101** [6]
Art 3.2.6 . . . . . **4:108**; **4:108** [4]–[9]
Art 3.2.7 . . . . . **1:201** [12]; **4:109**; **4:109** [6]; **4:113**; **Intro before Art 9:305** [32]; **15:101** [6]
Art 3.2.7 (1) **4:109**
Art 3.2.7 (2) . . . . . **4:109**; **15:103** [11]
Art 3.2.7 (3) . . . . . **4:109**; **15:103** [11]
Art 3.2.8 . . . . . **4:111**; **4:111** [6]
Art 3.2.8 (1) . . . . . **4:111**; **4:111** [6]
Art 3.2.8 (2) **4:111**
Art 3.2.9 . . . . . **3:205**; **4:114**; **4:114** [1], [4]–[5]
Art 3.2.10 . . . . . **4:105**; **4:105** [1], [5]–[6]; **4:114** [5]
Art 3.2.10 (1) **4:105**
Art 3.2.10 (2) **4:105**; **4:109**
Art 3.2.11 . . . . . **1:107** [1]; **1:303** [1]; **4:112**
Art 3.2.11–3.2.15 . . . . . **3:205**
Art 3.2.12 . . . . . **4:113**; **4:113** [3]; **14:101** [10]
Art 3.2.12 (1) . . . . . **4:113**; **4:113** [4]
Art 3.2.12 (2) **4:113**
Art 3.2.13 . . . . . **4:116**; **4:116** [1], [4]–[5]; **15:103** [5]
Art 3.2.14 . . . . . **4:115**; **4:115** [1]; **9:305** [1], [9]; **16:105** [2]
Art 3.2.15 . . . . . **4:115**; **Intro before Art 9:305** [26]; **9:306** [7], [21], [25], [27], [29]–[30], [33]–[34], [36], [42], [46]; **15:104**; **15:104** [13]; **16:105**; **16:105** [2]
Art 3.2.15 (1) . . . . . **4:115**; **9:306** [15]
Art 3.2.15 (2) . . . . . **4:115**; **9:306** [21], [27], [32], [34]
Art 3.2.15 (3) . . . . . **4:115**; **9:306** [21]
Art 3.2.15 (4) **4:115**
Art 3.2.16 . . . . . **4:102** [5]; **4:117**; **9:502** [6]
Art 3.2.17 . . . . **Intro before Art 1:101** [8]; **1:107**; **1:107** [4], [8], [16], [29]–[30]; **6:110**
Art 3.3.1 . . . . . **4:101**; **4:101** [1]; **4:116** [2]; **15:101** [9], [15]; **15:102**; **15:102** [5], [7]–[9], [11]–[13], [15], [22], [24], [27]–[29], [31]; **15:103** [5], [11]; **15:104**; **15:104** [11]; **15:105** [3]; **Intro before Art 16:101** [13]
Art 3.3.1 (1) . . . . . **15:102**; **15:102** [4], [8]
Art 3.3.1 (2) . . . . . **15:102**; **15:102** [12], [27]
Art 3.3.1 (3) . . . . . **15:102**; **15:102** [12], [28]; **15:103** [6]–[7]; **15:104**
Art 3.3.1 (3)(b) . . . . . **Intro before Art 9:305** [32]
Art 3.3.1 (3)(e) . . . . . **15:102** [10], [31]
Art 3.3.1 (3)(f) . . . . . **15:102** [31]
Art 3.3.1 (3)(g) . . . . . **15:102** [31]
Art 3.3.2 . . . . **6:110**; **Intro before Art 9:305** [26]; **9:306** [7], [11]; **15:104**; **15:104** [7]–[12]; **15:105**
Art 3.3.2 (1) . . . . . **Intro before Art 9:305** [31]; **15:104**; **15:104** [8]
Art 3.3.2 (2) . . . . . **Intro before Art 9:305** [31]; **9:306** [11]; **15:104**; **15:104** [11]
Art 3.3.2 (3) . . . . . **9:306** [11]–[12], [15], [42]; **15:104**; **15:104** [13]
Art 3.5 . . . . . **4:103** [12]
Art 3.5 (1) . . . . . **4:103** [21]
Art 3.5 (1)(a) . . . . . **4:103** [10], [12]–[14]
Art 3.5 (2)(a) . . . . . **4:103** [24]
Art 3.8.2 (2) . . . . . **6:106** [11]
Art 3.10 . . . . . **8:109** [7]
Art 4.1 . . . **1:107** [25]; **Intro before Art 5:101** [4]; **5:101**; **5:101** [3], [6], [11]; **5:102**
Art 4.1–4.3 . . . . . **Intro before Art 5:101** [3]
Art 4.1–4.8 . . . . . **Intro before Art 5:101** [3]
Art 4.1 (1) . . . . . **1:107** [25]; **Intro before Art 5:101** [3]; **5:101**
Art 4.1 (2) . . . . . **1:107** [22], [25]; **1:302** [1]; **2:406** [9]; **Intro before Art 5:101** [3]; **5:101**
Art 4.2 . . . . . **Intro before Art 1:101** [8]; **1:107**; **1:107** [4], [7], [11], [21], [25], [27], [29]–[31]; **1:303** [31]; **Intro before Art 5:101** [4], [14]; **5:101** [3]; **5:102**
Art 4.2 (1) . . . . . **1:107**; **1:107** [21], [25], [31]; **Intro before Art 5:101** [19]; **5:101** [8]; **6:103** [2]
Art 4.2 (2) . . . . . **1:107**; **1:107** [25], [27], [31]; **1:302** [8]
Art 4.3 . . . . **1:107**; **1:107** [26], [31]; **Intro before Art 5:101** [3]; **5:101** [3]; **5:102**; **5:102** [1], [5]; **5:105** [11]; **6:112** [4]
Art 4.3–4.5 . . . . . **Intro before Art 5:101** [4]
Art 4.3 (a) **5:102**
Art 4.3 (b) **5:102**
Art 4.3 (c) **5:102**
Art 4.3 (d) **5:102**

Art 4.3 (e) **5:102**
Art 4.3 (f) **5:102**
Art 4.4 . . . . . **Intro before Art 5:101** [3]; **5:105**; **5:105** [1], [4], [7], [10]–[11]
Art 4.5 . . . . . **Intro before Art 5:101** [3]; **5:106**; **5:106** [3], [5]
Art 4.6 . . . . . **2:402** [22]; **Intro before Art 5:101** [3]–[4]; **5:103**; **5:103** [4]–[5], [7]
Art 4.7 . . . . . **Intro before Art 5:101** [3]–[4]; **5:107**; **5:107** [2]
Art 4.8 . . . . . **Intro before Art 5:101** [3], [18]; **6:102**; **6:102** [15]
Art 4.8 (1) **6:102**
Art 4.8 (2) **6:102**
Art 4.8 (2)(a) **6:102**
Art 4.8 (2)(b) **6:102**
Art 4.8 (2)(c) **6:102**
Art 4.8 (2)(d) **6:102**
Art 5.1.1 . . . . . **6:102**; **6:102** [15]; **9:501 (1)** [8]
Art 5.1.2 . . . . . **Intro before Art 5:101** [16], [18]; **6:102**; **6:102** [15]; **6:106** [11]; **9:501 (1)** [8]; **19:302** [4]
Art 5.1.3 . . . . . **Intro before Art 1:101** [6]; **1:202**; **1:202** [2], [4]–[8], [10]–[12]; **6:112** [4]
Art 5.1.4 . . . . . **9:501 (1)** [9]; **19:201**; **19:201** [5]
Art 5.1.4 (1) **19:201**
Art 5.1.4 (2) . . . . . **19:201**; **19:201** [5]
Art 5.1.5 . . . . . **9:501 (1)** [9]; **19:201**; **19:201** [5]
Art 5.1.5 (a) **19:201**
Art 5.1.5 (b) **19:201**
Art 5.1.5 (c) **19:201**
Art 5.1.5 (d) **19:201**
Art 5.1.6 . . . . . **6:108**; **6:108** [1], [7]
Art 5.1.7 . . . . . **6:104** [11]; **6:106** [11]; **6:107** [2]; **7:108** [7]; **18:201** [4]; **19:203** [4]
Art 5.1.7 (1) . . . . . **2:402** [21]; **6:104**; **6:106** [11]; **6:107** [3]; **19:203**; **19:301**; **19:301** [5], [7]
Art 5.1.7 (2) . . . . . **6:105**; **6:106** [11]
Art 5.1.7 (3) . . . . . **6:106**; **6:106** [11]
Art 5.1.7 (4) . . . . . **6:107**; **6:107** [2]
Art 5.1.8 . . . . . **6:109**; **6:109** [1]; **6:112** [1]; **Intro before Art 9:305** [4]
Art 5.1.9 . . . . . **10:108** [6]
Art 5.1.9 (1) . . . . . **2:107** [5]
Art 5.2.1 . . . . . **6:110**; **6:110** [6]–[7], [9], [20], [33]; **Intro before Art 12:101** [4]; **12:101** [10]
Art 5.2.1 (1) . . . . . **6:110**; **6:110** [4], [8], [18], [24], [26]; **12:101** [10]
Art 5.2.1 (2) . . . . **6:110**; **6:110** [4], [31]; **12:101** [10]
Art 5.2.2 . . . . . **6:110**; **6:110** [4], [8], [17]–[18]
Art 5.2.3 . . . . **6:110**; **6:110** [4], [19], [23], [38]–[39]
Art 5.2.4–5.2.6 . . . . . **6:110** [28]
Art 5.2.4 . . . . . **6:110**; **6:110** [4], [19], [54]
Art 5.2.5 . . . **6:110**; **6:110** [4], [19], [46], [50]–[51]
Art 5.2.6 . . . . . **1:107** [1]; **6:110**; **6:110** [4], [19], [42]; **12:101**; **12:101** [10]–[11], [16]
Art 5.3.1 . . . . . **16:101**; **16:101** [5], [10]–[11]; **16:103** [1]
Art 5.3.2 . . . . . **16:103**; **16:103** [1]
Art 5.3.2 (a) **16:103**
Art 5.3.2 (b) **16:103**
Art 5.3.3 . . . . . **Intro before Art 16:101** [10]; **16:102**; **16:102** [4]; **16:104** [1]
Art 5.3.3 (1) . . . . . **1:201** [78]; **16:102**
Art 5.3.3 (2) **16:102**
Art 5.3.4 . . . . . **16:103** [6]; **16:104**; **16:104** [1]
Art 5.3.5 . . . . **6:110**; **Intro before Art 9:305** [26]; **9:306** [7]; **9:306 App II** [2]; **16:105**; **16:105** [1], [4]
Art 5.3.5 (1) **16:105**
Art 5.3.5 (2) **16:105**
Art 5.4 . . . . . **6:108** [7]
Art 5.4 (2) . . . . . **6:108** [7]
Art 5.6 . . . . . **6:108** [7]
Art 6.1.1 . . . . . **7:102**; **7:102** [8]; **9:501 (1)** [13]; **14:203** [2]
Art 6.1.1 (a) . . . . . **7:102**; **7:102** [5]; **9:501 (1)** [11]
Art 6.1.1 (b) . . . . **7:102**; **7:102** [7]; **9:501 (1)** [11]
Art 6.1.1 (c) . . . . . **7:102**; **7:102** [8]; **9:501 (1)** [11]
Art 6.1.3 . . . . . **9:304** [8]
Art 6.1.3 (1) . . . . . **Intro before Art 7:101** [14]
Art 6.1.4 . . . . . **7:104**; **7:104** [3], [9]; **9:201** [10]; **16:101** [4]; **19:301** [5], [8]
Art 6.1.4 (1) . . . . . **7:104**; **7:104** [4], [6]–[8]; **19:301** [5]
Art 6.1.4 (2) . . . . . **7:104**; **7:104** [9]; **19:301**
Art 6.1.5 . . . . . **7:103**; **7:103** [5]–[6]
Art 6.1.5 (1) . . . . . **7:103**; **7:103** [4]
Art 6.1.5 (2) . . . . . **7:103**; **7:103** [7]
Art 6.1.5 (3) . . . . . **7:103**; **7:103** [4]
Art 6.1.6 . . . . . **7:101**; **7:101** [11]; **11:306** [11]
Art 6.1.6 (1) . . . . . **7:101**; **7:101** [6]
Art 6.1.6 (1)(a) . . . . . **7:101** [8]; **9:508-2 (5)** [6]
Art 6.1.6 (1)(c) . . . . . **7:101** [7]
Art 6.1.6 (2) . . . . . **7:101**; **7:101** [11]; **11:306** [3]
Art 6.1.7 . . . . . **7:107**; **7:107** [4]
Art 6.1.7 (1) . . . . . **7:107**; **7:107** [4]–[5]; **9:102 (2)–(3)** [13]
Art 6.1.7 (2) . . . . . **7:107**; **7:107** [6]; **9:102 (2)–(3)** [13]
Art 6.1.8 . . . . . **7:107**; **7:107** [7]
Art 6.1.8 (1) . . . . . **7:107**; **7:107** [7]
Art 6.1.8 (2) . . . . . **7:107**; **7:107** [7]
Art 6.1.9 . . . . . **7:108**; **7:108** [5]; **9:510** [1]
Art 6.1.9 (1) . . . . . **7:108**; **7:108** [10]
Art 6.1.9 (1)(a) . . . . . **7:108** [8]
Art 6.1.9 (1)(b) . . . . . **7:108** [5]–[6]
Art 6.1.9 (2) . . . . . **7:108**; **7:108** [6]
Art 6.1.9 (3) . . . . . **7:108**; **7:108** [9]
Art 6.1.9 (4) . . . . . **7:108**; **7:108** [10]

Art 6.1.10 . . . . . **7:108**; **7:108** [7]
Art 6.1.11 . . . . . **7.112**
Art 6.1.12 . . . . . **7:109**; **7:109** [1], [10]; **13:105** [4]
Art 6.1.12 (1) **7:109**
Art 6.1.12 (2) **7:109**
Art 6.1.12 (3) **7:109**
Art 6.1.13 . . . . . **6:110**; **7:109**
Art 6.1.14 . . . . . **1:202** [6]; **16:101** [5]
Art 6.1.14–6.1.17 . . . . . **7.112** [6]
Art 6.1.16 . . . . . **7.112** [5]; **7.112** [7]; **Intro before Art 9:305** [4]
Art 6.2 . . . . . **6:111** [17]
Art 6.2.1 . . . . . **6:111**
Art 6.2.1–6.2.3 . . . . . **9:102 (2)–(3)** [27]
Art 6.2.2 . . . . . **6:111**; **6:111** [17], [21]
Art 6.2.2 (a) . . . . . **6:111**; **6:111** [17]; **9:305** [4]
Art 6.2.2 (b) **6:111**
Art 6.2.2 (c) **6:111**
Art 6.2.2 (d) **6:111**
Art 6.2.3 . . . . . **6:111**; **Intro before Art 9:305** [4]; **9:305** [9]
Art 6.2.3 (1) **6:111**
Art 6.2.3 (2) **6:111**
Art 6.2.3 (3) **6:111**
Art 6.2.3 (4) **6:111**
Art 6.2.3 (4)(a) . . . . . **Intro before Art 9:305** [4], [6]; **9:306** [24]
Art 6.2.3 (4)(b) . . . . . **15:103** [11]
Art 6.3.1 . . . . **6:112**; **6:112** [1], [4], [9], [13]–[15]; **Intro before Art 9:305** [4]
Art 6.3.1 (1) . . . . . **6:112**; **6:112** [11]
Art 6.3.1 (2) . . . . . **6:112**; **6:112** [11]
Art 6.3.1 (3) . . . . . **6:112**; **6:112** [9]
Art 6.3.1 (4) . . . . . **6:112**; **6:112** [15]
Art 6.3.2 . . . . . **Intro before Art 9:305** [4]
Art 7.1.1 . . . . . **1:301**; **Intro before Art 8:101** [15]; **8:101** [12], [17]; **8:102** [1], [5]–[6]; **9:102 (1)** [27]; **9:102 (2)–(3)** [10]; **9:501 (1)** [6]
Art 7.1.2 . . . . . **8:101**; **8:101** [12]–[14], [16]–[17], [20]–[21]; **9:102 (2)–(3)** [10]; **9:201** [16]; **9:301** [53]; **9:504** [9]
Art 7.1.3 . . . . . **7:104** [8]; **Intro before Art 8:101** [22]; **9:201**; **9:201** [5], [9], [12], [14]
Art 7.1.3 (1) . . . . . **7:104** [1]; **9:201**
Art 7.1.3 (2) **9:201**
Art 7.1.4 . . . . . **8:104**; **8:104** [2]–[3], [9]–[12], [15], [17]–[18], [22]–[23], [31]; **9:102 (1) App** [5]
Art 7.1.4 (1) **8:104**
Art 7.1.4 (1)(a) . . . . . **8:104** [13], [15]
Art 7.1.4 (1)(a)–(c) . . . . . **8:104** [9]
Art 7.1.4 (1)(b) . . . . . **8:104** [23]
Art 7.1.4 (1)(c) . . . . . **8:104** [17]–[18], [23]
Art 7.1.4 (1)(d) . . . . . **8:104** [17]
Art 7.1.4 (2) . . . . . **8:104**; **8:104** [22]–[23]
Art 7.1.4 (3) . . . . . **8:104**; **8:104** [22], [25], [28]
Art 7.1.4 (4) . . . . . **8:104**; **8:104** [26]
Art 7.1.4 (5) . . . . . **8:104**; **8:104** [28]
Art 7.1.5 . . . . . **8:102** [14]–[15]; **8:106** [4]–[5], [10]; **Intro before Art 9:101** [3]; **9:301**; **9:301** [18], [25]–[26]; **10:101** [12]
Art 7.1.5 (1) **8:106**
Art 7.1.5 (2) . . . . . **8:102** [4], [14]; **8:106**; **8:106** [9]; **9:301** [48]
Art 7.1.5 (3) . . . . . **8:106** [4]; **9:301**; **9:301** [16], [18], [43]–[44], [46]–[47]
Art 7.1.5 (4) . . . . . **9:301**; **9:301** [17], [25], [35]
Art 7.1.6 . . . . . **6:201** [3]; **8:109**; **8:109** [4], [7]
Art 7.1.7 . . . . . **4:102** [5]; **6:112** [4]; **Intro before Art 8:101** [3]; **8:101** [10]; **8:108**; **9:101** [13]; **9:102 (2)–(3)** [8], [10]; **9:306** [42]; **9:501 (1)** [8]; **9:504** [9]; **9:508** [9]; **10:101** [11]; **14:303** [1]
Art 7.1.7 (1) . . . . . **1:302** [1]; **8:108**
Art 7.1.7 (2) . . . . . **8:108**; **9:102 (2)–(3)** [15]
Art 7.1.7 (3) . . . . . **1:202** [10]; **8:102** [4]; **8:108**
Art 7.1.7 (4) . . . **8:101**; **8:108**; **9:102 (2)–(3)** [10]; **9:301** [37]; **9:501 (1)** [6]
Art 7.2.1 . . . . . **Intro before Art 9:101** [3]; **9:101**; **9:101** [6], [9], [13], [15], [22]; **9:102 (1)**; **9:102 (1)** [5]
Art 7.2.2 . . . . . **Intro before Art 9:101** [3]; **9:102 (1)**; **9:102 (1)** [5], [8], [10], [22]–[24]; **9:102 (2)–(3)** [1], [10], [13]–[15], [18], [20], [25], [27], [29]–[31], [36]–[38], [43]
Art 7.2.2 (a) . . . . . **9:102 (2)–(3)**; **9:102 (2)–(3)** [2], [11], [13]
Art 7.2.2 (b) . . . . . **9:102 (2)–(3)**; **9:102 (2)–(3)** [6], [18], [24]
Art 7.2.2 (c) . . . . . **9:102 (2)–(3)**; **9:102 (2)–(3)** [33], [36]
Art 7.2.2 (d) . . . . . **9:102 (2)–(3)**; **9:102 (2)–(3)** [29]
Art 7.2.2 (e) . . . . . **9:102 (2)–(3)**
Art 7.2.3 . . . . . **Intro before Art 9:101** [6]; **9:101** [10]; **9:102 (1)**; **9:102 (1)** [25]–[26], [28], [41], [43]; **9:102 (1) App** [6]; **9:102 (2)–(3)** [1], [24]; **9:502** [4]
Art 7.2.4 . . . . . **Intro before Art 9:101** [8]; **9:102 (1)**; **9:102 (1)** [5], [7]
Art 7.2.4 (1) . . . . . **9:102 (1)**
Art 7.2.4 (2) . . . . . **9:102 (1)**; **9:102 (1)** [5]
Art 7.2.5 . . . . . **8:102**; **8:102** [4], [9]–[10], [12], [14]–[17]; **9:303** [28]
Art 7.2.5 (1) . . . . . **8:102**; **8:102** [14]–[17]
Art 7.2.5 (2) . . . . . **8:102**; **8:102** [14]
Art 7.3.1 . . . . . **6:112** [10], [13]; **Intro before Art 9:301** [3]–[4]; **9:301** [7], [18], [20], [22], [37]; **9:302** [5], [15];

Intro before Art 9:305 [4]; **10:101** [12]
Art 7.3.1 (1) . . . . . **8:106** [4]; **9:301**; **9:301** [15]; **9:501 (1)** [11]
Art 7.3.1 (2) . . . . . **8:101** [17]; **8:103**; **8:103** [13], [16]; **8:106** [4]; **9:301** [20]; **9:501 (1)** [11]
Art 7.3.1 (2)(b) . . . . . **8:103** [13], [17]
Art 7.3.1 (2)(c) . . . . . **8:103** [13]; **9:301** [37]
Art 7.3.1 (2)(d) . . . . . **8:103** [13]; **9:302** [15]
Art 7.3.1 (2)(e) . . . . . **8:103** [13]
Art 7.3.1 (3) . . . . . **8:106** [4]; **9:301**; **9:301** [16], [18], [25]
Art 7.3.2 . . . . . **1:107** [1]; **1:303** [1]; **9:303**; **9:303** [12]–[14], [17], [23]
Art 7.3.2 (1) . . . . . **9:303**; **9:303** [6]
Art 7.3.2 (2) . . . . . **9:102 (2)–(3)** [43]; **9:301** [51]; **9:303**; **9:303** [16], [18], [23]–[25], [28]; **14:101** [10]
Art 7.3.3 . . . . . **9:303** [25]; **9:304**; **9:304** [1], [3], [7], [11]
Art 7.3.4 . . . . . **8:105**; **8:105** [5], [7]–[10], [12]; **9:304** [7], [9]–[10]
Art 7.3.4 (2) . . . . . **9:304** [9]
Art 7.3.5 . . . . . **4:115** [1]; **6:109**; **Intro before Art 8:101** [3]; **Intro before Art 9:305** [4]; **9:305**; **9:305** [1], [10], [12]–[13]
Art 7.3.5–7.3.7 . . . . . **Intro before Art 9:301** [1]
Art 7.3.5 (1) . . . . . **8:102** [2]; **9:305**
Art 7.3.5 (2) . . . . . **8:102**; **8:102** [1]; **9:305**
Art 7.3.5 (3) **9:305**
Art 7.3.6 . . . . . **6:112** [3]–[4]; **Intro before Art 8:101** [3]; **9:102 (1) App** [10]; **Intro before Art 9:305** [10], [14], [26]; **9:306**; **9:306** [2], [7], [21], [25], [27], [30], [33]–[35], [42], [46]; **9:306 App I** [5]; **15:104** [13]; **16:105**; **16:105** [2]–[3]
Art 7.3.6 (1) . . . . . **6:112** [4]; **9:306**; **9:306** [15]
Art 7.3.6 (1)–(3) . . . . . **9:306 App II** [1]
Art 7.3.6 (2) . . . . **9:306**; **9:306** [21], [27], [32]–[34]
Art 7.3.6 (3) . . . . . **9:306**; **9:306** [21]
Art 7.3.6 (4) . . . . . **9:306**; **9:306 App I**
Art 7.3.7 . . . . . **6:109**; **6:112** [4]; **9:302** [14]; **Intro before Art 9:305** [4], [13]–[14], [26]; **9:306**; **9:306** [7], [10]; **16:105**; **16:105** [2]–[5]
Art 7.3.7 (1) . . . . . **9:302** [14]; **9:306**
Art 7.3.7 (2) **9:306**
Art 7.4.1 . . . . . **4:102** [5]; **8:101**; **8:101** [10]; **8:102**; **8:102** [1], [2]; **9:101** [13]; **9:102 (2)–(3)** [10]; **9:306** [42]; **9:501 (1)**; **9:501 (1)** [6]; **9:502** [2]; **10:101** [11]
Art 7.4.1–7.4.13 . . . . . **Intro before Art 9:501** [1]
Art 7.4.2 . . . . . **9:501 (2)** [10]; **9:502** [2], [10]–[11]
Art 7.4.2 (1) . . . . **9:501 (1)** [1], [12]; **9:502**; **9:502** [1]
Art 7.4.2 (2) . . . . . **9:501 (2)**; **9:502**
Art 7.4.3 . . . . . **9:501 (2)**; **9:501 (2)** [10]–[11]
Art 7.4.3 (1) . . . . . **9:501 (2)**
Art 7.4.3 (2) . . . . . **9:501 (2)**; **9:501 (2)** [13]
Art 7.4.3 (3) . . . . . **9:501 (2)**; **9:502** [15]
Art 7.4.4 . . . . . **9:503**; **9:503** [5], [8], [12]
Art 7.4.5 . . . . . **9:504** [9]; **9:506**; **9:506** [5]
Art 7.4.6 . . . . . **9:507**; **9:507** [6], [8]
Art 7.4.6 (1) **9:507**
Art 7.4.6 (2) . . . . . **9:507**; **9:507** [8], [10]
Art 7.4.7 . . . . . **8:101** [17]–[18]; **9:504**; **9:504** [9]–[10], [13], [20]
Art 7.4.8 . . . . . **9:504**; **9:504** [11]
Art 7.4.8 (1) . . . . . **9:101** [15]; **9:504**
Art 7.4.8 (2) **9:504**
Art 7.4.9 . . . . . **Intro before Art 9:501** [1]; **9:508**; **9:508** [6], [10]; **9:508-2 (1)** [4], [8]
Art 7.4.9 (1) . . . . **9:508**; **9:508** [9]; **9:508-2 (1)** [4]
Art 7.4.9 (2) . . . . **9:508**; **9:508** [3]; **9:508-2 (5)** [6]
Art 7.4.9 (3) . . . . . **9:508**; **9:508-2 (6)** [1]
Art 7.4.10 . . . . . **9:508** [8]; **9:508-4** [1]
Art 7.4.12 . . . . . **7:108** [7]; **9:510**; **9:510** [2]–[3]
Art 7.4.13 . . . . . **9:509**; **9:509** [1], [7]–[8], [10]–[11], [18]–[19], [21]
Art 7.4.13 (1) **9:509**
Art 7.4.13 (2) . . . . . **9:509**; **9:509** [17]
Art 8.1 . . . . . **Intro before Art 13:101** [19], [21], [26]; **13:101**; **13:101** [5], [11], [20], [25], [30], [32]
Art 8.1–8.5 . . . . . **Intro before Art 13:101** [12]
Art 8.1 (1) **13:101**
Art 8.1 (2) **13:101**; **13:102**
Art 8.2 . . . . . **13:103**
Art 8.3 . . . . . **1:107** [1]; **1:303** [1]; **13:104**; **13:104** [8]
Art 8.4 . . . . . **13:105**; **13:105** [4]
Art 8.4 (1) **13:105**
Art 8.4 (2) **13:105**
Art 8.5 . . . . . **13:106**; **13:106** [7]; **14:503** [2]
Art 8.5 (1) **13:106**
Art 8.5 (2) **13:106**
Art 8.5 (3) **13:106**
Art 9.1.1 . . . . . **1:106 (1)** [1]; **Intro before Art 11:101** [11], [17]; **11:101**; **11:101** [1]–[2], [4], [7], [12]–[13]; **11:104** [1]; **11:401** [4]
Art 9.1.2 . . . . . **1:106 (2)** [4]; **11:101**; **11:101** [2], [14]–[16]
Art 9.1.2 (a) **11:101**
Art 9.1.2 (b) . . . . . **11:101**; **11:101** [13]
Art 9.1.3 . . . . . **11:103** [8]; **11:203** [6]; **11:302**; **11:302** [1], [3], [5]
Art 9.1.4 . . . . . **11:101** [3]; **11:103**; **11:103** [2], [8]–[9]
Art 9.1.4 (1) **11:103**
Art 9.1.4 (2) **11:103**

Art 9.1.5 . . . . . **11:102**; **11:102** [2], [6]–[7], [9]–[10], [12]; **11:204** [4]
Art 9.1.5 (a) . . . . . **11:204** [4]
Art 9.1.6 . . . . . **11:102**; **11:103**; **11:103** [6]
Art 9.1.7 . . . . . **Intro before Art 11:101** [15]; **11:101** [11]; **11:104**; **11:104** [1]–[2], [6]–[7]; **11:302** [1], [3], [5]; **11:401** [4]; **12:201** [9]
Art 9.1.7 (1) **11:104**
Art 9.1.7 (2) . . . . . **11:104**; **11:104** [6]; **11:203** [6]; **11:302**
Art 9.1.8 . . . **11:306**; **11:306** [2]–[3], [5], [7], [12]; **Intro before Art 13:101** [14]
Art 9.1.9 . . . . . **11:301**; **11:301** [6]–[7], [10]; **Intro before Art 13:101** [14]
Art 9.1.9–9.1.12 . . . . . **Intro before Art 11:101** [15]
Art 9.1.9 (1) . . . . . **11:301**; **11:301** [6], [15]; **11:307** [3]
Art 9.1.9 (2) . . . . . **11:301**; **11:301** [6], [11]
Art 9.1.10 . . . . . **11:101** [5]; **11:303**; **11:303** [10], [14], [17]–[18], [21]; **11:304**
Art 9.1.10 (1) . . . . . **11:303**; **11:303** [11]
Art 9.1.10 (2) . . . . . **11:303** [11], [18]; **11:304**
Art 9.1.11 . . . **11:303** [14]; **11:305**; **11:305** [3]–[4], [7]–[8], [10]; **11:307** [2]
Art 9.1.12 . . . . . **Intro before Art 11:101** [15]; **11:303**; **11:303** [23]–[25]; **11:305** [10]
Art 9.1.12 (1) **11:303**
Art 9.1.12 (2) . . . . **11:303**; **11:303** [11], [23], [26]
Art 9.1.12 (3) . . . . . **11:303**; **11:303** [11], [24]
Art 9.1.12 (4) . . . . . **Intro before Art 11:101** [20]; **11:303**; **11:303** [27]
Art 9.1.13 . . . . . **11:307**; **11:307** [7]; **12:201**
Art 9.1.13 (1) **11:307**
Art 9.1.13 (2) . . . . . **11:307**; **11:307** [4]–[5]; **Intro before Art 13:101** [12], [14]; **13:101** [5]
Art 9.1.13 (3) . . . . . **12:102** [5]
Art 9.1.14 . . . . . **11:101** [11]; **11:201**; **11:201** [1], [4], [7], [9]
Art 9.1.14 (a) . . . . . **11:101** [7]; **11:201**
Art 9.1.14 (b) **11:201**
Art 9.1.15 . . . . . **11:202**; **11:204**; **11:204** [1], [5]–[6]; **Intro before Art 13:101** [12], [14]; **13:101** [5]
Art 9.1.15 (a) **11:204**
Art 9.1.15 (a)–(e) . . . . . **11:204** [1]
Art 9.1.15 (b) . . . . . **11:204**; **11:204** [5]
Art 9.1.15 (c) . . . . . **11:204**; **11:204** [5]
Art 9.1.15 (d) **11:204**
Art 9.1.15 (e) . . . . . **11:204**; **11:204** [5]
Art 9.1.15 (f) . . . . . **11:203**; **11:203** [4], [6]; **11:204**
Art 9.1.19 (1) . . . . . **2:104** [4]
Art 9.2.1 . . . . . **Intro before Art 12:101** [1]; **12:101**; **12:101** [2], [4]
Art 9.2.1 (a) **12:101**
Art 9.2.1 (b) . . . . . **12:101**; **12:101** [7], [10], [16]
Art 9.2.2 . . . . . **12:101** [2]
Art 9.2.3 . . . . . **Intro before Art 12:101** [2]; **12:101**; **12:101** [4]–[6]
Art 9.2.4 . . . . . **12:101**; **12:101** [5]
Art 9.2.4 (1) **12:101**
Art 9.2.4 (2) **12:101**
Art 9.2.5 . . . . . **10:101** [5]; **12:101**; **12:101** [10], [12]; **12:201** [7]
Art 9.2.5 (1) . . . . . **12:101**; **12:101** [12]; **12:102**
Art 9.2.5 (2) . . . . . **12:101**; **12:101** [12]
Art 9.2.5 (3) . . . . . **12:101**; **12:101** [10], [12]
Art 9.2.6 . . . . . **7:106** [5]–[7], [11]; **Intro before Art 12:101** [4]; **12:101** [6]
Art 9.2.6 (1) . . . . . **7:106**; **7:106** [6], [8]; **12:101** [6]
Art 9.2.6 (2) . . . . . **8:107**; **8:107** [4]–[5]; **12:101** [6]
Art 9.2.7 . . . . . **12:102**; **12:102** [1]–[2], [5]; **12:201**
Art 9.2.7 (1) . . . . . **12:102**; **12:102** [2]
Art 9.2.7 (2) . . . . . **12:102**; **12:102** [5]; **Intro before Art 13:101** [12], [14]; **13:101** [5]
Art 9.2.8 . . . . **12:101** [12]; **12:102** [1], [7], [9]–[10]
Art 9.2.8 (1) . . . . . **12:101** [12]
Art 9.2.8 (2) . . . . . **12:102**; **12:102** [8]
Art 9.2.8 (3) . . . . . **12:102**; **12:102** [8]
Art 9.3.1 . . . . . **1:106 (1)** [1]; **12:201**; **12:201** [5]–[7]
Art 9.3.2 . . . . . **12:201** [5]
Art 9.3.3 . . . . . **12:201**; **12:201** [6]
Art 9.3.4 . . . . . **12:201**; **12:201** [6]
Art 9.3.4 (1) **12:201**
Art 9.3.4 (2) **12:201**
Art 9.3.5 . . . . . **10:101** [5]; **12:201**; **12:201** [7]–[8]
Art 9.3.5 (1) . . . . . **12:201**; **12:201** [7]
Art 9.3.5 (2) . . . . . **12:201**; **12:201** [7]
Art 9.3.5 (3) . . . . . **12:201**; **12:201** [7]
Art 9.3.6 . . . . . **12:201**; **12:201** [8]; **Intro before Art 13:101** [12], [14]; **13:101** [5]
Art 9.3.6 (1) **12:201**
Art 9.3.6 (2) **12:201**
Art 9.3.7 . . . . . **12:201** [8]
Art 10.1 . . . . . **14:101**; **14:101** [3], [7], [10]; **14:501** [2]
Art 10.1–10.11 . . . . . **Intro before Art 14:101** [11]
Art 10.1 (1) **14:101**
Art 10.1 (2) . . . . . **14:101**; **14:101** [10]
Art 10.2 . . . . . **14:101** [7]; **14:203** [2]–[4]; **14:301** [1], [3]; **14:307** [1], [3]; **14:502** [1]
Art 10.2 (1) . . . . . **14:201**; **14:201** [1]; **14:203**; **14:301**; **14:301** [2]; **14:302 (1)–(2)** [4]; **14:303** [3]; **14:307**
Art 10.2 (2) . . . . . **14:201**; **14:201** [1]; **14:203**; **14:203** [3]; **14:301**; **14:302 (1)–(2)** [4]; **14:307**; **14:307** [2]
Art 10.3 . . . . . **14:601**; **14:601** [3]
Art 10.3 (1) **14:601**
Art 10.3 (2) **14:601**

Art 10.4 . . . . . **Intro before Art 14:301** [1]; **14:401** [1]–[2]
Art 10.4 (1) . . . . . **Intro before Art 13:101** [12], [15]; **14:401**
Art 10.4 (2) . . . . . **14:401**; **14:401** [3]
Art 10.5 . . . . . **10:110**; **10:110** [2]; **Intro before Art 13:101** [15]; **14:302 (1)–(2)**; **14:302 (1)–(2)** [4]; **14:302 (3)**
Art 10.5–10.8 . . . . . **Intro before Art 14:301** [1]
Art 10.5 (1) . . . . . **14:302 (1)–(2)**; **14:302 (1)–(2)** [4]
Art 10.5 (2) . . . . . **14:302 (1)–(2)**
Art 10.6 . . . . . **10:110**; **10:110** [2]; **14:302 (1)–(2)** [4]; **14:302 (3)**
Art 10.6 (1) . . . . . **14:302 (3)**
Art 10.6 (2) . . . . . **Intro before Art 9:305** [4]; **14:302 (3)**
Art 10.7 . . . . . **10:110**; **10:110** [2]; **14:302 (3)**; **14:302 (3)** [1]; **14:304** [5]
Art 10.8 . . . . **14:302 (1)–(2)** [4]; **14:303** [2]–[3]; **14:305** [1]; **14:306** [1]
Art 10.8 (1) . . . . **14:303**; **14:303** [2]–[3]; **14:305**; **14:305** [1], [3]; **14:306**; **14:306** [1]
Art 10.8 (2) . . . . . **14:305**; **14:305** [1], [3]; **14:306**
Art 10.9 . . . . . **14:501**; **14:501** [7]
Art 10.9 (1) **14:501**
Art 10.9 (2) **14:501**
Art 10.9 (3) . . . . . **14:501**; **14:501** [7]
Art 10.10 . . . . . **Intro before Art 13:101** [12], [15]; **13:101** [15]; **14:503**; **14:503** [2]
Art 10.11 . . . . . **14:501**; **14:501** [1]
Art 11.1.1 . . . . . **1:106 (1)** [1]; **Intro before Art 10:101** [13]; **10:101**; **10:101** [7], [11]; **10:102** [3]
Art 11.1.1 (a) . . . . **10:101**; **10:101** [8]; **11:306** [12]
Art 11.1.1 (b) **10:101**
Art 11.1.2 . . . . . **Intro before Art 10:101** [13]; **10:101** [1]; **10:102**; **10:102** [2]; **10:111** [6]
Art 11.1.2 (b) . . . . . **10:111** [6]
Art 11.1.3 . . . . . **10:101**; **10:101** [8]
Art 11.1.4 . . . . . **10:111**; **10:111** [1]–[2], [5], [7]; **10:205** [11]; **Intro before Art 13:101** [12]–[13]; **13:101** [5]
Art 11.1.5 . . . . . **10:107**; **10:205**; **10:205** [4]; **Intro before Art 13:101** [12]–[13]; **13:101** [5]
Art 11.1.6 . . . . . **10:108**; **10:108** [2]–[3]; **10:205**; **10:205** [6]
Art 11.1.6 (1) **10:108**
Art 11.1.6 (2) . . . . . **10:108**; **10:108** [3]
Art 11.1.7 . . . . . **10:110**; **10:110** [3]–[4]; **10:205**
Art 11.1.7 (1) . . . . . **10:110**; **10:205** [10]
Art 11.1.7 (2) **10:110**
Art 11.1.8 . . . . . **10:109**; **10:205**
Art 11.1.8 (1) . . . . . **10:109**; **10:205** [9]
Art 11.1.8 (2) . . . . **10:109**; **10:109** [3]; **10:205** [9]
Art 11.1.9 . . . . . **10:105**; **10:105** [2]
Art 11.1.10 . . . . . **10:106**; **10:108**; **10:109**; **10:110**
Art 11.1.11 . . . . . **10:106**; **10:106** [6]; **11:101** [13]
Art 11.1.11 (1) **10:106**
Art 11.1.11 (2) . . . . . **10:106**; **10:106** [12]
Art 11.1.12 . . . . . **10:111**; **10:111** [1]–[3], [7]; **10:205** [11]; **Intro before Art 13:101** [12]–[13]; **13:101** [5]
Art 11.1.12 (a) . . . . . **10:111**; **10:111** [4]
Art 11.1.12 (b) **10:111**
Art 11.1.12 (c) **10:111**
Art 11.1.13 . . . . . **10:106**; **10:106** [13]
Art 11.2.1 . . . . . **1:106 (1)** [1]; **10:201**; **10:201** [1], [4], [9]; **10:202** [1]
Art 11.2.1 (a) **10:201**
Art 11.2.1 (b) . . . . . **10:201**; **10:201** [1]
Art 11.2.1 (c) . . . . . **10:201**; **10:201** [1]
Art 11.2.2 . . . . . **10:201**; **10:201** [1]; **10:205**; **10:205** [4]
Art 11.2.3 . . . . . **6:110**; **10:205**; **10:205** [9]–[10]; **13:101** [5]
Art 11.2.3 (1) . . . . . **10:205**; **10:205** [11]; **Intro before Art 13:101** [12]–[13]
Art 11.2.3 (2) . . . . . **10:205**; **10:205** [4], [6], [10], [12]; **Intro before Art 13:101** [12]–[13]
Art 11.2.4 . . . . . **10:204**; **10:204** [1]–[2]
Art 11.2.4 (1) **10:204**
Art 11.2.4 (2) **10:204**

Principes Contractuels Communs see PCC

Principles of European Contract Law *see* PECL

Principles of European Law, Service Contracts *see* PEL SC

Principles of European Tort Law *see* PETL

Principles of the Existing EC Contract Law (Acquis Principles) *see* ACQP

Proposal for a Common European Sales Law *see* CESL

Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law *see* RegCESL

RegCESL (Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, 2011)
Recitals . . . . . **Gen Intro** 2
Recital 10 . . . . . **Gen Intro** 2
Recital 11 . . . . . **9:102 (1) App** [3]
Recital 19 . . . . . **19:101** [7], [11]
Recital 24 . . . . . **19:101** [22]
Recital 26 . . . . . **Intro before Art 2:501** [26]; **Intro before Art 12:101** [2]

Recital 27 . . . . . **Intro before Art 13:101** [18]; **Intro before Art 15:101** [3]; **Intro before Art 18:201** [4]; **18:202** [3]
Recital 31 . . . . . **2:401** [10]
Recital 32 . . . . . **5:106** [2]
Art 1 (1) . . . . . **2:402** [6]; **2:403** [4]; **Intro before Art 5:101** [12]; **18:101**; **18:101** [18]
Art 1 (3) . . . . . **8:104** [29]
Art 1.1 . . . . . **Intro before Art 12:101** [2]
Art 2 . . . . . **Intro before Art 1:101** [8]; **1:302** [9]; **2:501 App II** [2]
Art 2 (a) . . . . . **2:101 (1)** [1]
Art 2 (b) . . . . . **1:201** [8], [66], [79]; **2:401** [5]
Art 2 (c) . . . . . **2:406** [15]; **9:501 (1)** [1], [8]; **9:501 (2)**; **9:502** [11]; **19:202** [7]
Art 2 (e) . . . . . **1:301 Appendix**
Art 2 (f) . . . . . **1:301 Appendix**
Art 2 (g) . . . . . **9:501 (1)** [8]; **9:502** [11]
Art 2 (h) . . . . . **2:402** [6]; **18:101**; **18:101** [18]
Art 2 (j) . . . . . **2:402** [27]; **18:101**; **19:101** [21]
Art 2 (k) . . . . . **2:402** [6]; **2:403** [4]; **18:101**; **18:101** [18]
Art 2 (m) . . . . . **2:402** [6]; **2:403** [4]; **Intro before Art 19.101** [2]; **19.101**; **19:101** [8]–[9]; **19:201** [6]
Art 2 (p) . . . . **2:403** [3]; **2:501 App II** [4], [6]–[7]
Art 2 (q) . . . . . **2:403** [3]; **2:501 App II** [17], [22]
Art 2 (t) . . . . . **2:101 (2)** [14]; **2:404** [4]
Art 2 (u) . . . . . **2:403** [7]
Art 2 (w) . . . . . **9:102 (1)** [20]
Art 3 . . . . . **Gen Intro** 2; **1:101**
Art 4 . . . . . **1:101**; **9:508-2 (5)** [6]
Art 4–7 . . . . . **1:101**
Art 4 (1) **1:101**
Art 4 (4) . . . . . **7:101** [9]
Art 5 . . . . . **1:101**; **2:402** [6]; **2:403** [4]; **6:110** [2]
Art 5 (c) . . . . . **19.101**; **19:101** [12]
Art 6 . . . . . **1:101**; **2:402** [6]; **2:403** [4]
Art 6 (1) **1:101**
Art 7 . . . . . **1:101**
Art 7 (1) . . . . . **1:101**; **2:402** [8]
Art 8 . . . . . **1:101**; **1:104**; **2:101 (2)** [15]; **2:204** [17]
Art 8 (1) **1:101**; **1:104**
Art 8 (2) **1:101**; **1:104**
Art 8 (3) . . . . . **1:101**; **1:104**; **19:101** [22]
Art 9 . . . . . **1:101**; **1:104**; **2:101 (2)** [15]; **2:402** [24]
Art 9 (1) . . . . . **1:101**; **1:104**; **Intro before Art 2:401** [21]
Art 9 (2) **1:101**; **1:104**
Art 11 . . . . . **1:101**; **1:101** [2]; **Intro before Art 2:401** [21]; **2:406** [15]
Art 20 . . . . . **2:403** [8]
Annex I **18:101**
Annex II . . . . . **1:101**; **1:104**; **Intro before Art 2:401** [21]; **2:402** [24]; **2:403** [19]

