

# Principles of Latin American Contract Law\*

## Chapter 1. Preamble

### Section 1. General provisions

#### Article 1. Scope of Application

(1) These principles set forth general rules applicable to domestic and international contracts.

Consumer contracts are not governed by these Principles.

(2) These principles apply when:

a) The parties subject themselves to them, in part or in full.

b) The parties have agreed that their contract be governed by general principles of law, the *lex mercatoria*, or the like.

#### Article 2. Functions

(1) These Principles apply to interpret international uniform law instruments and domestic law governing the contract.

(2) These Principles may also be used as a model for national or international legislators.

#### Article 3. Public policy and mandatory rules

Nothing in these Principles shall restrict the application of mandatory rules or the operation of principles that are protected by public policy, whether of national, international, or supranational origin, which are applicable in accordance with the rules of private international law.

#### Article 4. Application, interpretation and supplementation of the Principles

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

(2) In the interpretation of these Principles, regard is to be had to their international character and the need to promote uniformity in their application.

(3) 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.

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\* Translation updated and revised by Rodrigo Momberg and Stefan Vogenauer. The original translation was based on the text approved by the drafting committee in October 2014 and was provided by Adriana Maestas and Manuel Alcalde of Linklaters LLP New York, and published as an annex in *The Future of Contract Law in Latin America*, Momberg, R. and Vogenauer, S. (Eds.), Hart, Oxford, 2017.

## **Section 2. General Principles**

### **Article 5. Freedom of contract**

The parties are free to enter into contracts and to determine their content, so long as this does not violate public policy or the law.

### **Article 6. Binding force of contract**

A contract validly entered into is binding upon the parties.

### **Article 7. Good faith**

- (1) The parties must act in accordance with the requirements of good faith.
- (2) Agreements limiting good faith shall have no effect whatsoever.

## **Chapter 2. Formation of the contract**

### **Section 1. Definition and elements of the contract**

#### **Article 8. Definition of contract**

A contract is an agreement by means of which two or more parties create, transfer, modify, or extinguish a legal relationship of an economic nature.

#### **Article 9. Elements of a contract**

Consent, subject-matter, cause, and in certain cases, formalities, are the elements required to form a contract.

### **Section 2. Contract negotiation**

#### **Article 10. Freedom of and withdrawal from negotiation**

The parties are free to negotiate the contract and to withdraw from the negotiations at any time, in accordance with good faith.

#### **Article 11. Withdrawal against good faith**

- (1) Compensation must be provided for the loss caused by withdrawing from negotiations in bad faith.
- (2) A party that initiates or continues negotiations when not able or not intending to reach an agreement is also required to provide this compensation.
- (3) In no event shall compensation be provided for the loss of expected benefits under a contract that is not concluded.

### **Article 12. Duty of confidentiality**

(1) A party receiving confidential information in the course of negotiating a contract may not use or disclose such confidential information, subject to compensation for the losses and restitution of benefits received.

## **Section 3. Consent**

### **Article 13. Conclusion of the contract**

Contracts are concluded at the time of valid acceptance, unless the parties agree otherwise or unless otherwise provided by law.

### **Article 14. Consent of the parties**

The consent of the parties is demonstrated by their statements or conduct.

### **Article 15. Definition of offer**

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

(2) An offer may be made to one or more specific persons or to the public at large.

### **Article 16. Effect and withdrawal of offer**

(1) An offer becomes effective when it reaches the offeree.

(2) An offer may be withdrawn before it reaches the offeree.

### **Article 17. Revocation of offer**

(1) An offer may be revoked before the offeree has dispatched an acceptance.

(2) If acceptance consists of a conduct differing from a declaration of acceptance, it may be revoked until the contract is concluded.

### **Article 18. Irrevocable offer**

An offer is irrevocable if:

(1) The offeror has indicated that it is irrevocable

(2) The offeror has fixed a time for its acceptance and the offeror does not expressly reserve the power to revoke it.

(3) The offeree has been able to rely, in good faith, on the offer being irrevocable.

### **Article 19. Expiration of the offer**

The offer will expire in the following cases, even if it is irrevocable:

(1) When rejected by the offeree. Expiration will be effective at the time the rejection reaches the offeror.

- (2) When the offeree's reply contains additions, limitations, or other modifications that materially alter the terms of the offer.
- (3) When the offeror dies or is incapacitated prior to receiving the acceptance.
- (4) When it is not accepted within the time fixed by the offeror or, if no time is fixed, within a time that may be expected in good faith.