Rome Convention on the Law Applicable to Contractual Obligations of 19 June 1980
Art 7 . . . . . **15:102** [5]
Art 10 (1)(d) . . . . . **14:101** [2]
Art 18 . . . . . **1:106 (1)** [5]

Statement of the European Law Institute on the Proposal for a Regulation on a Common European Sales Law *see* CESL-ELI

ULF (Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods of 1 July 1964)
Art 2 . . . . . **2:201** [3]
Art 3 . . . . . **2:101 (2)** [5]; **2:201** [3]
Art 3–8 . . . . . **2:101 (1)** [5]
Art 4 (2) . . . . . **5:102** [1]
Art 5 . . . . . **2:202** [10], [12]
Art 5 (1) . . . . . **2:202** [11], [19]
Art 5 (2) . . . . . **2:202**; **2:202** [11]
Art 5 (3) **2:202**
Art 5 (4) . . . . . **2:202**; **2:202** [11]–[12]
Art 6 . . . . . **2:204**
Art 6 (1) **2:204**
Art 6 (2) **2:202**; **2:204**; **2:206**
Art 7 . . . . . **2:208**; **2:208** [2]
Art 7 (1) **2:208**
Art 7 (2) . . . . . **2:208**; **2:208** [3]
Art 8 . . . . . **2:206**
Art 8 (1) . . . . . **2:206**; **2:206** [1]–[2]
Art 8 (2) . . . . . **1:304 (1)**; **1:304 (1)** [9]–[10]; **2:206**; **2:206** [3]
Art 8 (3) **2:206**
Art 9 . . . . . **2:207**
Art 9 (1) **2:207**
Art 9 (2) . . . . . **2:207**; **2:207** [2]
Art 10 . . . . . **2:204** [5]
Art 11 . . . . . **2:203** [7]
Art 13 (2) . . . . . **5:102** [1]

ULIS 1935 draft (Convention relating to a Uniform Law on the International Sale of Goods, 1935 draft)
Art 10 . . . . . **1:105** [2]
Art 11 . . . . . **1:106 (2)** [3]
Art 16 . . . . . **1:105** [2]
Art 17 . . . . . **1:105** [2]
Art 38 . . . . . **1:105** [2]
Art 40 . . . . . **1:105** [2]
Art 41 . . . . . **1:105** [2]
Art 63 . . . . . **1:105** [2]
Art 64 . . . . . **6:104** [10]
Art 78 . . . . . **1:105** [2]

Art 106 . . . . . **1:105** [2]
Art 107 . . . . . **1:105** [2]

ULIS 1956 draft (Convention relating to a Uniform Law on the International Sale of Goods, 1956 draft)
Art 10 (1) . . . . . **1:105** [13]

ULIS (Convention relating to a Uniform Law on the International Sale of Goods of 1 July 1964)
Art 1–8 . . . . . **Intro before Art 1:101** [1]
Art 2 . . . . . **1:106 (2)** [6]
Art 3 . . . . . **1:102** [5]
Art 5 (1)(a) . . . . . **18:101** [18]
Art 5 (1)(c) . . . . . **18:101** [18]
Art 9 . . . . . **1:105** [1]
Art 9–17 . . . . . **Intro before Art 1:101** [1]
Art 9 (1) . . . . . **1:105** [1], [8]
Art 9 (2) . . . . . **1:105** [1], [12]–[14]
Art 9 (3) . . . . . **1:105** [1]; **5:102** [1]
Art 10 . . . . . **9:301** [14]
Art 13 . . . . . **9:507** [6]
Art 15 . . . . . **Intro before Art 1:101** [7]; **2:101 (2)** [5]
Art 16 . . . . . **9:102 (1)** [22]
Art 17 . . . . . **1:106 (1)** [11]; **1:106 (2)**; **1:106 (2)** [1], [3], [6]
Art 19 (2) . . . . . **18:305** [9]
Art 24 (2) . . . . . **9:501 (1)** [6]
Art 24 (3) . . . . . **9:301** [50]
Art 25 . . . . . **9:102 (2)–(3)** [36]; **9:303** [9]
Art 26 . . . . . **9:301** [14], [47]
Art 26 (1) . . . . . **9:303** [9]
Art 26 (2) . . . . . **9:303** [9]
Art 27 . . . . . **9:301** [14], [47]
Art 30 . . . . . **9:301** [14]
Art 30 (2) . . . . . **9:303** [9]
Art 31 . . . . . **9:301** [14]
Art 31 (2) . . . . . **9:303** [9]
Art 33 . . . . . **18:203 (2)** [2]; **18:204** [10]
Art 33 (1) . . . . . **18:203 (2)** [2]
Art 33 (1)(c) . . . . . **18:203 (2)** [9]
Art 33 (1)(e) . . . . . **18:203 (2)** [10]
Art 37 . . . . . **8:104** [8]
Art 41 (2) . . . . . **9:501 (1)** [6]
Art 42 (1)(a) . . . . . **9:102 (1)** [25]
Art 42 (1)(c) . . . . . **9:102 (1)** [25]
Art 43 . . . . . **9:301** [14]
Art 44 . . . . . **9:301** [14]
Art 44 (1) . . . . . **8:104** [8]
Art 44 (2) . . . . . **8:106** [4]; **9:301** [14], [24]
Art 46 . . . . . **8:104** [25]
Art 49 (1) . . . . . **9:102 (2)–(3)** [46]
Art 55 (1)(a) . . . . . **9:301** [14]
Art 57 . . . . . **6:104** [10]–[11]
Art 61 . . . . . **9:101** [7]
Art 61 (1) . . . . . **9:101** [6]
Art 61 (2) . . . . . **9:101** [15]; **9:102 (2)–(3)** [40]; **9:303** [9]
Art 62 (1) . . . . . **9:301** [14]; **9:303** [9]
Art 62 (2) . . . . . **9:301** [14]
Art 64 . . . . . **9:301** [50]
Art 66 . . . . . **9:101** [7]
Art 66 (1) . . . . . **9:301** [14]
Art 66 (2) . . . . . **9:301** [14]
Art 70 (1)(a) . . . . . **9:301** [14]
Art 70 (2) . . . . . **9:101** [7]
Art 74 . . . . . **9:501 (1)** [6]
Art 74 (1) . . . . . **8:108** [17]
Art 74 (3) . . . . . **8:101** [12]
Art 75 . . . . . **9:302** [12]
Art 76 . . . . . **9:304**; **9:304** [3]
Art 81 (1) **9:508**
Art 82 . . . . . **9:503** [5]
Art 83 . . . . . **9:508**; **9:508** [4]; **9:508-2 (6)** [1]
Art 84 . . . . . **9:506** [4]; **9:507**; **9:507** [8], [10]
Art 84 (1) . . . . . **9:507**; **9:507** [4]
Art 84 (2) **9:507**
Art 85 . . . . . **9:506**; **9:506** [1], [4]–[5]
Art 86 . . . . . **9:506**; **9:506** [4]; **9:507**
Art 96 . . . . . **18:301** [12]
Art 97 . . . . . **18:303** [18]
Art 99 . . . . . **18:306**; **18:306** [4]–[6]
Art 99 (1) **18:306**
Art 99 (2) **18:306**

UN Convention on the Assignment of Receivables in International Trade *see* CARIT

UN Convention on the Contract for the International Carriage of Goods by Road (CMR) of 19 May 1956
Art 13 (1) . . . . . **Intro before Art 10:201** [7]

UN Convention on Contracts for the International Sale of Goods *see* CISG

UN Convention on International Interests in Mobile Equipment of 16 November 2001
Art 2 (3) . . . . . **Intro before Art 11:101** [3]
Art 31 . . . . . **Intro before Art 11:101** [3]

UN Convention on the Law of Treaties of 23 May 1969
Art 31–33 . . . . . **1:106 (1)** [9]; **Intro before Art 5:101** [12]
Art 33 . . . . . **5:107** [1]
Art 62 . . . . . **6:111** [17]

UN Convention on the Limitation Period in the International Sale of Goods of 14 June 1974
Art 13 . . . . . **14:302 (1)–(2)** [1], [4]
Art 14 . . . . . **14:302 (3)** [1]

Art 15 . . . . . **14:302 (3)** [1]
Art 17 (2) . . . . . **14:302 (1)–(2)** [3]
Art 20 . . . . . **14:401**; **14:401** [2]
Art 20 (1) **14:401**
Art 20 (2) . . . . . **14:401**; **14:401** [2]
Art 21 . . . . . **14:303**; **14:303** [2]–[3]; **14:306** [1]
Art 22 (1) . . . . . **14:601** [2]
Art 22 (2) . . . . . **14:601** [2]
Art 22 (3) . . . . . **14:601** [2]
Art 23 . . . . . **14:302 (1)–(2)** [4]
Art 24 . . . . . **14:501** [1]
Art 25 (2) . . . . . **14:501** [7]; **14:503** [2]
Art 26 . . . . . **14:501** [1]
Art 27 . . . . . **14:502** [1]

UN Convention on the Use of Electronic Communication in International Contracts of 23 November 2005
Art 4 (g) . . . . . **2:204** [14]
Art 10 (2) . . . . . **1:303** [23], [26]–[27]; **2:205** [5]

UNCITRAL Model Law on International Commercial Arbitration, 2002
Art 3 (1) . . . . . **14:302 (3)** [1]

UNCITRAL Uniform Rules on Contract Clauses for an Agreed Sum Due upon Failure of Performance, 1983
Art 5 . . . . . **9:509** [10]
Art 6 . . . . . **9:509**; **9:509** [15]
Art 7 . . . . . **9:509**; **9:509** [14]
Art 8 . . . . . **9:509** [17]–[18]
Art 9 . . . . . **9:509** [10]

UNIDROIT Convention on Agency in the International Sale of Goods *see* CAISG

UNIDROIT Convention on International Factoring of 28 May 1988
Art 5 . . . . . **11:102**; **11:102** [4]
Art 5 (1) . . . . . **11:102** [14]
Art 5 (a) **11:102**
Art 5 (b) . . . . . **11:102**; **11:102** [4], [11]
Art 6 (1) . . . . . **11:301** [5], [10]
Art 6 (2) . . . . . **11:301** [5]
Art 6 (3) . . . . . **11:301** [5]
Art 7 . . . . . **11:201** [5]
Art 8 . . . . . **11:303** [9]
Art 8 (1) . . . . . **11:303** [9]–[10], [17], [20]
Art 8 (1)(a) . . . . . **11:303** [21]
Art 8 (1)(c) . . . . . **11:303** [17]
Art 9 (1) . . . . . **11:307** [2]
Art 9 (2) . . . . . **11:307** [3]–[4]
Art 12 . . . . . **11:303** [21]
Art 18 . . . . . **11:301** [5]
Art 18 (2) . . . . . **11:307** [3]–[4]

UNIDROIT Draft of a Law for the Unification of Certain Rules Relating to the Validity of Contracts of International Sale of Goods, 1973
Art 3 . . . . . **5:101** [2]
Art 3 (1) . . . . **Intro before Art 5:101** [3]; **5:101** [2]
Art 3 (2) . . . . **Intro before Art 5:101** [3]; **5:101** [2]
Art 3 (3) . . . . **Intro before Art 5:101** [3]; **5:101** [2]
Art 4 (1) . . . . . **5:102** [1]

UNIDROIT Principles of International Commercial Contracts *see* PICC

GENERAL INTRODUCTION EUROPEAN CONTRACT LAWS

Foundations, Commentaries, Synthesis

Nils Jansen and Reinhard Zimmermann

I.	Origins	[1]–[3]
II.	The idea of commenting on European contract laws	[4]–[8]
III.	The textual basis of European contract law	[9]–[23]
	1. PECL, PICC, and CISG	[9]–[11]
	2. ACQP and DCFR; PCC	[12]–[18]
	3. Consumer Rights Directive, FS, and CESL	[19]–[21]
	4. Collapse	[22]–[23]
IV.	Gaining orientation	[24]–[38]
	1. Problems	[25]–[28]
	2. The form and nature of the commentary	[29]–[38]

I. Origins

1 In the autumn of 2010 the editors of this volume ran a seminar within a summer school organized by the *Studienstiftung des deutschen Volkes* in the French Maritime Alps. The aim of that seminar was a comparative assessment of the various 'restatements', 'model laws', 'reference texts', or 'non-legislative codifications'[1] on European contract law that had by then been published. That assessment turned out to be much more interesting than we had originally envisaged, for we discovered that those texts were genetically related in unexpectedly complex ways. We had known before, of course, that some rules and formulations in later texts had been taken over or adapted from older texts and that a number of the restatements were also connected to the European Union's *acquis communautaire*. But we had not been aware of the extent to which the texts were interrelated; nor had we appreciated the changes of wording and systematic context that had occurred. The mixture of complex genetic relationships, of correspondence and differences in formulation, and of shifts in approach and policy thus became more interesting, but also more difficult to understand.

2 During a walk through a nearby river gorge, we discussed the possibility of a more comprehensive study of these texts in historical and comparative perspective. Since, by that time, the European Commission had asked an Expert Group to prepare a *Feasibility Study for a Future Instrument in European Contract Law*, we decided to wait for the publication of that Feasibility Study.[2] Soon thereafter, in October 2011, the European Commission took another step and

[1] N Jansen, *The Making of Legal Authority: Non-legislative Codifications in Historical and Comparative Perspective* (2010); cf also R Zimmermann, '"Wissenschaftliches Recht" am Beispiel (vor allem) des europäischen Vertragsrechts', in C Bumke and R Röthel (eds), *Privates Recht* (2012) 21–48.

[2] It is easily accessible in O Radley-Gardner, H Beale, R Zimmermann, and R Schulze (eds), *Fundamental Texts on European Private Law* (2nd edn, 2016) 1382–441.

published a *Proposal for a Regulation on a European Sales Law* (RegCESL).[3] The prospect of a codification of a central area of European private law (albeit in the form of an 'optional instrument')[4] thus appeared to be in the offing. When we started with our project, we thus took the provisions of the *Common European Sales Law* (CESL) as our point of departure; after all, it appeared to be destined to become an authoritative *legislative* reference text. In December 2014, however, the European Commission, now led by Mr Juncker, announced its intention to withdraw the CESL.[5] The CESL thus lost its special status; and we realized that, for the time being, the authoritative basis of European contract law cannot be one individual, uniform text. Rather the European and international texts that have, over the years, been prepared, all have to be taken into account: the European Union's many Directives, the relevant international Conventions, and the restatements.[6] We therefore decided to re-organize our project and to take the first of the restatements eventually leading up to the CESL, ie the *Principles of European Contract Law* (PECL) as our point of reference.[7] In the meantime, our project had grown in size and ambition: it was to be no longer a collection and assessment of the various restatements, interspersed with comparative comment, but a set of comprehensive historical and comparative commentaries providing the background for properly understanding and evaluating the international texts, and for inquiring to what extent they do indeed restate European law in a convincing and appropriate manner.

3 In this introduction we will explain the aims pursued by our book and the way in which it is structured, we will describe its background and its inspiration, and we will argue that it is now the right time for an attempt to draw up a balance sheet of what has been going on in the field of European contract law over the past forty, or so, years.

II. The idea of commenting on European contract laws

4 The Europeanization of private law is a particularly significant legal development today.[8] It occurs on many different levels, and it involves many different actors. Thus, within the European Union, the legislature in Brussels has enacted about twenty Directives in the traditional core areas of private law, the vast majority of them in contract law, and many more in related areas, such as labour law, company law, energy, or transportation.[9] Since, however, the European legislature lacks a general competence for private law, these Directives are of a pointillistic character; they do not constitute a coherent body of law.[10] Nonetheless, they contain rules, policies, and concepts determining the private laws of the EU member states. The same is true of the activities of the European Court of Justice in Luxemburg. For while many of its judgments affect

[3] COM(2011) 653 final–2011/0284 (COD). The Draft Common European Sales Law itself constitutes Annex I to the Proposed Regulation. Both documents are easily accessible in *Fundamental Texts* (fn 2) 1442–529.

[4] See Art 3 RegCESL, read together with Recital 10.

[5] European Commission, *Commission Work Programme 2015—A New Start* COM(2014) 910 final.

[6] For details, see below, III.

[7] O Lando and H Beale (eds), *Principles of European Contract Law*, Part I (1995); O Lando and H Beale (eds), *Principles of European Contract Law*, Parts I and II (2000); O Lando, E Clive, A Prüm, and R Zimmermann (eds), *Principles of European Contract Law*, Part III (2003). On the PECL as our point of reference, see below, [33].

[8] For overviews, see R Zimmermann, 'Comparative Law and the Europeanization of Private Law', in Reimann and Zimmermann, *Oxford Handbook*, 539–78; id, 'The Present State of European Private Law', (2009) 57 *AJCL* 479–512.

[9] See H Micklitz, 'The Visible Hand of European Regulatory Private Law: The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation', (2009) 28 *Yearbook of European Law* 3–59.

[10] *MaxEuP*/Basedow, 'EU Private Law', 537–41; S Weatherill, in Twigg-Flesner, *Private Law*, 58–69.

national private laws, the European Court of Justice is not a Supreme Court for the adjudication of private law matters in general for the European Union.[11]

Legal scholarship, of course, is free of these restrictions. Thus, over the years, a body of literature has emerged which is genuinely European in spirit. Unfortunately, however, this body of literature does not exhibit a high degree of coherence either. A number of authors have addressed the European Union's legislation and the case law of the European Court of Justice,[12] have studied general principles of EU private law,[13] or have analysed the impact of the *acquis communautaire* on national laws.[14] Articles and textbooks address issues of European consumer law,[15] European company law,[16] European procedural law,[17] and other individual fields,[18] and there are also textbooks on EU contract law.[19] Legal historians have demonstrated the European character of a legal culture that has characteristically been shaped by the Roman-Canon *ius commune*, of which the national codifications are specific modern manifestations.[20] Comparative lawyers have taken up the challenge to present the law from a vantage point above, or beyond, existing national laws.[21] The (Trento) Common Core of European Private Law Project has endeavoured to sketch, on the basis of comparative case studies, the commonalities and differences between the national systems of private law existing in Europe.[22] Some scholars have even tried to identify common rules and principles of European tort law,[23] and of a European law of unjustified enrichment.[24] At the same time, much academic effort has been invested, not only by well-established professors, but also by doctoral and post-doctoral researchers, in devising principles, definitions, and model rules of European private law.[25] It is hardly surprising that all these various groups of scholars have employed different methods and techniques; after all, they did not define their task in an identical manner. 5

[11] *MaxEuP*/Pirrung, 'European Court of Justice (ECJ)', 583–8.

[12] See, eg, B Heiderhoff, *Europäisches Privatrecht* (4th edn, 2016); Weatherill, *Internal Market*.

[13] cf, eg, A Metzger, *Extra legem, intra ius* (2009); N Reich, *General Principles of EU Civil Law* (2014).

[14] AS Hartkamp, *European Law and National Private Law* (2nd edn, 2016); AS Hartkamp, C Sieburgh, and W Devroe, *Cases, Materials and Text on European Law and Private Law* (2017).

[15] For an overview, see N Reich, H-W Micklitz, P Rott, and K Tonner (eds), *European Consumer Law* (2nd edn, 2014); C Twigg-Flesner (ed), *Research Handbook on EU Consumer and Contract Law* (2016); S Whittaker, 'Consumer Contracts', in HG Beale (ed), *Chitty on Contracts*, vol II (32nd edn, 2015) [38-001]–[38-547].

[16] S Grundmann, *European Company Law* (2nd edn, 2012).

[17] B Hess, *Europäisches Zivilprozessrecht* (2010).

[18] For an overview, see, eg, the contributions to the *Max Planck Encyclopedia of European Private Law* (2012), to the *Cambridge Companion to European Union Private Law* (2010), or to Bussani and Werro, *European Private Law*.

[19] K Riesenhuber, *EU-Vertragsrecht* (2013); R Schulze and F Zoll, *Europäisches Vertragsrecht*, (2015).

[20] P Koschaker, *Europa und das römische Recht* (4th edn, 1966); Coing, *Privatrecht* I and *Privatrecht* II; Zimmermann, *Obligations*; id, *Roman Law, Contemporary Law, European Law: The Civilian Tradition Today* (2001).

[21] See, in particular, H Kötz, *Europäisches Vertragsrecht* (1996); and see the extended second edition, 2015. The first edition has been translated into English by Tony Weir, *European Contract Law* (1997), a translation of the second edition has appeared in 2017, too late to be taken into account by the authors of this book.

[22] M Bussani and U Mattei (eds), *The Common Core of European Private Law* (2002); id, *Opening up European Law* (2007). Completed projects in the field of contract law include R Zimmermann and S Whittaker (eds), *Good Faith in European Contract Law* (2000); J Gordley (ed), *The Enforceability of Promises in European Private Law* (2001); R Sefton-Geen (ed), *Mistake, Fraud, and Duties to Inform in European Private Law* (2005); J Cartwright and M Hesselink (eds), *Precontractual Liability in European Private Law* (2011); E Hondius and HC Grigoleit (eds), *Unexpected Circumstances in European Private Law* (2011).

[23] C von Bar, *The Common European Law of Torts*, 2 vols (1998/2000); C van Dam, *European Tort Law* (2nd edn, 2013).

[24] P Schlechtriem, *Restitution und Bereicherungsausgleich in Europa: Eine rechtsvergleichende Darstellung*, 2 vols (2000/2001).

[25] For details, see below, III.

6 As a result, we are still faced today with a number of isolated discourses on European private law, with a particular emphasis on contract law, or rather: on European contract laws. The knowledge produced within one of these discourses all too often appears to pass unnoticed by others. Thus, while scholars of comparative private law have not only occasionally ignored the genuinely European legislation, comparative and historical research has often been disregarded by those dealing with the *acquis communautaire*. Similarly, the efforts undertaken critically to evaluate European legislation, drafts presented by the European Commission, and texts produced by groups of academics with or without any official mandate do not seem to have had much impact. We therefore think that it is high time to integrate those discourses, to relate them to one another, and thus to provide comprehensive information on, and critical analysis of, the present state of European contract law. That is the purpose of the present book.

7 Modern commentaries are usually devoted to one legal system's authoritative legislative sources (ie, usually, the text of a codification). They pursue an exegetical approach and analyse the law, including the relevant case law, in an attempt to understand what a specific legislative text is intended, or taken, to mean.[26] In the field of European contract law, however, such an approach appears to be less plausible as, to a large extent, it is still lacking the necessary legislative basis. It is thus not possible to present European contract law in the form of an exegetical commentary of a specific piece of legislation. Furthermore, lawyers in Europe need to understand how European legislation, as far as it does exist, relates to national conceptions of contract law; and they also need to know to what extent the rules and concepts used in the many non-legislative texts are identical to, or different from, the rules and concepts found in the national legal systems. Finally, even as far as the meaning of the rules in instruments such as the CESL is concerned, it would be unwise not to consider previous textual layers of European contract law. Most provisions in the CESL were reformulations of older texts contained in directives, conventions, or model rules. Even the most recent version of a rule must therefore be understood as a contribution to an ongoing debate on European contract law. Its meaning will often become clearer when it is contrasted with its earlier versions.[27]

8 In view of the fragmented state of European scholarship and of the plurality of textual authorities,[28] we have attempted to adopt a broad perspective and an integrative approach. All relevant reference texts have to be taken into account and critically assessed against each other. The guiding questions will always be: What are the answers given to a particular question in the various reference texts? Are there differences between them? What is the reason for these differences, and how are they to be assessed? Is it possible, in view of the plurality of texts, to state a synthesis? What is the basis for such synthesis? Our book, therefore, rule by rule, compares the texts with each other and reconstructs their genesis. Moreover, it makes accessible to the reader the existing literature and learning on those texts. Last, but not least, it provides the basic comparative and historical information as far as it is necessary in order fully to understand the reference texts. Our book is thus driven by the conviction that legal texts cannot appropriately be understood if they are cut off from the background from which they have emerged.

[26] For a detailed and nuanced picture, see D Kästle-Lamparter, 'Juristische Kommentare–theologische Kommentare. Von der Farbe des Chamäleons', in id and N Jansen (eds), *Kommentare in Recht und Religion* (2014) 393–450, 409–17, 426 f; more comprehensively, see D Kästle-Lamparter, *Die Welt der Kommentare* (2016).

[27] See already N Jansen and R Zimmermann, 'Contract Formation and Mistake in European Contract Law: A Genetic Comparison of Transnational Model Rules', (2011) 21 *Oxford JLS* 625–62.

[28] 'Proliferation of sources': M Király, 'The Rise and Fall of Common European Sales Law', in *Eppur si muove: The Age of Uniform Law* (2016) 1862–72, 1865.

III. The textual basis of European contract law

1. PECL, PICC, and CISG

9 One of the most interesting, most widely acclaimed, and most influential projects on the way towards the harmonization of European contract law is the one initiated by Ole Lando. It has been carried out by an international group of academics (often referred to as the 'Lando Commission') and has led to the Principles of European Contract Law, generally known by the acronym PECL.[29] It is conceived as a European reference text in the form of a 'restatement', which can guide the interpretation and development of the national legal systems in Europe and thus pave the way towards a gradual assimilation of these systems. At the same time, it provides a conceptual and systematic infrastructure for community legislation concerning contract law and can be taken as a first step towards a European Contract Code.[30] It is thus the first and foremost example of what can be described as a 'non-legislative codification': a text in the form of a codification which, however, attains its authority, if any, not by legislative command (*ratione imperii*) but as a result of its persuasiveness and recognition in legal discourse (*imperio rationis*).[31] As such, it has become the model for many similar subsequent projects.

10 More or less simultaneously with the PECL a Working Group set up by the International Institute for the Unification of Private Law (UNIDROIT) in Rome[32] has prepared another, equally ambitious, instrument: the *Principles of International Commercial Contracts* (PICC).[33] Both instruments are comparable in many respects.[34] Thus, in particular, they have been prepared in a similar manner, they pursue similar aims, and they have been drafted in a similar style. The Working Groups responsible for the PECL and the PICC knew of each other's work, and they have influenced each other in a number of respects. There are two major differences between both projects in that (i) UNIDROIT pursues the aim of global rather than European harmonization of contract law, and (ii) the UNIDROIT project specifically deals with international *commercial* contracts while the Lando Commission has formulated principles of contract law in general. In view of these differences, it may appear surprising that the rules adopted in the PECL and the PICC do not differ very much from each other; in some areas, they are virtually identical.

11 The similarity of the rules contained in the PECL and PICC can, to some extent, be explained by the way in which the work of the academic groups responsible for both instruments was coordinated. Attention can also be drawn to the fact that what is regarded as fair and reasonable for general contract law can also very largely be taken to be fair and reasonable for commercial contracts; that European thinking patterns tend to dominate even outside of Europe; and that, in spite of 200 years of national legal development, contract law is still more international in

[29] See above, fn 7.

[30] For a more detailed analysis, see R Zimmermann, 'Ius Commune and the Principles of European Contract Law: Contemporary Renewal of an Old Idea', in MacQueen and Zimmermann, *European Contract Law* 1–42.

[31] See the references above, in fn 1.

[32] *MaxEuP*/Kronke, 'UNIDROIT', 1723–7.

[33] The PICC have appeared in 1994 in their original version. (Slightly) revised and (substantially) extended versions have been published in 2004, in 2010, and in 2016. There is a comprehensive commentary on the PICC, edited in its second edition by S Vogenauer (see the general literature list). cf also MJ Bonell, *An International Restatement of Contract Law* (3rd edn, 2005); *MaxEuP*/Kleinheisterkamp, 'UNIDROIT Principles of International Commercial Contracts (PICC)', 1727–32; R Zimmermann, 'Die UNIDROIT-Grundregeln der Internationalen Handelsverträge 2004 in vergleichender Perspektive', (2005) 13 *ZEuP* 264–90; S Vogenauer, 'Die UNIDROIT Grundregeln der internationalen Handelsverträge 2010', (2013) 21 *ZEuP* 7–42. The text of the UNIDROIT PICC 2016 is easily accessible in *Fundamental Texts* (fn 2) 1530–75.

[34] See, eg, Bonell, *International Restatement* (fn 33) 335–59.

substance and character than any of the other core areas of private law—the hypothetical will of reasonable parties has usually been the focal point for the evolution of its doctrines. Another important factor is that both the PECL and the PICC (as well as the *Consumer Sales Directive*)[35] have been significantly inspired by one of the most successful acts of legal harmonization worldwide in the course of the 20th century, the *UN Convention on Contracts for the International Sale of Goods* (CISG) of April 1980.[36] Thus, for example, no less than fifty-two of the 132 articles contained in the first two parts of the PECL are modelled on a provision contained in the CISG,[37] and for the PICC that ratio is very similar. The CISG, of course, can also be regarded as a contemporary manifestation of a genuinely European tradition. It is based on the (Hague) *Uniform Laws on the International Sale of Goods* (ULIS) and on the *Formation of Contracts for the International Sale of Goods* (ULF), both dating from 1964. The driving force behind these Uniform Laws was Ernst Rabel, and their intellectual foundations are contained in his great treatise 'Das Recht des Warenkaufs' (vol I (1936), vol II (1958)). Thus, at the beginning of the 21st century there was a 'troika'[38] of codes on international contract law. They were reasonably well adjusted to each other and successfully stimulated discussion on national law reform across Europe.

2. ACQP and DCFR; PCC

12 A major problem soon became apparent: none of the three instruments took account of the *acquis communautaire* in the area of consumer contract law that had emerged, in the form of individual directives, from the middle of the 1980s onwards. Most important among them were, in the comparatively early years, the *Doorstep Selling Directive* (1985), the *Unfair Terms in Consumer Contracts Directive* (1993), the *Distance Selling Directive* (1997), and the *Consumer Sales Directive* (1999). Given their limited scope of application (ie commercial contracts), it is a matter of course that neither CISG nor PICC deal with the specificities of consumer contract law and with the European Union's approach to this field of legal regulation. The PECL, however, purport to lay down rules of general contract law; and general contract law can (and should!)[39] be seen as encompassing consumer contracts. That they did not deal with the matter is due simply to the fact that work on the PECL had been started before even the *Doorstep Selling Directive* had been enacted; and that Part I of the PECL (dealing, *inter alia*, with formation of contracts and non-performance) was published in 1995, ie four years before the enactment of the *Consumer Sales Directive*. Nonetheless, by the time Part II of the PECL appeared, it had become clear that that document presented an incomplete, and partly inadequate, picture of European contract law. European contract law, by that time, consisted of

[35] See S Grundmann, 'Introduction' in CM Bianca and G Grundmann, *EU Sales Directive: Commentary* (2002) 15–20.

[36] There is a large body of literature on the CISG; the most recent comprehensive commentary is the 4th edn (2016) of Schwenzer (ed), *Schlechtriem and Schwenzer*, with a bibliography at 1419–521. The CISG has, by now, been ratified by eighty-five states and is applied in an ever-growing number of decisions by courts and arbitral tribunals.

[37] Very often, however, there are phrasing changes or modifications; see the table in HM Flechtner, 'The CISG's Impact on International Unification Efforts: The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law', in F Ferrari (ed), *The 1980 Uniform Sales Law: Old Issues Revisited in the Light of Recent Experiences* (2003) 169–97, 181–7. On the CISG as a 'veritable world sales law' and on its impact on other harmonization efforts, see MJ Bonell, 'European Contract Law and the Development of Contract Law Worldwide', in *Proceedings of the 4th European Jurists' Forum* (2008) 85–110.

[38] O Lando, 'CISG and its Followers: A Proposal to Adopt Some International Principles of Contract Law', (2005) 53 *AJCL* 379–401, 379.

[39] cf Zimmermann, *German Obligations*, 205–28.

two layers of law: the *acquis commun*, ie the traditional contract laws as laid down in the national codifications, and the *acquis communautaire*, ie the 'odd batch'[40] of directives enacted by the European legislature.

13 It was widely recognized, not least by the European Commission itself, that the *acquis communautaire* was in need of fundamental revision and improvement. The individual directives of which it consisted (and consists) had originated in piecemeal fashion: they were ill-adjusted to each other, unnecessarily complex, and questionable in many other respects. They did not constitute an internally consistent body of law, and it was even doubted whether they followed a coherent policy. When, therefore, in 2001 the European Commission started to issue a sequence of Communications on European contract law,[41] the revision of the consumer *acquis* was an important goal to be achieved. At the same time, however, the European Commission also envisaged an even more ambitious project: the creation of a comprehensive piece of legislation aiming at the harmonization of contract law at large, ie of a codification covering both the *acquis communautaire* on consumer contract law and the *acquis commun* on general contract law. While the Communications of the European Commission vacillated between the pursuit of these two aims, they managed to spark off a number of activities. Thus, in particular, a process was launched which was designed to lead to the establishment of a document intriguingly entitled 'Common Frame of Reference'. A network of academics was charged with the preparation of that document, the key members of that 'Network of Excellence', funded by the European Commission, being the Research Group on the Existing EC Private Law ('Acquis Group') and the Study Group on a European Civil Code.

14 The Acquis Group, created in 2002, had set itself the task of formulating a system of community private law, with the primary and secondary acts of EC legislation, as well as their interpretation by the European Court of Justice, as the authoritative basis. When, in 2007, a first volume entitled *Principles of the Existing EC Contract Law (Acquis Principles): Contract I* (ACQP) appeared—in 2009 a second volume, including a revision of Contract I, was to follow[42]—it soon became clear that their draftsmen had not tackled the task of subjecting the *acquis communautaire* to critical scrutiny, ie to what can properly be referred to as a 'revision'. Rather, the ACQP constitute a conceptually more coherent, but otherwise faithful reproduction of the 'existing EC contract law'. To the extent that the Acquis Group moved beyond such faithful reproduction, a tendency towards abandoning the limitations concerning the scope of application fixed by the directives and of generalizing the rules of the *acquis communautaire* can be identified.[43]

15 The Study Group on a European Civil Code, established in 1998, acted as a successor to the Lando Commission, even though its structure, aims, and working methods were markedly

[40] S Weatherill, 'Do we need a European Contract Law?', in *Proceedings of the 4th European Jurists' Forum* (2008) 3–47 (7).

[41] For an overview, see R Zimmermann, 'European Contract Law: General Report', in *Proceedings of the 4th European Jurists' Forum* (2008) 184–204, 195 f; H Beale, 'The story of EU contract law–from 2001 to 2014', in Twigg-Flesner, *EU Consumer and Contract Law*, 431–62, 435 f.

[42] Research Group on the Existing EC Private Law (Acquis Group) (ed), *Principles of the Existing EC Contract Law* (*Acquis Principles: Contract I* (2007) and *Contract II* (2009)). Unless otherwise indicated, citations to the ACQP, throughout this book, refer to *Contract II* (which can also be found in *Fundamental Texts* (fn 2) 1047–96).

[43] For a more detailed critical assessment of the ACQP, see N Jansen and R Zimmermann, 'Restating the Acquis Communautaire? A Critical Examination of the "Principles of the Existing EC Contract Law" ', (2008) 71 *MLR* 505–34; T Wilhelmsson, 'The Contract Law Acquis: Towards More Coherence Through Generalization?', in *Proceedings of the 4th European Jurists' Forum* (2008) 111–53; *MaxEuP*/Grigoleit and Tomasic, 'Acquis Principles', 10–15.

different.[44] It took upon itself the ambitious task of drafting sets of model rules for areas of the law adjacent to general contract law, such as delict, unjustified enrichment, *negotiorum gestio* (labelled 'benevolent intervention in another's affairs'), sales, and service contracts. Over the years, a number of individual volumes have appeared under the collective label of *Principles of European Law* (PEL).[45] The texts contained in most of these volumes cannot, even by the furthest stretch of the imagination, be referred to as 'restatement' because (apart from sales law) an *acquis commun* in the form of common rules and concepts is largely lacking.[46]

16 The DCFR,[47] essentially, constitutes an attempt to bring together nine bodies, or 'masses', of text and to merge them into one document.[48] These 'masses' of text are the PECL, the ACQP, and the rules contained in seven of the PEL volumes. In the process, however, the texts of the PECL were revised by the Study Group, sometimes only marginally, in other instances more substantially.[49] Most importantly, perhaps, the PECL in their revised version no longer constitute a freestanding set of rules on contract law but have been re-conceptualized under the auspices of a general law of obligations. At the same time, the DCFR employs the abstract term of a 'juridical act' and thus, for example, conceives of a contract as a 'bilateral or multilateral juridical act' (II.-1:101 (1)). The introduction of this overarching systematic category is part of an attempt by the draftsmen of the DCFR to achieve greater conceptual precision as well as a more thorough systematization of the European model rules. Nevertheless, it is somewhat surprising in view of the fact that in modern comparative law scholarship this concept is widely dismissed as unhelpful.[50] The ACQP, too, have been subject to some revision in the process of compiling the DCFR.[51]

17 The DCFR has come in for severe criticism.[52] Thus, in its attempt to move beyond the field of general contract law, it appears to be overambitious; the different masses of text brought

[44] *MaxEuP*/Schmidt-Kessel, 'Study Group on a European Civil Code', 1611–14.

[45] Of particular relevance for the present commentary are M Barendrecht, C Jansen, M Loos, A Pinna, R Cascão, S van Gulijk (eds), *Service Contracts* (*PEL SC*) (2007); E Hondius, V Heutger, C Jeloschek, H Sivesand, and A Wiewiorowska (eds), *Sales* (*PEL S*) (2008). For comment on service contracts, see the contributions to R Zimmermann (ed), *Service Contracts* (2010); for sales, see P Huber, 'Comparative Sales Law', in Reimann and Zimmermann, *Oxford Handbook*, 937–67; for service contracts, sales, and further areas of the law, see the contributions to A Vaquer (ed), *European Private Law Beyond the Common Frame of Reference* (2008).

[46] N Jansen, *Binnenmarkt, Privatrecht und europäische Identität* (2004), 31–63; Zimmermann, 'Present State of European Private Law' (fn 8) 494–503.

[47] C von Bar, E Clive, and H Schulte-Nölke (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)*, Interim Outline Edition (2008) and Outline Edition (2009); C von Bar and E Clive (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)*, Full Edition, vols I–VI (2009). The (for the purposes of the present book) essential parts of the DCFR can also be found in *Fundamental Texts* (fn 2) 1097–334.

[48] *MaxEuP*/Zimmermann, 'Common Frame of Reference (CFR)', 261–5; H Beale, 'European Contract Law: The Common Frame of Reference and Beyond', in Twigg-Flesner, *Private Law*, 116–30.

[49] See, for example, Eidenmüller, Faust, Grigoleit, Jansen, Wagner, and Zimmermann, 'CFR', 666 f; Beale, 'European Contract Law' (fn 48) 127 f.

[50] cf, eg, Ranieri, *Obligationenrecht*, 150. For a critical assessment of the 'juridical act' doctrine in the DCFR, see JP Schmidt, 'Der "juridical act" im DCFR: Ein nützlicher Grundbegriff des europäischen Privatrechts?' (2010) 18 *ZEuP* 304–20; Hellwege, 'DCFR', 665–702; N Jansen and R Zimmermann, 'Contract Formation and Mistake' (fn 27) 620–33.

[51] See, from the point of view of the Acquis Group, the contributions by C Twigg-Flesner, S Leible, E Terryn, and T Pfeiffer in Schulze, *Common Frame of Reference*, 97–185.

[52] Eidenmüller, Faust, Grigoleit, Jansen, Wagner, and Zimmermann, 'CRF', 659–708; S Grundmann, 'The Structure of the DCFR–Which Approach for Today's Contract Law?', (2008) 4 *ERCL* 225–47; JM Smits, 'The Draft-Common Frame of Reference, Methodological Nationalism and the Way Forward', (2008) 4 *ERCL* 270–80; S Whittaker, *The 'Draft Common Frame of Reference': An Assessment. Commissioned by the Ministry of Justice, United Kingdom* (2008) (available online); W Doralt, 'Strukturelle Schwächen in der Europäisierung des Privatrechts: Eine Prozessanalyse der jüngeren Entwicklungen', (2011) 75 *RabelsZ* 260–85; N Jansen and R Zimmermann, ' "A European

together in the DCFR are ill-adjusted to each other; the substantive deviations from previous layers of text, in particular the PECL, are not always easy to understand; and the overly doctrinaire character of many of the concepts used and definitions included in the DCFR[53] is all too evident. The general impression is that much more preparatory work and genuinely European scholarship are necessary before a codification of this size will be successful.[54]

18 In the meantime, a joint Working Group of the *Association Henri Capitant* and the *Société de Législation Comparée* had been set up in order to produce a revised version of the PECL.[55] It was published at first (with commentaries) under the title *Principes contractuels communs* (PCC) in French, and subsequently also (limited to the revised 'black letter' provisions) in English.[56] If the Study Group and the Acquis Group did not in fact take account of the French proposal, this was probably due to the time pressure that bedevilled the entire DCFR project. At the same time, however, it must be said that the PCC are marked by a certain distance from the international consensus and an attempt to give contract law a specifically French flavour, without being able to base this shift on good reasons. By and large, the PCC do not constitute an advance compared to the PECL.[57] The French Working Group also, incidentally, drafted three 'Principes directeurs du droit Européen du contrat' ('liberté contractuelle', 'securité contractuelle', and 'loyauté contractuelle')[58] which formed the basis for an introductory passage entitled 'Principles' in vol I of the DCFR.[59]

3. Consumer Rights Directive, FS, and CESL

19 By the time the DCFR was published, the European Commission had adopted a two-pronged approach. On the one hand, in October 2008, a *Proposal for a Directive on Consumer Rights* was published[60] which was supposed to 'merge' the four most important existing directives in the field of consumer protection 'into a single horizontal instrument'.[61] Eventually, in

Civil Code in All But Name": Discussing the Nature and Purposes of the Draft Common Frame of Reference', (2010) 69 *Cambridge LJ* 98–112; the contributions to Wagner, *Common Frame of Reference*.

[53] See Jansen and Zimmermann, 'European Civil Code' (fn 52) 108–11. Vol I of the DCFR contains a catalogue of more than 150 definitions.

[54] According to Beale, 'European Contract Law' (fn 48) 119, the exercise of drawing up the DCFR 'was primarily an academic one in comparative law'. The aim of the founder of the Study Group, however, went much further; see, eg, C von Bar, 'A Common Frame of Reference for European Private Law–Academic Efforts and Political Realities', (2008) 23 *Tulane European and Civil Law Forum* 37–49; and see the discussion by Jansen and Zimmermann, 'European Civil Code' (fn 52) 88–112.

[55] According to Beale, 'Story' (fn 41) 443, it was a 'tactical error' on the part of the 'Network of Excellence' to ask the two French associations to suggest amendments to the PECL because it led 'to a lessening of the DCFR's authority'.

[56] Association Henri Capitant, *Société de Législation Comparée, Projet de Cadre Commun de Référence—Principes contractuels communs* (2008) 211–838; for the English version of the black letter rules, see B Fauvarque-Cosson and D Mazeaud (eds), *European Contract Law. Materials for a Common Frame of Reference: Terminology, Guiding Principles, Model Rules* (2008) 573–614. The PCC can also be found in *Fundamental Texts* (fn 2) 1337–81.

[57] For a detailed analysis of two parts of the PCC, see Jansen and Zimmermann, 'Contract Formation and Mistake' (fn 27) 643–54, 650–4, 660. The Expert Group charged with the preparation of the Feasibility Study (see above, text to fn 2) *did* consider the PCC but this resulted 'in very little, if any change of substance': Beale, 'Story' (fn 41) 444.

[58] Association Henri Capitant, Société de Législation Comparée, *Projet de Cadre Commun de Référence—Principes contractuels communs* (2008) 21–198; for an English version, see Fauvarque-Cosson and Mazeaud (fn 56) 419–572. cf also *Fundamental Texts* (fn 2) 1335–7.

[59] von Bar and Clive, Full Edition (fn 47) vol I, 37–63 (here, four principles are listed, ie freedom, security, justice, and efficiency).

[60] COM(2008) 614 final.

[61] This Proposal encountered opposition, particularly because of the shift of strategy from minimum to full harmonization; see, eg, Norbert Reich, 'Von der Minimal- zur Voll- zur "Halbharmonisierung"—Ein europäisches Privatrechtsdrama in fünf Akten', (2010) 18 *ZEuP* 7–39; J Smits, 'Full Harmonization of Consumer Contract Law?

October 2011, a *Consumer Rights Directive* was issued.[62] It does not, of course, constitute a European consumer code, nor even a comprehensive compilation, but is a fairly unambitious consolidation of merely two of the previously existing directives, ie the *Doorstep Selling* and *Distance Contracts Directives*. In particular, the *Consumer Rights Directive* does not reflect a critical review of the *acquis communautaire* as it had been envisaged, eg, in a Communication of 2004 entitled 'The Way Forward'.[63] On the other hand, in late April 2010, the Commission set up the above-mentioned Expert Group[64] in order to 'recontractualize', and also revise the DCFR.[65]

20 A few weeks *after* the Expert Group had begun its work, the Commission published a Green Paper on 'Policy options for progress towards a European Contract Law for consumers and businesses'[66] and thus began a consultation process on what purpose the document to be created was to serve, and on its legal nature. The consultation period ended when the Expert Group had already been working for nearly nine out of the total of twelve months of its existence.[67] However, the Commission's intentions had, by that time, become quite clear: the creation of an 'optional instrument' was the preferred solution.[68] The findings of the Expert Group were published in May 2011 as a *Feasibility Study for a future instrument in European Contract Law*.[69] That study provided the basis for a *Proposal for a Regulation on a Common European Sales Law* that was published in October 2011.[70] The CESL, contained in Annex I to the proposed Regulation, constitutes a draft codification comprising not only the sales law mentioned in its title but also general contract law, as well as contracts for the supply of digital content and for services closely related to a contract of sale or a contract for the supply of digital content (installations, repair, or maintenance).[71] The CESL was not supposed to apply directly to all such contracts concluded within the European Union; its application was to depend on a specific agreement of the parties to that effect ('opt-in model'), even if, surprisingly, that agreement was

A Critique of the Draft Directive on Consumer Rights', (2010) 18 *ERPL* 5–14; cf also Zimmermann, 'Present State' (fn 8) 486–90.

[62] For comment, see C Wendehorst, 'Die neue Richtlinie über die Rechte der Verbraucher', in *Festschrift für Irmgard Griss* (2011) 717–34; E Hall, G Howells, and J Watson, 'The Consumer Rights Directive: An Assessment of its Contribution to the Development of European Consumer Contract Law', (2012) 8 *ERCL* 139–66; O Unger, 'Die Richtlinie über die Rechte der Verbraucher—Eine systematische Einführung', (2012) 2 *ZEuP* 270–304; P Bydlinski and B Lurger (eds), *Die Richtlinie über die Rechte der Verbraucher* (2012); G de Cristofaro and A de Franceschi (eds), *Consumer Sales in Europe* (2016). According to Beale, 'Story' 438, the Commission 'seems to have decided to cut its losses on the [Consumer Rights Directive], because by then it had a new approach', ie the optional instrument.

[63] COM(2004) 651 final.

[64] See above text to fn 2.

[65] For interesting insider information on the work of the Expert Group, see Beale, 'Story' (fn 41) 438–48. Concerning terminology, the Expert Group 'generally preferred to draft along the lines of PECL rather than the DCFR': Beale, 'Story' (fn 41) 445.

[66] COM(2010) 348 final. For comment, see Max Planck Institute for Comparative and International Private Law, 'Policy Options for progress towards a European contract law: comments on the issues raised in the Green Paper from the Commission of 1 July 2010, COM(2010) 348 final', (2011) 75 *RabelsZ* 371–438.

[67] The Expert Group thus, for a considerable period, had to work on an 'as if' basis: Beale, 'Story' (fn 41) 439; cf also the comments by another member of the Expert Group: M Király (fn 28) 1871 ('almost "a mission impossible"').

[68] See V Reding, 'Warum Europa ein optionales Europäisches Vertragsrecht benötigt', (2011) 19 *ZEuP* 1–6. For comment see, eg, E Arroyo Amayuelas, 'The idea of an optional contract code', in Twigg-Flesner, *EU Consumer and Contract Law*, 463–86.

[69] See above fn 2.

[70] See above fn 3.

[71] The latter extension resulted from a decision by the European Commission of December 2010: Beale, 'Story' (fn 41) 446. Beale, 444, also points out that there are two topics on which the FS (and consequently also the CESL) departs substantially from the DCFR (and thus also the PECL): the rules on restitution and on prescription. For further differences between DCFR and CESL, see Beale, 'Story' (fn 41) 454–9.

conceived as a choice exercised within the scope of the respective national law applicable according to the Rome I Regulation. The CESL was not, therefore, intended to constitute a 'twenty-eighth' contract law regime, but rather a 'second' one, made available to contracting parties in a uniform manner within the various EU member states.

21 With the publication of the CESL, the process of harmonizing European contract law had reached a critical stage. On the one hand, it was to be the crowning achievement of many years of deliberations and of the production of text after text: the nucleus of a European code of contract law properly so-called, and possibly even of a European Civil Code. For the European Commission, it had, as a 'strategic growth-enhancing initiative',[72] become a prestige project that was to be forced through the Council of the European Union and the European Parliament before the expiry of the latter's term of office in the summer of 2014. On the other hand, it was again a document suffering from severe deficiencies.[73] Thus, it was not comprehensive, for it lacked rules on illegality, agency, plurality of debtors and creditors, assignment, set-off, and a number of other matters.[74] It was marked by surprising structural peculiarities,[75] questionable policy choices, and technical imperfections, and it was based on an overly complex application regime that would have produced a considerable number of unnecessary difficulties. Thus, it was to be feared that the idea of a European Sales Law was doomed to an inauspicious future had the Regulation been enacted as proposed, or with only minor alterations and improvements.

4. Collapse

22 As it turned out, this was not to happen. The term of office of the European Parliament, and with it of the (second) Barroso Commission ended after only a first reading of the CESL in the European Parliament had occurred;[76] and the new (Juncker) Commission announced soon after having assumed office that it intended to withdraw the Proposal, and with it the CESL.[77] Instead, another proposal specifically aiming 'to fully unleash the potential of e-commerce in the Digital Common Market' was to be prepared,[78] as part and parcel of the 'Digital Market Strategy for Europe'.[79] On 9 December 2015 a Proposal for a Directive 'on certain aspects'

[72] *Communication from the Commission: A Roadmap to Stability and Growth*, COM(2011) 669 final.

[73] For critical comment, see Eidenmüller, Jansen, Kieninger, Wagner, and Zimmermann, 'CESL', 301–57; the contributions to G Wagner and R Zimmermann, 'Sondertagung der Zivilrechtslehrervereinigung zum Vorschlag für ein Common European Sales Law', (2012) 212 *AcP* 467–852; Dannemann and Vogenauer, *European Sales Law in Context*; Claeys and Feldkamp, *Sales Law*.

[74] This appears to have been due to the desire, on the part of the Commission, to enact a relatively short document. Thus, a limit of 150 articles had been imposed on the Expert Group charged with the drafting of the FS; see Beale, 'Story' (fn 41) 445, commenting that while the Commission was correct to say that these topics may be less relevant for cross-border trade, 'the principle reason for their omission was lack of space'. According to Király (fn 28) 1871, it was due to time pressure that a number of areas were not covered.

[75] Thus, for example, Part IV of the CESL ('Obligations and remedies of the parties to a sales contract or a contract for the supply of digital content'), based on Part IV of the FS, is structured along the lines of the CESL rather than PECL, PICC, and DCFR. For background, see Beale, 'Story' (fn 41) 446 f (who in a spirit of understatement refers to 'a slightly odd sandwich structure').

[76] In that first reading, the CESL had been accepted, subject to a large number of amendments, by a substantial majority: *European Parliament Legislative resolution of 26 February 2014 on the proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law*, COM(2014) 0635–C7–0329/2011–2011/0284(COD) (2013).

[77] Above fn 5.

[78] *Commission Work Programme 2015* (fn 5).

[79] *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Market Strategy for Europe*, COM(2015) 192 final.

concerning contracts for the online and other distance sale of goods[80] has indeed been published. This proposal takes the rules of the Consumer Sales Directive as its basis, and it provides for full harmonization of the criteria for conformity of the goods, the hierarchy of remedies available to the consumer, the periods for the reversal of the burden of proof, and the rules on commercial guarantees.[81] It is to be accompanied by a Proposal for a Directive 'on certain aspects' concerning contracts for the supply of digital content.[82] Looking at the two proposals, and considering the great ambitions with which the political process of harmonizing European contract law had once started, one is reminded of Horace: 'parturient montes, nascetur ridiculus mus'.[83]

23 There are even more texts that have to be taken into account in order to gain a truly comprehensive picture. Thus, a Working Party of the European Law Institute (ELI)[84] has examined the Proposal for a Regulation establishing a CESL and published a Statement in 2012, and a Supplement to that Statement in 2014, in which improvements were suggested.[85] If these ELI-documents, to some extent, constitute another layer of text within the process kicked off by the PECL,[86] the same cannot be said about the *Avant-projet* of a *Code Européen des Contrats*, 'co-ordinated' by Giuseppe Gandolfi in the name of an *Accademia dei Giusprivatisti Europei*.[87] It stands quite apart from the mainstream of the discourse on European contract law.[88] Contrary to texts such as PECL, PICC, DCFR, and CESL it is very largely the work of one person, and it has taken its cue from two models. These models are the Italian *Codice civile* and a Contract Code drawn up on behalf of the English Law Commission at the end of the 1960's (which, however, has neither been implemented nor even been published in England).[89] The draftsmen of PECL, PICC, and all of the subsequent layers of text, on the other hand, have made every effort not to base their work on any individual national legal system. This may be one reason why the *Avant-projet Gandolfi* only plays a marginal role, if any, in the current debate on European contract law. Comparatively more significant is a set of *Principles of European Tort Law* (PETL) drafted by a group of academics around Helmut Koziol, and supported by the European Centre of Tort and Insurance Law as well as the Austrian Academy of Sciences.[90] The PETL, of course,

[80] COM(2015) 635 final; easily accessible in *Fundamental Texts* (fn 2) 839–55.

[81] See the explanatory memorandum to the Proposal under 1, second bullet point (*Fundamental Texts* (fn 2)) 820–38.

[82] COM(2015) 634 final; easily accessible in *Fundamental Texts* (fn 2) 797–819.

[83] *Ars Poetica*, 139 ('Mountains shall be in labour; yet an absurd little mouse will be born').

[84] On which see R Zimmermann, 'Challenges for the European Law Institute', (2012) 16 *Edinburgh LR* 5–23.

[85] ELI, *Statement* (2012) and ELI, *Statement* (2014); both documents are available on the ELI website under 'Publications'.

[86] A number of the suggestions made by the ELI Working Group have found their way into the Draft Report (COM(2011) 0635–C7–0329/2011–2011/0284(COD) (2013); for background, see H-P Meyer and J Lindemann, 'Zu den aktuellen Entwicklungen um das Gemeinsame Europäische Kaufrecht auf EU-Ebene', (2014) 22 *ZEuP* 1–7) submitted by the European Parliament's Committee on Legal Affairs which was accepted by the European Parliament in its first reading on 26 February 2014 (see above fn 76); cf also Beale, 'Story' (fn 41) 460, according to whom the amendments subject to which the CESL was accepted in the European Parliament's first reading 'drew heavily on the ELI Statement'.

[87] G Gandolfi (co-ordinator), *Code Européen des Contrats: Avant-projet, livre premier* (2004). For background, see P Stein (ed), *Incontro di studio su il futuro codice europeo dei contratti* (1993); id (ed), *Convegni di studio per la redazione del progetto di un codice europeo dei contratti* (1996). Subsequently, a second volume devoted to the law of sale has been published: G Gandolfi (co-ordinator), *Code Européen des Contrats: Avant-projet, livre deuxième* (2007).

[88] R Zimmermann, 'Der "Codice Gandolfi" als Modell eines einheitlichen Vertragsrechts für Europa?', in *Festschrift für Erik Jayme* (2004) 1401–18.

[89] H McGregor, *Contract Code drawn up on behalf of the English Law Commission* (published in 1993 by Giuffré, Milano).

[90] European Group on Tort Law (ed), *Principles of European Tort Law: Text and Commentary* (2005); on which see H Koziol, 'Die "Principles of European Tort Law" der "Group on European Tort Law"', (2004) 12 *ZEuP* 234–59; R Zimmermann, 'Principles of European Tort Law and Principles of European Contract Law', in H Koziol and

deal with an area of the law adjacent to contract law, but a number of the issues covered (eg causation, damages, solidary liability) are also relevant within the field of contract law.[91]

IV. Gaining orientation

The collapse of the European Commission's plans to codify European contract law is not the end of the road.[92] The quest for a European contract law will go on. However, borrowing a metaphor common in the field of consumer contract law, a 'cooling-off period' may be desirable, a time for academic reflection about what has happened over the past three or four decades, and for an assessment of where we stand today. We have seen the production of a bewildering number of reference texts, and we are thus faced with a complex and confusing picture of European contract *laws* rather than a European contract *law*. Most of the texts mentioned so far are based on, and hermeneutically related to, each other. But there has not, so far, been a critical and comprehensive examination of why and in which respects they differ from each other. 24

1. Problems

Quite clearly, the sheer number of bodies of text that have so far been produced, and the difficulties inherent in any genetic comparison of these texts, present a problem for any student of European contract law today. Another problem, in that context, is that there is very little in the nature of *travaux préparatoires* from which an answer can be gleaned. The black letter rules of the PECL are accompanied by Comments, but these Comments are largely exegetical in character: they explain what a specific rule, or concept, is intended to mean, but not why it has been adopted.[93] The same applies to the Comments appended to the PICC. The draftsmen of Books II and III of the DCFR have mostly taken over the Comments from the PECL. Sometimes these Comments have been abbreviated or expanded upon, and sometimes they have been changed. At least occasionally, changes have been made even where a rule has remained unchanged, and no changes have been made even where a rule *has* been changed.[94] This juxtaposition of newly formulated rules and old comments, or of old rules and newly formulated comments engenders difficulties of interpretation. As far as the FS is concerned, we find some scattered comments in twelve documents entitled 'Commission's synthesis' of the meetings of the Expert Group on European Contract Law, available online.[95] The CESL were not accompanied by any explanatory 25

B Steininger (eds), *European Tort Law 2003* (2004), 2–31; N Jansen, 'Principles of European Tort Law? Grundwertungen und Systembildung im europäischen Haftungsrecht', (2006) 70 *RabelsZ* 732–70; G Wagner, 'The Project of Harmonizing European Tort Law', in H Koziol and B Steininger (eds), *European Tort Law 2005* (2006) 650–82; *MaxEuP*/Magnus, 'Principles of European Tort Law', 1335–9.

[91] Another set of model rules on 'non-contractual liability arising out of damage caused to another' is contained in Book IV of the Draft Common Frame of Reference; see C von Bar and E Clive (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)*, Full Edition, vol IV (2009); cf also C von Bar (ed), *Non-Contractual Liability Arising out of Damage Caused to Another* (*PEL Liab Dam*) (2009).

[92] But see Beale, 'Story' (fn 41) 431, according to whom this is 'quite possibly signaling the end of any interest in any general form of European contract law'. For a general analysis, see J Smits, 'The future of contract law in Europe', in Twigg-Flesner, *EU Consumer Law and Contract Law*, 549–65.

[93] If the authors of international model rules abstain from such explanations, this is supposed to strengthen the authority of these model rules: see Jansen, *Making of Legal Authority* (fn 1) 106–11 and 131–6. With respect to the DCFR, see also Jansen and Zimmermann, 'European Civil Code' (fn 52) 110 f; Hellwege, 'DCFR', 699.

[94] See, as far as two specific problem areas are concerned, the analysis in Jansen and Zimmermann, 'Contract Formation and Mistake' (fn 27) 641–3, 654–9, 661.

[95] According to Beale, 'Story' (fn 41) 447, comments on many chapters of the FS were prepared on behalf of the Expert Group and sent to the Commission; but they have not been made public 'and their fate is unknown'.

statements or comments at all.[96] The PCC do, in their original, French version, provide a 'motivation' for changes proposed to the PECL, even if the 'analyse comparée' is based (apart from CISG and PICC) on the *Avant-projet de réforme du droit des obligations et de la prescription* (*Avant-projet Catala*, 2006)[97] and the *Code Européen des Contrats* (*Avant-projet*),[98] ie upon a national (French) and a nationally inspired legal text. The relatively most helpful and most comprehensive set of notes is the one appended to the ACQP because, apart from a Commentary, it also contains, rule by rule, an examination of the foundation in the *acquis communautaire* (sources, development, 'political issues').

26 Among the other problems immediately apparent to an observer of the present state of European contract law is the fact that a revision of the consumer *acquis*, so emphatically called for by the European Commission,[99] has not yet taken place. The ACQP and the Consumer Rights Directive attempt to achieve a greater degree of coherence; but more fundamental questions relating to the rational justification for the legal rules constituting the *acquis*, to the consistency of evaluations, the intellectual coherence of the approaches adopted, devices chosen, ideas pursued, and legal institutions established have not yet been confronted by either the European legislature or any of the academic groups responsible for the various restatements.[100]

27 Also, it is clear that the different bodies of law that have been merged in the process of producing a European contract code have not always been properly adjusted to each other; and that the repeated revision of these bodies of text has not always improved their quality. Gaps have opened up, new inconsistencies have arisen, and a number of ill-considered decisions have been taken.[101] This may have been due, at least partly, to the great time constraints under which just about all working groups subsequent to the Lando Commission (with the exception of the four Working Groups established, over the years, by UNIDROIT) have been labouring from the moment when the project of a European contract code had become part of the Commission's political agenda: the DCFR, after all, was to be completed before the end of the term of office of the Barroso I Commission, and the CESL was to be enacted before the end of the term of office of the Barroso II Commission.

28 Another reason for the deficiencies in the later textual layers is the fact that the discussions on which they were based were conducted in the sterile atmosphere of conference rooms, under pressure of time and politics, and without much contact with the general comparative discourse on European contract law. There is little evidence that the body of pertinent literature, published over the years,[102] has been tapped. Apart from that, just about all national contract laws in Europe have undergone very interesting developments in recent or very recent times, usually

[96] Not even the recitals of the draft Regulation itself can be used for this purpose, as they refer only to the draft Regulation itself which mainly determines the application requirements for the CESL; they do not address the CESL itself.

[97] On which see, J Cartwright, S Vogenauer, and S Whittaker (eds), *Reforming the French Law of Obligations* (2009).

[98] See above, fn 87.

[99] See above, fn 63.

[100] For an academic initiative to address these questions and thus to propose a revision of the consumer *acquis*, see H Eidenmüller, F Faust, HC Grigoleit, N Jansen, G Wagner, and R Zimmermann, *Revision des Verbraucher-acquis* (2011). For a summary in English, see H Eidenmüller, F Faust, HC Grigoleit, N Jansen, G Wagner, and R Zimmermann, 'Towards a Revision of the Consumer Acquis', (2011) 48 *CMLR* 1077–123.

[101] This, at least, was the result of preliminary studies such as Jansen and Zimmermann, 'Contract Formation and Mistake' (fn 27) 625–62, or R Zimmermann, 'Interest for Delay in Payment of Money', in L Gullifer and S Vogenauer (eds), *English and European Perspectives on Contract and Commercial Law: Essays in Honour of Hugh Beale* (2014) 319–49, and already of our seminar in the autumn of 2010 under the auspices of the *Studienstiftung* that initiated the present volume.

[102] See the titles contained in the general literature list for this volume.

pointing in the direction of an organic convergence and with some of the international texts (CISG, PICC, PECL) providing a source of information concerning the direction of international legal development.[103]

2. The form and nature of the commentary

29 When the Roman Church, in the decades after the reforms initiated by Gregory VII, re-organized itself as a legal body, ie as an institution shaped and ruled by means of legislation, the inherited law of the Church was in a state of fundamental disorder and uncertainty. Over the centuries, an enormous number of canons of Church councils and decretals of Popes had accumulated, often only known in parts of Christianity or to a few learned clergymen. Nobody had an overview of Canon law in its entirety; the law had simply become unmanageable. In that situation the *Decretum Gratiani* was published which was soon to become the central textual authority of Canon law. Its title expresses the later attribution of this text to Gratian: a jurist and monk, or perhaps a couple of jurists and monks, of whose life or lives nearly nothing is known.[104] The original title had been *Concordia discordantium canonum*, 'concordance of dissonant canons', and this title formulated a clear programme: the text integrated large parts of the earlier canons and decretals with excerpts from Roman law, passages from the scripture and from the church fathers' writings into a coherent body of legal norms. Gratian thus re-organized all these texts, irrespective of their origin, into a single legal document. Yet, as many of those quite distinct authorities were in apparent contradiction, or 'dissonance', with each other, Gratian related them to specific questions of actual Canon law practice; this made it possible for him to uncover and harmonize apparent conflicts by distinguishing and re-interpreting these texts in the light of related authorities. For this purpose, Gratian included, between the collected individual texts of authority, his own explanatory *dicta*: short texts that analysed, interpreted, and harmonized the Church's laws.[105] When, in the autumn of 2010, we discussed what needed to be done, we instantaneously thought of the *Decretum* and thus, while we worked on the project, we have always in our communications referred to it, not without a tinge of irony, under that title.

30 In the 18th century, the law of England was arguably in a similarly infelicitous state as early medieval Canon law. It consisted of seemingly independent bodies of law (common law, equity, and statutory law) and had not been the object of academic revision. Hence, its actions, rules, and institutes had grown apart. As a whole, the laws of England were therefore difficult to administer and even more difficult to synthesize into a coherent system. Such synthesis, however, was the project of Sir William Blackstone, the first professor of English law at the University of Oxford.

[103] See, eg, Zimmermann, 'Contemporary Manifestation' (fn 30) 33–41; Jansen (fn 1) 59–77; most recently, see A Estrella Faria, 'The Influence of the UNIDROIT Principles of International Commercial Contracts on National Laws', in *Eppur si muove: The Age of Uniform Law* (2016) 1318–49.

[104] 'Unfortunately, virtually everything about it, save its authority and importance, seems to be either disputed or unknown': RH Helmholz, *The Spirit of Classical Canon Law* (1996) 7; see also K Christensen, 'Introduction', in Gratian, *Treatises on Laws* (1993), ix–xxvii, xiv—the volume also contains a translation into English of the first part of the *Decretum* (by A Thompson) and of the *Ordinary Gloss* to the *Decretum* (by J Gordley); A Winroth, *The Making of Gratian's Decretum* (2000) 122 and *passim*. Apparently, there were at least two versions of the *Decretum*. The original version was probably written around 1139. During the immediately following years, it was substantially enriched and restructured; only at that stage did Roman law find its place within the text.

[105] See, eg, Helmholz, *Classical Canon Law* (fn 104) 7; Christensen, 'Introduction' (fn 104) xii with further references. For further literature on the *Decretum Gratiani*, see, eg, EJH Schrage, *Utrumque Ius* (1992) 91–5; JA Brundage, *Medieval Canon Law* (1995) 44–9; P Landau, 'Gratian and the *Decretum Gratiani*', in W Hartmann and K Pennington (eds), *The History of Medieval Canon Law in the Classical Period, 1140–1239* (2008) 22–54; *MaxEuPl*/Thier, 'Canon Law', 133–7, 135.

Clearly, his *Commentaries on the Laws of England*, the most influential book on English law in (early) modern times,[106] was driven by the ideal of an 'acquaintance with the general spirit of laws and the principles of universal jurisprudence, combined with an accurate knowledge of our own municipal constitutions, their original, reason, and history'.[107] This is a jurisprudential ideal, which has also motivated us from early on; and Blackstone's *Commentaries* have thus inspired the title of our book.

31 Of course, medieval and early modern law do not present solutions for the problems of our times. Contemporary jurists will not find suitable models for how to deal with the present state of European contract law in either Gratian or Blackstone, or in any other historical book of authority. We cannot simply employ the methods of those who went before us. One of the things that may be learned from those earlier works, however, is that every generation of jurists has to find the type of literature that best meets the challenges of its own time. The format chosen by us is therefore as much of an experimental character as were the works of Gratian and Blackstone. This is another reason for adopting the term 'Commentaries' rather than 'Commentary', in the title of this book. The modern (German) 'commentary' has obviously been a highly appropriate format to administer the law contained in a civil code,[108] but it is clearly not appropriate for modern European contract law.

32 What we are attempting to do is, first, critically to compare the various reference texts on European contract law—from ULIS and CISG, via PECL and PICC, down to DCFR and CESL, as well as the relevant *acquis communautaire*. We will be asking in which respect these layers of texts differ, and how these differences can be explained and assessed.[109] We will then, second, tie the discussion concerning these texts back to the pertinent historical and comparative background and thus investigate whether, and to what extent, the texts can be taken to be genuinely European in nature, ie to constitute a manifestation of a common core of European contract law. If this is not the case, we will ask whether, and for what reason, they *should be seen* as reference points for the further development of European contract law. Obviously, then, our project has a significant historical dimension—both in its endeavour to find common ground, and to assess and critically examine differences and different experiences. We approach our task by way of rule-by-rule commentaries on the foundations as well as the modern manifestations of European contract law. In doing so, we hope to achieve a picture of that subject matter marked by more nuance and depth of focus than can be achieved in a textbook.

33 As far as the *acquis commun* is concerned, we have chosen the PECL as our point of departure. ULIS and CISG only deal with certain aspects of general contract law, the PICC do not have a European focus, the DCFR is based on an overambitious reconceptualization, and both FS and CESL suffer from obvious gaps and other deficiencies. Of course, the PECL are also open to

[106] On Sir William Blackstone and his *Commentaries on the Laws of England* see, eg, SFC Milsom, 'The Nature of Blackstone's Achievement', (1981) 1 *Oxford JLS* 1–12; JW Cairns, 'Blackstone, An English Institutist: Legal Literature and the Rise of the Nation State', (1984) 4 *Oxford JLS* 318–60; GH Jones, in AWB Simpson (ed), *Biographical Dictionary of the Common Law* (1984) 57–61; WR Prest, *William Blackstone: Law and Letters in the Eighteenth Century* (2008); id (ed), *Blackstone and his Commentaries* (2014).

[107] W Blackstone, *Commentaries on the Laws of England*, vol I (4th edn, Dublin, 1771) ii.

[108] Kästle-Lamparter (fn 26) 209–88.

[109] For preliminary model studies, see Jansen and Zimmermann, 'Contract Formation and Mistake' (fn 27) 625–62; R Zimmermann, 'Die Auslegung von Verträgen: Textstufen transnationaler Modellregeln', in *Festschrift für Eduard Picker* (2010) 1353–73. On the notion of 'textual layers', see R Zimmermann, 'Textstufen in der modernen Entwicklung des europäischen Privatrechts', (2009) 20 *Europäische Zeitschrift für Wirtschaftsrecht* 319–23. For a comparative study relating to two bodies of texts, see S Vogenauer, 'Common Frame of Reference and UNIDROIT Principles of International Commercial Contracts: Coexistence, Competition, or Overkill of Soft Law? (2010) 6 *ERCL* 143–83.

criticism in many respects, as will become apparent throughout this book; all in all, however, they can still be regarded as the most convenient reference text for our purposes. The PECL texts thus determine the structure of our book, for wherever the PECL have a text on a particular issue, it always appears at the top of the page. Underneath, we have printed, for ease of reference, the relevant texts from the other transnational instruments. These columns of text, in turn, are often followed by a 'synthesis', which is either identical to, or based on one or the other of the existing texts, or on a combination of them.[110] That synthesis is regarded by the author of the respective part of our book as the 'most appropriate' text in terms of the critical, historical, and comparative analysis that follows, adjusted to the terminology and drafting style of the PECL. Representing the text that appears to state, or restate, European law in the comparatively most convincing and appropriate manner, the synthesis is always printed in bold. Wherever there is no synthesis, the 'most appropriate' text, which is thus printed in bold, is usually the one taken from the PECL. Occasionally, however, neither the text of the PECL, nor any other text is printed in bold. This means that the respective rule is dispensable.

34 We have not regarded it as our task to formulate our own rules, ie new texts, which we, for one reason or another, regard as desirable, but have limited ourselves to making a reasoned choice between the available texts, drafted by the various international working groups. Wherever, nonetheless, amendments to a given text appeared to be necessary, or where obvious infelicities could be ironed out, this has been marked. Interpolations made by the author of the commentary are therefore indicated by italics and explained either in a footnote or in the commentary. Inconsistencies in the capitalization of headings in the PECL and other patent errors have been silently corrected. Even if we have not drafted rules which we regard as superior to the ones contained in the transnational instruments, we have often, of course, in our commentaries indicated in which direction those rules should be developed by the draftsmen of a future set of model rules, or of a European codification.

35 The general structure of the book thus follows that of the PECL which, however, we have complemented with some chapters, sections, and individual provisions taken from a number of other sources, primarily in order to account for the European Union's quickly growing consumer *acquis*. Usually we have taken the pertinent directives as our point of departure and have then printed, and subsequently analysed in comparative perspective, the texts based on these directives in ACQP, DCFR, FS, and CESL. In order to facilitate the reader's orientation, we have broadly followed the cue provided in DCFR, FS, and CESL as to how to merge the *acquis communautaire* with the *acquis commun*. In the process, we have attempted not to change the numbering of the rules contained in the PECL, but just extended that numbering, or adjusted the structure of the PECL, in what appeared to us to be the most convenient manner. The same applies where we have inserted rules from other textual layers into the system of the PECL. Additions to the PECL are thus Sections 4 and 5 of Chapter 2, Section 2 of Chapter 6, Art 6:112, Art 7:102-1, Art 9:508-1 until 9:508-4, Art 16:103 until 16:105, and Chapters 18 and 19. For reasons explained below,[111] Art 9:306 to 9:309 have been reduced to one single article (Art 9:306). Appendices have been added to Art 2:501, 2:504, 2:505, 9:306, and 9:508.

36 The purpose of this commentary, as has been said above, is to provide comprehensive information on, and a thorough analysis of, European contract law in a situation which is marked

[110] If the synthesis is identical with one of the previous layers of text, this is indicated by the symbol = ; if it is based on one of the previous layers of text, this is indicated by the words 'based on …'; and if it is based on one of the previous layers of text with other layers of text contributing to a reformulation, this is indicated by the words 'based on …, rst …'. The abbreviation 'rst …' stands for 'restated on the basis of …'.

[111] Introduction before Art 9:305, Art 9:306, [26].

by a plurality of texts, and a fragmented scholarship dealing with them. It makes no sense, however, simply to collect and analyse *all* the available comparative and historical information on a specific issue—nobody could possibly want to read such a book. Likewise, not all reference texts can be analysed in equal detail. Hence, certain decisions were necessary as to the relative relevance of the reference texts and the pertinent background information, for an important task of a good commentary is the selection of the most relevant information. Thus, a European commentary can be expected to refer readers to the pertinent comparative literature and to central national authorities such as leading textbooks or commentaries. It cannot, however, provide a comprehensive picture of the national legal systems prevailing in Europe: neither as far as the range of systems covered (predominantly, for linguistic reasons, the Western European ones) nor as far as the exposition of detail is concerned. In attempting to construct, or reconstruct, a *European* discussion we follow a model that has already been employed by scholars such as Hein Kötz.[112] At the same time, we thereby hope to contribute to the crystallization of European contract law itself.[113] Throughout, we have given preference to legal literature written in English. However, in view of the complexity of the discourse about contract law in Europe, we have attempted not to disregard important contributions to that discourse merely because they are written in a language other than English. Reference to national legal systems is normally made on the basis of the relevant national legal literature.

37 It is not easy to co-ordinate a project of this size, and involving so many authors. Some chapters were finished earlier than others. Every author, however, has updated his or her chapter so as to reflect the law and the legal literature as of 31 December 2016. This means, for example, that the French *Code civil* is cited as it stands after the great reform of the law of obligations in 2016, unless something else is indicated (*Code civil*[1804]). Other codes, of course, are also quoted in the version in force by the end of 2016, unless something else is indicated (BGB[1900], *Codice civile*[1865], etc.)

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38 European contract law is different from national contract laws. It is a body of law still emerging in European legislation, in the jurisprudence of the European Court of Justice, and in scholarly discourse. In large parts it is, as yet, unsettled, not only as far as specific rules and doctrines are concerned, but also with respect to its sources. Nevertheless, it would be wrong to assume that a European contract law would require a codification to come into existence. To some extent, quite obviously, it already exists today: in the class-rooms of universities, where 'European contract law' is taught,[114] as well as in the practice of European and national courts and of international arbitration tribunals. It determines the interpretation of transnational contracts, and the standards according to which general terms of business are judged to be unfair. Regularly it is assumed to exist where national laws are reformed or interpreted in a European spirit, or where a European Directive has to be placed in context. The purpose of this commentary is to contribute to this process of shaping European contract law. When, one day, a new effort will be made to draft a more ambitious piece of legislation than the two draft directives presently under consideration, we hope that our book can serve as point of orientation and also as point of departure: for it aims to give a comprehensive and balanced account of where we stand today, as well as suggestions as to where we might want to go in the future.

[112] See above, fn 21.

[113] *MaxEuPl*/Jansen, 'European Private Law', 637–40.

[114] See, for example, the teaching materials by F Kadner Graziano, *Le contrat en droit privé européen* (2006); id, *Europäisches Privatrecht* (2008); H Beale, B Fauvarque-Cosson, J Rutgers, D Tallon, and S Vogenauer, *Cases, Materials and Text on Contract Law* (2nd edn, 2010, 3rd edn forthcoming in 2018).

CHAPTER 1
GENERAL PROVISIONS

Section 1: Scope of the Principles

Literature:

Freedom of Contract: PS Atiyah, *The Rise and Fall of Freedom of Contract* (1979); J Basedow, 'Freedom of Contract in the European Union', (2008) 6 *ERPL* 901–23; W Decock, *Theologians and Contract Law—The Moral Transformation of the Ius Commune (ca. 1500–1650)* (2013); J Gordley, *The Philosophical Origins of Modern Contract Doctrine* (1991) 69–229; T Gutmann, 'Some Preliminary Remarks on a Liberal Theory of Contract', (2013) 76 *Law and Contemporary Problems* 39–55; C Herresthal, 'Constitutionalisation of Freedom of Contract in European Union Law', in KS Ziegler and PM Huber (eds), *Current Problems in the Protection of Human Rights: Perspectives from Germany and the UK* (2013) 89–116; DJ Ibbetson, *A Historical Introduction to the Law of Obligations* (1999); Kötz, *European Contract Law*, 1–15, 124–53; A von Mehren, 'A General View of Contract', in *IECL* VII-1, ch 1, [1]–[126]; H Unberath, 'Freedom of Contract', in *MaxEuP* 751–5; HC Grigoleit, 'Mandatory Law (Fundamental Regulatory Principles)', in *MaxEuP* 1126–31; S Vogenauer, ' "General Principles" of Contract Law in Transnational Instruments', in L Gullifer and S Vogenauer (eds), *English and European Perspectives on Contract and Commercial Law—Essays in Honour of Hugh Beale* (2014) 291–318; G Wagner, 'Mandatory Contract Law: Functions and Principles in Light of the Proposal for a Directive on Consumer Rights', (2010) 3.1 *Erasmus LR* 47–70; M Weber, *Economy and Society: An Outline of Interpretive Sociology* (G Roth and C Wittich eds & transl, 1978) 666–752; S Whittaker, 'The Optional Instrument of European Contract Law and Freedom of Contract', (2011) 7 *ERCL* 371–98; Zimmermann, *German Obligations*, 159–228.

Usages and Practices: S Bainbridge, 'Trade Usages in International Sales of Goods: An Analysis of the 1964 and 1980 Sales Conventions', (1984) 24 *Virginia Journal of International Law* 619–65; JH Baker, 'The Law Merchant and the Common Law before 1700', (1979) 38 *Cambridge LJ* 295–322; A Carlsen, 'Usages and Practices Applicable to the Contract: Remarks on the Manner in which the PECL May Be Used to Interpret or Supplement Article 9 CISG', in J Felemegas (ed), *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law* (2006) 277–82; J Coetzee, 'The Role and Function of Trade Usages in Modern International Sales Law', (2015) 20 *Uniform LR* 243–70; H Dedek, 'Not Merely Facts—Trade Usages in German Contract Law', in F Gélinas (ed), *Trade Usages in International and Domestic Contexts* (2016) 81–102; Eidenmüller, Faust, Grigoleit, Jansen, Wagner, and Zimmermann, 'CFR', 659–708; F Enderlein and D Maskow, *International Sales Law* (1992); H Jokela, 'The Role of Usages in the Uniform Law on International Sales', (1966) 10 *Scandinavian Studies in Law* 81–96; C Pamboukis, 'The Concept and Function of Usages in the United Nations Convention on the International Sale of Goods', (2006) 25 *Journal of Law & Commerce* 107–32; E Rabel 'Der Entwurf eines einheitlichen Kaufgesetzes', (1935) 9 *RabelsZ* 1–79; E Rabel, 'A Draft of an International Law of Sales', (1938) 5 *University of Chicago LR* 543–65; BA Wortley, 'Mercantile Usage and Custom', (1959) 24 *RabelsZ* 259–69.

Interpretation and Supplementation: S Vogenauer, 'Interpretation of Statutes, History of', in *MaxEuP* 986–90; S Vogenauer, *Die Auslegung von Gesetzen in England und auf dem Kontinent: Eine vergleichende Untersuchung der Rechtsprechung und ihrer historischen Grundlagen* (2001).

Application of the Principles by Way of Analogy: E Clive, 'Interpretation', in MacQueen and Zimmermann, *European Contract Law*, 176–202; P Hellwege, 'Juridical Acts in the Draft Common Frame of Reference—A Model for Scotland?', (2014) 18 *Edinburgh LR* 358–82; J Kleinschmidt, 'Der Vertragsschluss im neuen französischen Schuldrecht—Betrachtung aus Sicht des Europäischen Vertragsrechts', in F Bien and J-S Borghetti (eds) *Die Reform des französischen Vertragsrechts* (2017) 79–112, 81–6; JP Schmidt, 'Der "juridical act" im DCFR: Ein nützlicher Grundbegriff des europäischen Privatrechts?', (2010) 18 *ZEuP* 304–20; id, 'Juridical Act', in *MaxEuP* 1016–20; id, 'The Structure of the DCFR: Borrowed from the German BGB or expression of a common European tradition?', in A Afonso (ed), *Um Direito Europeu das Obrigações* (2015) 33–51; C Witz, 'Contrat ou acte juridique?', in F Terré (ed), *Pour une réforme du droit de contrat* (2009) 51–65; *Vogenauer*/Vogenauer, Art 4.2; R Zimmermann, 'Die Auslegung von Verträgen: Textstufen transnationaler Modellregelungen', in *Festschrift für Eduard Picker* (2010) 1353–73.

Introduction before Art 1:101

1 Overview. The Principles of European Contract Law commence with Chapter 1, entitled 'General Provisions' (1:101–1:305). They thus follow a tradition reaching back to ULIS and CISG (even if the Chapters entitled 'General Provisions' in both instruments only take second place)[1] and, beyond those transnational instruments, to the UCC (Art 1, §§ 1-101–1-310). The PICC also have a Chapter 1 with 'General Provisions' (1.1–1.12). In one way or another, the layers of text subsequent to ULIS, CISG, PECL, and PICC follow suit.[2] The DCFR even deals with 'General provisions' at two different places (Book I: I.-1:101–1:110; Book II, Chapter 1: II.-1:101–1:110) and effectively also at a third place (Book III, Chapter 1: III.-1:101–1:111; that Chapter, however, merely carries the title 'General'); the Acquis Principles have a Chapter 1 with 'Introductory Provisions' (1:101–1:308); in the FS we find an opening Part I entitled 'Introductory Provisions' (1–12) which is identical to Chapter 1 entitled 'General';[3] similarly the CESL also contain a Part I ('Introductory Provisions', 1–12) which is again identical to Chapter 1 ('General Principles and Application'). The two French groups in charge of drafting the PCC have not dealt with Chapter 1 of the PECL and thus do not include 1:101–1:305 in their draft;[4] instead, they have added an introductory set of 'Principes directeurs du droit Européen de contrat' (Guiding Principles of European Contract Law).[5] These, in turn, were taken up by the draftsmen of the DCFR and were turned, in an amended form, into a kind of 'discours préliminaire' contained in vol I of the Full Edition of the DCFR.[6]

2 General background. The idea of prefacing a legal instrument with an introductory chapter containing a number of 'general provisions' was not, of course, an invention of the draftsmen of ULIS and CISG; it has a much longer pedigree. Thus, we find it implemented in a number of the great European codifications: most prominently and influentially, perhaps, in the *Code civil* ('Titre préliminaire'), the Austrian ABGB and the Swiss ZGB ('Einleitung'), and the *Codice civile* ('Disposizioni sulla legge in generale').[7] Much more ambitious was the attempt of pulling together, or 'factoring out', a set of general provisions with relevance for the entire civil

[1] They are preceded by a Chapter dealing with the respective instrument's 'sphere of application'. For ULIS, see 1–8 (Sphere of Application of the Law) and 9–17 (General Provisions); for CISG, see 1–6 (Sphere of Application) and 7–13 (General Provisions). In the PECL, on the other hand, the rules on application of the instrument are an integral part of Chapter 1.

[2] For an overview, though confined to the 'general principles' contained in these chapters on 'general provisions', see S Vogenauer, '"General Principles" of Contract Law in Transnational Instruments', in L Gullifer and S Vogenauer (eds), *English and European Perspectives on Contract and Commercial Law—Essays in Honour of Hugh Beale* (2014) 291–318, 299–310.

[3] This introduction of an additional level of subdivisions is of no added value and thus confusing.

[4] The reason they give is that Chapter 1 (along with some other Chapters) of the PECL does not belong to the 'noyau dur' of contract law (Association Henri Capitant, *Projet*, 17); translated in Fauvarque-Cosson and Mazeaud, *European Contract Law*, xxxii, as the 'solid core' of contract law).

[5] Association Henri Capitant, *Projet*, 21–209 (for an English version, see Fauvarque-Cosson and Mazeaud, *European Contract Law*, 421–572). The text of the 'Principes directeurs' consists of 11 articles, grouped under the headings *liberté contractuelle, sécurité contractuelle*, and *loyauté contractuelle*. The text of these articles is easily accessible in O Radley-Gardner, H Beale, R Zimmermann, and R Schulze (eds), *Fundamental Texts on European Private Law* (2nd edn, 2016) 1135–7.