#### **Article 20. Acceptance**

- (1) Any statement made by or other conduct of the offeree indicating assent to an offer constitutes acceptance.
- (2) Modifications to an offer by the offeree constitute the proposal of a new contract.

#### **Article 21. Silence as acceptance**

Silence or inactivity does not in itself amount to acceptance, except when it is considered to be an acceptance by operation of law, the intention of the parties, customs and usages, or the prior conduct of the parties.

#### **Article 22. Effects of acceptance**

- (1) A contract is concluded at the time the acceptance reaches the offeror.
- (2) When acceptance consists of a conduct, conclusion of the contract will take place at the time the offeror becomes aware of such conduct.
- (3) If by virtue of the offer or as a result of practices that the parties have established between themselves, the offeree may indicate assent by performing an act without notice to the offeror, acceptance will be effective at the moment the act is performed

#### **Article 23. Time of acceptance**

- (1) Any form of acceptance is effective when it reaches the offeror within the fixed time or, if no time is fixed, within a time period that is in accordance with good faith, having regard to the circumstances of the negotiation and to the means of communication employed by the offeror.
- (2) An oral offer must be accepted immediately, unless the circumstances indicate otherwise.

#### **Article 24. Late acceptance**

A late acceptance is effective if:

- (1) The offeror immediately notifies the offeree to that effect.
- (2) The written communication containing the late acceptance shows that it should have reached the offeror within the fixed time.

### **Article 25. Agreement with the terms of the offer**

(1) A reply to an offer that contains additions, limitations, or modifications constitutes a counteroffer.

(2) However, if the terms of the offer are not materially altered, the reply constitutes an acceptance, and the contract will be concluded with such additions, limitations or modifications.

(3) Even when the limitations or modifications do not materially alter the terms of the offer, the reply will be understood as a rejection in the following cases:

(a) When the offer expressly demands full or partial acceptance of the proposed terms.

(b) When the offeror without delay informs the offeree of its objection to the changes.

### **Article 26. Withdrawal of acceptance**

Acceptance may be withdrawn until the time at which it becomes effective.

## **Section 4. Defects of the contract**

### **Article 27. Scope of application**

The defects of the contract are mistake, fraud, threat, and gross disparity.

### **Article 28. Mistake**

Mistake means ignorance or an erroneous assumption relating to facts or to law when of such importance that a reasonable person in the same situation would not have concluded the contract or would have done so on significantly different terms.

### **Article 29. Grounds for mistake**

(1) Mistake vitiates a contract when:

(a) It is caused by information supplied by the other party.

(b) The other party knew or should have known of the mistake and did not disclose it against good faith.

(c) Both parties made the same mistake.

(2) In these cases, the contract is null if the mistake can be excused or the risk of its existence was not or ought not to have been assumed by the person who made it.

### **Article 30. Impediment to invoking mistake**

A mistaken party may not claim nullity of the contract if the counterparty offers to perform it in the manner and with the content according to which the mistaken party had intended to form the contract.

**Article 31. Mistake in expression or transmission**

The provisions of the foregoing articles apply to mistakes in expressing and transmitting intention.

**Article 32. Fraud**

(1) Fraud is the deceitful inducement to conclude a contract by means of an act or omission of a party thereto or of a third party.

(2) Fraud vitiates the contract when it is clear that in its absence the parties would not have concluded the contract and there has been no reciprocal fraud.

**Article 33. Compensation for fraud**

(1) The defrauding party is liable for damages.

(2) The party that was, at the time the contract was concluded, aware of the fraud committed by a third person is jointly and severally liable.

**Article 34. Threat**

A contract may be annulled if a party has been led to conclude it by an unlawful threat of an imminent and serious harm.

**Article 35. Determination of threat**

Consideration must be given to the age, gender, personal condition, and other circumstances of the party in question that might have a bearing on the seriousness of the threat.

**Article 36. Events not constituting threat**

Threatening the regular exercise of a right and simple reverential fear are not grounds for annulling a contract.

**Article 37. Gross disparity**

(1) A party may seek the adaptation of a contract or any of its clauses, or to annul the contract, if it or they give the other party an excessive advantage in contravention of the requirements of good faith.

(2) All circumstances must be taken into account when considering the excessiveness of an advantage, in particular the dependence of the aggrieved party and its extraordinary economic distress, urgent needs, ignorance or lack of experience.

Likewise, the relationship of trust existing between the parties as well as the nature and purpose of the contract must be taken into consideration.

(3) Upon request of the aggrieved party, the judge may adapt the contract in order to make it consistent with the agreement that would have been reached by the parties in accordance with good faith.