[6] C von Bar and E Clive (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)*, Full Edition, vol I (2009) 37–63. The three 'principes directeurs' have been turned into the four 'underlying principles' of freedom, security, justice, and efficiency.

[7] These preliminary titles are relatively short (Art 1–6 *Code civil*; §§ 1–13 ABGB; Art 1–10 ZGB; Art 1–16 *Codice civile*) and deal with matters such as the sources and the application of the law, the role of judges within a codified

code. The concept of a 'general part' originated in the age of the Law of Reason (*Vernunftrecht*), became a distinctive feature of the pandectist system of private law, and found its way into the German Civil Code as well as into a number of codifications influenced by it (eg Greece, Portugal; outside of Europe eg Japan and Brazil).[8] But all these introductions or general parts relate to the entire body of private law and do not, therefore, as far as their content is concerned, provide a model for the introductory chapters of the international instruments mentioned above, [1].[9] Many codifications, however, also contain 'general parts' for specific segments within the system of private law, especially for the law of obligations. The German (§§ 241–432), Italian (Art 1173–320), Portugese (Art 397–873), and Dutch civil codes (Book 6) provide examples.[10] They are marked by a number of differences. Thus, while in Portugal and in the Netherlands, the law of unjustified enrichment and delict is part and parcel of these general parts on the law of obligations, it is the object of separate regulation in Germany and Italy; and while the German, Portugese, and Dutch civil codes have in their general parts on the law of obligations a set of rules on contracts, or contractual obligations, in general, the Italian code has a special title apart from it.

General provisions concerning general contract law. All four codifications, and many others, therefore also have a set of general provisions relating to contract law. It can contain rules on the formation of a contract (Italy, the Netherlands), on termination of a contract, contracts for the benefit of a third party (Germany, Portugal), and on many other matters. Yet, the draftsmen of the PECL (and also of the PICC) could not simply follow one of these national models. For in the national codifications, the rules on contracts in general are to be contrasted with those relating to specific types of contracts. The PECL (and PICC), however, were designed in their entirety as model rules on general contract law, and a set of 'general provisions' could not, therefore, contain rules on formation and termination of contracts, or on contracts for the benefit of a third party: these, after all, are matters dealt with in the main body of the model rules. The task of the draftsmen of PECL (and PICC) was thus a relatively novel one, for which models only existed, as far as international legal harmonization is concerned, in ULIS and CISG.[11] **3**

system of law, and other rules of a—broadly speaking—methodological nature, as well as (in the case of the ZGB) certain general standards of behaviour. Particularly famous are Art 4 *Code civil* (a judge must not, 'sous prétexte du silence, de l'obscurité ou de l'insuffisance de la loi' shrink back from his task of giving a judgment), § 7 ABGB (if a case cannot be decided otherwise, recourse may be had to the 'natural principles' of law), and Art 1 and 2 (1) ZGB (in the absence of any relevant provision and of customary law, the judge must decide as if he were the legislator; everyone, in exercising his rights and complying with his duties, has to act in line with good faith ('Treu und Glauben')). For discussion, see O Ionescu, 'Le problème de la partie introductive du code civil', (1967) 19 *RIDC* 579–618, 603–18; on methodological rules in the introductory parts of continental European codifications, see C Wendehorst, 'Methodennormen in kontinentaleuropäischen Kodifikationen', (2011) 75 *RabelsZ* 730–63. On Art 4 *Code civil*, § 7 ABGB, and Art 1 and 2 (1) ZGB, see also Zweigert and Kötz, *Comparative Law*, 90, 163, 174, 176.

[8] See *MaxEuP*/JP Schmidt, 'General Part', 774–7; id, *Zivilrechtskodifikation in Brasilien: Strukturfragen und Regelungsprobleme in historisch-vergleichender Perspektive* (2009) 299–387; *HKK*/Schmoeckel, vor § 1, 'Der Allgemeine Teil in der Ordnung des BGB'; C Baldus and W Dajzak (eds), *Der Allgemeine Teil des Privatrechts: Erfahrungen und Perspektiven zwischen Deutschland, Polen und den lusitanischen Rechten* (2013). On the pandectist system of private law, see *MaxEuP*/JP Schmidt, 'Pandektensystem', 1238–42; cf also the comparative analysis by Ionescu (fn 7) 593–603. The Greek and Portuguese codes contain, within their general part, introductory chapters or titles dealing with 'the laws, their interpretation and application' (Portugal), or with legal rules in general and private international law (Greece).

[9] There are certain parallels with the preliminary titles mentioned in fn 7, as they also contain application rules (see below, [5]), and the general standard of good faith and fair dealing (see below, [6]).

[10] For the systematization of the law of obligations within the BGB, see *HKK*/Michaels, Vor § 241, 'Systemfragen des Schuldrechts', [14]–[17] and [51].

[11] cf also JP Schmidt, 'The Structure of the DCFR: Borrowed from the German BGB or Expression of a Common European Tradition?', in Ana Isabel Afonso (ed), *Um Direito Europeu das Obrigações?* (2015) 33–51, 37: 'systematization sui generis'.

4 **Structure.** The draftsmen of the PECL, initially, appear to have lumped together in Chapter 1, in a somewhat haphazard fashion, everything that in their view required to be dealt with, but for which another place could not be found: rules on application, usages, (autonomous) interpretation, good faith, notice, and some other matters, plus a number of definitions.[12] The members of the 'Lando Commission' themselves must have regarded this as unsatisfactory, for in the course of preparation of a new edition, combining Parts I and II of the PECL, they revised Chapter 1 by adding a number of rules and by providing a structure. Chapter 1, therefore, now contains three Sections, one of them entitled 'Scope of the Principles', the others 'General Duties' and 'Terminology and Other Provisions'. That structure was changed in the ACQP (which is unsurprising in view of the different scope of the ACQP)[13] and completely abandoned in the DCFR where, as has already been pointed out, the relevant rules were scattered over three different books. Thus, the rule on good faith (PECL 1:201) can be found in DCFR III.-1:103, the one on usages and practices (PECL 1:105) in DCFR II.-1:104, and the one on autonomous interpretation (PECL 1:106) in DCFR I.-1:102. The tripartite general part has thus effectively been converted into a regulation containing three different general parts, one of them relating to 'Obligations and corresponding rights' (Book III), the second to 'Contracts and other juridical acts' (Book II), and the third to the DCFR in general (Book I).[14] The draftsmen of the FS undid this and reverted to an introductory Chapter 1, subdivided into three Sections on 'Application of the instrument', 'General principles', and 'Other general rules'. In the CESL (and, previously, in FS^{2nd}) we only find two Sections, one on 'General principles', the other on 'Application'. Chapter 1 of the PICC, by contrast, does not contain any subdivisions.

5 **Content (1): Application rules.** Looking at the content, rather than the structure, of the respective Introductory Chapters, we find a considerable amount of correspondence, but also significant differences. First, the PECL in 1:101, 1:103, and 1:104 contain application rules. They are not discussed in the present book, for they do not lend themselves to comparative study.[15] They have to be formulated specifically for the instrument to which they relate since they need to be adapted to the respective instrument's scope and design. Apart from that, it is to be doubted whether such rules should be part of a Chapter with 'General Provisions'.[16]

6 **Content (2): 'General principles'.** Second, there are two general rules of a truly foundational nature: freedom of contract, and good faith and fair dealing.[17] Freedom of form is a third such general rule and it is closely associated with freedom of contract.[18] In the PECL, strangely, it is

[12] O Lando and H Beale, *Principles of European Contract Law*, Part I (1995) Chapter 1 (1.101–1.110).

[13] Section 1 of the ACQP's Chapter 1 is entitled 'Scope', Section 2 'Consumer and business', and Section 3 'Notice and form'.

[14] For criticism of the (over-)ambitious conceptual structure of the DCFR underlying the scheme, see N Jansen and R Zimmermann, '"A European Civil Code in All But Name": Discussing the Nature and Purposes of the Draft Common Frame of Reference', (2010) 69 *Cambridge LJ* 98–112.

[15] See below, Art 1:101, [1]; Art 1:103, [1]; and Art 1:104, [1].

[16] The draftsmen of the DCFR evidently take them to be part of 'a short and general guide for the reader on how to use the whole text': von Bar and Clive (fn 6) 'Introduction', [34]. But see *Vogenauer*/Vogenauer, 'Introduction to Chapter 1 of the PICC', [3], stating that rules on the scope of application and the applicability are 'less pressing issues for a non-binding instrument such as the PICC' (or, it may be added, the PECL and the DCFR), and so the draftsmen 'could comfortably relegate them to a "Preamble" '; cf also id, 'General Principles', 301 ('elegantly relegated to a Preamble'). ULIS and CISG have a separate introductory Chapter on 'sphere of application' (see above, [1]); as far as the CESL is concerned, the application provisions are contained in the Regulation itself of which the CESL is merely an annex. Use of the term 'application' in Chapter 1, Section 2 of the CESL is thus somewhat misleading; cf also below, fn 50.

[17] For freedom of contract, see also PICC 1.1, DCFR II.-1:102 (under the title 'party autonomy'), FS 7, CESL 1; for good faith and fair dealing, see also PICC 1.7, DCFR III.-1:103 (in connection with I.-1:103), FS 8, CESL 2.

[18] See below, Art 2:101 (2), [2], [16].

tucked away as a subparagraph of a rule in the Chapter on Formation of Contracts (Art 2:101 (2)), but in line with PICC (1.2), FS (10), and CESL (6) it should be brought forward into the Chapter on General Provisions.[19] Another general rule of a similarly foundational nature is the binding character of a contract ('pacta sunt servanda').[20] It is set out prominently in PICC 1.3 and DCFR II.-1:103. The PECL do not contain a similarly specific provision, even though, of course, they also acknowledge the binding force of contracts. The first subparagraph of the rule on change of circumstances bears witness to that commitment.[21] This is true also of FS and CESL where the same implicit acknowledgement is contained in FS 92 (1) and CESL 89 (1) sent 1; also Part II in both instruments carries the heading 'Making a binding contract'. Stefan Vogenauer in his essay on ' "General Principles" of Contract Law in Transnational Instruments' also counts the duty to co-operate among these 'general principles'. And, indeed, we find it in PECL 1:202, DCFR III.-1:104, and CESL 3. In the PICC and the FS it does not seem to be attributed the symbolic significance of a general principle, for it is only laid down in PICC 5.1.3 and FS 89.[22] But there are good reasons to doubt whether a duty to co-operate should be laid down at all in a codification, or set of model rules, next to a general duty of good faith.[23]

'General Principles' in the national codifications. The national codifications of private law, incidentally, have traditionally been reluctant to spell out the foundational rules of contract law just mentioned in their black-letter rules.[24] Thus, the *Code civil* of 1804 only used to have a conspicuous provision acknowledging the binding force of contract ('Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites': Art 1134 (2)) and an inconspicuous one concerning the duty to perform a contract in good faith (Art 1134 (3)). The BGB, usually regarded as a particularly principled piece of legislation, does not even contain a statutory version of any of those general principles: its draftsmen tended to regard rules on what was either self-evident or of a purely doctrinal character as superfluous and thus potentially harmful.[25] Even the famous 'good faith' provision in § 242 BGB was, on a literal reading, not the sweeping statement into which it subsequently came to be turned.[26] But there are also codifications which have embraced the general principles more eagerly;[27] the Portugese *Código civil* of 1966, for example, contains provisions on freedom of form and freedom of contract,[28] while the Dutch BW of 1992 contains a spectacularly broad good faith provision.[29] Yet, it is only in the French *Code civil*, as reformed in 2016, that we find, along the lines of the transnational model 7

[19] Art 2:101 (2), [17] *in fine*; Vogenauer (fn 2) 317.

[20] Vogenauer (fn 2) 292. On *pacta sunt servanda*, see Zimmermann, *Obligations*, 537–45, 576–82; M-P Weller, *Die Vertragstreue* (2009); Beale, Fauvarque-Cosson, Rutgers, Tallon, and Vogenauer, *Contract Law*, 64–76.

[21] PECL 6:111 (1): 'A party is bound to fulfil its obligation even if performance has become more onerous, whether because the cost of performance has increased or because the value of the performance it receives has diminished'.

[22] cf also ACQP 7:104. Concerning PICC 5.1.3 Vogenauer (fn 2) 300, writes that the provision 'could not have been hidden more effectively'.

[23] See below, Art 1:202, [12].

[24] For details, see Vogenauer (fn 2) 293–9.

[25] *HKK*/Rückert, vor § 1, 'Das BGB und seine Prinzipien', [31]–[38].

[26] See S Whittaker and R Zimmermann, 'Good faith in European contract law: surveying the legal landscape', in: R Zimmermann and S Whittaker (eds), *Good Faith in European Contract Law* (2000) 18–32; and see, on the perpetuation of the *exceptio doli*, R Zimmermann, *Roman Law, Contemporary Law, European Law: The Civilian Tradition Today* (2001) 83–7.

[27] According to Vogenauer (fn 2) 297, there has been a move towards the codification of general contract law principles, beginning in the codifications of the Romanistic tradition. Vogenauer also, however, points out that the draftsmen of the CISG resisted that trend; see 298 f for an analysis.

[28] Art 219 and 405 *Código civil* (Portugal); the latter provision is the first one in the Section on contract law.

[29] Art 6:2 BW; see Whittaker and Zimmermann (fn 26) 54 f (' … culmination of the statutory career of the concept of good faith').

rules, a specific chapter on 'dispositions liminaires' at the outset of the regulation of contract law and containing rules, prominently placed, on freedom of contract, the binding force of contracts, and the duty to negotiate, conclude, and perform contracts in good faith.[30] There is much to be said for including such general rules of foundational importance in transnational contract law restatements.[31]

8 **Content (3): Other provisions of general application.** Third, PECL 1:301 specifies the 'meaning of terms'. It is a strange rule in that it contains definitions and specifications concerning individual issues;[32] and in that the definitions and specifications are placed under the proviso 'except where the context otherwise requires'. Of what help is a definition that is applicable only if the context so requires?[33] The draftsmen of the DCFR indulged in a veritable definomania, for DCFR I.-1:108 incorporates a list of no less than 163 definitions.[34] In the CESL,[35] the list has been reduced to 24. Definitions such as the ones contained in the international model rules are less helpful than is usually thought.[36] The resilience of the BGB, for example, is due not least to the fact that its draftsmen have tended to abstain from definitions; they, rightly, relied on the courts and legal scholarship in this regard.[37] PECL 1:302 (on reasonableness)[38] is closely related to 1:301, even though it is (also) not a definition in the strict sense of the word.[39] Next, PECL 1:107 and 1:303 deal with key issues concerning unilateral acts,[40] the significance of which is often underestimated in modern contract law.[41] In view of the fact that unilateral acts (such as declarations of avoidance, termination, or set-off) occur in many different contexts, it is difficult to deal with them anywhere else than in a chapter relating to contract law in general. The same applies to the rules on usages and practices, and interpretation and supplementation (1:105 and 1:106).[42] In a comprehensive code of private law, the rule on notice (1:303) would have ended up in a General Part relating to all fields covered in that code. The same can be said of the rule on computation of time (1:304, with the exception of the first subparagraph which relates to periods of time set by the parties),[43] and possibly of one or two other rules. The

[30] Art 1102, 1103, and 1104 *Code civil*. A general provision on freedom of form is contained in Art 1172. There is no rule on the duty to co-operate; see below, Art 1:202, [12]. The Gandolfi *Avant-projet* also contains a Title 1 with 'Dispositions préliminaires'; however, it only sets out the general principle of 'Autonomie contractuelle'.

[31] Vogenauer (fn 2) 316: 'These principles are important guideposts in the application of the instrument.' Such guideposts are of particular importance 'in the transnational context, [where] as yet a shared background legal culture is lacking'; cf also, as far as freedom of contract and freedom of form are concerned, below, Art 1:102, [1], [3], [21], Art 2:101 (2), [16] ('symbolic function'). ULIS (15) and CISG (11) only expressly entrench freedom of form in their chapter on 'General provisions'. Vogenauer (fn 2) 299, however, points out that CISG 11 is not very prominently placed and that it is also 'overshadowed' by the two articles immediately following it.

[32] With regard to four of the six terms dealt with, PECL 1:301 merely specifies that they 'include' this or that. PICC 1.11 contains five 'definitions', of which only one uses the device of indicating that something is 'included' in something else.

[33] Eidenmüller, Faust, Grigoleit, Jansen, Wagner, and Zimmermann, 'CFR', 702.

[34] For criticism, see Eidenmüller, Faust, Grigoleit, Jansen, Wagner, and Zimmermann, 'CFR', 701–5.

[35] Or, more precisely, in RegCESL 2. FS 2 contains 17 definitions.

[36] See below, Art 3:301, [1].

[37] Zimmermann, *German Obligations*, 23 f, with references.

[38] cf also DCFR I.-1:104, FS 4, and CESL 5.

[39] See below, Art 1:302, [1].

[40] See also DCFR II.-1:101 (2), II.-7.101 (3), II.-8:201, and II.-8:202, FS 12, CESL 12, but see PICC 3.2.17 and 4.2; PICC 1.10, DCFR I.-1:109, FS 10, and CESL 10.

[41] See below, Art 1:107, [1] f.

[42] See also PICC 1.9 and DCFR II.-1:104, but see FS 65 and CESL 67; PICC 1.6, DCFR I.-1:102, FS 1, and CESL 4. For the guidelines on interpretation, see also S Vogenauer, 'Drafting and Interpretation of a European Contract Law Instrument', in Dannemann and Vogenauer, *Common European Sales Law in Context*, 82–119, 107–17.

[43] See also PICC 1.12, DCFR I.-1:110, FS 11, CESL 11.

provision on imputed knowledge and intention (1:305) is a *mixtum compositum* of issues relevant in the law of agency on the one hand, and liability for non-performance on the other.[44]

Sequence. One function of an Introductory Chapter with 'General provisions' is regulatory economy. Laying down a single rule in that Chapter saves a draftsman of a document the trouble of repeating it in all the contexts where it becomes relevant; it can also be seen as a contribution towards avoiding gaps in the law and of ensuring coherence.[45] Apart from that, it can help to accentuate values and ideas which permeate the entire instrument and which, therefore, need to be kept in mind throughout.[46] If it is to fulfil the latter function, the general rules of a foundational character have to be stated, as conspicuously as possible, at the outset of the instrument.[47] Freedom of contract, freedom of form, the binding character of a contract, and good faith and fair dealing should therefore be moved to that position. Both PICC and CESL in this respect provide a more satisfactory model than the PECL, where even freedom of contract (1:102) finds itself 'somewhat *forlornly*'[48] between two rules of a more technical character.[49] Whether these rules are placed in a separate section (as in the CESL) or not (as in the PICC) is a matter of secondary importance, particularly because the other rules to be included in an Introductory Chapter are so heterogeneous that hardly any other heading than 'Other Provisions of General Application' appears to be imaginable.[50] **9**

Title. As far as the title of the Introductory Chapter is concerned, 'General Provisions' (PECL, PICC, DCFR) appears to be preferable to 'Introductory Provisions' (ACQP, FS), or 'General principles and application' (CESL). In particular, the enigmatic term 'Principles', widely employed for the model rules in general,[51] and for the general rules of a foundational character in particular,[52] should be avoided. It is hardly ever used in the jurisprudential sense as **10**

[44] See below, Art 1:305, [2]. The rule in PECL 1:305 has been taken over, with very minor changes, by DCFR II.-1:105; PICC, FS, and CESL do not have a parallel provision. On CISG 79 (2) see below, Art 1:305, [14].

[45] See, eg, *MaxEuP*/Schmidt (fn 8) 'General Part', 775; and see below, Art 1:107, [3].

[46] *Vogenauer*/Vogenauer, Introduction to Chapter 1 of the PICC, [2], [6], and [9] (the Introductory Chapter 'to some extent sets the tone for the application of the entire instrument').

[47] See the fifth in a list of eight 'guidelines for the codification of general principles of contract law' suggested by Vogenauer (fn 2) 316 f. All of these guidelines deserve support; cf, eg, as far as the seventh guideline is concerned, below, Art 1:102, [2], [23].

[48] Vogenauer (fn 2) 302.

[49] The PICC devote their first three articles to freedom of contract, freedom of form, and the binding character of contract. Good faith and fair dealing, however, has been relegated to a less prominent position (1.7). The reason for this may be that the PICC exclusively apply to commercial contracts where the principle of good faith has been emerging more slowly than in general contract law which may be due to the fact that English law does not recognize such principle of general application (see S Whittaker, 'Introductory', in HG Beale (ed), *Chitty on Contracts*, vol I (32nd edn, 2015) [1-039]). The CESL starts off with three articles on freedom of contract, good faith and fair dealing, and co-operation (under the heading 'General Principles'); freedom of form is mentioned a little later (6, under the heading 'Application'); the binding character of contract is only implicitly acknowledged, eg, by the heading of Part II.

[50] The heading 'Application', chosen by the draftsmen of the CESL, is problematic and potentially misleading for at least two reasons. First, the term 'application' is used here in a different sense as, for example, in PECL 1:101 and DCFR I.-1:101 (intended field of application of the instruments as such); and, second, use of the heading 'Application' for Section 2 of Chapter 1 as opposed to the heading 'General principles' for Section 1 of Chapter 1 somehow appears to imply that the provisions in Section 1 cannot, or do not have to be applied.

[51] *Principles* of European Contract Law, *Principles* of International Commercial Contracts, Acquis *Principles*. In the German edition of the PECL, the term 'Principles' has not, as might have been thought closer to the original, been translated as 'Prinzipien' but as 'Grundregeln': C von Bar and R Zimmermann, *Grundregeln des Europäischen Vertragsrechts, Teile I und II, Deutsche Ausgabe* (2002); see also, as far as ACQP and PICC are concerned, the German translation in R Schulze and R Zimmermann (eds), *Europäisches Privatrecht: Basistexte* (5th edn, 2016) III.20 and III.35.

[52] See, eg, PECL 1:201, Comment A (note, however, that freedom of contract is regarded as a 'rule': PECL 1:102, Comment); ACQP 1:304, [4]; DCFR I.-1:103, Comment B; DCFR II.-1:102, Comments; PICC 1.1, Comments 1 and 2;

designating general standards which only have a relative weight and will often, therefore, have to be balanced against other, counterveiling, principles.[53] A provision such as the one contained in PECL 1:102, PICC 1.7, or CESL 2 may thus better be described as a rule of a more general nature,[54] or of a foundational character.

PICC 1.7, Comments 1 and 2, heading to Comment 4. The DCFR, Outline Edition, probably prompted by the 'Principes directeurs' drafted by a French working group (above fn 5), contained a section ([9]–[25]) dealing with the term 'Principles', and distinguishing between 'fundamental principles', 'underlying principles', and 'overriding principles'; for criticism, see Eidenmüller, Faust, Grigoleit, Jansen, Wagner, and Zimmermann, 'CFR', 669–77; see also below, Art 1:201, [62]–[64].

[53] A principle, as opposed to a rule does not, therefore, necessarily determine the outcome of a case. See R Dworkin, *Taking Rights Seriously* (1977) 22–8; and see, as far as the international model rules are concerned, R Zimmermann, 'Ius Commune and the Principles of European Contract Law: Contemporary Renewal of an Old Idea', in MacQueen and Zimmermann, *European Contract Law*, 6 f; Vogenauer (fn 2) 310–12.

[54] DCFR, Outline Edition, [10]. Vogenauer (fn 2) 310, also, for example, regards the provision on freedom of contract as 'a kind of "general rule" ', which is of 'fundamental importance'.

Art 1:101: Application of the Principles

(1) These Principles are intended to be applied as general rules of contract law in the European Union.
(2) These Principles will apply when the parties have agreed to incorporate them into their contract or that their contract is to be governed by them.
(3) These Principles may be applied when the parties:
  (a) have agreed that their contract is to be governed by 'general principles of law', the 'lex mercatoria' or the like; or
  (b) have not chosen any system or rules of law to govern their contract.
(4) These Principles may provide a solution to the issue raised where the system or rules of law applicable do not do so.

PICC Preamble

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.

RegCESL 3: Optional nature of the Common European Sales Law

The parties may agree that the Common European Sales Law governs their cross-border contracts for the sale of goods, for the supply of digital content and for the provision of related services within the territorial, material and personal scope as set out in Articles 4 to 7.[1]

RegCESL 8: Agreement on the use of the Common European Sales Law

(1) The use of the Common European Sales Law requires an agreement of the parties to that effect. The existence of such an agreement and its validity shall be determined on the basis of paragraphs 2 and 3 of this Article[2] and Article 9,[3] as well as the relevant provisions in the Common European Sales Law.

(2)–(3) …

RegCESL 11: Consequences of the use of the Common European Sales Law

Where the parties have validly agreed to use the Common European Sales Law for a contract, only the Common European Sales Law shall govern the matters addressed in its rules. Provided that the contract was actually concluded, the Common European Sales Law shall also govern the compliance with and remedies for failure to comply with the pre-contractual information duties.

[1] RegCESL 4: Cross-border contracts: '(1) The Common European Sales Law may be used for cross-border contracts … .'
RegCESL 5: Contracts for which the Common European Sales Law can be used: 'The Common European Sales Law may be used for:
(a) sales contracts;
(b) contracts for the supply of digital content …
(c) related service contracts, … '
RegCESL 6: Exclusion of mixed-purpose contracts and contracts linked to a consumer credit: '(1) The Common European Sales Law may not be used for mixed-purpose contracts including any elements other than the sale of goods, the supply of digital content and the provision of related services within the meaning of Article 5 … .'
RegCESL 7: Parties to the contract
'(1) The Common European Sales Law may be used only if the seller of goods or the supplier of digital content is a trader. Where all the parties to a contract are traders, the Common European Sales Law may be used if at least one of those parties is a small or medium-sized enterprise ("SME") … .'

[2] RegCESL 8: '(2) In relations between a trader and a consumer the agreement on the use of the Common European Sales Law shall be valid only if the consumer's consent is given by an explicit statement which is separate from the statement indicating the agreement to conclude a contract. The trader shall provide the consumer with a confirmation of that agreement on a durable medium.
(3) In relations between a trader and a consumer the Common European Sales Law may not be chosen partially, but only in its entirety.'

[3] RegCESL 9: Standard Information Notice in contracts between a trader and a consumer: '(1) In addition to the pre-contractual information duties laid down in the Common European Sales Law, in relations between a trader and

1 **The textual basis of European contract law.** It is obvious that the legal nature of the texts reviewed in this commentary diverges significantly. While the many Directives in the field of consumer law are instances of formal legislation and hence strictly binding, the more comprehensive texts, such as the PECL, the PICC, and the DCFR are non-legislative codifications: codifications that have been drafted outside the political sphere of states and governments by actors who did not pursue substantial interests of their own in the matters governed, but rather acted in pursuit of what they perceived as the common good.[4] Quite clearly, the texts are therefore subject to different rules and principles guiding their application.[5] Nevertheless, as has been explained in more detail in the introduction,[6] only in their entirety do these texts constitute the basis of present European contract law. Rules on application, however, need to be formulated specifically for the instrument to which they relate as they need to be adapted to the instrument's scope and design. They cannot be restated in the form of a general rule. Thus, it would not make much sense to restate them in this general commentary on European contract laws.

2 **Textual authorities.** The PICC and the PECL contain rules guiding their application; yet whether a court will apply such texts under a choice of law depends on the choice of law rules of the forum.[7] In the European context, this is the Rome I Regulation, which limits the subject

a consumer the trader shall draw the consumer's attention to the intended application of the Common European Sales Law before the agreement by providing the consumer with the information notice in Annex II in a prominent manner. Where the agreement to use the Common European Sales Law is concluded by telephone or by any other means that do not make it possible to provide the consumer with the information notice, or where the trader has failed to provide the information notice, the consumer shall not be bound by the agreement until the consumer has received the confirmation referred to in Article 8 (2) accompanied by the information notice and has expressly consented subsequently to the use of the Common European Sales Law.
(2) The information notice referred to in paragraph 1 shall, if given in electronic form, contain a hyperlink or, in all other circumstances, include the indication of a website through which the text of the Common European Sales Law can be obtained free of charge.'

[4] N Jansen, *Making Legal Authority: Non-legislative Codifications in Historical and Comparative Perspective* (2010) 7 and *passim*.

[5] Much has been written on this issue, in particular, when the CESL was discussed; see eg K Boele-Woelki, *Unifying and Harmonizing Substantive Law and the Role of Conflict of Laws* (2010); British Institute of International and Comparative Law, *Study on the Question of Effectiveness of an Assignment or Subrogation of a Claim against Third Parties and the Priority of the Assigned or Subrogated Claim over a Right of Another Person—Final Report* (2011, available online); G Dannemann, 'Choice of CESL and Conflict of Laws', in id and Vogenauer, *European Sales Law in Context*, 21–81; Eidenmüller, Jansen, Kieninger, Wagner, and Zimmermann, 'CESL'; M Fornasier, '"28." versus "2. Regime"—Kollisionsrechtliche Aspekte eines optionalen europäischen Vertragsrechts', (2012) 76 *RabelsZ* 401–42; J Kleinschmidt, 'Stellvertretung, IPR und ein optionales Instrument für ein europäisches Vertragsrecht', (2011) 75 *RabelsZ* 497–540; O Lando, 'Principles of Contract Law as the Law Applicable and as Incorporation', in *Festschrift für Willibald Posch*, 393–408; English Law Commission and Scottish Law Commission, *An Optional Common European Sales Law: Advantages and Problems. Advice to the UK Government* (2011, available online); Max Planck Institute for Comparative and International Private Law, 'Policy Options for Progress Towards a European Contract Law', (2011) 75 *RabelsZ* 371–438; P Mankowski, 'CFR und Rechtswahl', in M Schmidt-Kessel, *Der Gemeinsame Referenzrahmen—Entstehung, Inhalte, Anwendung* (2009) 389–432; R Michaels, 'Umdenken für die UNIDROIT-Prinzipien: Vom Rechtswahlstatut zum Allgemeinen Teil des transnationalen Vertragsrechts' (2009) 73 *RabelsZ* 866–88; G Rühl, 'The Common European Sales Law: 28th Regime, 2nd Regime or 1st Regime', (2012) 19 *Maastricht Journal of European and Comparative Law* 148–63; S Symeonides, 'Contracts Subject to Non-State Norms', (2006) 54 *American Journal of Comparative Law, Supplement Issue* 209–32; *Vogenauer*/Michaels, 'Preamble I', [30]–[107]; *Vogenauer*/Scherer, 'Preamble II', [1]–[42]; S Whittaker, 'The Proposed "Common European Sales Law": Legal Framework and the Agreement of the Parties', (2012) 75 *MLR* 578–605.

[6] cf with much more detail above, General Introduction, [9]–[23].

[7] *Vogenauer*/Michaels, 'Preamble I', [32].

matter of such a choice of law to genuine state law. Nevertheless, non-legislative codifications may be incorporated into the contract under substantive law.[8] More remarkably, they have been used as authorities by many European courts, by international arbitration tribunals, and by legislatures reforming national codifications.[9] And finally, they may become authorities for a 'general part' of transnational contract law.[10] At first sight, the CESL is of quite a different nature. It has been drafted as an Annex to a European regulation specifically providing for its applicability; here it was explicitly laid down that the text could be chosen as an 'optional instrument'—somewhat surprisingly such a choice would even have retroactive effect (RegCESL 11). Although the CESL has not, and will not, become good law, it may nevertheless be treated as a source of inspiration. In many commentaries below the CISG and other conventions such as the CARIT will turn out to be relatively important texts—those texts may be applicable under international law and they are, at the same time, authorities in the European context. The same is true for the many Directives that are addressed not to citizens, but rather to Member States. Of course, those Directives are nevertheless to be treated, in the relevant contexts, as the most authoritative reference texts of European contract law. From a doctrinal perspective on European contract law, authority matters more than the rules on application.

[8] *Vogenauer*/Michaels, 'Preamble I', [33]. cf also Rome I Regulation, Recital 13.
[9] Jansen (fn 4) 59–77 with many further references.
[10] Michaels, 'Umdenken', (fn 5).

Art 1:102: Freedom of Contract

(1) Parties are free to enter into a contract and to determine its contents, subject to the requirements of good faith and fair dealing, and the mandatory rules established by these Principles.
(2) The parties may exclude the application of any of the Principles or derogate from or vary their effects, except as otherwise provided by these Principles.

PICC 1.1: Freedom of contract

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

PICC 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.

PICC 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

DCFR^{Interim} II.-1:102: Party autonomy

(1) Parties are free to make a contract or other juridical act and to determine its contents, subject to the rules on good faith and fair dealing and any other applicable mandatory rules.

(2) Parties may exclude the application of any of the following rules relating to contracts or other juridical acts, or the rights and obligations arising from them, or derogate from or vary their effects, except as otherwise provided.

(3) A provision to the effect that parties may not exclude the application of a rule or derogate from or vary its effects does not prevent a party from waiving a right which has already arisen and of which that party is aware.

DCFR II.-1:102: Party autonomy

(1) Parties are free to make a contract or other juridical act and to determine its contents, subject to any applicable mandatory rules.

(2) Parties may exclude the application of any of the following rules relating to contracts or other juridical acts, or the rights and obligations arising from them, or derogate from or vary their effects, except as otherwise provided.

(3) A provision to the effect that parties may not exclude the application of a rule or derogate from or vary its effects does not prevent a party from waiving a right which has already arisen and of which that party is aware.

CESL 1: Freedom of contract[1]

(1) Parties are free to conclude a contract and to determine its contents, subject to any applicable mandatory rules.

(2) Parties may exclude the application of any of the provisions of the Common European Sales Law, or derogate from or vary their effects, unless otherwise stated in those provisions.

Synthesis ((1) = PICC 1.1; (2) based on CESL 1 (1); (3) based on PECL 1:102 (2)): Freedom of Contract

(1) The parties are free to enter into a contract and to determine its content.
(2) *This freedom is* subject to any applicable mandatory rules.
(3) The parties may exclude the application of any of the *rules* or derogate from or vary their effects, *unless* otherwise *stated*.

I.	Introduction	[1]
II.	Function and prevalence of provisions on freedom of contract	[2]–[5]
III.	Historical perspectives	[6]–[20]
	1. The rise of freedom of contract	[7]–[10]
	2. The 'decline' of freedom of contract	[11]–[15]
	3. The 'resurrection' of freedom of contract	[16]–[18]
	4. Explaining the rise of symbolic provisions on freedom of contract	[19]–[20]
IV.	Conclusions and recommendations	[21]–[24]

[1] FS 7 is substantially identical.

I. Introduction

When it comes to freedom of contract, private lawyers sometimes allow themselves a healthy dose of pathos. And so this freedom is heralded as 'the backbone of private law',[2] as 'fundamental to all liberal societies',[3] as part of the common cultural heritage of the West.[4] Admittedly, not everyone is enchanted by such high rhetoric. Instead of liberty, some praise fairness, social justice, and solidarity.[5] But even they can hardly deny that freedom of contract provides the 'starting point'[6] for all European systems of contract law.[7] That is to say, absent legislative or judicial pronouncements to the contrary, parties in all jurisdictions are free to conclude whatever contract they desire (freedom to contract)—and they are free to reject the conclusion of a contract (freedom from contract).[8] Against this background, it is not surprising that, apart from the ACQP,[9] all transnational instruments of contract law contain a provision on freedom of contract.[10] **1**

[2] Schwenzer, Hachem, and Kee, *Sales Law*, [4.47]. For a different metaphor, see R Zimmermann, 'European Contract Law: General Report', in *4th European Jurists' Forum* (2008) 185–204, 203: 'the lodestar for the entire law of contract'.

[3] *MaxEuP*/Grigoleit, 1128.

[4] A Bruns, 'Die Vertragsfreiheit und ihre Grenzen in Europa und den USA—Movement from Contract to Status?', (2007) *JZ* 385–94, 386. J Lüttringhaus, *Vertragsfreiheit und ihre Materialisierung im Europäischen Binnenmarkt* (2018) 31.

[5] See, eg, MW Hesselink, 'The Politics of a European Civil Code', (2004) 10 *European LJ* 675–97, 687; A Somma, 'Social Justice and the Market in European Contract Law', (2006) 2 *ERCL* 181–98; Study Group on Social Justice in European Private Law, 'Social Justice in European Contract Law: a Manifesto', (2004) 10 *European LJ* 653–74. For a critical response to the manifesto, see G Wagner, 'Die soziale Frage und der Gemeinsame Referenzrahmen', (2007) 15 *ZEuP* 180–211.

[6] This formula is used quite often in European private law. See, eg, DCFR Principle 3; C-W Canaris and HC Grigoleit, 'Interpretation of Contracts', in Hartkamp, Hesselink, Hondius, Mak, and Du Perron, *European Civil Code*, 445–69, 446; S Grundmann, 'European Contract Law(s) of What Colour?', (2005) 1 *ERCL* 184–210, 195. As should become clear from the following, it is understood in a rather minimalistic sense in the present context.

[7] For comparative references, see PECL 1:102, Comment and Notes; DCFR II.–1:102, Notes 1–4; Lüttringhaus (fn 4) 171–93. See also below fn 33 to 41.

[8] On this distinction between a positive and a negative dimension of freedom of contract see, eg, *Vogenauer*/Vogenauer, Art 1.1, [6]. The academic terminology on this point is not homogenous. cf SA Smith, 'Freedom and Capacity of Contract', in CB Gray (ed), *The Philosophy of Law: An Encyclopedia*, vol I (1999) 318–20, 318, distinguishing between freedom to contract and freedom of contract. Within the academic literature, the positive dimension of freedom of contract is often divided into further sub-categories, such as: the freedom to select the other party, the freedom to enter into a contract, the freedom to determine its content, the freedom to modify an existing contract. Arguably, these distinctions merely have an illustrative purpose. The resulting sub-categories do not seem to add anything substantial to the rough definition of freedom to contract given above. And there seems to be no hierarchy between them. For the distinction between freedom of contract and freedom of form, see below, Art 2:101 (2).

[9] Presumably, the drafting committee of the ACQP held the view that, by the time of 2007, the *acquis communautaire* did not provide a sufficient basis for including a rule on freedom of contract. For a critical assessment of the ACQP on this point, see Basedow, 'Freedom of Contract', 910. For a critical assessment of the *acquis* on this point, see Herresthal, 'Constitutionalisation of Freedom of Contract', 100–15. As a result of more recent ECJ jurisprudence, there is now little doubt that freedom of contract forms part of the *acquis*. See ECJ, 22.01.2013—C-283/11, *Sky Österreich GmbH/Österreichischer Rundfunk*, [42]; ECJ, 18.07.2013—C-426/11, *Mark Alemo-Herron and Others/Parkwood Leisure Ltd*, [32]: holding that the protection afforded by Art 16 of the Charter of Fundamental Rights ('freedom to conduct a business') also covers freedom of contract. For a criticism of the Court's reasoning, see J Prassl, 'Freedom of Contract as a General Principle of EU Law? Transfers of Undertakings and the Protection of Employer Rights in EU Labour Law', (2013) 42 *Industrial LJ* 434–46, 442 f; S Weatherill, 'Use and Abuse of the EU's Charter of Fundamental Rights: on the improper veneration of "freedom of contract" ', (2014) 10 *ERCL* 167–82, 176–80. For an exhaustive analysis of the status of freedom under EU law, see recently Lüttringhaus (fn 4) 93–249 and *passim*.

[10] In addition to the provisions printed above, see: PCC 0:101: 'Freedom of the parties to enter into a contract. (1) Each party is free to contract and to choose the other party. (2) The parties are free to determine the content of the contract and the rules of form which apply to it. (3) Freedom of contract operates subject to compliance with mandatory rules.' See also Art 2 in Gandolfi *Avant-projet*, 521: 'Contractual autonomy. (1) The Parties can freely determine the contents of the contract, within the limits imposed by mandatory rules, morals, and public policy, as established

From a comparative perspective, however, the need for such a provision is not immediately obvious. After all, many national private laws do not have an express provision on freedom of contract, despite using it as a starting point. One is even tempted to call it ironic that instruments such as the DCFR or the CESL—sometimes criticized as too restrictive with respect to freedom of contract[11]—pronounce that freedom with a grand gesture, whereas some comparatively liberal private law codifications do not. Upon closer inspection, it becomes clear that the provisions on freedom of contract mainly fulfil a symbolic function: they affirm the value of freedom of contract, without making any normative difference (below [2]–[4]). Such affirmations of freedom of contract have become increasingly popular with national legislators and drafters of transnational instruments (below [5]). Arguably, this can be explained by reference to the history of freedom of contract: the famous story of its rise, fall, and tentative renaissance (below [6]–[18]). Against this background, the spread of such provisions may, seemingly paradoxically, be interpreted both as a sign of the renewed appeal of freedom of contract—and as an indication that it can no longer be taken for granted (below [19]–[20]). Whether it would be advisable to include such a symbolic provision on freedom of contract in a codification of European contract law depends very much on one's political convictions. From a moderately liberal perspective, much may be said in favour of an inclusion. Among the existing solutions, PICC and CESL provide the best basis for drawing up such a provision (below [21]–[24]).

II. Function and prevalence of provisions on freedom of contract

2 **The normative redundancy of the provisions.** From a normative point of view, the provisions on freedom of contract in PICC,[12] PECL, DCFR, or CESL are largely redundant. This is true both insofar as they grant freedom of contract and insofar as they subject it to limitations. (A possible exception is the problematic rule in DCFR II.-1:102 (3) on waivers, which appears in no other instrument.)[13] As to their liberal dimension, the redundancy of the provisions seems uncontroversial. Neither the official comments to the instruments[14] nor the academic literature assert that the parties' freedom of contract is actually enlarged by virtue of these provisions.[15]

in the present Code, Community law or national laws of the Member States of the European Union, provided always that the parties thereby do not solely aim to harm others. (2) Within the limits imposed by the preceding paragraph, the parties may draw up contracts not regulated by the present Code, particularly by combining different legal types and connecting several acts.' For the special case of CISG and ULIS, see below, fn 45.

[11] See, eg, Eidenmüller, Faust, Grigoleit, Jansen, Wagner, and Zimmermann, 'CFR', 678; Eidenmüller, Jansen, Kieninger, Wagner, and Zimmermann, 'CESL', 344.

[12] In the following, PICC 1.1, PICC 1.4, and PICC 1.5 will be read together, given that they are closely related to each other.

[13] DCFR II.-1:102 (3) states that a provision prohibiting the deviation from a rule does not prohibit a party from waiving a right that has arisen as a result of that rule and of which that party is aware. This suggests that consumers are generally free to waive a mandatory consumer right once the right has arisen and once they have become aware of it. It seems doubtful whether a rule to that effect has a sufficient basis in the *acquis communautaire* or in the *acquis commun*. Consumer Sales Directive 7 (1) permits such waivers with regard to rights resulting from a lack of conformity of a consumer good: that is to say in cases where the lack of conformity has been brought to the seller's attention. (A rule to the same effect is included in CESL 108.) In German scholarship, it is disputed, however, that similar waivers are generally admissible in cases of mandatory consumer rights. See *Beck-Online Großkommentar*/JF Hoffmann, § 779 (2017) [61]; *Münchener Kommentar*/Habersack, § 779, [11]. Against this background, it is probably for a good reason that the CESL does not contain a similar rule as DCFR II.-1:102 (3). But see *Schulze*/Schulte-Nölke, Art 1, [9], stating that Consumer Sales Directive 7 (1) 'should be seen as one manifestation of a general principle applicable to all mandatory provisions in the CESL'.

[14] See PICC 1.1, Comment; PECL 1:102, Comment; DCFR II.-1:102, Comments.

[15] See, as to PICC 1.1, *Vogenauer*/Vogenauer, Art 1.1. See, as to CESL 1, C Herresthal, 'Zur Dogmatik und Methodik des Gemeinsamen Europäischen Kaufrechts nach dem Vorschlag der Kaufrechts-Verordnung', in Schulte-Nölke, Zoll, Jansen, and Schulze, *Kaufrecht*, 85–149, 112. See also *Schulze*/Schulte-Nölke, Art 1, [4]; Schulze and Zoll,

A close reading of the provisions makes clear why. The provisions do not spell out how far freedom of contract extends; nor do they command that freedom of contract be realized to the highest possible degree, that provisions limiting freedom of contract generally be interpreted narrowly,[16] or that disproportionate limitations of freedom of contract be struck down.[17] Instead, they merely determine that, in the absence of any applicable mandatory rules to the contrary, parties enjoy freedom to contract.[18] And they make clear that the rules in the instruments are only mandatory if so provided.[19] If these provisions were missing, any contemporary lawyer would deduce that information from the other provisions in the instrument.[20] Arguably, the same applies, *mutatis mutandis*, to the restrictive dimension of the provisions. Insofar as they subject freedom of contract to the limits of mandatory law, their normative redundancy is self-evident.[21] The latter is admittedly less obvious, insofar as PECL 1:102 and DCFR$^{\text{Interim}}$ II.-1:102 subject freedom of contract to the requirements of good faith and fair dealing. It has been suggested that courts might interpret this as an invitation to intervene into the parties' freedom to a hitherto unseen extent.[22] Even if this apprehension were justified,[23] this would not mean that the respective provisions had a distinctive normative content. After all, in addition to the said provisions, PECL and DCFR$^{\text{Interim}}$ (as well as the other instruments) contain rather broad

European Contract Law 74, [91]. The latter two contributions suggest that CESL 1 is useful for the adjudication of legal disputes; but they do not explicitly appear to claim that the parties' freedom is actually enhanced by the provision.

16 Even if the provisions on freedom of contract are read in conjunction with the provisions on interpretation (PICC 1.6; PECL 1:106; DCFR I.-1:102; CESL 4), such a rule cannot convincingly be established. In essence, all of the latter rules state that the instruments should be interpreted in accordance with their underlying principles. Freedom of contract, of course, is one of these principles (that would be clear even if the pertinent provisions were absent). However, it is certainly not the only principle. This follows from the very existence of limitations of freedom of contract and from the references to good faith, for example. In the case of the DCFR, it also follows explicitly from the essay preceding the actual rules. See DCFR Princ 1: naming freedom, security, justice, and efficiency as the underlying principles. Hence, an interpreter will usually be able to point not only to freedom of contract, but also to some conflicting principle when confronted with the question whether a certain rule should be interpreted broadly or narrowly.

17 Hence, the provisions do not lay down 'principles' in the sense commonly used in legal theory. They merely constitute a 'general rule' to which exceptions are possible. See Vogenauer, '"General Principles" of Contract Law', 310 f. On the theoretical notion of legal principles see, eg, R Alexy, 'On the Structure of Legal Principles', (2000) 13 *Ratio Juris* 294–300.

18 See PECL 1:102 (1); PICC 1.1 in connection with PICC 1.4; DCFR II.-1:102 (1); CESL 1 (1).

19 See PECL 1:102 (2); PICC 1.5; DCFR II.-1:102 (2); CESL 1 (2). An additional rule is contained in DCFR II.-1:102 (3). On this rule, see above, fn 13.

20 The first information—that freedom to contract constitutes the starting point of the respective instrument—can be deduced from the provisions spelling out the conditions for the conclusion of a valid contract. See below, Art 2:101 (1). The second information—that parties may deviate from the provisions in the instrument unless otherwise provided—can, by way of an *argumentum e contrario*, be inferred from the existence of provisions expressly prohibiting the deviation from a certain rule. Such an express prohibition can, for example, be found in the provisions on good faith and fair dealing. See below, Art 1:201 (2).

21 See DCFR II.-1:102, Comments: calling the reference to mandatory law in the provision 'just a reminder that party autonomy is not absolute'; M Schmidt-Kessel, 'Der Vorschlag der Kommission für ein Optionales Kaufrecht—Einleitung', in id, *Kaufrecht*, 1–27, 3: calling the reference to mandatory law in CESL 1 self-evident; similarly also *Schmidt-Kessel*/Müller-Graff, Art 1, [11].

22 See Eidenmüller, Faust, Grigoleit, Jansen, Wagner, and Zimmermann, 'CFR', 678 f. Possibly as a result of this criticism, the reference to good faith and fair dealing in DCFR$^{\text{Interim}}$ II.-1:102 has been deleted and, hence, no longer appears in DCFR II.-1:102. See C von Bar, H Beale, E Clive, and H Schulte-Nölke, 'Introduction', in DCFR$^{\text{Outline}}$, 1–46, 20: stating that the reference has been deleted because it 'gave rise to confusion'. See also K Riesenhuber, 'Die Inhaltskontrolle im Common Frame of Reference (CFR) für ein Europäisches Privatrecht', in K Riesenhuber and IK Karakostas (eds), *Inhaltskontrolle im nationalen und Europäischen Privatrecht* (2009) 49–79, 75 f: stating that it was possibly the scholarly criticism that lead to the modification.

23 For a sceptical view, see T Pfeiffer, 'Von den Principles of European Contract Law zum Draft Common Frame of Reference', (2008) 16 *ZEuP* 679–707, 688 f: asserting that the reference to good faith in DCFR$^{\text{Interim}}$ II.-1:102 merely mirrors the well-established position of German law.

provisions exclusively dedicated to the duties of good and fair dealing.[24] If the references to good faith and fair dealing in PECL 1:102 and DCFR[Interim] II.-1:102 were missing, activist judges could equally well take these provisions as basis for their interventions. From a systematic point of view, it seems more plausible that the said references in PECL 1:102 and DCFR[Interim] II.-1:102 replicate the content of the special provisions on good faith—instead of adding anything substantial to it.[25]

3 **The symbolic function of the provisions.** Given that the provisions on freedom of contract have apparently no bearing on the legal position of the parties, it seems plausible that their primary function is symbolic: that they are supposed to convey a message about the commitment of the respective instrument to freedom of contract. Such an interpretation seems to be favoured by many academic observers.[26] And it helps to make sense of some of the peculiarities of the provisions. First, it explains why many of them—PICC 1.1, CESL 1, PECL 1:102—are situated at the beginning of the respective instrument or at least close to it. Not only does this ensure that their messages reach even a hasty reader, it is arguably also part of the message: An observer is likely to assume that it says something about the character of an instrument, or of the value of freedom of contract, when its very first rule is devoted to that freedom[27] (which is not to mean that such an assumption would necessarily be correct).[28] In addition, an interpretation of the provisions as symbolic helps to understand the stylistic differences between them. As one commentator has observed, it is probably 'no coincidence' that the PICC 'with their commercial focus … set out freedom of contract in their crispest form'.[29] In symbolic terms, it does make a difference, after all, whether a reader, after learning that parties enjoy freedom of contract, is reminded by the very same provision that this freedom is limited by mandatory law (as in the case of PECL, DCFR, and CESL)—or whether this reminder is included in a separate provision (as in the case of the PICC). And the same applies as to whether the principle of good faith is mentioned only in a separate provision (as in the case of PICC, DCFR, and CESL)—or whether it is also mentioned in the same provision as freedom of contract (as in the case of PECL and DCFR[Interim]).[30] Arguably, much of the academic disputes surrounding these provisions have concerned primarily their symbolic implications.[31]

[24] See below, Art 1:201.

[25] See also PECL 1:102, Comment: The comment explicitly refers to PECL 1:201, ie the provision on good faith; this supports the assumption that, by including a reference to good faith also into PECL 1:102, the drafters have not intended to add anything substantial to PECL 1:201.

[26] For the most extensive discussion of the function of these provisions, see Vogenauer, '"General Principles" of Contract Law', 315 f. See also *Vogenauer*/Vogenauer, Introduction to Chapter 1, [6]; *Schmidt-Kessel*/Müller-Graff, Art 1, [3], calling CESL 1 an ordoliberal confession of faith ('ordoliberale[s] Bekenntnis'); *Schulze*/Schulte-Nölke, Art 1, [1], stating that the provision on freedom of contract is 'evidently meant to be highly symbolic'. Sometimes, the function of the provisions is also described as 'programmatic', which, in the present context, is arguably not very different from 'symbolic'. See *Leible and Lehmann*/Leible, 12; Riesenhuber (fn 22) 75.

[27] cf Vogenauer, '"General Principles" of Contract Law', 316. This assessment seems to be confirmed by the fact that several authors have attached importance to the systematic position of the provisions on freedom of contract. See, eg, J Basedow, 'Kodifikationsrausch und kollidierende Konzepte—Notizen zu Marktbezug, Freiheit und System im Common Frame of Reference', (2008) 16 *ZEuP* 673–6, 675; Herresthal (fn 15) 112; M Schauer, 'Einleitende Bestimmungen (Teil I CESL-Entwurf)', in Wendehorst and Zöchling-Jud, *Vorabend*, 43–62, 44.

[28] cf *Beck-Online Großkommentar*/Herresthal, § 311 (2017) [16], criticizing the provisions on freedom of contract in the transnational instruments as mere lip services to freedom of contract; *Vogenauer*/Vogenauer, Introduction to Chapter 1, [10], stating generally that a reading of the fundamental principles of the PICC 'may create a misleading impression'.

[29] Vogenauer, '"General Principles" of Contract Law', 315 f.

[30] For a detailed comparison of the symbolic effect of the different provisions, see Vogenauer, '"General Principles" of Contract Law', 300–10.

[31] For a criticism of CESL 1 with express reference to its symbolic dimension see, eg, Herresthal (fn 15) 112 f.

Comparative perspectives. A look into the national contract laws and the pertinent scholarship lends support to the claim that the provisions on freedom of contract in PICC, PECL, DCFR, and CESL primarily serve symbolic purposes. As is well known, only some European codifications contain similarly explicit provisions on freedom of contract:[32] among them the Spanish *Código civil* of 1889,[33] the Swiss *Obligationenrecht* of 1911,[34] the Italian *Codice civile* of 1942,[35] and the Portuguese *Código civil* of 1967.[36] As far as one can see, nobody in comparative law scholarship suggests that these provisions actually enlarge, or restrict, the degree of party autonomy under the respective jurisdictions. Inversely, no contract law scholar seems to draw any pertinent conclusion from the absence of equivalent provisions in the Austrian ABGB of 1810,[37] the German BGB of 1900,[38] the Dutch BW of 1992,[39] or in English law.[40] A case in point is also offered by the 2016 overhaul of the French *Code civil*. As part of the reform, the law of contract in the code has been supplemented with a chapter on 'introductory provisions' (*dispositions préliminiaires*) including a provision expressly dealing with freedom of contract.[41] 4

[32] See *Vogenauer*/Vogenauer, Art 1.1, [3]; Zweigert and Kötz, *Comparative Law*, 324. Lüttringhaus (fn 4) 171–93.

[33] See Art 1255 *Código civil Español*: 'Los contratantes pueden establecer los pactos, cláusulas y condiciones que tengan por conveniente, siempre que no sean contrarios a las leyes, a la moral ni al orden público.' (The contracting parties may establish any covenants, clauses and conditions deemed convenient, provided that they are not contrary to the laws, to morals, or to public policy).

[34] See Art 19 OR (1): 'Der Inhalt des Vertrages kann innerhalb der Schranken des Gesetzes beliebig festgestellt werden.' (The content of a contract may be freely determined within the limits of the law.)

[35] See Art 1322 (1) *Codice civile*: 'Autonomia contrattuale. (1) Le parti possono liberamente determinare il contenuto del contratto nei limiti imposti dalla legge. (2) Le parti possono anche concludere contratti che non appartengano ai tipi aventi una disciplina particolare, purché siano diretti a realizzare interessi meritevoli di tutela secondo l'ordinamento giuridico.' ('Contractual autonomy. (1) The parties may freely determine the content of the contract within the limits imposed by law. (2) The parties may also conclude contracts that are not of the types that are particularly regulated, provided that they are directed towards the realization of an interest worthy of protection under the legal order.') For a comparison of this provision with PECL 1:102, see *Antoniolli and Veneziano*/Veneziano, 30–48, 31 f.

[36] See Art 405 *Código civil Português*: '(Liberdade contratual). (1) Dentro dos limites da lei, as partes têm a faculdade de fixar livremente o conteúdo dos contratos, celebrar contratos diferentes dos previstos neste código ou incluir nestes as cláusulas que lhes aprouver.' ((Freedom of Contract) (1) Within the limits of the law, the parties have the power freely to determine the content of the contracts, to conclude contracts different from those provided for in this Code, or to include clauses as they wish.)

[37] For an account of the recognition of party autonomy under Austrian law (despite the absence of an explicit statutory provision to that effect), see P Rummel, in P Rummel and M Lukas (eds), *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch* (4th edn, 2014) § 859, [22]–[37].

[38] For an account of the recognition of freedom of contract under German law, both as a principle of contract law and as a constitutionally guaranteed fundamental right, see *Münchener Kommentar*/Busche, vor § 145, [2]–[4]. Lüttringhaus (fn 4) 175 f. For a comparison between German law and PECL and DCFR with regard to the recognition of freedom of contract, see *Leible and Lehmann*/Leible, 9–12. For an account of the absence of explicit provisions on freedom of contract in the German codifications of the 18th and 19th centuries, see *HKK*/Rückert, vor § 1, [69].

[39] For an account of the recognition of freedom of contract under Dutch law (despite the fact that it can only indirectly be inferred from Art 6:248 BW) and a comparison with the PECL, see *Busch, Hondius, van Kooten, Schelhaas, and Schrama*/Grosheide, 33 f.

[40] For an account of the recognition of freedom of contract under English law (despite the absence of an explicit statutory provision to that effect) see, eg, S Whittaker, 'Introductory', in HG Beale (ed), *Chitty on Contracts*, vol I (32nd edn, 2015) [1-027]–[1-035].

[41] See Art 1102 *Code civil*: '(1) Chacun est libre de contracter ou de ne pas contracter, de choisir son cocontractant et de déterminer le contenu et la forme du contrat dans les limites fixées par la loi. (2) La liberté contractuelle ne permet pas de déroger aux règles qui intéressent l'ordre public.' ((1) Everyone is free to contract or not to contract, to choose the person with whom to contract, and to determine the content and form of the contract, within the limits imposed by legislation. (2) Contractual freedom does not allow derogation from rules which are an expression of public policy.) For an account of the reform, with particular focus on the new introductory provisions, see M Mekki, 'The General Principles or Contract Law in the "Ordonannce" on the Reform of Contract Law', (2016) 76 *Lousiana LR* 1193–211. See also Malaurie, Aynès, and Stoffel-Munck, *Obligations*, [449].

Until then, such a provision has not been part of the code.[42] The officially articulated aim of this step, however, is not to increase freedom of contract—but rather to 'affirm' the principle (alongside other principles of French contract law).[43] Hence, the inclusion of the provision has plausibly been interpreted as a purely symbolic measure.[44]

5 **A general trend.** Today, legislative pronouncements of contractual freedom are more common than they were in the age of the grand private law codifications. This is what may be inferred from the recent addition of such a provision to the *Code civil* and from the existence of similar provisions in PICC, PECL, DCFR, and CESL. The prevalence of such provisions seems to have increased also in comparison to the more recent past. As testament to that effect, reference can be made to the fact that both the CISG of 1980 and the first version of the PECL, published in 1995, did not yet contain such provisions. Instead, both instruments recognized freedom of contract only implicitly, in provisions dealing with the exclusion or modification of the Convention or the Principles: CISG 6[45] and PECL[1995] 1:102.[46] This increase in the popularity of codificatory entrenchments of freedom of contract can, on the one hand, be explained by reference to a general change in the style of legal drafting. The draftsmen of the German BGB, for example, famously adhered to quite rigid concepts of *Gesetzgebungskunst* (art of legislation): Statutes were only supposed to pronounce what was practically relevant and not self-evident.[47] Obviously such ideas have grown out of fashion[48]—and they are considered particularly unconvincing in a transnational environment where lawyers may have different conceptions of what is self-evident.[49] On the other hand, it is also possible to explain the increased popularity of symbolic provisions on freedom of contract by reference to the history of that very freedom—as shall now be demonstrated.

[42] Contrary to repeated assertions, the celebrated formula in the previous Art 1134 *Code civil* ('Les conventions légalement formées tiennent lieu de la loi à ceux qui les ont faites'—Contracts legally formed have the force of law for the parties who made them) did not endorse freedom of contract. It only referred to the legal effects of contracts. See J Gordley, 'Myths of the French Civil Code', (1994) 42 *AJCL* 459–505, 469. A similar rule is now included in Art 1103 *Code civil.*

[43] See Art 8 no 1 *Loi N° 2015-177 du 16 février 2015 relative à la modernisation et à la simplification du droit et des procédures dans les domains de la justice et des affaires intérieures*: '[a]ffirmer les principes généraux du droit des contrats tels que la bonne foi et la liberté contractuelle'.

[44] See Mekki (n 41) 1203: ' … symbolic reiteration of the legislature's commitment … to the principle of freedom of contract'.

[45] See CISG 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.' It should be noted that, unlike the provisions on freedom of contract in PECL, PICC, DCFR, and PECL, CISG 6 does have a distinct normative content. For in contrast to the said instruments, the Convention is applicable irrespective of an explicit choice of the parties (cf CISG 1). Against this background, CISG 6 grants parties the power to opt out of the application of the Convention: a power that they arguably would not have otherwise. Going beyond that, the provision is also understood to express that, within the sphere of application of the CISG, parties enjoy freedom of contract. See, eg, *Schlechtriem and Schwenzer*/Schwenzer and Hachem, Art 6, [8]. Arguably, however, the latter information could be deduced from the other provisions of the CISG anyway. The fact that CISG 6 expresses the latter information not very forcefully (compared to PICC 1.1, for example) is pointed out by Vogenauer, '"General Principles" of Contract Law', 299: 'decidedly low-key fashion'. A similarly low-key commitment to freedom of contract was also included in ULIS 3.

[46] PECL[1995] 1.102 had stated: 'The parties may exclude the application of any of these Principles or derogate from or vary their effects except as otherwise provided in the Principles.' See O Lando and H Beale (eds), *The Principles of European Contract Law, Part I* (1995) 42. On the absence of a provision on freedom of contract in the PECL[1995], see also Vogenauer, '"General Principles" of Contract Law', 301.

[47] See Vogenauer, '"General Principles" of Contract Law', 296. See also Zimmermann, *German Obligations*, 225; *HKK*/Rückert, vor § 1, [31]–[37]; B Mertens, *Gesetzgebungskunst im Zeitalter der Kodifikationen* (2004) 324 f.

[48] See F Wieacker, *A History of Private Law in Europe* (transl T Weir, 1995) 378: 'Today we want clearer practical and moral standards, a more graphic form of expression in laws, and more sensitive appreciation of the demands of social and individual justice'.

[49] See Vogenauer, '"General Principles" of Contract Law', 316.

III. Historical perspectives

Outline. The history of freedom of contract (or its dominant narrative) offers rich material for interpreting the rise of symbolic provisions on freedom of contract. Depending on the perspective chosen, one may arrive at radically different conclusions. On the one hand, the rise may appear as an indication of a recently renewed appeal of freedom of contract. On the other hand, it may be interpreted as a sign that freedom of contract has lost its self-evident character. Before trying to make these seemingly contradictory interpretations plausible (below [19]–[20]), this section will first give a rough summary of the history of freedom of contract—or rather a rough summary of the widespread representation of that history.[50] Its basic contours are well known: It is the story of the rise of freedom of contract until the end of the 19th century (below [7]–[10]), the subsequent 'decline' or 'materialization' of that freedom in the course of the 20th century (below [11]–[15])[51]—and its tentative renaissance in recent decades (below [16]–[18]). **6**

1. The rise of freedom of contract

'From Status to Contract'. Roughly speaking, two perspectives on the rise of freedom of contract can be distinguished. The first one focuses on developments 'external' to contract doctrine: in particular on the decay and abolition of feudal and early modern institutions and norms restricting the freedom of commerce, the sale of labour, and real property.[52] To a large extent, but with stark differences between the European regions, these liberalizations were achieved between the 18th and the 19th centuries.[53] As is well known, they were accompanied and fostered by far-reaching socio-economic changes—and a paradigmatic shift in economic thought: the emergence of the idea of self-regulation. In deviation from mercantilist ideology, proponents of so-called classical economics, most famously Adam Smith, saw only a limited need for governmental regulation of economic affairs: they considered private ordering as being generally aligned with public welfare.[54] Taken together, these structural and ideological changes contributed to the rise of a modern market economy—and to the by now proverbial progression 'from Status to Contract'.[55] **7**

[50] The following paragraphs largely rely on a selection of secondary sources and they blithely ignore most national peculiarities. Hence, they are, in many respects, vulnerable to criticism by legal historians. At best, they give a reasonably fair account of how the history of freedom of contract is commonly construed within the transnational discourse on European private law. An awareness of the latter is arguably sufficient for understanding the contemporary developments in European private law.

[51] For a fresh perspective on this narrative, see M Auer, *Der privatrechtliche Diskurs der Moderne* (2014) 1–9 and *passim*.

[52] See, eg, D Grimm, 'Soziale, wirtschaftliche und politische Voraussetzungen der Vertragsfreiheit—Eine vergleichende Skizze', in *Recht und Staat der bürgerlichen Gesellschaft* (1987) 165–91.

[53] See, most famously and with a particular focus on England, K Polanyi, *The Great Transformation* (1944) 56–102 and *passim*. Today, Polanyi's work is apparently no longer considered state-of-the-art within economic history. It still seems undisputed, however, that the 18th and 19th centuries have witnessed a great liberalization, in particular with regard to the sale of labour. See, eg, J Kocka, *Capitalism: A Short History* (2016) 17 f, 84–103 and *passim*. See also Grimm (fn 52) 165–91; *HKK*/Rückert, vor § 611, [7] with further references concerning the historical literature.

[54] See Atiyah, *The Rise and Fall*, 292–323. See also KI Vaughn,' Invisible Hand', in J Eatwell, M Murray, and P Newman (eds), *The New Palgrave—A Dictionary of Economics*, vol II (1987) 997–9; W Plumpe and R Köster, 'Ökonomische Klassik', in *Enzyklopädie der Neuzeit*, vol IX (2009) 413–19.

[55] cf HS Maine, *Ancient Law: Its Connection with the Early History of Society and its Relation to Modern Ideas* (1861) 170, famously claiming that 'the movement of the progressive societies has hitherto been a movement from Status to Contract'. Maine's aphorism lends itself to numerous interpretations and is liable to various criticisms. For a nuanced account of the existing historical scholarship on Maine's thesis and for a critical engagement with contemporary references to Maine, see KI Schmidt, 'Henry Maine's "Modern Law": From Status to Contract and Back Again?', (2017) 65 *AJCL* 145–86.

8 A general theory of contract. The genesis of freedom of contract cannot be reduced, however, to the history of the abolition of feudal, mercantilistic, and other contract-external barriers to trade. More interesting, at least from the perspective of most legal historians,[56] has been the development 'internal' to contract law. It consisted in the evolution of a general, principally open, voluntaristic concept of contract: of the idea that, as a general rule, binding contracts could have any content, and that their conclusion and content depended on the parties' will alone. As is well known, this concept was not, historically, self-evident. Roman law lacked a general notion of contract,[57] and thus an idea of freedom of contract.[58] The same can probably be said about the common law before the 18th century.[59] Today, many scholars locate the historical origin of a general, voluntaristic concept of contract in early modern continental Europe. More specifically, it is often credited to the so-called late scholastics of the 16th and 17th centuries. Blending Roman law, Canon law, Aristotelian and Thomistic philosophy, they developed what was possibly 'the first systematic theory of contract'.[60] This theory, legal historians assert, rested on the notion of 'freedom of contract' (*libertas contractuum*), which in turn was based on the idea of man as the owner of his will and his goods.[61] Later generations of legal scholarship, it is claimed, were heavily influenced by scholastic thought: in particular the Natural lawyers of the 17th and 18th centuries, among them Hugo Grotius, Samuel Pufendorf, and Robert-Joseph Pothier, who partly were also received in the English common law.[62]

9 The will theories. The late-scholastic idea of *libertas contractuum* was not identical, however, to the predominant modern concept of freedom of contract.[63] Most importantly, as a consequence of their commitment to Arisotelian-Thomistic virtue-ethics, the late scholastics were convinced that contracts had to conform to the principle of commutative justice.[64] Consequently, in deviation from the Roman sources, equality of exchange was held to be a key requirement[65]—an idea

[56] But see N Luhmann, *Law as a Social System* (transl KA Ziegert, 2004) 397 f, claiming that the 'crucial limitations on freedom of contract' were the external ones—and not the internal ones of private law doctrine.

[57] Roman law recognized certain types of contract, among them four consensual contracts, but it did not recognize a general principle according to which a contract could be based on consent alone: the general rule was 'ex nudo pacto non oritur actio'; see Coing, *Privatrecht* I, 398 f; Gordley, *Philosophical Origins*, 30 f; Zimmermann, *Obligations*, 561–5.

[58] See, eg, *HKK*/Rückert, vor § 1, [69]. This is not to say, however, that Roman law was generally illiberal when it came to private ordering. Examples to the contrary are the famous passages of Ulp D. 4.4.16.4 and Paul D 19.2.22.3. According to the latter, parties to contracts of sale and certain other bilateral contracts were free to fix their own price and take advantage of each other, as long as they did not commit fraud. See Zimmermann, *Obligations*, 255 f, treating the fragments mentioned as a reflection of the 'liberalistic (rather than paternalistic) spirit or Roman law'.

[59] See, eg, Gordley, *Philosophical Origins*, 134; D Ibbetson, 'Contract: English Common Law', in Katz, *Encyclopedia of Legal History*, vol II, 194–97, 194.

[60] See J Gordley, 'Natural Law Origins of the Common Law of Contract', in J Barton (ed), *Towards a General Law of Contract* (1990) 367–465, 460. See generally id, *Philosophical Origins*, 69–111; Decock, *Theologians and Contract* Law, 162–208 and *passim*.

[61] See W Decock, 'Jesuit freedom of contract', (2009) 77 *Tijdschrift voor Rechtsgeschiedenis* 423–58; id, *Theologians and Contract Law*, 162–78, 212–14, 606–20 and *passim*.

[62] See Gordley, *Philosophical Origins*, 71, 113 and *passim*; Ibbetson, *Historical Introduction*, 215, 217–19.

[63] See Decock, *Theologians and Contract Law*, 607–9 and *passim*; see also the review of Decock's book: N Jansen, (2014) 131 *ZSS (GA)* 525–35, 534.

[64] See Gordley, *Philosophical Origins*, 94–102 and *passim*; Decock, *Theologians and Contract Law*, 507–604, 608.

[65] See Decock, *Theologians and Contract Law*, 507–604. The conflicting Roman sources were Ulp D. 4.4.16.4 and Paul D 19.2.22.3: cf fn 58. Admittedly, the Roman sources also contained the famous constitutions of Emperor Diocletian—C 4.44.2 and C 4.44.8—according to which a seller of real estate could rescind the contract if the agreed price was less than half of the 'true price'. The medieval jurists had already extended this remedy (known as *laesio enormis*) to all kinds of other contracts. The late scholastics went even further in holding that, in the Court of Conscience, smaller deviations from the 'true price' could also give rise to restitutionary obligations. For accounts of the development of *laesio enormis*, see J Gordley, 'Equality in Exchange', (1981) 69 *California LR* 1587–656, 1638–44; *MaxEuP*/Finkenauer, 'Laesio Enormis', 1029–32; Zimmermann, *Obligations*, 259–70.

to which also many of the Natural lawyers, such as Grotius and Pufendorf, were still committed.[66] Today, the expulsion of such notions of substantive justice from contract doctrine is attributed to the ascent of the so-called will theories:[67] a term commonly understood to denote concepts of contract organized (almost) exclusively around the volition of the contracting parties.[68] According to most accounts, the will theories became the dominant paradigm of contract in the course of the 19th century, both in continental Europe[69] and in the common law tradition.[70] How this development is to be explained is still subject to scholarly debate. Many credit it specifically to Immanuel Kant's formal ethic of duty and freedom.[71] Others attribute it, more generally, to the philosophy of enlightenment, or—even more broadly—to the rise of liberalism and/or normative individualism.[72] Some also see a connection to the demands of the emerging market economy,[73] while others point to the earlier erosion of Aristotelian philosophy.[74] In any event, the increasingly liberal spirit in contract theory was also reflected in positive contract law. Whereas the French *Code civil* and the Austrian ABGB, both drafted at the beginning of the century, still contained (weakish) remedies for peculiar cases of inequality of exchange—descendants of the doctrine of *laesio enormis*—the German BGB famously did not.[75] Moreover, in the course of the 19th century, statutes fixing strict maximum interest rates were abolished in several European jurisdictions (albeit sometimes only for a short time).[76]

An age of unlimited freedom? Under the impression of the just-described developments, later generations of scholars have popularized a certain image of the 19th century.[77] According **10**

[66] Gordley (fn 65) 1603 and *passim*; Gordley, *Philosophical Origins*, 161; Decock, *Theologians and Contract Law*, 598–601.

[67] See, eg, Gordley (fn 65) 1624 f; Decock, *Theologians and Contract Law*, 608; M Lobban, 'Contract', in J Baker (ed), *The Oxford History of the Laws of England*, vol XII (2010) 295–610, 297.

[68] See, eg, Gordley, *Philosophical Origins*, 161–213; Ibbetson, *Historical Introduction*, 220–44; Decock, *Theologians and Contract Law*, 608.

[69] For a comparative treatment with reference, *inter alia*, to France and Germany, see Gordley, *Philosophical Origins*, 161–213. As is well known, the rise of a voluntaristic concept of contract in France did not put an end to the requirement of *cause*, notwithstanding the fact that the latter was hardly compatible with such a concept. See id, 164–70. On the requirement of *cause* and its recent abolition, see also below Art 2:101 (1), [19].

[70] See, eg, Lobban (fn 67) 297; Ibbetson, *Historical Introduction*, 220–44. As is well known, the English doctrine of consideration, not unlike the French doctrine of *cause*, survived the ascent of the will theory, despite being hardly reconcilable with it. See id, 236–41. On the doctrine of consideration, see also below Art 2:101 (1) [20].

[71] See, eg, Wieacker (fn 48) 297 f. References to Kant are also very common in articles written by scholars of contemporary contract law. See, eg, Basedow, 'Freedom of Contract', 902; Whittaker, 'The Optional Instrument', 374. For a sceptical view of Kant's influence on modern contract theory, see Gordley, *Philosophical Origins*, 8, 227. Needless to say, there is abundant literature in German on this issue. For references and a historical account of the ascent of the will theory in Germany see, eg, H Dedek, *Negative Haftung aus Vertrag* (2007) 103–15, in particular 107.

[72] For an early interpretation in that sense, see S Williston, 'Freedom of Contract', (1921) 4 *Cornell LQ* 365–80, 366–8; see also, eg, Terré, Simler, and Lequette, *Obligations*, [20]–[24]; Canaris and Grigoleit (fn 6) 446. For a broad perspective, see also Auer (fn 51) 20 and *passim*.

[73] See, with regard to the development in England, Atiyah, *The Rise and Fall*, 398 and *passim*. For a sceptical summary of Atiyah's account, see Lobban (fn 67) 297–300. For a similar interpretation, in the terms of system theory, see Luhmann (fn 56) 399, speaking of the 'structural coupling of economy and law'; similarly also A Abegg and A Thatcher, 'Review Essay—Freedom of Contract in the 19th Century: Mythology and the Silence of the sources—Sybille Hofer's Freiheit ohne Grenzen? Privatrechtstheoretische Diskussionen im 19. Jahrhundert', (2004) 5 *German LJ* 101–14, 108 f.

[74] See Gordley, *Philosophical Origins*, 228 f.

[75] See Zimmermann, *Obligations*, 267 f; *MaxEuP*/Finkenauer (fn 65) 1030. See also S Hofer, 'Wucher', in F Jaeger (ed), *Enzyklopädie der Neuzeit*, vol XV (2012) 252–58, 257; Kötz, *Europäisches Vertragsrecht*, 161 f.

[76] See *MaxEuP*/Tröger, 'Interest', 946–50, 947; Hofer (fn 75) 257. For an account of the English development see, eg, RM Goode, 'Usury in English Law', (1982) 1 *Arizona Journal of International & Comparative Law* 38–60, 44 f. For an account of the German development, see Zimmermann, *German Obligations*, 169 f.

[77] For the following see, eg, F Wieacker, *Das Sozialmodell der klassischen Privatrechtsgesetzbücher und die Entwicklung der modernen Gesellschaft* (1953) 4–12, 16, 18; *IECL* VII-2/Kramer, 'Defects in the Contracting Process', [1]; Zimmermann, *Obligations*, 577, 579.

to this vision, the spirit of the 19th century is well encapsulated in the *bon mot* 'qui dit contractuel dit juste'.[78] It was an age permeated by the belief that individuals know their own interest best; and a period largely committed to what is today described as a 'formal' notion of freedom of contract: a concept of contract law under which mentally competent adults enjoy full and equal capacity to contract, irrespective of existing socio-economic inequalities between them, and under which contractual consent can be invalidated only by reference to specific defects in the bargaining process, in particular mistake, misrepresentation, and duress.[79] In recent years, it has been suggested, however, that the popular idea of the 19th-century commitment to freedom of contract should be revised. Support for this claim can be found in a variety of historical studies. Thus it has been shown that, in France, the ideas of economic liberalism and private autonomy enjoyed feeble support only until at least the middle of the 19th century.[80] Moreover, it has been demonstrated that most German private law scholars of that time by no means advocated unlimited freedom of contract.[81] In addition, one can also point to the sometimes neglected fact that, as a matter of positive law, family affairs (and sexuality)[82] were generally outside the sphere of freedom of contract.[83] It is also noteworthy that, at that time, there were already legislative restrictions on freedom of contract specifically intended to protect workers,[84] or purchasers in certain sale contracts.[85] However, important as these observations are, they do

[78] A Fouillée, *La science sociale contemporaine* (1885) 410. For a critical account of the contemporary habit to treat Fouillée's statement as an expression of unrestrained individualism, see L Rolland, ' "Qui dit contractuel dit juste." (Fouillée) … en trois petits conds, à reculons', (2006) 51 *McGill LJ* 765–80. For another famous point of reference, see the opinion by Jessel MR in *Printing and Numerical Registering Company v Sampson* (1874–75) LR 19 Eq 462, 465: '[P]ublic policy requires … that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred'. See Zimmermann, *Obligations*, 577, calling this statement 'representative of the attitude prevailing in the 19th century'.

[79] For different accounts of the concept of 'formal' freedom of contract, see, eg, *IECL* VII-2/Kramer, 'Defects in the Contracting Process', [1]; C-W Canaris, 'Wandlungen des Schuldvertragsrechts—Tendenzen zu seiner "Materialisierung" ', (2000) 200 *AcP* 273–364, 277–80; Wagner (fn 5) 192. Often, the concept of 'formal' freedom of contract is considered to be the correlate of a procedural (as opposed to substantive) understanding of contractual justice. On the latter distinction see, eg, *IECL* VII-1/von Mehren 'A General View of Contract', [73]. For a succinct and critical overview of these concepts, see also M Auer, *Materialisierung, Flexibilisierung, Richterfreiheit* (2005) 23–42.

[80] See, eg, A Bürge, *Das französische Privatrecht im 19. Jahrhundert* (2nd edn, 1995) 89–93, 131, 494 f and *passim*; Gordley (fn 42) 469–78. For references to French literature on this issue, see also Decock, *Theologians and Contract Law*, 609 f.

[81] See S Hofer, *Freiheit ohne Grenzen? Privatrechtstheoretische Diskussionen im 19. Jahrhundert* (2001) 72 f and *passim*; *HKK*/Hofer, vor § 241, [13]–[19]. See also J Rückert, 'Zur Legitimation der Vertragsfreiheit im 19. Jahrhundert', in D Klippel (ed), *Naturrecht im 19. Jahrhundert* (1997) 135–83, 150–82; Zimmermann, *German Obligations*, 162, stating that lawyers of the 19th century 'were acutely aware of the limitations of freedom of contract'. For a review of Hofer's book in English, see Abegg and Thatcher (fn 73).

[82] cf Weber, *Economy and Society*, 690: 'Today the chances of a return to freedom of sexual contract are more remote than ever.' Weber was making this observation at the beginning of the 20th century.

[83] See, with particular reference to Savigny, D Kennedy, 'Savigny's Family/Patrimony Distinction and its Place in the Global Genealogy of Classical Legal Thought', (2010) 58 *ACJL* 811–42, 828. For a broader perspective, see J Halley, 'What is Family Law?: A Geneology Part I', (2011) 23 *Yale Journal of Law & the Humanities* 1–109, 2 f and *passim*; Auer (fn 51) 83–7.

[84] See, eg, S Simits, 'The Case of the Employment Relationship: Elements of a Comparison', in W Steinmetz (ed), *Private Law and Social Inequality in the Industrial Age* (2000) 181–202, 192–7; S Hedley, 'Employment and Labor Law: English Common Law', in Katz, *Encyclopedia of Legal History*, vol II, 425–28, 426; J Rückert, 'Employment and Labor Law: Medieval and Post-Medieval Roman Law', in Katz, *Encyclopedia of Legal History*, vol II, 428–31, 430. At the same time, it has also been shown that certain parts of 19th-century labour law were still infused by the spirit of feudalism. See, eg, *T Keiser*, 'Between Status and Contract? Coercion in Contractual Labour Relationships in Germany from the 16th to the 20th century', (2013) 21 *Rechtsgeschichte* 32–47, 44–6.

[85] For an account of the German development in that respect, see Zimmermann, *German Obligations*, 165–8, pointing to the Act concerning Instalment Sales (*Abzahlungsgesetz*) of 16 May 1894 and legislation protecting the public against pedlars. See also M Vec, 'Consumer Protection: Medieval and Post-Medieval Roman Law', in Katz, *Encyclopedia of Legal History*, vol II, 169–73, 170.

not refute the idea that, compared to earlier times, contractual freedom was considerably expanded in the 19th century;[86] and that welfarist interventions into freedom of contract were not as common during that time as they became in the 20th century. Hence, it does not seem unjustified to think of the 19th century as the heyday of formal freedom of contract. In any event, many contemporary contributions to the debate about freedom of contract are still based on this assumption.[87]

2. The 'decline' of freedom of contract

The rise of the 'interventionist state'. As is well known, the heyday of freedom of contract in the 19th century was followed by an age of increasing state interventionism into the economy, lasting well into the second half of the 20th century (and, depending on one's viewpoint, continuing until the present time).[88] The preferred instruments of the 'interventionist' or 'welfare' state were external to private law: the nationalization of enterprises, the set-up of administrative agencies, the expansion of administrative and social security law, etc.[89] At the same time, interventionism also left its mark on private law—mainly through mandatory rules of contract law.[90] This development has famously been described as 'decline' or 'fall' of freedom of contract.[91] Others have used the more cheerful, but notoriously vague formula of 'materialization'.[92] It is often understood to signify that the new rules of contract law were infused by socio-ethical considerations that had arguably played little role under the former, 'formal' paradigm of contract law:[93] for example by a sensibility for inequalities of bargaining power, a desire to protect 'the weaker party', an aspiration to ensure 'real', or 'actual', or 'effective' freedom in the market sphere.[94] Irrespective of which term—'decline' or 'materialization'—one prefers, there is no doubt that the underlying development cannot be attributed to the national legislators alone. In many legal systems, the ordinary judiciary,[95] and sometimes constitutional

11

[86] cf Weber, *Economy and Society*, 729: 'The possibility of entering with others into contractual relations the content of which is entirely determined by individual agreement … has been immensely extended in modern law, at least in the spheres of exchange of goods and of personal work and services.'

[87] See, eg, B Lurger, 'The Future of European Contract Law between Freedom of Contract, Social Justice, and Market Rationality', (2005) 1 *ERCL* 442–68, 447; Grundmann (fn 6) 194; M Hesselink, 'Common Frame of Reference & Social Justice', (2008) 4 *ERCL* 248–69, 259.

[88] See Atiyah, *The Rise and Fall*, 592–6; M Vec, 'Interventionsstaat', in *Handwörterbuch zur deutschen Rechtsgeschichte*, vol II (2nd edn, 2012) col 1279–83.

[89] For an account of the German development, see M Stolleis, 'Die Entstehung des Interventionsstaates', (1989) 11 *Zeitschrift für Neuere Rechtsgeschichte* 129–47. For an account in English with a particular focus of the aspect of welfarism, see id, *Origins of the German Welfare State: Social Policy in Germany to 1945* (2013).

[90] For brief comparative overviews, see *MaxEuP*/Grigoleit, 1129–31; *MaxEuP*/Unberath, 752–4; Zweigert and Kötz, *Comparative Law*, 327–47.

[91] See Atiyah, *The Rise and Fall*, 726–64; similarly *MaxEuP*/Grigoleit, 1129; Herresthal, 'Constitutionalisation of Freedom of Contract', 92; Bruns (fn 4) 394. Bruns suggests that the said development could also be described as the reversal of what Henry Maine famously described as 'movement from Status to Contract'. See id, 394. Other authors have made similar suggestions. It has been demonstrated, however, that the idea of a reverse movement from contract to status is hardly compatible with Maine's understanding of status. See Schmidt (fn 55) 163–70.

[92] See, eg, Canaris (fn 79) 277–89; J Habermas, *Faktizität und Geltung* (1992) 485–7; Zimmermann, *German Obligations*, 171.

[93] For a (largely critical) account of different aspects of materialization, see G Wagner, 'Materialisierung des Schuldrechts unter dem Einfluss von Verfassungsrecht und Europarecht—Was bleibt von der Privatautonomie?', in U Blaurock and G Hager (eds), *Obligationenrecht im 21. Jahrhundert* (2010) 13–84.

[94] For an early statement of the insight that 'formal' freedom of contract does not mean 'real' freedom, see Weber, *Economy and Society*, 729: 'The great variety of permitted contractual schemata and the formal empowerment to set the content of contracts in accordance with one's desires and independently of all official form patterns, in and of itself by no means makes sure that these formal possibilities will in fact be available to all and everyone.'

[95] A well-known example is the German history of fairness control of standard contract terms. The courts had already developed an overt control mechanism on the basis of the good faith provision of the BGB (§ 242), before the

courts,[96] have taken a leading role as well. And since the 1980s, the institutions of what is now the European Union have also been a driving force behind the transformation of contract law.[97]

12 **Labour contracts and tenancy contracts.** The welfarist regulation of contract law and the corresponding academic discourse have had several focal points in the course of the 20th century.[98] One of them has been the employment contract. It was at the beginning of the century, when the famous 'social question' still loomed large, that the employment relationship was first conceptualized as being substantially different from other contracts.[99] Since then, labour law and the rest of private law have been gradually decoupled, notably as a result of the increasing normative significance of collective labour agreements and extensive special legislation intending to protect workers.[100] Another focal point of contract regulation has been the tenancy contract, originally also part of the 'social question'.[101] In the first part of the 20th century, many European states have effectively superseded the private housing market by an administrative law-based system of central planning (while sometimes leaving the private law provisions on lease contracts untouched).[102] In the second half of the century, the regulatory approach partly shifted: direct public control was lessened in favour of indirect control through mandatory private law provisions, sometimes called 'social lease law'.[103] In the emerging academic

legislator attended to the problem. See Kötz, *European Contract Law*, 141 f; *IECL* VII-1/von Mehren 'A General View of Contract', [79]; *MaxEuP*/Hellwege, 'Standard Contract Terms', 1588–92, 1591. Zimmermann, *German Obligations*, 173–5.