(4) The party against which an action of nullity is brought may also request adaptation in accordance with the previous paragraph, provided it promptly informs the other party of this decision.

## **Section 5. Subject-matter, cause and formal requirements of the contract**

### **Article 38. Subject-matter of the contract**

(1) The subject-matter of a contract must be ascertained or ascertainable, possible, and lawful.

(2) It is unlawful when it is prohibited by law or when it is contrary to good morals or to public policy.

### **Article 39. Cause of the contract and obligation**

(1) All obligations require a cause. A cause is presumed to exist as long as it is not proven otherwise, even if it is not expressed.

(2) The cause of the contract must be lawful.

### **Article 40. Formal requirements**

(1) As to form, a contract is valid when it complies with the requirements of the law that govern it, or the legal requirements of the State in which it is concluded, or the law of the place where it is to be performed.

(2) When persons are located in different States at the time a contract is concluded, the place of conclusion shall be understood as the place where the contract is concluded in accordance with these Principles.

## **Chapter 3. Nullity of contract**

### **Article 41. Absolute and relative nullity**

Nullity is absolute when the public interest is affected; and relative, when only private interests are affected.

### **Article 42. Total or partial nullity**

(1) Where one or more individual terms of a contract are found to be null, the remaining terms of the contract will continue in effect, unless this is not possible due to the nature of the contract or the original intention of the parties. In the event of the latter, a court must rule on the nullity of the entire contract.

(2) As to partial nullity, if necessary, a court may adapt the contract in accordance with the requirements of good faith.

### **Article 43. Invoking nullity**

Nullity may be invoked through an action or a defence

### **Section 1. Absolute nullity**

#### **Article 44. Standing**

Absolute nullity must be determined by a court, and may be undertaken at the court's own initiative. It may also be invoked by any interested party, even when such party is not party to the contract.

#### **Article 45. Grounds for nullity**

Contracts that violate the law, public policy, or good morals incur absolute nullity.

#### **Article 46. Confirmation under absolute nullity not possible**

An absolutely-null contract cannot be confirmed.

### **Section 2. Relative nullity**

#### **Article 47. Standing**

Relative nullity may only be invoked by the person for whose benefit it is established.

#### **Article 48. Confirmation and prescription**

(1) The party with the right to invoke relative nullity may confirm the contract by explicitly or implicitly expressing its intention to uphold the contract as valid.

The act of validation does not require the consent of the other party.

(2) The confirmed contract will be understood as valid as of its conclusion and in no way will it impair third parties in good faith.

(3) The action to invoke relative nullity is extinguished by prescription.

#### **Article 49. Option with the means of relief**

The party with the right to invoke the relative nullity of the contract or exercise one of the means of relief for non-performance may choose between these options.

### **Section 3. Effects of nullity**

#### **Article 50. Effects of nullity between the parties**

(1) The nullity results in the extinction of the contract, unless is the nullity is partial.

(2) Restitutions are governed by the rules provided in articles 119 and 123.

#### **Article 51. Effect on third persons**



Nullity may be upheld against third persons, except when they have acquired rights through the payment of valuable consideration and in good faith.

**Article 52. Restitution not possible due to unlawful subject-matter or cause**

Restitution is not possible with regard to transfers or payments knowingly proceeding from an unlawful subject matter or cause.

**Chapter 4. Simulation**

**Article 53. Simulation between the parties**

A private declaration by the parties that is inconsistent with that which they have overtly contracted for may be enforced by either party.

**Article 54. Simulation and third persons**

(1) Third persons in good faith may enforce the private declaration or that which they have apparently contracted for, at their discretion.

(2) Third persons may seek a declaration of simulation to the extent the declaration affects their interests.

(3) In the event of a dispute between third persons, preference will be given to the third persons in good faith that enforce the overt act.

**Chapter 5. Effects of a contract on third parties**

**Section 1. Representation**

**Article 55. Scope of application**

This section does not govern representation conferred by law, or as a result of an appointment made by a public or judicial authority.

**Article 56. Scope of the authority**

(1) The acts that one person performs in the name of another, within the scope of its authority, produce the same effects as if it had been done by the principal; so long as the third party knew, or ought to have known that the representative was acting in that capacity.

(2) When the principal authorizes the representative to act in its own name, the effects of the contract entered into by the representative with a third party will directly affect the representative.

**Article 57. Authority to act**

(1) The scope of the representative's authority is determined by the grant, notwithstanding the authority that is implied from the nature of the transaction entrusted.