[96] For an example, see the famous 'suretyship decision' of the German Federal Constitutional Court: BVerfGE 89, 214–36 (19.10.1993). The Court held that, by virtue of the guarantee of private autonomy derived from Art 2 (1) *Grundgesetz*, civil courts were required to control the content of contracts entailing unusual burdens for one of the parties and resulting from unequal bargaining power. In essence, this meant that the right to private autonomy could be invoked against a formal understanding of the principles of freedom of contract and *pacta sunt servanda*. For accounts in English, see M Habersack and R Zimmermann, 'Legal Change in a Codified System', (1999) 3 *Edinburgh* LR 272–93; Zimmermann, *German Obligations*, 207 f; *MaxEuP*/Unberath,753.

[97] See, eg, Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (Doorstep Selling Directive). For further references, see Basedow, 'Freedom of Contract', 914; *MaxEuP*/Jansen, 'European Private Law', 637–40, 639; Zimmermann, *German Obligations*, 194–7. In addition, the 20th century has also witnessed an increasing influence of international organizations and private rule-makers on contract law. See, eg, *MaxEuP*/Junker, 'International Labour Organization (ILO)', 967–70; F Cafaggi, 'Private Regulation in European Private Law', in Hartkamp, Hesselink, Hondius, Mak, and Du Perron, *European Civil Code*, 91–126; *MaxEuP*/Hopt, 'Private Rule-Making and Codes of Conduct', 1348–52.

[98] Any attempt at giving an exhaustive account of the 20th-century restrictions of freedom of contract is bound to fail, given their multitude and variety. For other accounts, see eg, *MaxEuP*/Grigoleit, 1126–31; ME Storme, Freedom of Contract: Mandatory and Non-Mandatory Rules in European Contract Law, (2007) 15 *ERPL* 233–50; MJ Treblicock, *The Limits of Freedom of Contract* (1993); T Wilhelmsson, 'Varieties of Welfarism in European Contract Law', (2004) 10 *European LJ* 712–33.

[99] See B Hepple, 'Introduction', in id, *The Making of Labour Law in Europe* (1986) 1–30, 6–12; MW Finkin, 'Comparative Labour Law', in Reimann and Zimmermann, *Oxford Handbook*, 1131–60, 1132–8; M Stolleis, *History of Social Law in Germany* (2014) 68. As indicated above, special legislation for the protection of workers existed already in the 19th century, albeit to a limited extent. See the references in fn 84.

[100] See generally *MaxEuP*/Grigoleit, 1129; *MaxEuP*/Henssler, 'Collective Labour Agreements', 233–8. See also the various contributions in B Hepple and B Veneziani (eds), *The Transformation of Labour Law in Europe* (2009); A Bogg, C Costello, ACL Davies, and J Prassl (eds), *The Autonomy of Labour Law* (2015).

[101] See Kötz, *European Contract Law*, 127; *MaxEuP*/Grigoleit, 1129. See also, with regard to England and Germany, B Markesinis, H Unberath, and A Johnston, *The German Law of Contract: A Comparative Treatise* (2nd edn, 2006) 48–50.

[102] See P Oestmann, 'Lease and Tenancy Contracts: Medieval and Post-Medieval Roman Law', in Katz, *Encyclopedia of Legal History*, vol IV, 56–8, 57 f; Wieacker (fn 71) 435. See also *HKK*/Oestmann, §§ 535–580a, [80]–[84]; T Repgen, 'Tenancy in Germany between 1871 and 1914–Norms and Reality', in W Steinmetz (ed), *Private Law and Social Inequality in the Industrial Age* (2000) 381–409.

[103] See Markesinis, Unberath, and Johnston (fn 101) 48; Oestmann (fn 102) 58. See also *HKK*/Oestmann, §§ 535–560a, [84]–[87].

debates on European contract law harmonization, contracts of employment and of tenancy have been largely ignored[104]—an indication that the regulatory approaches in Europe are still quite diverse on these matters.

Consumer contracts. Contracts between businesses and consumers have been a further well-known centre of attention of contract regulation. While there have been isolated forerunners of consumer legislation in the 19th century,[105] it was only with the expansion of mass consumption after 1960 that consumer protection became a central political concern[106]—and that the idea of a distinctive category of consumer contracts became accepted, comprising as different transactions as sales of consumer goods, consumer credit contracts, or contracts about package holidays.[107] Not least because of the activities of the EU legislator since the 1980s, similar instruments of consumer protection, including notably: mandatory substantive duties vis-à-vis the consumer,[108] information duties,[109] withdrawal rights,[110] and provisions for the fairness control of standard clauses,[111] have become part of virtually all European jurisdictions. (There is an emerging European consensus, however, that the fairness control of standard clauses should also been extended to commercial contracts.)[112] While the instruments just mentioned were largely unknown in the 19th century, the consumer protection movement has arguably also contributed to a cautious revival of the time-honoured idea of equality of exchange: demonstrated, *inter alia*, by new legislative or jurisprudential endeavours to grant relief in cases of gross disparity between performance and counterperformance.[113] Rules establishing a price control have, however, remained largely exceptional—and have, so far, not become part of the *acquis communautaire*.[114] The transnational instruments only allow for the avoidance of a grossly unfair contract if one party has taken advantage of the other party's peculiar position of weakness.[115] **13**

Anti-discrimination law. Towards the end of the 20th century, discrimination in the market sphere—on the basis of personal characteristics such as sex, ethnic origin, or sexual orientation—became another object of intense regulatory efforts. The origin of this development lies in the **14**

[104] In the DCFR—the most comprehensive instrument on European contract law—the exclusion of employment contracts is expressly stated. See DCFR I.-1:101 (2)(e). On the latter exclusion, see M Freedland and M Lehmann, 'Non-discrimination and the "Constitutionalization of Contract Law"', in Dannemann and Vogenauer, *European Sales Law in Context*, 160–89, 183 f. The exclusion of the tenancy contracts from the DCFR follows from the fact that Part B of Book IV of the DCFR only covers contracts for the lease of goods, ie corporeal moveables. See DCFR IV.B.-1:101 (1) in connection with the definition of 'goods' incorporated via DCFR I.-1:108.

[105] See the references in fn 85.

[106] See *HKK*/Schmoeckel, vor §§ 312 ff, [23]–[26]; Vec (fn 85) 171 f; Zimmermann, *German Obligations*, 171 f.

[107] See, eg, *MaxEuP*/Haar, 'Consumer Credit (Regulatory Principles)', 365–9; *MaxEuP*/Rösler, 'Sale of Consumer Goods', 1500–4; *MaxEuP*/Staudinger, 'Package Travel Contracts (Package Tours)', 1234–8.

[108] See *MaxEuP*/Grigoleit, 'Mandatory Law (Basic Features of Regulation in European Private Law)', 1121–6, 1122; Wagner, 'Mandatory Contract Law', 62–6; Zimmermann, *German Obligations*, 218 f. See also below, Art 18:103 (2), [27].

[109] See *MaxEuP*/Heiderhoff, 'Information Obligations (Consumer Contracts)', 869–72. See also below, Art 1:401. It should be noted that, according to some authors, information duties may also be conceptualized as a restriction of freedom of form. See below, Art 2:101 (2), [14].

[110] See *MaxEuP*/Mankowski, 'Right of Withdrawal', 1476–9. See also below, Art 2:401.

[111] See *MaxEuP*/Hellwege, 'Standard Contract Terms', 1588–92, 1591; *MaxEuP*/Grigoleit, 1129 f. See also below, Intro before Art 6:201.

[112] See below, Intro before Art 6:201, [13]–[14]; Art 6:201, [3]–[4]. Many European jurisdictions subject commercial contracts to a fairness control. See *MaxEuP*/Hellwege (fn 111) 1591. For the German story, see Zimmermann, *German Obligations*, 173–5.

[113] See Gordley, *Foundations*, 364–8; *MaxEuP*/Finkenauer (fn 65) 1030 f; Zimmermann, *Obligations*, 268–70.

[114] On the (failed) attempt to extend the fairness control in the CESL to the adequacy of the price, see MW Hesselink, 'Could a fair price rule (or its absence) be unjust?', (2015) 11 *ERCL* 185–96, 187.

[115] See below, Art 4:109.

social movements emerging from the 1960s onwards: the civil rights movement, the feminist movement, the gay and lesbian movement, and others.[116] It took quite a long time, however, until their influence became visible in general contract law. On the European level, the first anti-discrimination prohibitions with a direct effect between private parties evolved in the 1970s. They only applied in the labour market, and only to discriminations on grounds of sex.[117] Some jurisdictions went further and also addressed discrimination on grounds such as race; but typically these rules also remained limited to employment law.[118] It was only at the beginning of the 2000s that anti-discrimination prohibitions were extended to general contract law across the entire EU—mainly as a consequence of two EU Directives addressing discrimination on the basis of race, ethnic origin, and sex.[119] Going beyond these prescriptions, several Member States also passed prohibitions concerning discrimination on grounds of age, religion, sexual orientation, and disability.[120] Especially in Germany, these reforms were criticized as an undue interference with freedom of contract.[121] The transnational instruments incorporating anti-discrimination provisions—ACQP and DCFR[122]—were criticized on similar grounds.[123]

15 **Farewell to freedom of contract?** Increasing contract regulation in the 20th century was accompanied by heated academic debates about the continuing value of freedom of contract. These discussions centred around two closely related questions: whether the existing contract law could still be explained on the basis of the idea of freedom of contract; and whether that freedom should still be treated as the most important normative principle for the further shaping of contract law. It seems that, in the period up until the 1970s, a substantial—and possibly ever more rising—number of academics answered these questions in the negative.[124] As early as the end of the 19th century, scholars such as Otto von Gierke famously departed from the then arguably still individualistic mainstream, proposing a concept of private law that saw freedom of contract as inherently limited by community interests.[125] This current of communitarian

[116] See, eg, E Eichenhofer, *Geschichte des Sozialrechts in Europa* (2007) 115. For an extensive historical account of anti-discrimination law with a focus on USA, UK, and Germany, see M Grünberger, *Personale Gleichheit* (2013) 116–221, 269–314.

[117] See, eg, M Bell, *Anti-Discrimination Law in the European Union* (2002) 42–51. As is well known, from its very beginning, the law of (what is now) the EU also contained prohibitions of discriminations on grounds of nationality and prohibitions of certain discriminations with the effect of distorting competition. However, the effect of these prohibitions on contract law has remained comparatively limited. For an overview of the different types of prohibitions, see *MaxEuP*/Basedow, 'Discrimination (General)', 481–5.

[118] For an overview of the different national traditions, see Bell (fn 117) 149–80; DCFR II.-2:101, Notes.

[119] See Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

[120] See, eg, *MaxEuP*/Lüttringhaus, 'Discrimination (Contract Law)', 474–8, 475.

[121] For an overview, see Freedland and Lehmann (fn 104) 165–9; Grünberger (fn 116) 46–8.

[122] See ACQP 3:101-ACQP 3:203; DCFR II.-2:101- DCFR II.-2:105. No anti-discrimination provisions are contained in PECL, PICC, and CESL. For a critical comparison of the different instruments with regard to the principle of non-discrimination, see Freedland and Lehmann (fn 104) 161–5, 171–82.

[123] See Eidenmüller, Faust, Grigoleit, Jansen, Wagner, and Zimmermann, 'CFR', 672. For a more positive view of the anti-discrimination rules in the DCFR see, eg, S Leible, 'Non-Discrimination', in Schulze, *Common Frame of Reference*, 125–42; E Hondius, 'Diskriminierungsschutz und Europäisches Vertragsrecht—Einige Beobachtungen aus niederländischer Sicht', in R Schulze (ed), *Non-Discrimination in European Private Law* (2011) 199–207.

[124] For a historical account of this development, with a slightly different focus, see D Kennedy, 'From the Will Theory to the Principle of Private Autonomy: Lon Fuller's "Consideration and Form" ', (2000) 94 *Columbia LR* 94–175, 117–26 and *passim*.

[125] cf O von Gierke, *Die soziale Aufgabe des Privatrechts* (1889) 17, 28. Gierke asserted that the 'community's spirit must permeate private law from the bottom up', that freedom of contract could only denote a 'reasonable freedom', a freedom which was 'inherently limited by virtue of its moral function' (own translations). Much of Gierke's concept remained quite vague, however. For a detailed account and for an account of similar propositions by other scholars, see

contract thought broadened in the early decades of the 20th century, with French scholars like Emmanuel Gounot, Léon Duguit, and René Demogue stressing the importance of solidarity and justice over individual freedom in private law.[126] In the 1930s, national-socialist scholars went much further and infamously awarded absolute priority to the welfare of the German *Volk* over freedom of contract.[127] Possibly as a reaction to the totalitarian excesses, post-war Germany initially experienced a revival of liberal thought, with Werner Flume formulating a rhetorically powerful argument in favour of considering private autonomy as the foundational principle of private law,[128] and with ordoliberalism playing a crucial role in the evolution of competition law in Europe: a field of law intended to protect economic freedom (and, in a sense, freedom of contract) against self-destruction.[129] Between the late 1960s and the late 1970s, however, academic support for freedom of contract crumbled again. This was possibly a consequence of the still rather recent advent of mass consumption and the ubiquity of standard clauses. It may also have reflected the fact that, even in Western Europe of that time, many were convinced of the advantages of 'plan' over 'contract'.[130] And it may have mirrored the general loss of faith in the possibility of explaining and shaping the law by reference to abstract concepts. In any event, the scepticism towards freedom of contract could be witnessed across Europe. Several scholars proclaimed a 'crisis' of contract (theory);[131] Patrick Atiyah published the book whose famous

Hofer (fn 81) 141–8 and *passim*. For a complete English translation of Gierke's text, see now O von Gierke, *The Social Role of Private Law* (transl E McGaughey, 2016), available online.

126 See E Gounot, *Le principe de l'autonomie de la volonté* (1912) 387: 'En matière de contrats, il n'y a qu'un seul principe absolu: c'est la justice. La liberté n'est qu'un moyen en vue du juste; ell ne repose que sur une présomption de justice'; L Duguit, *Les transformations générales du droit privé depuis le Code Napoléon* (1920) 96: 'Pour qu'un acte de volonté puisse produire un effet de droit, … il faut encore qui'il soit déterminé par un … but de solidarité sociale'; R Demogue, *Traité des obligations en général*, vol I (1923) [5 bis]: 'On n'a pas besoin de la Liberté. L'ordre social importe beaucoup plus.' Demogue also famously claimed that a contract was a little company with each party working towards a common goal. See id, *Traité des obligations en général*, vol VI (1931) [3]. For a historical account of the French development, see V Ranouil, *L'autonomie de la volonté: naissance et evolution d'un concept* (1980) 133–49. For a general view on the rise of 'The Social' as a transnational legal consciousness at the beginning of the 20th century, see *D Kennedy*, 'Two Globalizations of Law & Legal Thought: 1850–1968', (2003) 36 *Suffolk University LR* 631–79, 648–68; see also J Rückert, 'Private Law, Concept of', in Katz, *Encyclopedia of Legal History*, vol IV, 391–97, 394 f.

127 See K Larenz, 'Die Wandlung des Vertragsbegriffs', (1935) 5 *Deutsches Recht* 488–91, 491, claiming that, instead of being subject to exceptional limitations only, freedom of contract under national-socialism extended only so far, as the necessities of the 'life of the people' (*Volksleben*) permitted. But see also W Schmidt-Rimpler, 'Grundfragen einer Erneuerung des Vertragsrechts', (1941) 147 *AcP* 130–97, defending freedom of contract against the backdrop of a collectivist idea of 'rightness' (*Richtigkeit*). Within the German context, Schmidt-Rimpler's idea of the bargaining process leading to the 'right' or 'correct' solution (*Richtigkeitsgewähr*) became one of the most-cited legitimations of freedom of contract. Its highly questionable normative premise has been largely ignored. For a pointed criticism of the widespread misinterpretation of Schmidt-Rimpler, see Auer (fn 79) 36 fn 85. For an account in English, see Habersack and Zimmermann (fn 96) 278 f. For a historical account of national-socialist ideas on freedom of contract, see *HKK*/ Hofer, vor § 241, [30]–[31].

128 See W Flume, 'Rechtsgeschäft und Privatautonomie', in E v Caemmerer, E Friesenhahn, and R Lange (eds), *Hundert Jahre Deutsches Rechtsleben*, vol I (1960) 135–238, 136–47, in particular 141; id, *Allgemeiner Teil des Bürgerlichen Rechts*, vol II (1965) 1–22, in particular 6, equating private autonomy with the maxim *stat pro ratione voluntas*.

129 For historical accounts of the emergence of (European and German) competition law after World War II and the influence of ordoliberalism, see DJ Gerber, 'Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the New Europe' (1994) 42 *AJCL* 25–84; 49–74 and *passim*; id, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (1998) 232–391. See now also KK Patel and H Schweitzer (eds), *The Historical Foundations of EU Competition Law* (2013).

130 For a historical account with a focus on Germany, see U Herbert, *Geschichte Deutschlands im 20. Jahrhundert* (2014) 805–9. For a transnational perspective, see T Judt, *Postwar: A History of Europe since 1945* (2005) 360–73.

131 See H Batifoll, 'La "crise du contrat" et sa portée', (1967) 12 *Archives de Philosophie du Droit* 13–30; EA Kramer, *Die 'Krise' des liberalen Vertragsdenkens* (1974).

title suggested the impending end of freedom of contract;[132] and Konrad Zweigert went so far as to call freedom of contract 'a chimera, a fantasy and not in any way a reality'.[133]

3. The 'resurrection' of freedom of contract

16 **Theoretical reinvigoration.** For those who, by the end of the 1970s, considered the idea of freedom of contract virtually dead, the subsequent development must appear like an 'unlikely resurrection'.[134] Of course, legislative and judicial inroads into freedom of contract have continued (as was said above, anti-discrimination and consumer contract provisions, for example, proliferated only after 1980). Nevertheless, it seems that academic support for freedom of contract has resurged.[135] As part of a revival of (re-)constructive private law theory, an increasing number of scholars have propounded ambitious concepts of contract that embrace freedom of contract.[136] Roughly speaking, most of these theories fall into one of two camps the respective pedigrees of which can arguably be traced back to the 18th and 19th centuries, either to Kantian philosophy or to classical economics. Contributions of the latter kind have been put forward by scholars of the law-and-economics movement. They have defended freedom of contract on the grounds that it increases total welfare: Freely entered agreements, they have argued, are frequently the best instruments for bringing about an efficient allocation of resources, given that individuals may generally be presumed to act rationally with regard to their self-interest.[137] As is well known, these scholars have been critical of limiting freedom of contract by reference to notions such as fairness, social justice, or inequality of bargaining power, while not rejecting mandatory law *per se*. According to their opinion, some of the modern restrictions of contractual freedom can be justified on efficiency grounds—including, among others, information duties, withdrawal rights, and the judicial control of standard clauses. Such limitations, they have claimed, are, in principle, capable of alleviating undesirable informational asymmetries, safeguarding

[132] See PS Atiyah, *The Rise and Fall of Freedom of Contract* (1979).

[133] K Zweigert and H Kötz, *An Introduction to Comparative Law*, vol II (transl T Weir, 1977) 9. Instead of attributing the statement to both authors, it seems appropriate to credit it to Zweigert alone. First, Zweigert had made a similar statement in an earlier article of his; see K Zweigert, '"Rechtsgeschäft" und "Vertrag" heute', in *Festschrift für Max Rheinstein* (1969) 493–504, 503: 'Vertragsfreiheit [ist] bei präziser Betrachtung ein Traumschloß, eine Utopie und keine Realität'. Second, Hein Kötz later explicitly disavowed Zweigert's view when assuming exclusive responsibility for the treatise; cf K Zweigert and H Kötz, *An Introduction to Comparative Law* (3rd edn, transl T Weir, 1998) 332.

[134] cf G Gilmore, *The Death of Contract* (1974) 103: 'Contract is dead—but who knows what unlikely resurrection the Easter-tide may bring?'

[135] See, eg FH Buckley, 'Introduction', in id, *The Fall and Rise of Freedom of Contract* (1999) XI–XII. Buckley is writing from an American perspective. It seems, however, that there has been a similar development in Europe. cf the observation of Wagner, 'Mandatory Contract Law', 48: 'During the 1960s and 1970s it was believed that the principle of party autonomy was unhelpful in organizing modern societies. The proclamation of the "death of contract" was … an affirmation of a new paradigm in private law … Today the "death of contract" movement seems to be dead itself.' See also *IECL* VII-2/Kramer, 'Defects in the Contracting Process', [1], suggesting that contract law theory has experienced a turn towards 'postinterventionist thought'.

[136] Many of these theories have originated in North America, but have subsequently been received in the European private law discourse. In the following, references are kept to a minimum. For an account of the renaissance of private law theory in the United States, see EG Hosemann, '"The New Private Law"—Die neue amerikanische Privatrechtswissenschaft in historischer und vergleichender Perspektive', (2014) 78 *RabelsZ* 37–70, 48–52 and *passim*. For a historical account of the renaissance of more formal conceptions of freedom of contract in Germany since 1980, see M Bäuerle, *Vertragsfreiheit und Grundgesetz* (2001) 148, 153–8.

[137] For a recent articulation of this view by a European scholar, see G Wagner, 'Mandatory Contract Law', 51 f and *passim*. For a summary of the comprehensive American literature, see BE Hermalin, A Katz, and R Craswell, 'Contract Law', in AM Polinsky and S Shavell (eds), *Handbook of Law and Economics*, vol I (2007) 21–30.

rational decisions, or reducing transaction costs.[138] Partly in response to these instrumentalist theories of contract law, other scholars have engaged in new efforts to reconstruct contract law in a non-consequentialist way: most notably by reference to the venerable idea of individual autonomy.[139] Proponents of these theories have been pronouncedly sceptical of many tendencies in modern contract regulation as well. However, not unlike their instrumentalist rivals, they have also claimed that some of the more recent limitations of freedom of contract are compatible with, or even required by, the normative foundation of that freedom (in their case, individual autonomy instead of efficiency).[140]

'Neoliberalism'. The reinvigoration of freedom of contract within private law theory has not, presumably, occurred independently from developments in society at large. As is well known, the last decades of the 20th century witnessed a general upswing of market-oriented thinking across Europe and North America.[141] To some extent, this may have been a consequence of the collapse of the Soviet Union and the political transformation of Central and Eastern Europe after 1989. Western observers have famously interpreted this as an 'unabashed victory of economic and political liberalism'.[142] At last, the centrally planned economy ceased to be a plausible political alternative to the decentralized market economy. It was well before 1989, however, that the revival of market-oriented thinking had started. By the end of the 1970s, rising unemployment and inflation rates had partly discredited the post-war Western model of a heavily regulated market economy. Within the discipline of economics, Keynesianism had lost ground to more market-friendly approaches. From the 1980s onwards, many Western states started to embrace market-liberal policies (albeit to different degree) that gave rise to the so-called neoliberal capitalism: deregulation of the financial sector, removal of trade barriers, privatization, and de-unionization.[143] Most of these political measures had no immediate impact on the core of contract law[144] (even though the politics of privatization presumably 17

[138] See, eg, G Wagner, 'Zwingendes Vertragsrecht', in Eidenmüller, Faust, Grigoleit, Jansen, Wagner, and Zimmermann, *Verbraucher-acquis*, 1–52, 16–18, 21–35.

[139] See, eg, C Fried, *Contract as Promise* (1981) 1, 7 f, 16 f and *passim*; Gutmann, 'Some Preliminary Remarks'. For an account of other autonomy-based theories, see P Benson, 'Contract', in Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (2010) 29–63, 37–49.

[140] cf Gutmann, 'Some Preliminary Remarks', 53–5, asserting that an autonomy-based theory of contract can speak in favour of pre-contractual duties to inform, compulsory contracting, and possibly also in favour of rules including a test of substantial unfairness. cf also P Benson, 'The Unity of Contract Law', in id (ed), *The Theory of Contract Law: New Essays* (2001) 118–205, 198–201: asserting that a liberal theory of contract is compatible with a doctrine of unconscionability; SA Besson, 'Discrimination and Freedom of Contract', (1999) 3 *International Journal of Discrimination and the Law* 269–97, defending anti-discrimination law by reference to the principle of autonomy.

[141] For a general account and criticism see, eg, MJ Sandel, *What Money Can't Buy: The Moral Limits of Markets* (2012).

[142] See F Fukuyama, 'The End of History?', (1989) 16 *The National Interest* 3–18, 3. For slightly similar assessments from that time by private lawyers, see C-W Canaris, 'Verfassungs- und europarechtliche Aspekte der Vertragsfreiheit in der Privatrechtsgesellschaft', in *Festschrift für Peter Lerche* (1993) 873–91, 873; EJ Mestmäcker, 'Die Widerkehr der bürgerlichen Gesellschaft und ihres Rechts', (1991) 10 *Rechtshistorisches Journal* 177–92, 177 f. Also in today's debates about European private law, the break-down of Eastern European state socialism after 1989 is invoked as an argument in favour of liberalism. See, eg, O Lando, 'Liberal, Social and "Ethical" Justice in European Private Law', (2006) 43 *CMLR* 817–33, 822.

[143] The most drastic reforms took place in the United States under Ronald Reagan and in the United Kingdom under Margaret Thatcher; but a change in economic policy also occurred in parts of continental Europe. For a historical account of the American experience, see DM Kotz, *The Rise and Fall of Neoliberal Capitalism* (2015). For an account from a Continental European perspective, see Herbert (fn 130) 961–78. For a comparative analysis with particular reference to privatization, see B Bortolotti and D Siniscalco, *The Challenges of Privatization* (2004).

[144] cf the cautious appraisal of Beale, Fauvarque-Cosson, Rutgers, Tallon, and Vogenauer, *Contract Law*, 76. The authors are merely suggesting the possibility that 'the return in force of economic liberalism' might give 'rise to a resurgence of freedom of contract and, perhaps, to a stepping back by the legislator from interference with the contract'.

increased the practical importance of contract as institution).[145] It is plausible, however, that the ideological currents underlying these economic reforms were also partly responsible for the renaissance of freedom of contract in private law scholarship.[146]

18 Continuing disagreement. Notwithstanding the renaissance of economic liberalism, political differences about freedom versus solidarity, individualism versus altruism have continued—and so have, of course, scholarly disagreements about freedom of contract. As an observer notes, contemporary 'contract theory presents itself as a multiplicity of mutually exclusive approaches with their own distinctive contents and presuppositions.'[147] Not only are efficiency and autonomy—the foundations of today's two dominant contract theories—incompatible with each other,[148] there are also several other competing views of contract: such as those suggesting that contract law can be explained as the product of balancing the conflicting (and equally important) principles of freedom and social justice;[149] or those who argue that freedom of contract should, from the very start, be understood to allow only the conclusion of (approximately) fair contracts.[150] Admittedly, most actors in the debates on European contract law do not reason by direct and exclusive reference to any of these theories: many eclectically combine arguments from mutually incompatible theories (autonomy and efficiency, for example); many also reason by reference to an incompletely theorized notion of 'material', or 'real', or 'genuine' freedom of contract: a concept which, because of its vagueness, can often be used to argue both in favour and against a certain regulatory intervention. Against this backdrop, it may even be considered surprising that, concerning particular rules of mandatory contract law (eg withdrawal rights, control of standard clauses in consumer contracts), there is still a large degree of unanimity in European scholarship. Irrespective of the existing controversies with regard to other rules (eg anti-discrimination provisions, mandatory substantive duties vis-à-vis the consumer), it should also be noted that no serious scholar of contract law today argues for the complete renunciation of freedom of contract.

This seems to imply that, in Europe, neoliberalism has, so far, not changed the core of contract law. cf also: MW Hesselink, *CFR & Social Justice* (2008) 65 f. He refers to the 'rise of neoliberal thought in the West' and a 'renewed faith in the capacity of individuals to take care of their own interests' without naming any example of how this has affected positive contract law; in fact, he acknowledges the persistence of 'extensive interference' with freedom of contract.

145 cf Study Group on Social Justice in European Private Law (fn 5) 655, claiming that 'the private law of contract is currently becoming more significant' as a result of neoliberal attempts to 'reduce the role of the State'.

146 Support for this claim can be derived from the fact that contract scholars themselves sometimes invoke the broader social and political trends when making normative propositions. See, eg, B Dauner-Lieb, 'A Special Private Law for B2C? Silver Bullet or Blind Alley?', in Schulze (ed), *New Features in Contract Law* (2007) 107–17, 111. She claims that the 'liberal social model is experiencing a considerable renaissance in economic and legal policies' and uses this as an argument. Of course, further research on the intellectual history of contemporary contract law is needed to substantiate the presumption that there is a strong link between the renaissance of liberalism in private law theory and in society at large.

147 Benson (fn 139) 29. See also Gutmann, 'Some Preliminary Remarks', 44.

148 See, eg, Gutmann, 'Some Preliminary Remarks', 46 f. cf also Whittaker, 'The Optional Instrument', 373–80, arguing that the conflict between a 'market vision' and an autonomy-based vision of freedom of contract law underlies modern European contract law.

149 See Lurger (fn 87) 453. See also Study Group on Social Justice in European Private Law (fn 5) 654. Admittedly, it is debatable whether the proponents of 'social justice' in European contract law have actually produced a free-standing alternative to other existing theories of contract law. For a critical view, see Gutmann, 'Some Preliminary Remarks', 47–9.

150 See Gordley (fn 65) 1645–56; F Rödl, 'Contractual Freedom, Contractual Justice, and Contract Law (Theory)', (2013) 76 *Law and Contemporary Problems* 57–70, 62 and *passim*. See also E Weinrib, *The Idea of Private Law* (1995) 138 f.

4. Explaining the rise of symbolic provisions on freedom of contract

A symbol of strength? On the basis of the history of freedom of contract, it should now be clear why the rise of symbolic provisions on freedom of contract (above, [5]) can be interpreted in two radically different ways (see above, [6]). On the one hand, the intellectual 'crisis' of freedom of contract in the 1970s may be taken as backdrop. From such a perspective, the spread of pertinent symbolic provisions appears as an expression of the renewed intellectual appeal of freedom of contract. In support for this interpretation, reference can, for example, be made to the difference between the CISG of 1980 and the PICC of 1994, two bodies of rules with a similar focus on commercial contracts. Whereas the CISG—drafted when socialism still had Eastern Europe in its clutches and when doubts about the value of freedom of contract were widespread also in the West—does not contain a forceful symbolic provision on freedom of contract, the PICC—completed at the time when Western academics stood under the (mistaken) impression of the 'end of history'[151]—do contain such a provision (above, [5]). In support of this interpretation, attention can also be drawn to the fact that French observers have interpreted the recent inclusion of a provision on freedom of contract in the *Code civil* as an expression of neoliberalism.[152] **19**

A symbol of crisis? On the other hand, the contemporary popularity of pronouncements of freedom of contract can be contrasted with the situation in the 19th century. As noted, the Austrian and German legislators did not include a symbolic provision on freedom of contract in their Codes: presumably because it was taken for granted that that freedom formed the basis of contract law (above, [4]–[5]) Against this background, the spread of such provisions in European private law appears less as a symbol of the regained appeal of liberalism and more as an indication that freedom of contract, since its heyday in the 19th century, has lost its character as something self-evident.[153] From that perspective, in other words, the provisions themselves look like the symbol of a crisis that has only seemingly been overcome. This is not to say that the status of freedom of contract as a starting point of European contract is, in fact, at risk. Admittedly, the historical development since the 19th century has demonstrated that freedom of contract inevitably produces socio-economic coercion, exclusion, and inequality. At the same time, history has also demonstrated, however, that under the conditions of normative individualism and a Western modernity largely defined by it, there is no plausible alternative to taking freedom of contract as a starting point. Hence, while that freedom will continue to be severely criticized and limited (and, in many cases, rightfully so), it will also inevitably be reaffirmed again and again. And the provisions on freedom of contract will continue to symbolize this tension. **20**

IV. Conclusions and recommendations

The case for including a provision. Given that the provisions on freedom of contract in the transnational instruments merely fulfil a symbolic function (above, [3]), it may appear doubtful whether any of them should be included in a codification of European contract law. Steadfast supporters of legislative purism and ardent proponents of a socialist private law are likely to **21**

[151] cf the sources in fn 142.

[152] See Mekki (fn 41) 1203.

[153] For a somewhat similar interpretation with regard to the provision on freedom of contract in the Swiss *Obligationenrecht*—Art 19 (1) OR—, see A Abegg, 'Die Ausdifferenzierung der Vertragsfreiheit im Wirtschaftsrecht', (2004) 87 *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* 197–208, 207, claiming that the inclusion of the provision should not be interpreted as a triumph of freedom of contract; it should rather be seen in the historical context of new political interventions into freedom of contract.

argue against an inclusion.[154] All others have reason to support it. First, a decision against a symbolic pronouncement of freedom of contract would itself carry a symbolic meaning. Given that such pronouncements have become increasingly popular (above, [5]), such a step would constitute a rupture with an established trend in European private law. This could be interpreted as a relativization of freedom of contract that would be undesirable from most points of view. Second, within the existing transnational instruments, the provisions on freedom of contract can be interpreted as a symbolic counterweight to the broad and prominently placed provisions on good faith and fair dealing.[155] If the latter were included in a codification of European contract law, a deletion of the provisions on freedom of contract would inevitably create an imbalance.

22 **A synthesis of the most appropriate provisions.** Which of the existing provisions is to be preferred depends very much on the value attached to freedom of contract. On the basis of a moderately liberal perspective, PICC and CESL provide the best solutions for a codification of European contract law. They articulate the general rule of freedom of contract comparatively most clearly. The synthesis largely follows these two provisions. Its first paragraph is identical to PICC 1.1. As opposed to CESL 1 (1), it does not state that freedom of contract only applies 'subject to any applicable mandatory rules'. In order to strengthen the liberal dimension of the provision, this self-evident qualification has been moved to the second paragraph of the synthesis. One could also move it to a separate provision, following the model of PICC 1.4. A provision similar to the third paragraph of the synthesis can be found in virtually all instruments (cf PECL 1:102 (2), PICC 1.5, DCFR II.-1:102 (2), and CESL 1 (2)). If the second paragraph of the synthesis were to constitute a separate provision—along the lines of PICC 1.4—, the third paragraph should also be moved to that provision. Admittedly, one could also argue that it should be deleted altogether. In essence, the provisions after which the third paragraph of the synthesis is modelled state—in a complicated fashion—that provisions in the respective instrument are only mandatory if this is so provided. As said,[156] this information can, by way of an *argumentum e contrario*, be inferred from the existence of provisions expressly prohibiting the deviation from a certain rule. If it is nevertheless considered desirable to have an express provision to that effect,[157] one should at least formulate it in a more straightforward fashion.

23 **Less suitable solutions.** Compared to PICC 1.1 and CESL 1 (1), the other provisions are less suitable for a codification of European contract law. DCFR II.-1:102 employs the term 'party autonomy' instead of 'freedom of contract'. Arguably, this term does not possess the same clarity and weight in some jurisdictions as 'freedom of contract'; in addition, it evokes associations to a non-consequentialist justification of freedom of contract—thereby unnecessarily excluding other possible justifications.[158] Moreover, DCFR II.-1:102, in its third paragraph, contains a

[154] For an argument in the latter sense, see L Nogler and U Reifner, 'Social Contracts in the Light of the Draft Common Frame of Reference for a Future EU Contract Law', in Antoniolli and Fiorentini, *Factual Assessment* 335–76, 359, claiming that the 'classical codifications were cautious enough not to legislate on the principle of freedom of contract' and taking DCFR II.-1:102 as indicative of 'how deep neo-liberal model thinking is rooted in the minds of the drafters' of the DCFR. This criticism, of course, stands in a remarkable contrast to the widespread criticism of the DCFR as unduly restrictive of freedom of contract. See above, fn 11.

[155] On their meaning and effect, see below, Art 1:201.

[156] cf already above, fn 20.

[157] Such a general pronouncement would, of course, rule out the possibility of activist judges declaring provisions as mandatory which do not already contain an express statement to that effect. In case a legislator would like to leave this possibility open, it would be wise not to include such a provision.

[158] See S Whittaker and K Riesenhuber, 'Conceptions of Contract', in Dannemann and Vogenauer, *European Sales Law in Context*, 120–59, 141 f, asserting that the term 'autonomy', as opposed to 'freedom of contract', appears only rarely in the English legal discourse, and claiming that it is hardly compatible with an economic (ie instrumentalist) conception of freedom of contract.

problematic provision on waivers that would possibly undermine the effectiveness of consumer protection rules.[159] In any event, a symbolic pronunciation of freedom of contract is hardly a fitting place for such a rule. The main weaknesses of PECL 1:102 and DCFR^{Interim} II.-1:102 have already been addressed (above, [2]). The references to the requirements of good faith and fair dealing constitute an undesirably strong symbolic qualification of freedom of contract; they are also prone to cause confusion, given that the requirements of good faith and fair dealing are also addressed in a separate provision.[160]

Lessons from the French legislator? From a liberal perspective, the provision on freedom of contract that has recently been included in the French *Code civil*, Art 1102 (above, [4]), is even more forceful than the pertinent provisions in PICC and CESL. It covers all the dimensions that are typically considered to be part of freedom of contract today: including, notably, freedom from contract, freedom to choose the contractual partner, and freedom of form.[161] While the latter freedom has received a special provision in PICC and CESL,[162] the first two dimensions are not mentioned by the latter instruments (nor are they mentioned in PECL and DCFR). This can arguably be explained by the fact that neither PICC nor CESL contain anti-discrimination provisions or provisions on compulsory contracts (*Kontrahierungszwang*). In a codification of European contract law, at least provisions of the first kind would probably (and rightly) be included. Against this background, it would make sense—in symbolic terms—also specifically to mention the freedom to choose one's contractual partner and the freedom not to contract. A future European legislator committed to the idea of liberalism could consequently rephrase the first paragraph of the synthesis (or of CESL 1 (1)) along the lines of Art 1102 *Code civil*—that is to say, in terms similar to the following ones: 'Everyone is free to contract or not to contract, to choose the person with whom to contract, and to determine the content of the contract.' 24

[159] cf the references to the German literature in fn 13.

[160] See below, Art 1:201.

[161] cf already above, fn 8. The assessment that these sub-categories of freedom of contract do not add anything substantial to a broad definition of freedom of contract remains accurate. From a symbolic perspective, this is not decisive, however.

[162] See below, Art 2:101 (2).

Art 1:103: Mandatory Law

(1) Where the law otherwise applicable so allows, the parties may choose to have their contract governed by the Principles, with the effect that national mandatory rules are not applicable.
(2) Effect should nevertheless be given to those mandatory rules of national, supranational and international law which, according to the relevant rules of private international law, are applicable irrespective of the law governing the contract.

PICC 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.

1 **Note.** See Art 1:101, [1] f. Rules on application need to be formulated specifically for the instrument to which they relate as they need to be adapted to the instrument's scope and design. They cannot be restated in the form of a general rule. Thus, it would not make much sense to restate them in this general commentary on European contract laws.

Art 1:104: Application to Questions of Consent

(1) The existence and validity of the agreement of the parties to adopt or incorporate these Principles shall be determined by these Principles.
(2) Nevertheless, a party may rely upon the law of the country in which it has its habitual residence to establish that it did not consent if it appears from the circumstances that it would not be reasonable to determine the effect of the party's conduct in accordance with these Principles.

RegCESL 8: Agreement on the use of the Common European Sales Law
(1) The use of the Common European Sales Law requires an agreement of the parties to that effect. The existence of such an agreement and its validity shall be determined on the basis of paragraphs 2 and 3 of this Article[1] and Art 9,[2] as well as the relevant provisions in the Common European Sales Law.
(2)–(3) …

Note. See Art 1:101, [1] f. Rules on application need to be formulated specifically for the instrument to which they relate as they need to be adapted to the instrument's scope and design. They cannot be restated in the form of a general rule. Thus, it would not make much sense to restate them in this general commentary on European contract laws. **1**

[1] RegCESL 8: '(2) In relations between a trader and a consumer the agreement on the use of the Common European Sales Law shall be valid only if the consumer's consent is given by an explicit statement which is separate from the statement indicating the agreement to conclude a contract. The trader shall provide the consumer with a confirmation of that agreement on a durable medium.
(3) In relations between a trader and a consumer the Common European Sales Law may not be chosen partially, but only in its entirety.'

[2] RegCESL 9: Standard Information Notice in contracts between a trader and a consumer: '(1) In addition to the pre-contractual information duties laid down in the Common European Sales Law, in relations between a trader and a consumer the trader shall draw the consumer's attention to the intended application of the Common European Sales Law before the agreement by providing the consumer with the information notice in Annex II in a prominent manner. Where the agreement to use the Common European Sales Law is concluded by telephone or by any other means that do not make it possible to provide the consumer with the information notice, or where the trader has failed to provide the information notice, the consumer shall not be bound by the agreement until the consumer has received the confirmation referred to in Article 8 (2) accompanied by the information notice and has expressly consented subsequently to the use of the Common European Sales Law.
(2) The information notice referred to in paragraph 1 shall, if given in electronic form, contain a hyperlink or, in all other circumstances, include the indication of a website through which the text of the Common European Sales Law can be obtained free of charge.'

Art 1:105: Usages and Practices

(1) The parties are bound by any usage to which they have agreed and by any practice they have established between themselves.

(2) The parties are bound by a usage which would be considered generally applicable by persons in the same situation as the parties, except where the application of such usage would be unreasonable.

CISG 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.

PICC 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 usage would be unreasonable.

DCFR II-1:104: Usages and practices

(1) The parties to a contract are bound by any usage to which they have agreed and by any practice they have established between themselves.

(2) The parties are bound by a usage which would be considered generally applicable by persons in the same situation as the parties, except where the application of such usage would be unreasonable.

(3) This Article applies to other juridical acts with any necessary adaptations.

CESL 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.

I.	Introduction	[1]–[2]
II.	Historical background	[3]–[6]
III.	Practices, usages, and their 'binding effect'	[7]–[15]

I. Introduction

1 **Usages and practices in the international instruments.** PECL 1:105 focuses on the question of when 'usages' and 'practices' can be considered as forming part of the content of a contract, and thus addresses an array of well-known problems pertaining to the formation and interpretation of contracts as well as to the general issue of how the 'voluntary' content of a contract relates to 'involuntary' content imposed by external norms. It also focuses on the related question of the extent to which usages and customs can be thought of as 'normative' and how this, in turn, determines their relationship to the rules of positive law. 'Usages' are of particular importance in mercantile contexts; PECL 1:105 therefore has its forerunners in the attempts to create a uniform regulation of usages in international trade. The ancestry of PECL 1:105 stretches back, via CISG 9, to the first drafts of the ULIS.[1] As tools through which merchants adapt swiftly and flexibly to the necessities of an ever-changing commercial reality, mercantile usages are perceived

[1] See below at [2], [12]. ULIS 9 read as follows:
'(1) The parties shall be bound by any usage which they have expressly or impliedly made applicable to their contract and by any practices which they have established between themselves.

as being of vital importance for international trade and are even seen as the very essence of a cosmopolitan, flexible 'law merchant' that serves as a form of self-governance in international commerce.[2] CISG 9, one of the prominent forerunners of PECL 1:105, addresses the bindingness of usages (and practices), and has thus been called one of the most important provisions of the CISG, as it allows the Convention to adjust to 'new commercial problems'.[3] However, the treatment of usages in CISG 9 was also among the most contentious issues in the genesis of that instrument.[4] Lively debates revolved, in particular, around the 'normative' effect of usages in cases in which the parties have not knowingly incorporated the usage into their agreement. At the heart of these debates was the question as to how to explain the 'normative' effect of usages.[5] The answers to this question have traditionally been grouped into two 'theories': a 'subjective' theory, according to which usages bind only as contractual terms, and an 'objective' theory, which treats usages themselves as norms that have an immediate binding effect on the parties.[6] Despite these roots in international commercial law, the scope of application of PECL 1:105 is not restricted to merchants, a restriction that was later considered in CESL 67.[7]

General concerns regarding the regulation of usages. Attempts to capture commercial law in statutes or codification are typically met with the concern that the 'living' commercial law consisting of customs and usages will crystallize, petrify, and thus be rendered incapable of accommodating practical mercantile necessities. The tension between the idea of a 'living law' of commerce and that of codification remained the target of the critics of the project to unify the international law of sales, and was one of the main reasons for the United States' lingering scepticism towards the ULIS.[8] The treatment of usages in the CISG proved contentious at all stages of its development.[9] Rules that address the effects of changing and evolving usages on commercial contracts thus have assumed a pivotal role within every project of commercial law harmonization. As early as 1935, Ernst Rabel had referred to the corpus of usages and customs that governed international trade as the 'autonomous law of commerce'[10]—long before the label of the 'new lex mercatoria' was coined.[11] The general sentiment underlying and driving the **2**

(2) They shall also be bound by usages which reasonable persons in the same situation as the parties usually consider to be applicable to their contract. In the event of conflict with the present Law, the usages shall prevail unless otherwise agreed by the parties.
(3) Where expressions, provisions or forms of contract commonly used in commercial practice are employed, they shall be interpreted according to the meaning usually given to them in the trade concerned.'

[2] See, eg, A Goldstajn, 'Usages of Trade and Other Autonomous Rules of International Trade According to the UN (1980) Sales Convention', in P Sarcevic and P Volken (eds), *International Sale of Goods: Dubrovnik Lectures* (1986) 55–110, 56 f; L Graffi, 'Remarks on Trade Usages and Business Practices in International Sales Law', (2011) 29 *Journal of Law & Commerce* 273–95, 273; Bainbridge, 'Trade Usages in International Sales of Goods', 624. On the discourse on the 'new lex mercatoria', see below, fn 11.

[3] Bainbridge, 'Trade Usages in International Sales of Goods', 626; See also J Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (1982) 144.

[4] P Schlechtriem, *Uniform Sales Law: The UN Convention on Contracts for the International Sale of Goods* (1986) 41.

[5] Schlechtriem (fn 4); See also H Dölle, 'Bedeutung und Funktion der "Bräuche" im Einheitsgesetz über den Internationalen Kauf beweglicher Sachen', in *Ius Privatum Gentium: Festschrift für Max Rheinstein* (1969) 447–53, 457 f.

[6] Jokela, 'The Role of Usages', 87–9.

[7] *Schulze*/Kieninger, Art 67, [10].

[8] R Kearney, *Report of the Delegation of the United States of America to the Diplomatic Conference on the Unification of Law Governing the International Sale of Goods* (1964) 6; HJ Berman, 'The Uniform Law on International Sale of Goods: A Constructive Critique', (1965) 30 *Law & Contemporary Problems* 354–69, 355 f.

[9] *Schlechtriem and Schwenzer*/Junge, Art 9, [1].

[10] Rabel, 'Der Entwurf eines einheitlichen Kaufgesetzes', 2.

[11] On the origins of the 'New Lex Mercatoria Doctrine' see KP Berger, *The Creeping Codification of the Lex Mercatoria* (2nd edn, 2010) 1–8; P Kahn, 'La lex mercatoria: point de vue français après quarante ans de controverses', (1992) 37 *McGill LJ* 413–27, 414 f.

project of developing a uniform law of sales, of which Rabel was one of the main protagonists, was that national and international commercial practice had developed an intricate system of contractual self-governance whose relationship to the projected codification of international sales law needed to be clarified.[12] From its earliest stages onwards, the drafts of the ULIS thus contained numerous provisions that focused on the import and prevalence of usages.[13] Article 10 of the 1935 draft stated that parties are bound by usages they knew or should have known, yet in the latter case only if the usage in question could not be considered 'unreasonable', and that a usage prevails over the uniform law in case of conflict.[14]

II. Historical background

3 **Codification, usages, and the 'law merchant'.** The articulation of the idea of commercial law as a form of mercantile self-governance can be traced back to the 19th century, when scholars began to devise the theory of a traditional *lex mercatoria* as a—'cosmopolitan'—legal order with medieval origins.[15] The difficulties faced by the initiative to unify the international sale of goods mirror to a certain extent the challenges that particularly the Continental legal systems faced when attempting to codify commercial law in the 19th century; while national codifications aimed to replace the traditional customary law, it was obvious from the outset that usages remained of decisive importance in the reality of commercial law: 'Mais, en droit commercial plus qu'ailleurs, l'hégémonie de la loi est irréaliste.'[16] In the light of the undeniable practical importance of usages, their legal nature had to be considered with respect to their relationship to the positive, state-issued commercial law: were usages to be seen as a form of customary law that competes with the authority of state-issued law or simply as a type of factual habit that might inform the understanding and interpretation of commercial interaction—or perhaps as a kind of norm *sui generis*? In the varying theoretical responses to these questions lay the origins of the divergent approaches that were first contrasted by Ernst Rabel in 1936:[17] a 'subjective' theory, according to which usages bind only as contractual terms, and an 'objective' theory, which treats usages themselves as norms that have immediate binding effect on the parties. This theoretical divergence would later prove to be a matter of major contention in the debates on the wording of CISG 9.[18]

[12] Rabel, 'Der Entwurf eines einheitlichen Kaufgesetzes', 2; id, 'The Draft of an International Law of Sales', 546.

[13] In the 1935 draft, usages were mentioned in Art 10, 16, 17, 38, 40, 41, 63, 78, 106, and 107. See Rabel, 'Der Entwurf eines einheitlichen Kaufgesetzes', 2.

[14] Article 10:

'(1) Les parties sont liées par les usages dont elles connaissent ou doivent connaître l'existence. Le juge peut écarter un usage non raisonnable si la teneur de cet usage n'était pas connue de l'une des parties lors de la conclusion du contrat.
(2) Lorsque des clauses ou formulaires usités dans le commerce ont été employés, le juge doit les interpréter conformément aux usages commerciaux.
(3) L'usage l'emporte sur la présente loi en cas de contradiction.'

[15] On this development, see E Kadens, 'The Myth of the Customary Law Merchant', (2012) 90 *Texas LR* 1153–206, citing (at 1168) eg W Mitchell, *An Essay on the Early History of the Law Merchant* (1904), L Goldschmidt, *Handbuch des Handelsrechts*, vol 1 (1891). It is not a mere coincidence that HJ Berman, an outspoken critic of the ULIS project, as a legal historian was convinced of the idea of a cosmopolitan *lex mercatoria*. See id, *Law and Revolution: The Formation of the Western Legal Tradition* (1983) 333–56.

[16] Y Reinhard, C Nourissat, and S Thomasset-Pierre, *Droit Commercial* (8th edn, 2012), [54].

[17] E Rabel, *Das Recht des Warenkaufs,* vol I (1936) 58 f. As jurisdictions that adopt the latter approach (which accords trade usages the status of law—and thus binding force irrespective of their incorporation into a contract), Rabel named Austria and Italy; he located the first approach, which explains the legal relevance of trade usages through a tacit incorporation into the contract, in France, England, the United States, and Switzerland. Germany and the Scandinavian countries were, at the time probably rightfully so, considered as adhering to an intermediate solution.

[18] Jokela, 'The Role of Usages', 87–9.

Historical overview: Continental approaches (1). In France, the project of codifying private law was particularly aimed at establishing a monopoly of the posited law of the *Code civil*, doing away with the *coutumes*, the older customary law; while the customs were abolished, however, *usages* were understood not to be in competition with positive private law and were still referred to throughout the *Code*.[19] Usages had been traditionally seen as shaping the content and extent of contractual obligations, as famously expressed by Domat (and echoed in Art 1135 *Code civil*[1804]): 'Les conventions obligent non-seulement à ce qui y est exprimé, mais encore à tout ce que demande la nature de la convention, & à toutes les suites que l'équité, les loix & l'usage donnent à l'obligation où l'on est entré'.[20] However, even after promulgation of the codes, the perception of *usages commerciaux* as *sources* of commercial law was not entirely abandoned.[21] There was a strong sense that commercial law had its roots and was derived from custom and usage, and that the codified private law was unable to capture the essence of the quickly developing commercial law.[22] Throughout the 19th century, a theory was thus entertained that suggested a different treatment of usages in the context of general private law and the commercial context: in the area of *private law*, usages were not technically considered sources of law but only interpretive aids (see, eg, Art 1135, 1159, 1160 *Code civil*[1804]), whereas in the field of commercial law, they were considered *sources du droit commercial* which would 'rank' beneath legislative enactments of commercial law but take precedence over the general rules of private law.[23] Towards the end of the 19th century, Edmond-Eugène Thaller, in his influential commercial law treatise, expounded the view that commercial usages have no normative effect per se, but obligate the parties only as part of a contractual agreement.[24] If the parties did not address the applicability of a usage explicitly, the usage would be incorporated into the contract as a *convention sous-entendue*.[25] Deciding whether a certain (commercial) contract was governed by a usage was thus deemed an exercise in interpretation under Art 1135 and 1160 *Code civil*[1804], the latter being based on Pothier's 'fifth rule' for the interpretation of contracts,[26] which Pothier himself grounded in the paroemia *in contractibus tacite veniunt ea quae sunt moris et consuetudinis*.[27] 4

Continental approaches (2). Similarly, in Germany, usages were perceived as the essence and source of commercial law,[28] and the ADHGB of 1861,[29] a predecessor of the German Commercial Code, (*Handelsgesetzbuch* - HGB) differentiated strictly between usages as sources of commercial law (Art 1 ADHGB) and usages that merely informed interpretation of mercantile interactions (Art 279 ADHGB). Usages that fell under the purview of Art 1 were accorded the status of customary commercial law, which, in the hierarchy of sources of law, ranked lower than provisions 5

[19] Reinhard, Nourissat, and Thomasset-Pierre (fn 16), [54].

[20] J Domat, *Les loix civiles dans leur ordre naturel, nouvelle édition, tome premier* (Paris, 1777) liv I, tit I, sect III, 1.

[21] Reinhard, Nourissat, and Thomasset-Pierre (fn 16), [55].

[22] E Fuzier-Herman (ed), *Répertoire général alphabétique du droit français, publié par A Carpentier et G Frèrejouan du Saint*, vol 36 (1905) 453 no 1.

[23] Fuzier-Herman (fn 22) 453 no 1.

[24] Reinhard, Nourissat, and Thomasset-Pierre (fn 16), [55]; E Thaller, *Traité élémentaire de droit commercial* (1898) no 43.

[25] Fuzier-Herman (fn 22) 454 f, no 16.

[26] 'L'usage est d'une si grande autorité pour l'interprétation des conventions, qu'on sous-entend dans un Contrat les clauses qui y sont d'usage, quoiqu'elles ne soient pas exprimées': JR Pothier, *Traité des Obligations*, vol 1 (1764) no 95.

[27] The *regula* can be found in various versions, such as *contractibus tacite insunt quae sunt moris et consuetudinis*; See, eg, L Volkmar, *Paroemia et Regulae Juris Romanorum, Germanorum, Franco-Gallorum, Britannorum* (1854) 504; it is probably derived from Ulp D 50.17.34.

[28] See, eg, H Thöl, *Das Handelsrecht* (3rd edn, 1854) 33 f.

[29] *Allgemeines Deutsches Handelsgesetzbuch*.

of the ADHGB but higher than the general rules of private law.[30] Article 1 ADHGB, however, was abolished when the new commercial code, the HGB, came into force in 1900; the task of justifying the normative effect of usages now fell on the provision that previously had been seen as applying to usages that were *not* normative in nature (§ 346 HGB, the successor of Art 279 ADHGB).[31] In conjunction with a theoretical shift in contract law towards an objective theory of interpretation, this paved the way for an explanation of the normative effect of usages as terms of the contract that could be tied to a 'reasonable' understanding of the alleged will of the parties; there was, however, a lingering sense that usages were *norms* (albeit possibly non-legal ones),[32] which is why Ernst Rabel opined in 1936 that the German legal system adhered to an intermediate theory between the 'subjective' and the 'objective' approaches,[33] a notion that even recently still reverberated in legal scholarship.[34] In Italy, the distinction between *usi normativi* and *usi interpretativi* persists to this day; it would appear, moreover, that *usi negoziali* in particular are widely accepted as being binding as contractual terms,[35] yet the distinction remains blurry.[36]

6 **Historical overview: common law.** In England, a similar process can be observed insofar as a customary 'law merchant' was 'absorbed'[37] into the common law, which led to the comparable challenge of defining the relationship between mercantile custom and usage on the one hand and the common law on the other.[38] The most pivotal contribution to this process of integrating commercial practice into the common law is typically attributed to the jurisprudence of Lord Mansfield; however, his willingness to accord law-like status to custom and usage has also elicited the comment that turning mere changeable usage into common law rules may have 'froze[n] the Georgian practice of merchants as the permanent law of England'.[39] Yet the main vehicle for endowing changeable and evolving trade usages or mercantile customs (as opposed to the 'immemorial' customs of the common law proper)[40] with normative effects has in fact been the *law of implied terms*. The House of Lords described the practice of implying terms to give effect to a custom or usage as 'the fabric out of which much of the modern commercial law was created in the eighteenth and early nineteenth centuries'.[41] Nowadays, terms implied through usage or custom are one category of the established catalogue that also includes the implication 'in fact' and 'in law', a doctrinal taxonomy that developed in the early 20th century.[42]

[30] See, eg, G Löhr, *Das Allgemeine Deutsche Handelsgesetzbuch: Erläutert aus den Materialien, der Rechtslehre und den Entscheidungen der deutschen Gerichte* (1868) Art 1, [5]; L Goldschmidt, *Handbuch des Handelsrechts*, vol 1 (2nd edn, 1864) 330. See also *Reichsoberhandelsgericht*, (1872) 6 *Entscheidungen des Reichsoberhandelsgerichts* 78 (23.4.1872).

[31] A Werner, in *Düringer/Hachenburg, Das Handelsgesetzbuch*, vol 4 (3rd edn, 1932) § 346, [1]; cf *Entwurf eines Handelsgesetzbuches und eines Einführungsgesetzes in der Fassung der dem Reichstag gemachten Vorlage* (1897) 208.

[32] P Oertmann, *Rechtsordnung und Verkehrssitte* (1914) 25–7.

[33] Rabel (fn 17) 59. See H Dedek, 'Not Merely Facts', 87–98.

[34] J Busche and T Mayer-Maly, in *Münchener Kommentar zum Bürgerlichen Gesetzbuch,* vol 1 (4th edn, 2001) § 157, [15 f].

[35] See, eg, Cassazione civ, sez II, no 5135 (06.03.2007).

[36] M Franzoni, *Degli effetti del contratto: Efficacia del contratto e recesso unilaterale* (1999) 67; CM Bianca, *Diritto civile: Il contratto*, vol 3 (2015) 336–38.

[37] Bainbridge, 'Trade Usages in International Sales of Goods', 626. Focusing on the involved actors, Coquillette refers to the process as 'professionalization': HR Coquillette, *The Civilian Writers of Doctors' Commons, London. Three Centuries of Juristic Innovation in Comparative, Commercial and International Law* (1988) 124.

[38] See, eg, LS Sutherland, 'The Law Merchant in England in the Seventeenth and Eighteenth Centuries', (1934) 17 *Transactions of the Royal Historical Society, Fourth Series* 149–76; Baker, 'The Law Merchant', 295–322.

[39] Baker, 'The Law Merchant', 299.

[40] Wortley, 'Mercantile Usage and Custom', 260 f.

[41] *Baker v Black Sea & Baltic General Insurance Co Ltd* [1998] 1 WLR 974, 982. See also MP Furmston, *Cheshire, Fifoot and Furmston's Law of Contract* (16th edn, 2012) 174 f.

[42] See below, PECL 6:102.

Reasons to reflect on the mechanism of integration had arisen in relation to written agreements and the admissibility of evidence regarding the existence of customs and usages. In the leading case of *Hutton v Warren* (1836), Baron Parke held that 'it has long been settled that, in commercial transactions, extrinsic evidence of custom and usage is admissible to annex incidents to written contracts, in matters with respect to which they are silent'.[43] The underlying explanation was that the custom in question 'was, by implication, imported into the lease',[44] invoking a statement by Lord Mansfield in *Wigglesworth v Dallison* that a custom can be read even into a formal lease under seal since it does 'not alter or contradict the agreement' in the lease—'it only superadds a right'.[45] Customs and usages were thus understood not as something external to the contract or a judicial addition after the fact;[46] rather, they were seen as forming part of the contract from the outset like an unwritten clause.[47] 'It is quite certain that general usages are tacitly annexed to all contracts relating to the business with reference to which they are made, unless the terms of such contracts expressly or impliedly exclude them', as Parke B put it in a later decision.[48] It is remarkable that in this context, courts in the 19th and early 20th centuries made reference to Pothier's 'fifth rule' of interpretation and the maxim *in contractibus tacite veniunt ea quae sunt moris et consuetudinis*.[49] The idea of the *tacit* annex implied that the basis upon which the usage or custom in question was read into the agreement was still a presumed intention of the parties.[50] However, a line of authority that developed particularly in the law of agency in the last third of the 19th century did not focus on whether a party could be presumed to have known a certain usage, but rather on whether the usage in question could be considered *reasonable*: if a party could show that a custom or usage was unreasonable, they would not be bound by it unless they were actually aware of it.[51] In line with the tendency towards an objective theory of contracts, this emphasizes the 'normative' nature of usages and customs of trade: 'A stranger to a locality or trade, or market, is not held to be bound by the custom of such locality, trade, or market, because he knows the custom, but because he has elected to enter into transactions in a locality, trade, or market wherein all who are not strangers do know and act upon such custom.'[52]

III. Practices, usages, and their 'binding effect'

Usages and practices in the system of the PECL. Like its forerunners, the PECL do not provide a definition of 'usage' and 'practice'. The same holds true for the DCFR and the CESL, an omission that, although criticized,[53] is in line with a similar abstinence in most domestic 7

[43] *Hutton v Warren* (1836) 1 M & W 466 (150 ER 517).
[44] *Hutton v Warren* (1836) 1 M & W 466 (150 ER 517).
[45] *Wigglesworth v Dallison* (1779) 1 Doug KB 201, 207 (99 ER 132).
[46] *Produce Brokers Company v Olympia Oil and Cake Company* [1916] 1 AC 314, 331.
[47] *Tucker v Linger* (1883) 8 AC 508, 511.
[48] *Metzner v Bolton* (1854) 9 Ex 518, 521 (156 ER 221).
[49] See, eg, *Moon v The Guardians of the Poor of the Witney Union* (1837) 3 Bingham New Cases 814 (132 ER 624, 625); *Daniel Brown v Andrew Ewing Byrne* (1854) 3 E & B 703 (118 ER 1304, 1307); *Suse and Others v Pompe and Another* (1860) 8 CB (NS) 538 (141 ER 1276, 1284); *Mollett and Others v Robinson* (1871–72) LR 7 CP 84, 103; *Produce Brokers Company v Olympia Oil and Cake Company* [1916] 1 AC 314, 331.
[50] *Produce Brokers Company v Olympia Oil and Cake Company* [1916] 1 AC 314, 324.
[51] cf *Robinson v Mollett* (1875) LR 7 HL 802; *Perry v Barnett* (1885) 15 QBD 388; *Seymour v Bridge* (1885) 14 QBD 460; *Reynolds v Smith* (1893) 9 TLR 494.
[52] *Robinson v Mollett* (1875) LR 7 HL 802.
[53] *Schulze*/Kieninger, Art 67, [10].

legal orders.[54] Besides PECL 1:105, the PECL focus on the relevance of usages and 'practices which the parties have established between themselves' in three different contexts: the general definition of 'reasonableness' in PECL 1:302; the formation of the contract in PECL 2:205; and the interpretation of the contract in PECL 5:102. In all of these instances, usages and practices serve as an interpretative standard, not as an immediate source of obligations.

8 **'Practices': legislative history.** The parties are 'bound by any practice they have established between themselves'. This wording was consolidated in ULIS 9 (1) and subsequently adopted (with only very minor changes)[55] by PECL 1:105, PICC 1:9, DCFR II-1:104, and CESL 67. In the 1956 draft of the ULIS, the provision dealing with usages did not include any reference to 'practice'. The US delegation proposed including an analogue to the concept of 'course of dealing' as laid down in UCC § 1-205 (1),[56] and in response to this request the addition 'par les habitudes qui se sont établies entre elles' was included in the first paragraph.[57]

9 **Definition and test.** The UCC defines 'course of dealing' as 'a sequence of previous conduct concerning previous transactions between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct'. This definition has proven valuable in defining 'practice' that the parties have 'established' between themselves. It is clear that in order for a 'practice' to form and to be considered 'established', the parties have to have dealt with each other on previous occasions in similar transactions.[58] A discernible pattern of conduct has to have emerged and it has to have been adhered to for a considerable period of time,[59] so that, as a result, it is possible to speak of the equivalent of a custom between the parties.[60] The 'decisive test' is whether the previous conduct gives rise to the reasonable expectation that it represents a common understanding and whether the other party feels bound by it.[61] Focusing on the criterion of reasonable expectations, the 'established practice' can be understood as tacitly agreed upon or as a reasonable implication,[62] parallel to the agreement on usages in PECL 1:105 (1). An alternative explanation is that the binding effect is an expression of the principle of good faith in its dimension of prohibiting *venire contra factum proprium*.[63]

10 **Usages.** According to PECL 1:105 (1), parties are bound by agreeing to apply a 'usage' or by establishing a 'practice' between them. PECL 1:105 (2), however, provides that usages can bind the parties even when there is no specific agreement as to their applicability. With respect to 'usages', the provision as a whole thus addresses two different situations. In the first scenario, the parties have agreed on the applicability of a usage. The wording of PECL 1:105 (1) is only slightly modified from the language used in the first paragraphs of the provision's predecessors, and as commentators on the PECL and on those forerunners agree, in these cases, the applicability

54 *Vogenauer*/Vogenauer, Art 1.9, [4].

55 PECL 1:105 (1) and PICC 1:9 (1) speak of 'practices' in the plural.

56 Now UCC § 1-303 (b) and (d).

57 O Riese, 'Die Haager Konferenz über die internationale Vereinheitlichung des Kaufrechts vom 2. Bis 25. April 1964: Verlauf der Konferenz und Ergebnisse hinsichtlich der materiellen Vereinheitlichung des Kaufrechts', (1965) 29 *RabelsZ* 1, 21.

58 cf EA Farnsworth, 'Unification of Sales Law: Trade Usage and Course of Dealing', in *Unification and Comparative Law in Theory and Practice: Contributions in Honour of Jean Georges Sauveplanne* (1984) 81, 83.

59 *Vogenauer*/Vogenauer, Art 1.9, [10].

60 *Schlechtriem and Schwenzer*/Junge, Art 9, [7].

61 *Vogenauer*/Vogenauer, Art 1.9, [10]; see also Pamboukis, 'The Concept and Function of Usages', 113.

62 Enderlein and Maskow, *International Sales Law*, Art 9, [2].

63 *Schlechtriem and Schwenzer*/Junge, Art 9, [7].

of the usage seems to follow directly from the principle of party autonomy.[64] As the parties are free to stipulate the content of their obligations, they are also free to bind themselves to external standards as they see fit (within the boundaries defined by mandatory law). PECL 1:105 (2), by contrast, refers to situations in which an agreement as to the applicability of a usage cannot be found. Only in this case is it necessary to define exactly which criteria have to be fulfilled for a certain external standard to be considered a 'usage'.[65] With respect to the various forerunners of the provision, it has been accepted that a tacit, 'implicit' (or implied) agreement of applicability of usages is sufficient for contractual incorporation under the first paragraph,[66] which, however, inevitably blurs the lines between the first and second paragraphs.[67]

Background: binding effect of usages. Whereas the inclusion of 'practices' in the wording of CISG 9 (1) proved non-controversial, the treatment of usages was much debated.[68] Especially the question as to how the 'normative' effect of usages should be conceptualized and justified proved to be a matter of contention—a question that has practical implications for example in situations where the parties have not knowingly incorporated a usage into their agreement, or where usages integrated into the contract conflict with other contractual terms or with the rules of the Convention. The suggestions made in response to this question have traditionally been grouped together under the label of a 'subjective' theory, according to which usages bind only as contractual terms, and of an 'objective' theory, which treats usages themselves as norms that have immediate binding effects on the parties.[69] Both approaches face obvious challenges: the 'subjective' theory has to explain how usages can be deemed integrated into a contract if there is no actual party intent to this effect; the 'objective' theory has to explain how 'normative usages' attain the force of law. **11**

ULIS and CISG. The wording of CISG 9 (2) was an attempt to strike a compromise between the 'subjective' and 'objective' approaches. ULIS 9 (2) had provided that the parties 'shall be bound by usages which reasonable persons in the same situation as the parties usually consider to be applicable to their contract'. The question whether non-merchants would be bound by such a usage was meant by the drafters to be left to the judge. The drafters of the CISG decided in favour of the contractual language of implied terms instead. Thus, the usage could be theoretically understood as deriving its normative force from the contract; this allowed, furthermore, for a consistent explanation as to why usages override non-mandatory provisions of the Convention.[70] At the same time, the wording made sure that a usage could be considered to be implied into the contract even when the parties merely 'ought to have known' of its applicability, a construct labelled by commentators as 'fictitious agreement'[71] that, in its practical effects, also endowed usages with a de facto normativity. However, the CISG added the further restrictions that any usage with such effects must be a usage of 'international trade' and 'widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.' With these changes from the wording of ULIS 9 (2), the drafters responded to a policy concern that was, however, connected to the doctrinal issue: developing countries, supported **12**

[64] *Schlechtriem and Schwenzer*/Schmidt-Kessel, Art 9, [1], [6]; *Vogenauer*/Vogenauer, Art 1.9, [10].
[65] Enderlein and Maskow, *International Sales Law*, Art 9, [1.1]; *Schlechtriem and Schwenzer*/Schmidt-Kessel, Art 9, [6].
[66] Enderlein and Maskow, *International Sales Law*, Art 9, [1.1]; *Vogenauer*/Vogenauer, Art 1.9, [10].
[67] Enderlein and Maskow, *International Sales Law*, Art 9, [1.1]; see MJ Bonell, in CM Bianca and MJ Bonell, *Commentary on the International Sales Law* (1987), Art 9, [1.4.1].
[68] Schlechtriem (fn 4) 41; Dölle (fn 5) 457 f.
[69] See above, [2].
[70] Schlechtriem (fn 4) 41.
[71] Enderlein and Maskow, *International Sales Law*, Art 9, [1.1].

by the socialist delegations, had voiced their worry that assigning usages a binding effect, particularly in the sense of an 'objective' validity of usages, would put non-western parties at a disadvantage since the usages in question were shaped predominantly in the trading places of the western industrialized nations.[72]

13 **PICC, PECL, DCFR, CESL.** The PICC, PECL, DCFR, and CESL all adopt a more 'objective' approach.[73] PICC 1.9 (2) partly reverted to the language of ULIS 9 (2) in that it abandons the contractual language of implied terms and speaks, as in its first paragraph, of the parties being 'bound'. However, the provision preserved the requirement that the usages be 'widely known to and regularly observed in international trade', as the drafters of the PICC were concerned with the protection of traders from developing countries entering the market in a developed country.[74] PECL 1:105 (2) and DCFR II-1:104 (2) both use the language of being 'bound', yet dispense with the requirement that a usage be internationally known and observed. As the comments make clear, the drafters of the PECL[75] and DCFR[76] fully intended to include *local* usages.[77] All three provisions share the exception that usages do not put the parties under obligations 'where the application of such usage would be unreasonable.' The first draft of what was later to become ULIS 9 (2)—ie the former Art 10 (1)—had provided that '[l]e juge peut écarter un usage non raisonnable si la teneur de cet usage n'était pas connue de l'une des parties lors de la conclusion du contrat', which was inspired by the traditional English practice regarding the 'reasonability' of usages:[78] only if a usage or custom is 'unreasonable' will it not bind parties that did not know of it.[79] The drafters of the PECL and DCFR explicitly give the example of a party being bound by a local usage as possibly unreasonable.[80] CESL 67 (2) was supposed to implement two alterations. The first is its explicit restriction of the scope of application to 'traders', an addition that has been welcomed.[81] Second, the stipulation that usages only bind the parties 'except where the application of such usage would be unreasonable' was abandoned. The requirement of reasonability might have seemed dispensable insofar as an 'unreasonable' usage would hardly appear to be 'generally applicable'. However, this argument, which echoes the arguments levelled against the introduction of the 'reasonability' requirement into PICC 1.9, does not take into account that a usage can be 'reasonable' in general, yet its application in a particular case under particular circumstances might be considered 'unreasonable' nevertheless.[82]

14 **Collisions: ULIS, CISG.** The second sentence of ULIS 9 (2) provides that '[i]n the event of conflict with the present Law, the usages shall prevail unless otherwise agreed by the parties.'

[72] Bianca and Bonell (fn 67), [1.3.2]; *Schlechtriem and Schwenzer*/Schmidt-Kessel, Art 9, [1.4.1]; G Eörsi, 'General Provisions', in NM Galston and H Smit (eds), *International Sales: The United Nations Convention on Contracts for the International Sale of Goods* (1984) 2–21; Jokela, 'The Role of Usages', 86 f; United Nations Commission on International Trade Law, *Yearbook*, vol I (1968–1970) 169; id, *Yearbook*, vol VI (1975) 52.

[73] See eg, J Coetzee, 'The Role and Function of Trade Usages', 264 f.

[74] *Vogenauer*/Vogenauer, Art 1.9, [14 f]—also considering possible exceptions in cases in which such concerns are unwarranted; see also MJ Bonell, *The Unidroit Principles in Practice* (2nd edn, 2004) Art 1.9, [4].

[75] PECL 1:105, Comment E (1).

[76] DCFR II-1:104, Comment E.

[77] See A Carlsen, 'Usages and Practices Applicable to the Contract', 280 f. See also R Zimmermann, 'The UNIDROIT Principles of International Commercial Contracts 2004 in Comparative Perspective', (2006) 21 *Tulane European & Civil Law Forum* 1–34, 7 f.

[78] Rabel, 'Der Entwurf eines einheitlichen Kaufgesetzes', 54.

[79] See above, [2], [5].

[80] PECL 1:105, Comment E (1); DCFR II-1:104, Comment E.

[81] *Schulze*/Kieninger, Art 67, [12].

[82] *Vogenauer*/Vogenauer, Art 1.9, [20].

The understanding that the issue of conflicts was in need of clarification goes back to the earliest drafts of the ULIS; as Rabel emphasized, the decision to let usages take precedence over the rules of the unified sales law was not self-evident[83]—a statement that has to be read against the backdrop of the long tradition of theorizing the legal nature and status of usages as sources of law.[84] When later the decision was made to adapt the wording of CISG 9 (2) to a 'subjective theory' of usages, using the contractual language of implied terms,[85] an explicit rule addressing the hierarchical relation between usage and the Convention was perceived as expendable and the second sentence of ULIS 9 (2) was therefore abandoned: 'Since usages which become binding on the parties do so only because they have been explicitly or implicitly incorporated into the contract, they will be applied rather than conflicting provisions of this Convention on the principle of party autonomy.'[86]

PECL, PICC, DCFR, CESL. PECL 1-105 (2), PICC 1.9 (2), and DCFR II-1:104 (2) have deliberately abandoned the contractual language employed by CISG 9 (2), thereby adopting more 'objective' language that resembles the wording chosen by the drafters of the ULIS. Commenting on the DCFR, critics pointed out that this language would have called for a clarification of the possible conflict between usages and the *contractual agreement*, even voicing the concern that DCFR II-1:104 (2) introduced usage as 'a binding, objective standard' and thus insinuated that usage would 'have priority over the agreement of the parties'.[87] In response to such criticism, CESL 67 (3) was supposed to clarify the position of terms that 'bind' the parties according to CESL 67 (1) and (2) vis-à-vis individually negotiated contractual agreements on the one hand and the mandatory provisions of the CESL on the other. CESL 67 (3) therefore would have been, in principle, a helpful addition that would have shed light on the status of usages in between party consensus and statutory default rules. The wording of CESL 67 (3), which focused on *individually negotiated* terms and mandatory rules, insinuated that 'usages' and 'practices' were supposed to take precedence not only over the non-mandatory rules of the CESL, but even over contractual standard terms. Taken seriously, this would have been a remarkable (if possibly unintentional) statement with respect to the quality of 'contracts of adhesion' as a somewhat lesser expression of free will and of the principle of party autonomy—an implication that, unsurprisingly, met with harsh criticism.[88] 15

[83] Rabel, 'Der Entwurf eines einheitlichen Kaufgesetzes', 53, commenting on the second sentence of Art 10 (3) of the 1935 draft: 'L'usage l'emporte sur la présente loi en cas de contradiction'.

[84] See above, [3]–[4].

[85] See above, [11]–[12].

[86] UN DOC. A/CONF. 97/5, 19; see also Schlechtriem (fn 4) 41.

[87] Eidenmüller, Faust, Grigoleit, Jansen, Wagner, and Zimmermann, 'CFR', 680.

[88] D Looschelders and M Makowsky, 'Kapitel 7: Inhalt und Wirkungen von Verträgen', in Schmidt-Kessel, *Kaufrecht*, 227, 229.

Art 1:106 (1): Interpretation and Supplementation (General Provision)

These Principles should be interpreted and developed in accordance with their purposes. In particular, regard should be had to the need to promote good faith and fair dealing, certainty in contractual relationships and uniformity of application.

CISG 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) …

PICC 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) …

DCFR I.-1:102: Interpretation and development

(1) These rules are to be interpreted and developed autonomously and in accordance with their objectives and the principles underlying them.

(2) They are to be read in the light of any applicable instruments guaranteeing human rights and fundamental freedoms and any applicable constitutional laws.

(3) In their interpretation and development regard should be had to the need to promote:

(a) uniformity of application;

(b) good faith and fair dealing; and

(c) legal certainty.

(4) …

(5) Where there is a general rule and a special rule applying to a particular situation within the scope of the general rule, the special rule prevails in any case of conflict.

CESL 4: Interpretation[1]

(1) The Common European Sales Law is to be interpreted autonomously and in accordance with its objectives and the principles underlying it.

(2) …

(3) Where there is a general rule and a special rule applying to a particular situation within the scope of the general rule, the special rule prevails in any case of conflict.

Synthesis (based on DCFR I.-1:102 (1), rst CESL 4 (1)): Interpretation […][2]

(1) These rules are to be interpreted autonomously […] and in accordance with their objectives and the principles underlying them.

I.	Historical and comparative background	[1]–[4]
II.	Textual layers and justification	[5]–[7]
III.	Scope and meaning	[8]–[14]

I. Historical and comparative background

1 **Introduction.** Order of appearance matters. In the international instruments interpretation clauses routinely figure among the first couple of provisions mentioned (PECL 1:106; CISG 7; PICC 1.6; DCFR I.-1:102; CESL 4). One instrument even places the interpretation clause at the very beginning (FS 1 (1)). The prominent positioning reflects the significance of its content: The interpretation clause governs the interpretation of all the instrument's provisions. Its purpose is to safeguard the core promise of the harmonizing endeavour—the uniform application of

[1] FS 1 (1) and (3) are essentially identical, CESL-ELI 7 (1) and (3) are identical.

[2] The heading of PECL 1:106 is 'Interpretation and Supplementation'. The binary structure of interpretation and supplementation goes back to the peculiar German distinction between *Auslegung* and *Rechtsfortbildung*. It will be suggested that it should be replaced by a unitary concept of interpretation which encompasses both aspects; see below, Art 1:106 (2), [1].

uniform law irrespective of national borders and legal systems—by disallowing an interpretation based on purely national considerations on the one hand (see below, [9]) and prescribing shared interpretative guidelines on the other (see below, [10]–[13]). What are the identifying features of the interpretation clauses and what distinguishes them from related legal rules? First of all, the interpretation clauses contain written rules.[3] This distinguishes them from unwritten rules of interpretation.[4] Second, the interpretation clauses govern the interpretation of black-letter provisions in international instruments. This distinguishes them from rules governing the interpretation of party statements.[5] Third, the interpretation clauses contain general rules of interpretation. This distinguishes them from definitions of individual legal terms.[6] The interpretation clauses not only apply to issues explicitly or implicitly settled by the provisions in international instruments. They also extend to issues not expressly settled by these provisions but nonetheless falling within the scope of the particular instrument. This extension will be dealt with separately (see below, Art 1:106 (2)).

Historical perspective (1): terminology and (lack of) autonomy. In Roman antiquity the *interpres* could be any kind of agent or intermediary. *Interpretatio* signified explanation, translation, or understanding in both legal and non-legal contexts.[7] The Roman classical jurists gave the term a specifically juridical sense: By *interpretatio* they referred to the process of determining the meaning of legal texts such as the Twelve Tables, the praetorian edict or Imperial Constitutions.[8] This meaning resembles today's use of the word interpretation. On the level of terminology, therefore, continuity prevails. In terms of content, however, things look different. In order to safeguard the uniform application of international instruments today's interpretation clauses postulate the principle of autonomous interpretation (see below, [9]). This interpretative principle lacks any clearly discernible precursor in antiquity. The exigencies of a strictly autonomous interpretation probably did not cross the Roman legal minds when interpreting distinct layers of the law. In early ancient Rome, for example, jurists often made recourse to arguments developed in the context of the *ius praetorium* in order to interpret the *ius civile* of the Twelve Tables, and vice versa. Governors of Roman colonies resorted to the *ius civile* when asked to decide a dispute between provincial non-Romans on the basis of local laws.[9] **2**

Historical perspective (2): interpretation rules in general. Classical Roman jurists, influenced by Hellenistic philosophical concepts,[10] endorsed interpretative criteria some of which sound strikingly familiar to the modern ear: regard for the purpose of the provision,[11] its systematic **3**

[3] The interpretation clauses contain legal 'rules' in the sense that they prohibit and prescribe a certain interpretative behaviour. On grounds of legal theory and conceptual taxonomy, however, it is debatable whether they really amount to rules 'in the strict jurisprudential sense', or contain mere principles or standards: cf S Vogenauer, 'Statutory interpretation', in J Smits (ed), *Elgar Encyclopedia of Comparative Law* (2nd edn, 2012) 826–38, 832.

[4] On unwritten rules of statutory interpretation in national legal systems, see below, [4].

[5] For clauses governing the interpretation of contracts and other juridical acts, see, eg, DCFR II.-8:101–8:202.

[6] See, eg, the definitions in PICC 1.11, 9.1.1, 9.3.1, 11.1.1, and 11.2.1 and in DCFR I.-1:105–1:108 in conjunction with the Annex.

[7] On the meaning of *interpres, interpretatio* and further derivations, see M Fuhrmann, 'Interpretatio: Notizen zur Wortgeschichte', in D Liebs (ed), *Sympotica Franz Wieacker* (1970) 80–110, 81.

[8] Fuhrmann (fn 7) 99 f.

[9] J Richardson, 'Roman Law in the Provinces', in D Johnston (ed), *The Cambridge Companion to Roman Law* (2015) 45–58, 57: ' … strongly influenced by the intellectual background of those who came to control and govern the provinces.'

[10] On the influence of the Hellenistic rhetoric doctrine of 'status', see Zimmermann, *Obligations*, 631–2 (concerning the interpretation of contracts); F Wieacker, *Römische Rechtsgeschichte*, Erster Abschnitt (1988) 670–72; *MaxEuP*/ Vogenauer, 'Interpretation of Statutes, History of', 987 f.

[11] Celsus D 1.3.18: 'Benignius leges interpraetandae sunt, quo voluntas earum conservetur.' See also Celsus D 1.3.17 and 19; Paul D 1.3.29; Ulp D 1.3.30.

context within the statute,[12] relevant customs, and judicial precedent.[13] These criteria were not yet embedded into any coherent theory of legal interpretation, and they sometimes contradicted one another.[14] Nor were they part of statutory law proper: Their sources were the writings of the Roman jurists, not *leges* or *senatus consulta*. These classical rules, therefore, cannot be considered structurally analogous precursors to the modern interpretation clauses—at least not until Justinian enacted the *Corpus Iuris Civilis* and thus changed their legal status. The Emperor's authority transformed the writings of the classical jurists, including the fragments on interpretation of statutes,[15] into authoritative written law, ie statutes themselves.[16] Justinian himself famously added an interpretation clause: he decreed that in case of doubts about the meaning of a provision (only) 'the Emperor shall give correct guidance, as He has the sole right to do under the laws.'[17] From the late 11th century the rules on interpretation embarked on a remarkable career.[18] It certainly did no harm that some interpretation rules were included in D 50.17, a Digest title well known for its abbreviated and thus easily accessible rules on substantive law. The systematic position guaranteed them the attention of glossators and commentators who began to elaborate on the maxims of interpretation and to add new ones.[19] The 15th, 16th, and 17th centuries saw an ever-increasing number of specific textbooks with exclusive focus on presenting and systematizing the rules of interpretation.[20] All these efforts, however, remained scholarly in nature and therefore cannot be considered structural precursors to the modern black-letter interpretation clauses. Only the codifications at the turn of the 19th century once again brought with them a change in legal status: the General Code of Law for the Prussian Territories of 1794, in particular, contained an entire section with provisions on 'interpretation of statutes' (PrALR Introduction §§ 46–58). Other codifications followed suit (on the French Code Civil and the Austrian ABGB, see below, [4]).[21] It has been argued that the nationalization of legal scholarship in the codificatory age temporarily broke up the hitherto existing unity of the doctrine of statutory interpretation which had embraced the European continent including the British Isles.[22]

[12] Celsus D 1.3.24: 'Incivile est nisi tota lege perspecta una aliqua particula eius proposita iudicare vel respondere.'

[13] Paul D 1.3.37: ' … optima enim est legum interpres consuetudo'. Callistratus D 1.3.38: ' … in ambiguitatibus quae ex legibus proficiscuntur consuetudinem aut rerum perpetuo similiter iudicatarum auctoritatem vim legis optinere debere.'

[14] *MaxEuP*/Vogenauer, 'Interpretation of Statutes, History of', 987; Vogenauer, *Auslegung von Gesetzen*, 433.

[15] But note that the distinction between interpretation of statutes and interpretation of contracts and other juridical acts is of relatively recent origin: 'Up to the 18th century legal writers were not concerned with the *interpretatio legis*, the *interpretatio pacti* or the *interpretatio testamenti* in particular, but with the *interpretatio iuris* in general': Vogenauer (fn 3) 829; see also *HKKl*/Vogenauer, §§ 133, 157, [9].

[16] *HKKl*/Vogenauer, §§ 133, 157, [12]: Most interpretation rules are to be found in D 1.3 (*De legibus senatusque consultis et longa consuetudine*). D 50.17 (*De diversis regulis iuris antique*) contains a somewhat smaller number of rules (eg fragments 67, 90, 202).

[17] *Constitutio Tanta* of 16 December 533, § 21 as translated by A Watson, *The Digest of Justinian*, vol I (2009). The early modern period witnessed similar provisions restricting interpretation to some kind of higher authority, so-called 'authoritative interpretation', see Vogenauer, *Auslegung von Gesetzen*, 581–85, 641–43.

[18] In detail: Vogenauer, *Auslegung von Gesetzen*, 430–663 and the chapters on 'Theorie der Gesetzesinterpretation' in J Schröder, *Recht als Wissenschaft: Geschichte der juristischen Methodenlehre in der Neuzeit (1500–1933)* (2nd edn, 2012).

[19] The importance of D 50.17 and the so called *brocardica*, or *generalia* (= legal maxims created by the glossators to capture the gist of D 50.17) is emphasized by *MaxEuP*/Vogenauer, 'Interpretation of Statutes, History of', 988 and Vogenauer, *Auslegung von Gesetzen*, 432–5.

[20] See Schröder (fn 18) 53–6. For a brief account in English, see *MaxEuP*/Vogenauer, 'Interpretation of Statutes, History of', 988.

[21] On these and many other codifications: C Schott, '*Rechtsgrundsätze' und Gesetzeskorrektur: Ein Beitrag zur Geschichte gesetzlicher Rechtsfindungsregeln* (1975); F-R Grabau, *Über die Normen zur Gesetzes- und Vertragsinterpretation* (1993).

[22] *MaxEuP*/Vogenauer, 'Interpretation of Statutes, History of', 989: The break was only temporary due to 'countermovements' taking place in continental Europe in the late 19th century and in England since the mid-20th century. Today, the doctrines of statutory interpretation are marked by 'fundamental unity' across Europe, cf Vogenauer, *Auslegung von Gesetzen*, 1295–1308.

Comparative perspective: national legal systems. National legal systems across Europe are far from homogenous. A first distinction can be drawn between systems which include legislative interpretation clauses and those which do not. Spain, Italy, Portugal, Austria, Switzerland, as well as some Eastern European countries belong to the former group.[23] Within this first group further distinctions can be made: Some provisions have a strong historical pedigree (eg §§ 6-8 ABGB [Austria] of 1811) while others are of more recent origin (eg Art 9 *Código Civil* [Portugal] of 1966); some are very brief (eg Art 1 ZGB [Switzerland]; Art 12 sent 1 *Disposizioni sulla legge in generale del Codice Civile* [Italy]) while others are quite lengthy (eg § 1, 3 and 4 *Código civil* [Spain]). The second group consists of national legal systems which do not contain legislative interpretation clauses. The draftsmen of the German BGB, for example, declined to lay down any such provisions because they were convinced a legislator should 'command' and not 'instruct'.[24] The French civil code, although the issue was debated in the drafting process, equally omits provisions dealing with issues of interpretation.[25] The same holds true for English law: in the 1980s a bill which proposed to bring about change did not make it through the House of Commons.[26] Of course, even legal systems which do not provide for black-letter interpretation clauses do acknowledge rules of statutory interpretation. These rules were often developed over centuries, they owe their origin to judicial practice as well as to legal scholarship (and, in particular, to the interaction between the two), and they are the object of countless treatises and textbooks.[27] Comparative lawyers, too, treat statutory interpretation as their 'pet subject' although the amount of truly comprehensive comparative literature still lags somewhat behind.[28] That said, however, the comparative perspective is of limited value when it comes to international instruments: The peculiar challenge for the interpretation of international instruments is their international character. This necessitates a complete dissolution from national terms, concepts, or principles (on the principle of autonomous interpretation, see below, [9]). That challenge is unique to international instruments; national legal systems lack any structurally analogous equivalent. 4

II. Textual layers and justification

Textual layers. All interpretation clauses postulate certain interpretative criteria. They differ, however, in their denomination and classification of these criteria. Two groups of criteria can be distinguished. On the one hand are abstract criteria such as 'purposes', 'objectives' or 'principles' 5

[23] See also UCC § 1-103 (USA).

[24] B Mugdan, *Die gesammten Materialien zum Bürgerlichen Gesetzbuch für das Deutsche Recht*, vol I, *Einführungsgesetz und Allgemeiner Teil* (1899) 365. The draftsmen explained that such a provision would be either 'superfluous because self-evident' or would have to contain guidelines which should better be explored by 'theory', ie academic scholarship.

[25] A proposed *livre préliminaire* contained rules on interpretation (*titre* V) but did not make it into the final draft. Its text is reproduced in the annex to P-Y Gautier, 'Pour le rétablissement du livre préliminaire du code civil', (2005) 41 *Droits* 37–52. The *Code civil* does, however, contain two *negative* provisions prohibiting judges faced with silent, obscure, or inefficient statutes to refuse judgments (Art 4 and 5 *Code civil* [France]).

[26] Interpretation of Legislation Bill 1981. This bill grew out of the 1969 Law Commission Report on Interpretation of Statutes.

[27] Vogenauer (fn 3) 826 with references to the standard national literature. Country reports on Argentina, Germany, Finland, France, Italy, Poland, Sweden, the United Kingdom, and the United States can be found in N MacCormick and R Summers (eds), *Interpreting Statutes: A Comparative Study* (1991). On Germany, France, and England in particular, see Vogenauer, *Auslegung von Gesetzen*, 28–231, 232–343, and 963–1252.

[28] Vogenauer (fn 3) 827 f with many references to the comparative literature and observing that German scholars are particularly 'obsessed' with legal methodology. For an early piece of comparative scholarship, see the taxonomy proposed by R Summers and M Taruffo, 'Interpretation and Comparative Analysis', in N MacCormick and R Summers (eds), *Interpreting Statutes: A Comparative Study* (1991) 461–510. For an extensive discussion see, again, Vogenauer, *Auslegung von Gesetzen*, 1254–94.

of the instrument (PECL 1:106 (1), PICC 1.6 (1), DCFR I.-1:102 (1), CESL 4 (1)). These criteria are not determined by the interpretation clause itself but their content must be derived from the remainder of the instrument. This legislative technique is historically associated more closely with the civil law rather than the common law, but the line should not be drawn all too sharply.[29] On the other hand, interpretation clauses refer to substantive criteria such as 'good faith and fair dealing', 'legal certainty', or 'uniformity of application' (PECL 1:106 (1); CISG 7 (1); PICC 1.6 (1); DCFR I.-1:102 (3)). These substantive criteria either specify the *prima facie* abstract criteria (eg PECL 1:106 (1): ' … in accordance with their purposes. In particular … ') or they relate directly to the interpretation of the international rules (eg CISG 7 (1) 'In the interpretation … regard is to be had … ').[30] The two aforementioned groups of criteria—*prima facie* abstract criteria on the one hand, substantive criteria on the other—are not mutually exclusive. Indeed, the substantive criteria often specify, by way of exemplary illustration, the abstract criteria (PECL 1: 106 (1); also DCFR I.-1:102 (3) and PICC 1.6 (1)). The criteria referred to in the CISG and CESL, however, keep the two ends of the spectrum strictly apart: CISG 7 (1) *only* refers to concrete substantive criteria ('international character'; 'uniform application'; 'good faith') while CESL 4 (1) *only* operates with abstract blanket-term criteria ('objectives' and 'principles'). Overall CISG 7 (1) contains the oldest and therefore one of the most influential textual layers.[31] It closely resembles Art 18 of the 1980 Rome Convention on the law applicable to contractual obligations which was adopted in the same year as the CISG.[32] The PECL and DCFR later added a set of abstract blanket-term criteria (PECL 1:106 (1) 'purposes'; DCFR I.-1:102 (1) and (3) 'objectives' and 'principles') as well as—in the case of the DCFR—two additional paragraphs on constitutional values and the principle of *lex specialis* (on these, see below, [7]). CESL 4 (1), in line with FS 1 (1), retained the set of abstract criteria ('objectives' and 'principles') but eliminated the list of substantive criteria (DCFR I.-1:102 (3)) and also deleted the paragraphs on constitutional values (DCFR I.-1:102 (2)). The final result is a provision that is considerably shorter, less casuistic and that operates with abstract general terms which presuppose rather than define objectives and principles. CESL 4 (1) arguably contains the most appropriate textual layer; it has therefore been chosen as the basis for the synthesis.

6 Justification: general interpretation clauses? Many national legal systems do well without interpretation clauses (see above, [4]). What then justifies the inclusion of such a clause into an international instrument? The issue is controversial. It has indeed been argued that interpretation clauses 'require interpretation themselves' and therefore 'raise more questions' than they provide answers;[33] that it is 'virtually impossible to develop a coherent statutory regime capable of

[29] See, eg, PECL 1:106, Notes 1: 'In the civil law countries the courts often extract general principles of law from statutes. This idea was alien to the ENGLISH tradition …, though now the English courts regularly interpret legislation in the light of its purpose.' On purposive interpretation in English courts see Zweigert and Kötz, *Comparative Law*, 266 f and, in much more detail, Vogenauer, *Auslegung von Gesetzen*, 963–1252.

[30] PICC 1.6 (1) does both at the same time: Any interpretation must observe the 'international character'. The 'uniformity in application', however, is mediated through the instrument's 'purposes'.

[31] The PECL borrowed from the CISG (see PECL 1:106, Note 1: 'similar to those expressed in CISG art. 7'), the DCFR from the PECL (DCFR I.-1:102, Commentary, last sentence: 'derived from PECL art. 1:106(1)') and the CESL from the DCFR (CESL 4 (1) and (3) is identical with DCFR I.-1:102 (1) and (5)). The PICC were also drafted on the basis of the CISG (see the references in *Vogenauer*/Vogenauer, Art 1.6, [2]).

[32] Article 18 Rome Convention 1980: 'In the interpretation and application of the preceding uniform rules, regard shall be had to their international character and to the desirability of achieving uniformity in their interpretation and application.' On the influence of this provision on later textual layers, see Dannemann and Vogenauer, *European Sales Law in Context*, 109.

[33] Dannemann and Vogenauer, *European Sales Law in Context*, 109.

embracing all aspects of statutory interpretation';[34] and that interpretation clauses are effectively dispensable given the existence of firmly established rules of interpretation in the context of international and European law.[35] This last point conveys the most far-reaching challenge: Depending on the legal nature of the international instrument—Uniform Law Convention such as the CISG? EU law such as the proposed CESL? Non-legislative codification such as the PECL?[36]—established rules of interpretation already exist which may come into conflict with the criteria set forth in the interpretation clauses. The interpretation of EU law, for example, is governed by the rules of interpretation incrementally developed by ECJ case law.[37] Non-legislative codifications, by contrast, are not embedded into any pre-existing corpus of interpretative rules. The case for the inclusion of interpretation clauses is therefore much stronger for non-legislative codifications than for instruments which are part and parcel of EU law. Indeed, the adoption of CESL 4 (1) would have amounted to an 'unprecedented break with tradition' since, so far, secondary EU law has never contained any interpretation clauses.[38] The break could perhaps be justified by the provision's capacity to draw attention to the peculiar requirements of the interpretation of international texts.[39] This assumes, however, that neither recitals nor official comments can achieve this goal to at least a satisfactory degree.[40]

Justification: specific interpretation clauses? The DCFR and CESL complement their general interpretation clause with additional clauses addressing very specific interpretative matters: the resolution of conflicts between general rules and special rules (DCFR I.-1:102 (5); CESL 4 (3)) and the due consideration for human rights, fundamental freedoms, and constitutional laws (DCFR I.-1:102 (2)). A third specific matter, the interpretation of issues within the scope of the instrument but not expressly settled by it, will be dealt with separately (see below, Art 1:106 (2)). The other instruments do not include any such specific interpretation clauses—a welcome example of legislative self-restraint. The inclusion of specific interpretation clauses is not only dispensable on doctrinal grounds since hardly anybody would deny that constitutional law, human rights, and the principle of *lex specialis* play an important role even if these criteria were not codified as black-letter rules.[41] The coverage of only certain specific interpretative matters—higher order norms and special rules—also inevitably provokes the question why other matters go unmentioned. Is the principle of *lex specialis* really any more salient than, for example, the principle of *argumentum e contrario* or *a maiore ad minus*?[42] Not even the authors of the DCFR and CESL would defend this assertion. Their goal was simply to draw attention to some interpretative issues which they perceived as particularly noteworthy.[43] This goal, however, can be 7

[34] Vogenauer (fn 3) 832.

[35] Dannemann and Vogenauer, *European Sales Law in Context*, 110.

[36] See Art 1:101, [1].

[37] General overview: *MaxEuP*/Rösler, 'Interpretation of EU Law', 979–82 with further references. cf also Vogenauer, *Auslegung von Gesetzen*, 344–429.

[38] Dannemann and Vogenauer, *European Sales Law in Context*, 108.

[39] J Kropholler, *Internationales Einheitsrecht: Allgemeine Lehren* (1975) 242 f: ' … at least the value to draw the attention of inexperienced national judges to the unique character of uniform law'.

[40] cf Dannemann and Vogenauer, *European Sales Law in Context*, 109 f.

[41] DCFR I.-1:102, Comment 6 openly admits that '[p]aragraph 5 is probably not strictly necessary'. For an example of the *lex specialis* principle in action, see *Schulze*/Schulte-Nölke, CESL 4 [10].

[42] Sceptical therefore Dannemann and Vogenauer, *European Sales Law in Context*, 113 'It is not clear why the drafters chose to single out [this] uncontroversial, long-established, and somewhat trivial maxim of interpretation … '

[43] The paragraph on human rights, fundamental freedoms, and constitutional law was intended to 'serv[e] as a reminder' that overriding laws may influence the interpretation (DCFR I.-1:102, Comment 3). The paragraph on *lex specialis* was meant to accommodate the concern of 'some legal systems', in particular English law, which routinely insert such a qualification 'whenever there is the slightest risk of conflict' (*ibid*, [6]).

served by means of recitals and official comments. The proposed synthesis therefore confines itself to the general interpretation clause.

III. Scope and meaning

8 Overview. This section examines the constituent components of the interpretation clauses. According to the provisions cited, any interpretation must be autonomous (see below, [9]), and it must take into account objectives/purposes (see below, [10]) as well as underlying principles of the interpreted rule (see below, [11]–[13]). It has already been pointed out that CESL 4 (1) provides the relatively most appropriate textual version (see above, [5]). Hence the following comments are based on the structure and terminology of CESL 4 (1). In each instance, however, it will be explained whether the other instruments contain the same, a similar, or a diverging rule. The section closes with remarks on the scope of the interpretation clauses (see below, [14]).

9 Autonomous interpretation. CESL 4 (1) and DCFR I.-1:102 (1) state that the international instruments must be interpreted 'autonomously'. CISG 7 (1), PECL 1:106 (1), and PICC 1.6 (1), by contrast, do not refer to autonomy. They do, however, make reference to the instrument's 'international character' (CISG 7 (1); PICC 1.6 (1)) and/or its 'uniformity of application' (CISG 7 (1); PECL 1:106 (1); PICC 1.6 (1)). These two criteria—internationality and uniformity—are not only closely intertwined and partly overlapping.[44] They are also just different ways of expressing the goal of autonomous interpretation.[45] The autonomy requirement operates on two levels: it not only influences the interpretation of all terms and concepts within the international instrument, but also extends to the methods and techniques of interpretation as such.[46] According to the first level of operation the meaning of all terms and concepts to which the international instruments refer must be established purely from within the instrument, ie without having recourse to external sources derived from national or supranational legal systems.[47] To illustrate this point with a concrete example. Whenever the DCFR uses the term 'damages' (eg DCFR II.-3:501) this term may not simply be equated with the French notion of *dommages* or *dommages-intérêts* and the doctrinal concepts established under the auspices of the French *Code civil*. It could, however, very well turn out that the autonomously interpreted European notion of damages (inadvertently) resembles the French notion of *dommages-intérêts*. The second level of operation concerns the methods and techniques of interpretation as such. They, too, must be developed independent from the interpretative methods and techniques recognized in the context of national or international laws.[48] The famous English plain meaning or literal rule, for

[44] See M Gebauer, 'Uniform Law, General Principles and Autonomous Interpretation', (2000) *Uniform Law Review* 683–705, 686; *Vogenauer*/Vogenauer, Art 1.6, [10].

[45] With the same result *Schulze*/Schulte-Nölke, Art 4, [3]: The CESL's autonomy of interpretation shall avoid 'multiple interpretations of the CESL' (= uniformity of application) and avoid 'interpreting it through the lenses of national laws' (= international character). Slightly different the taxonomy suggested by *Vogenauer*/Vogenauer, Art 1.6, [5] which equates autonomy with 'international character' but juxtaposes 'uniformity of application'.

[46] See, eg, *Vogenauer*/Vogenauer, Art 1.6, [6]–[8]; *Schlechtriem and Schwenzer*/Schwenzer and Hachem, Art 7, [8] and [20]; F Ferrari, 'Uniform Interpretation of the 1980 Uniform Sales Law', (1994) 24 *Georgia Journal of International and Comparative Law* 183–228, 201 f.

[47] But see *Schulze*/Schulte-Nölke, Art 4, [4] who argues that, for reasons of overall coherence, it would be wrong if other pieces of EU legislation were not taken into account when interpreting the provisions of the CESL since the CESL itself is a legislative act of the EU. On this issue, see below, [14].

[48] But see M Roth and R Happ, 'Interpretation of Uniform Law Instruments According to Principles of International Law', (1997) 3 *Uniform Law Review* 700–10, 702 arguing that international instruments are usually silent on issues of methodology and that, therefore, the methods and techniques of interpretation should be governed by

example, cannot be relied upon when interpreting a provision of the CESL.[49] Yet, once again, it cannot be ruled out that the instruments acknowledge an international rule which is similar to or even identical with the English plain meaning rule. Autonomy of interpretation is not an end of itself but only a means to achieve an even higher goal: the uniform application of the international rules.[50] Uniform application requires that cases with similar facts yield similar results, no matter when they are decided, where they are decided, and by whom they are decided.[51] In fact, uniform application is the reason why we have international instruments in the first place—it is often described as 'the very purpose of international uniform law'.[52] Autonomous interpretation, therefore, can be understood as a kind of meta-criterion—a 'general guideline'[53] or 'principle'[54]—which influences all other interpretative criteria, both in terms of their general admissibility and the relative weight attributed to them.[55]

Objectives/purposes. Except for CISG 7 (1) all interpretation clauses state that the international instruments shall be interpreted in accordance with their 'objectives' (DCFR I.-1:102 (1); CESL 4 (1)) or 'purposes' (PECL 1:106 (1); PICC 1.6 (1)). Both terms are similar if not synonymous.[56] Two kinds of objectives can be distinguished: objectives of the international instrument as a whole; and objectives of individual provisions of the instrument.[57] Objectives of the instrument as a whole can be inferred from, *inter alia*, the preambles, accompanying statements, recitals, synopses of the provisions, official comments, or notes.[58] Uniformity of application is an objective shared by all instruments (cf PECL 1:106 (1); CISG 7 (1); PICC 1.6 (1); DCFR I.-1:102 (3)(a); CESL Recital 8).[59] Other high-level objectives are the enhancement of cross-border trade (PECL Introduction, 1.A.; CISG Preamble; CESL Recital 1), the observance of good faith in international trade and fair dealing (PECL 1:106 (1); CISG 7 (1); DCFR I.-1:102 (3)(b)) and the furtherance of legal certainty (PECL 1:106 (1); DCFR I.-1:102 (3)(c)). The objectives of individual provisions, by contrast, must be determined on the basis of the provisions' wording in conjunction with recitals, official comments, or notes.[60] The objective of **10**

public international law, ie Articles 31–33 Vienna Convention on the Law of Treaties (cf also *MaxEuP*/Bischoff, 'Interpretation of International Uniform Law', 982–6, 983). For the contrary and prevailing view, see Kropholler (fn 39) 235–40.

[49] On the plain meaning rule, see *Halsbury's Laws of England*, vol 96; '*Statutes and Legislative Process*' (5th edn, 2012) [1092]. For historic developments, from the strict application of the rule in the 18th, 19th, and early 20th centuries to its relaxation since the mid-20th century, see Vogenauer, *Auslegung von Gesetzen*, 795–820, 1003–44.

[50] Expressly: *Vogenauer*/Vogenauer, Art 1.6, [10].

[51] *Vogenauer*/Vogenauer, Art 1.6, [9].

[52] *Vogenauer*/Vogenauer, Art 1.6, [9]. But see the qualification by Gebauer (fn 44) 692: 'The solution must be not just uniform, but right … '

[53] See, eg *Vogenauer*/Vogenauer, Art 1.6, [4] and passim. He contrasts 'guidelines' and 'criteria'.

[54] See, eg Gebauer (fn 44) 687 and 704; also *Schlechtriem and Schwenzer*/Schwenzer and Hachem, Art 7, [7] and [20]. Both contrast 'principles' and 'methods'.

[55] cf *Vogenauer*/Vogenauer, Art 1.6, [4]; Gebauer (fn 44) 702–4.

[56] Possible distinctions between objectives and purposes reveal themselves only upon very close reading. See, eg, PICC 1.6, Comment 3 which, on the one hand, refers to the instrument's 'main objective' to provide a uniform framework for international commercial contracts and, on the other hand, lists some more concrete 'purposes' such as the need to promote uniformity in its application and to promote good faith and fair dealing.

[57] See, eg, PICC 1.6, Comment 3: ' … in the light of the purpose and the rationale underlying the individual provisions *as well as* the Principles as a whole' (emphasis added).

[58] PECL 1:106, Comment B: ' … derived from the Articles and the comments to the Articles'; DCFR I.-1:102, Comment 2: ' … derived not only from the introductory remarks … but also from the later articles and the comments on them'; PICC 1.6, Comment 3 refers to the introduction and individual articles.

[59] This objective overlaps with autonomous interpretation, see above, [9].

[60] This at least is the approach suggested by PICC 1.6, Comment 3: ' … the text itself and … comments thereon.' The other instruments do not indicate how the purposes of a specific provision shall be determined.

rules on computation of time, for example, is to increase legal certainty by enabling parties to calculate the end of their time periods.[61] Last but not least the draftsmen hoped that the reference to objectives/purposes serves yet another goal: it was meant to encourage adjudicators to invest in a purposive, ie liberal and broad interpretation of the instruments instead of restricting themselves to an overly strict literal interpretation.[62]

11 **Principles: overview.** The DCFR and CESL must be interpreted in accordance with certain 'underlying principles' (DCFR I.-1:102 (1); CESL 4 (1)). By contrast, PECL 1:106 (1), CISG 7 (1), and PICC 1.6 (1) do not refer to principles. These instruments do, however, mention 'principles' (cf CISG 7 (2); PICC 1.6 (2)) and 'ideas' (cf PECL 1:106 (2)) in their adjacent provisions dealing with the issue of gap-filling (see below, Art 1:106 (2)). Indeed, the term 'principles' seems to have initially asserted itself in the specific context of gap-filling clauses.[63] The draftsmen of the DCFR and CESL then merged the reference to objectives/purposes, found in previous general interpretation clauses, with the reference to principles in previous gap-filling clauses. The product is the dichotomy of objectives/purposes on the one hand and principles on the other hand in DCFR I.-1:102 (1) and CESL 4 (1)—two notions with occasional overlap at the edges.[64] Principles have been defined, at least in the DCFR, as 'abstract basic values'.[65] It is helpful to distinguish between internal principles (see below, [12]) and external principles (see below, [13]).[66]

12 **Internal principles.** Principles inherent in the instrument are known as internal principles. Internal principles can be subdivided into explicit and implicit principles. Explicit internal principles are principles which are expressly referred to—either in the provisions of the instruments or in their accompanying sources (the preamble, explanatory statements, recitals, comments, notes etc).[67] Contrary to objectives/purposes, which can be specific to individual provisions (see above, [10]), the principles referred to in the interpretation clauses must permeate the instrument as a whole. Older textual layers expressly refer to 'general' principles (see below, in the context of Art 1:106 (2): CISG 7 (2); PICC 1.6 (2)). More recent texts tend to omit the 'general' but still require that the principles underlie 'it' (= the instrument as such, cf CESL 4 (1)) or, essentially synonymous, 'them' (= the instrument's rules in plural, cf DCFR I.-1:102 (1)). What kinds of explicit internal principles are to be found in the international instruments? The PECL, for example, refer to freedom of contract (PECL 1:102), consideration for usages and practices (PECL 1:105), good faith and fair dealing (PECL 1:201), duty to co-operate (PECL 1:202), reasonableness (PECL 1:302), and freedom of form (PECL 2:101 (2)). Other instruments refer

[61] See, eg, PECL 1:304, Comment A: 'Importance of Certainty for Both Parties'.

[62] This assumption rests on the so called expressive or symbolic function of the law. See PECL 1:106, Comment B: 'to avoid a strict and narrow interpretation'; PICC 1.6, Comment 3 and DCFR I.-1:102, Comment 1. Also see *Schulze*/Schulte-Nölke, Art 4, [6].

[63] cf Article 11 of the 1935 International Law of the Sale of Goods (see below, fn 73) and ULIS 17.

[64] Example: Good faith is clearly a principle underlying many if not all international instruments (see below, [12]). Through rephrasing into 'promotion of observance of good faith' (cf PICC 1.6, Comment 3) the very same substantive concern could easily be transformed into an objective/purpose.

[65] DCFR, Introduction [11]. On the basis of this definition, at least, the proposal by *Vogenauer*/Vogenauer, Art 1.6, [20] to recognize the canon of interpretative criteria (text, context, drafting history, purposes) as 'general principles of law' is questionable. These interpretative criteria hardly amount to (material) 'values' themselves. An interpretation may, of course, resort to all these interpretative criteria—yet not because they fall into the ambit of the interpretation clause, but since the interpretation clause should not be considered exclusive (see below, [14]).

[66] See, eg, Gebauer (fn 44) 694 f; *Schlechtriem and Schwenzer*/Schwenzer and Hachem, Art 7, [36].

[67] On the relevance of provisions and accompanying sources see DCFR I.-1:102, Comment 2: ' … underlying principles can be derived not only from the introductory remarks preceding these model rules but also from the later articles and the comments on them.'

to similar or slightly different sets of explicit internal principles.[68] Implicit internal principles, by contrast, are not referred to explicitly but are derived by way of deduction from the instrument's specific provisions and/or its general structure and underlying assumptions.[69] The CISG, for example, does not contain any explicit provision binding the parties to their mutually agreed terms. However, because some provisions of the CISG clearly rest on the principle of *pacta sunt servanda*, it can be argued that the CISG as such implicitly acknowledges the validity of this principle.[70] The acknowledgment of implicit internal principles must, however, not be stretched too far; the recognition of implicit principles may not be used as a gateway for reading content into the rules which is not really there.[71] The notion that a principle must be 'underlying' the instrument cautions against too generous an approach: the principle must be sufficiently strong to carry the instrument's weight.

External principles. Principles originating not from within the relevant instrument but from **13**
some other legal source are known as external principles. Their recognition as 'principles' falling within the ambit of the interpretation clauses is controversial. The question arises with regard to principles prevalent in national legal systems. It has been considered 'possible' to recognize 'general principles common to the private law traditions of the Member States' as underlying principles falling within the scope of the interpretation clauses.[72] The evolution of the textual layers, however, advises a more cautious stance: Art 11 of the 1935 Draft of an International Law of the Sale of Goods, an early precursor to the modern rule on gap-filling, referred broadly to 'general principles by which the present law is inspired'.[73] Later instruments not only dropped the term 'general' (see above, [12]), they also changed the phrase 'by which the present law is inspired' into 'underlying'. This change arguably raises the benchmark: A mere 'inspirational' principle no longer qualifies as a principle 'underlying' the instrument. Therefore, and in consideration of

[68] The PICC, for example, in addition to the principles mentioned in the PECL, refer to the binding character of contract (PICC 1.3), party autonomy (PICC 1.5), and prohibition of inconsistent behaviour (PICC 1.8). The CISG, besides referring to good faith in international trade (CISG 7 (1)), acknowledges party autonomy (CISG 6) and stresses the importance of usages (CISG 9) and lack of form (CISG 11). The DCFR devotes great attention to principles: not only does it explain at length the meaning of and approach to principles (DCFR, Introduction, [10]–[16]), the DCFR also contains a very lengthy discussion of the 'underlying principles' of freedom, security, justice, and efficiency (not to be confused with 'overriding principles', cf DCFR Introduction, [16]–[21]), each of which is further divided into several sub-principles (eg freedom of contract is a sub-principle of freedom, good faith a sub-principle of security, etc). See DCFR, Principles, 57–99 which relies on the comparative work of Fauvarque-Cosson and Mazeaud, *European Contract Law*, 421–572. Certain sub-principles are incorporated into the provisions of the DCFR (eg I.-1:103; I.-1:104; II.-1:102; II.-1:103; II.-1:104; II.-1:106). The CESL's first section, entitled 'general principles', refers to freedom of contract (CESL 1), good faith and fair dealing (CESL 2), and co-operation (CESL 3); further principles are contained in later sections, eg reasonableness (CESL 5) and no form required (CESL 6), as well as in the recitals (eg Recital 32: *favor contractus*).

[69] cf PICC 1.6, Comment 4: ' … extracted from specific provisions [as] an expression of a more general principle'. U Magnus, 'General Principles of UN-Sales Law' (1997) 3 *International Trade and Business Law Annual* 33–56, 40 distinguishes—in addition to explicit principles—three ways in which implicit internal principles can be inferred. cf Dannemann and Vogenauer, *European Sales Law in Context*, 113, with an analogy to the ECJ's inference of 'principles of civil law'.

[70] Magnus (fn 69) 40 and 42.

[71] See, eg, *Vogenauer*/Vogenauer, Art 1.6, [25] who is sceptical with regard to any allegedly implied PICC principle protecting the parties against procedural or substantive unfairness.

[72] Dannemann and Vogenauer, *European Sales Law in Context*, 113, referring by way of 'example' to the ECJ case law on fundamental rights.

[73] Article 11: 'If a question arises which is not expressly covered by the provisions of the present law, and the present law does not expressly refer such question to the provisions of the national law, the court shall apply the general principles by which the present law is inspired' (League of Nations 1935, Uniform Private Law, Draft I). According to E Rabel, 'Der Entwurf eines einheitlichen Kaufgesetzes', (1935) 9 *Zeitschrift für ausländisches und internationales Privatrecht* 1–79, 54 the reference to principles was inspired by the 'general principles of law recognized by civilised nations' in Article 38 Statute of the Permanent Court of International Justice.

the instruments' international nature (see above, [9]), the mere fact that a principle might be shared by many or even all national legal systems does not turn it into a 'principle' within the scope of the interpretation clause. Similar hesitation is appropriate with regard to principles contained in international instruments other than the one to be interpreted. Consider the following example. Do the 'principles' referred to by CESL 4 (1) include principles mentioned in the PICC but not in the CESL? Arguably not. Principles contained (only) in the PICC hardly 'underly' the CESL.[74] It is a separate question if and to what extent residual criteria beyond the scope of the interpretation clauses may be consulted for interpretative purposes (see below, [14]).

14 **The role of residual interpretative criteria?** The interpretation clauses do not conclusively list all permissible criteria of interpretation. Their purpose is merely to 'flag up' some particularly important aspects.[75] Hence the omission of reference to other interpretative criteria does not render these criteria *a priori* irrelevant or inadmissible.[76] The particular wording of a provision, for example, is neither an 'objective' nor an 'underlying principle'—and yet its relevance for the interpretation is, of course, universally accepted even under CESL 4 (1). The same holds true for the provision's systematic context: the content of surrounding provisions can certainly guide the interpretation.[77] Other potentially relevant criteria include, *inter alia*, the drafting history, the different language versions, other international instruments,[78] the case law of international or national courts, as well as policy arguments.[79] The instruments' general receptiveness to residual interpretative criteria does not necessarily render the interpretation clause and its enumerative list of criteria insignificant. Its significance exists in two ways. The interpretation clause arguably obliges the adjudicator to consult at least the expressly mentioned interpretative criteria (eg 'objectives' and 'underlying principles' according to CESL 4 (2)) no matter which other criteria he or she chooses to consult as additional persuasive authority.[80] Moreover, the interpretation clauses' express reference to certain interpretative criteria (and hence omission of reference to other criteria) reveals a certain distribution of relative weight of criteria; the distribution can be particularly helpful in cases of conflicting interpretative criteria.[81]

[74] *Schlechtriem and Schwenzer*/Schwenzer and Hachem, Art 7, [36] with further references. For a more generous view, see *Vogenauer*/Vogenauer, Art 1.6, [27] arguing with the diverging French language version of PICC 1.6 (2)—'don't ils s'inspirent'—while also recognizing that 'undue emphasis on this version' should be avoided.

[75] Dannemann and Vogenauer, *European Sales Law in Context*, 109; *Vogenauer*/Vogenauer, Art 1.6, [1].

[76] Dannemann and Vogenauer, *European Sales Law in Context*, 112: ' … mentioned by way of illustration only, and they do not preclude recourse to the other established criteria for interpretation in international uniform law and EU law.'

[77] Expressly acknowledged in CESL Recital 29 ' … should be interpreted on the basis of the underlying principles and objectives *and all its provisions*' (emphasis added).

[78] On the relevance of other EU legislation for the interpretation of an instrument which itself is part of EU law, see *Schulze*/Schulte-Nölke, Art 4, [4].

[79] See the comprehensive list in *Vogenauer*/Vogenauer, Art 1.6, [20]–[36].

[80] This obligation is manifest in expressions like '*should* be interpreted' (PECL 1:106 (1)), '*are* to be interpreted' (DCFR I.-1:102 (1)), 'regard *is* to be had' (CISG 7 (1); PICC 1.6 (1)) and '*is* to be interpreted' (CESL 4 (1)) (emphasis added). cf *Schlechtriem and Schwenzer*/Schwenzer and Hachem, Art 7, [7]: 'most explicit command'.

[81] See, in the context of the PICC, the taxonomy proposed by *Vogenauer*/Vogenauer, Art 1.6, [38]–[43]: strong weight to be given to the provision's wording, its context in the relevant instrument, its purposes and policy considerations; less weight to be accorded to the drafting history and the comparison with other international or domestic provisions.

Art 1:106 (2): Interpretation and Supplementation (Issues not Expressly Settled)

Issues within the scope of these Principles but not expressly settled by them are so far as possible to be settled in accordance with the ideas underlying the Principles. Failing this, the legal system applicable by virtue of the rules of private international law is to be applied.

CISG 7 (2)[1]

(1) …

(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.

PICC 1.6: Interpretation and supplementation of the Principles

(1) …

(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.

DCFR I.-1:102: Interpretation and development[2]

(1)-(3) …

(4) Issues within the scope of the rules but not expressly settled by them are so far as possible to be settled in accordance with the principles underlying them.

(5) …

CESL 4: Interpretation[3]

(1) …

(2) Issues within the scope of the Common European Sales Law but not expressly settled by it are to be settled in accordance with the objectives and the principles underlying it and all its provisions, without recourse to the national law that would be applicable in the absence of an agreement to use the Common European Sales Law or to any other law.

(3) …

Synthesis (based on CESL 4 (2)): Interpretation[4]

(2) ***The same standard of interpretation applies to***[5] **issues within the scope of the** ***rules***[6] **but not expressly settled by** ***them.*** **[…]**

Interpretation, supplementation, or development? The question whether the provision concerns interpretation, supplementation, or development may come as a surprise given that its wording does not refer to any of these terms but instead uses the verb 'settle' ('not expressly settled'; 'are … to be settled'; cf PECL 1:106 (2); ULIS 17; CISG 7 (2); PICC 1.6 (2); DCFR I.-1:102 (4); CESL 4 (2)). Nonetheless, as is evident from the provisions' overall headings as well as the wording of their first paragraphs (see above, Art 1: 106 (1)), some instruments ascribe the process of settlement to the broader category of 'interpretation' (CESL 4 (2): see the heading 'interpretation' and the reference only to 'interpreted' in CESL 4 (1); also CISG 7 (1)) while other instruments consider it to fall into the separate categories of 'supplementation' (PICC 1.6 (2): see the heading 'Interpretation and supplementation …') or 'development' (DCFR I.-1:102 (4): **1**

[1] ULIS 17 is very similar to the first part of CISG 7 (2): 'Questions concerning matters governed by the present Law which are not expressly settled therein shall be settled in conformity with the general principles on which the present Law is based.' An even earlier textual layer is Art 11 of the 1935 Draft of an International Law of the Sale of Goods. For the wording, see above, Art 1:106 (1), fn 75. ULIS contains a provision excluding the applicability of the rules of private international law: 'Rules of private international law shall be excluded for the purposes of the application of the present Law, subject to any provision to the contrary in the said Law.'

[2] FS 1 (2) looks similar to DCFR I.-1:102 (4) but crucially omits the expression 'so far as possible' and adds the words 'without recourse to national laws'. On the significance of this change, see below, [3].

[3] CESL-ELI 7 (2) is identical with CESL 4 (2).

[4] See above, Art 1:106 (1), fn 2.

[5] No difference in substance. Reference to the preceding paragraph merely clarifies that interpretation of issues expressly settled by the rules (= direct applicability of Art 1:106 (1)) and of issues not expressly settled by the rules (= Art 1:106 (2)) is subject to the same criteria; see below, [1].

[6] cf DCFR I.-1:102 (4).

see the heading 'Interpretation and development' and the reference to 'interpreted and developed' in DCFR I.-1:102 (1)).[7] Diverging taxonomies exist also on the national and supranational level:[8] France, England, and the ECJ subscribe to a broad concept of interpretation which includes the resolution of issues falling beyond the express wording of a statute.[9] Historically, this reflects the general perceptions which prevailed in the early modern period around the 16th century.[10] In Germany, by contrast, interpretation (*Auslegung*) only takes place within the confines of the statutory wording; issues beyond the express wording are to be settled not by interpretation but by judicial development (*richterliche Rechtsfortbildung*).[11] The German conceptual distinction—a legacy of the 17th and 18th centuries[12]—has often been criticized as overly complicated and ultimately dispensable.[13] Indeed, the alternative unitary taxonomy endorsed by CESL 4 and CISG 7 seems more appropriate: both texts use a broad concept of interpretation which encompasses issues expressly settled by the instrument (then: application of Art 1:106 (1)) and issues not expressly settled by it (then: application of Art 1:106 (2)). The criteria of interpretation are the same. Art 1:106 (2) merely *extends* the interpretative criteria of Art 1:106 (1) to issues not expressly covered by the instrument's black-letter rules.[14] Surprisingly, however, Art 1:106 (2) is actually the older of the two provisions. The most severe danger to the uniform application of international law was thought to emerge from issues for which the international texts contained no guidance at all, ie issues not settled by the instruments. Therefore the draftsmen of one of the earliest textual layers—the 1935 Draft of an International Law of the Sale of Goods—decided to incorporate a gap-filling interpretation provision.[15] A general interpretation clause, ie a clause concerning expressly settled issues, did not yet figure equally high on the legislative agenda.

2 **Historical and comparative background.** That legal statutes may turn out to be fragmentary and incomplete is well known. As early as in the 2nd century AD the Roman jurist Julian remarked that 'neither statutes nor *senatus consulta* can be written in such a way that all cases which might at any time occur are covered'.[16] Issues demanding resolution for the very first time, says Julian, must be settled through interpretation (*interpretatione*) or imperial decision-making (*constitutione*).[17] This statement could perhaps be understood to imply that Julian—and

[7] PECL 1:106 (2) also ascribes 'settlement' to a separate category different from interpretation, but suffers from inconsistent terminology: its heading refers to 'supplementation'. Its first paragraph, by contrast, uses the term 'developed'.

[8] For an overview: S Vogenauer, 'Statutory Interpretation', in J Smits (ed), *Elgar Encyclopedia of Comparative Law* (2nd edn, 2012) 826–38, 835 f; Dannemann and Vogenauer, *European Sales Law in Context*, 115 f.

[9] Vogenauer, *Auslegung von Gesetzen*, 289–91 (France), 394 f (ECJ), 1134 (England).

[10] See J Schröder, *Recht als Wissenschaft: Geschichte der juristischen Methodenlehre in der Neuzeit (1500–1933)* (2nd edn, 2012) 56 f: 'Doppelfunktion der Interpretation'.

[11] Vogenauer, *Auslegung von Gesetzen*, 141–6 with many further references to the German literature.

[12] Schröder (fn 10) 141.

[13] For a concise summary in English: Dannemann and Vogenauer, *European Sales Law in Context*, 116 f, explaining that in Germany the actual substantive concerns 'frequently ge[t] lost behind a smokescreen of formalistic sophistry.' See also Vogenauer (fn 8) 835 f.

[14] cf *Vogenauer*/Vogenauer, Art 1.6, [45]: ' … further the two interpretative guidelines'.

[15] See the Report on the 1935 Draft of an International Law of the Sale of Goods, 25: 'The difficulty is a serious one even when different judges are called upon to interpret the same rules of law, but it is still greater when judges are called upon not to interpret written law, but to make unwritten law to cover cases not expressly contemplated by that law.' Similar concerns by J Kropholler, *Internationales Einheitsrecht: Allgemeine Lehren* (1975) 292.

[16] Julian D 1.3.10: 'Neque leges neque senatus consulta ita scribi possunt, ut omnes casus qui quandoque inciderint comprehendantur … '

[17] Julian D 1.3.11: 'Et ideo de his, quae primo constituuntur, aut interpretatione aut constitutione optimi principis certius statuendum est.'

the draftsmen of the *Corpus Iuris Civilis* who later incorporated the fragment—adhered to a broad notion of *interpretatio* very much akin to the conceptualization underlying CISG 7 and CESL 4 (see above, [1]). However, Julian does not yet give any guidelines on *how* the cases not covered by statutory law should be resolved by interpretation; he neither mentions 'objectives' or 'principles' nor any other substantive criteria. The codifications of the 18th and 19th centuries, by contrast, already anticipate the modern rule.[18] According to the Prussian Code of 1794, a judge, whenever he does not find a statute which fits, shall decide the case on the basis of, *inter alia*, the 'general principles accepted in the statute book' (PrALR 49: 'nach den in dem Gesetzbuche angenommenen allgemeinen Grundsätzen'). This expression clearly resembles the modern interpretation clauses with their emphasis on 'underlying principles' (cf, eg, CESL 4 (2)). The Austrian Civil Code of 1811 posits that in the last instance a judge shall decide according to 'natural principles' (ABGB 7: 'natürliche Rechtsgrundsätze'). Natural principles seem to be somewhat less closely linked to the black-letter rules than principles 'underlying' them. The Swiss Civil Code of 1907 endorses an even more liberal approach by requiring the tribunal to 'judge according to the rule which it would issue as legislator' (ZGB 1 (2)). The Italian Civil Code of 1942, finally, emphasizes the importance of 'general principles of the legal system of the state' (Art 12 *Disposizioni sulla legge in generale del Codice Civile*).

Textual layers. The continuity between the different textual layers is hard to overlook. The central prerequisite, the existence of an 'issue within the scope' of the instrument but 'not expressly settled by it', carries exactly the same wording in almost all texts (PECL 1:106 (2); PICC 1.6 (2); DCFR I.-1:102 (4); CESL 4 (2); minor deviations in CISG 7 (2) and ULIS 17).[19] More variation exists with regard to the applicable standard of interpretation. A first discrepancy concerns the role which other (national or international) legal systems may play as potential gap-fillers: Under the CISG and PECL the adjudicator may subsidiarily (CISG 7 (2) 'in the absence of'; PECL 1:106 (2) 'failing this') resort to the legal system applicable by virtue of private international law. The CESL expressly excludes this option (CESL 4 (2) 'without recourse … '; previously FS 1 (2)). PICC 1.6 (2) and DCFR I.-1:102 (4) seem not to take a definite stance—in fact, however, they do. The *prima facie* inconspicuous expression 'as far as possible' implies that if a settlement in accordance with underlying principles is not 'possible' recourse may be had to the law applicable by virtue of private international law.[20] PICC and DCFR are therefore more akin to CISG and PECL than one might first assume. Only CESL sticks out with its uncompromising prohibition to resort to national law or any other law. Further discrepancies exist, but they are comparatively small. Some instruments specifically require the principles to be 'general' (CISG 7 (2); PICC 1.6 (2); also ULIS 17); distinguish between principles on which the instrument is 'based' (CISG 7 (2); also ULIS 17) and those which 'underly' the instrument (PECL 1:106 (2), PICC 1.6 (2), DCFR I.-1:102 (4), CESL 4 (2));[21] or add further

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[18] On these provisions, and the historical background generally, see Vogenauer, *Auslegung von Gesetzen*, 490–514.

[19] Contrast with Art 11 of the 1935 Draft Uniform Sales Law which was to apply to all questions 'not expressly covered by the provisions of the present law'. That an issue must also fall *within* the scope of the instrument was not yet expressed.

[20] See the half-explicit acknowledgment in PICC 1.6, Comment 4: ' … a solution should be found, whenever possible, within the system of the Principles itself *before resorting to domestic laws*' (emphasis added). The DCFR Comments are even more secretive. However, the statement that DCFR I.-1:102 'is derived from PECL Art. 1:106 (1)' except for 'some drafting changes and additions' at least suggests that such interpretation is possible, given that PECL 1:106 (2) expressly allows for the subsidiary recourse to legal systems applicable by virtue of private international law.

[21] The two expressions ('based' and 'underlying') seem to have a very similar meaning. But compare this with Article 11 of the 1935 Draft Uniform Sales Law (see above, Art 1:106 (1), fn 73) which sweepingly referred to all kinds of principles 'by which the present law is inspired'.