(2) The authority granted in general terms, authorizes the agent to perform the acts of ordinary administration related with the entrusted transactions.

(3) All other acts require the conferral of special authority.

Authority may be conferred either expressly or implicitly.

#### **Article 58. Implicit representation**

When a party acts as an employee of a business, or under other analogous circumstances, it is to be understood that they have authority to perform the acts that are ordinarily performed in the course of that business.

#### **Article 59. Apparent authority**

The act performed by a party that acts without authority, or exceeding its authority, does not bind the principal with the third party, unless the third party had believed, because of the principal's behavior, that the representative had authority to act.

#### **Article 60. Acts performed without authority**

(1) The person that acts without authority, or exceeding its authority, shall be liable for damages to the third party, unless the third party knew, or ought to have known, that the person acted without authority, or exceeding its authority.

(2) The principal may ratify the acts performed by the person that acted without authority, or exceeding its authority, in which case the principal is bound as of the date of the act, notwithstanding the rights of third persons in good faith.

#### **Article 61. Delegation of authority**

(1) Unless otherwise agreed, the representative has authority to delegate authority to another person, in which case the representative is liable for the acts of the delegate.

(2) The representative is not liable for the acts of the delegate, if the delegate has been appointed by the principal.

#### **Article 62. Several representatives**

Where several representatives have authority, it is to be understood that all of them act separately, unless otherwise agreed.

#### **Article 63. Conflict of interests**

(1) The representative cannot enter into self-contracting, or conclude a contract with third parties that could involve the representative a conflict of interest with the principal, unless the principal authorizes it, or if due to the nature of the act, no

detriment to the interests of the principal is caused. The representative is also precluded from entering into contracts, when also acting as a representative for the third party.

(2) The contract concluded in violation of this provision may be annulled.

#### **Article 64. Termination and modification of the authority**

(1) Termination or modification of the authority, for whatever cause, shall not be upheld against third parties, unless they knew or ought to have known of it.

(2) Notwithstanding the extinction of authority, the representative remains authorised and shall perform those acts that are necessary to prevent harm to the principal's interests.

### **Section 2. Contracts in favour of third parties**

#### **Article 65. Scope of application**

(1) Any party may contract in favour of a third party, and both the promisee and the beneficiary may demand what has been contracted.

(2) If the third party renounces the benefit, it will be considered as having never acquired the right.

#### **Article 66. Right of revocation**

(1) The promisee may revoke the contract or substitute the third party as long as the third party has not accepted it. The acceptance of the beneficiary renders the right conferred irrevocable.

(2) In the event of revocation or of lack of acceptance, the right will remain with the promisee, unless the contract indicates otherwise.

#### **Article 67. Defences**

The promisor may assert against the third party all defences arising out of the contract concluded with the promisee.

### **Section 3. Promise that the third party will do something**

#### **Section 68. Promise that the third party will do something**

A party that has promised that a third party will assume an obligation will be liable for compensating the counterparty if the third party refuses to be bound.

### **Chapter 6. interpretation**

#### **Article 69. Common Intention of Parties**

A contract is to be interpreted according to the common intention of the parties.

### **Article 70. Criteria for determining the common intention of the parties**

When determining the common intention of the parties, regard shall be had, among others, to the following criteria:

- (a) The rules of interpretation agreed upon by the parties.
- (b) The conduct of the parties during the formation, conclusion and performance of the contract.
- (c) Prior, concurrent, or subsequent conduct of the same parties in other contracts of the same nature.
- (d) The type, subject-matter and cause of the contract.
- (e) The usages of the place where the contract is concluded.

### **Article 71. Meaning of technical words**

Technical words and terms of art shall have the meaning assigned to them by those practising in the respective field, unless it is evident they have been assigned a different meaning.

### **Article 72. Systematic interpretation**

The clauses of a contract shall be interpreted one by another, so as to give them the meaning that most conforms to the contract in its entirety.

### **Article 73. Useful interpretation of the contract**

The interpretation of a clause that is able to produce some effect shall be preferred to the interpretation of a clause that is not capable of producing any effect.

### **Article 74. Ambiguous clauses**

Ambiguous clauses shall be interpreted in favour of the party that has contracted under the dominant influence of the other party, taking into consideration the dependence of the affected party, its extraordinary economic distress, its imperative urgent needs, its ignorance, its lack of experience, or its lack of bargaining skill.

### **Article 75. Non-negotiated clauses**

Non-negotiated clauses must be interpreted against the party that proposed them.

### **Article 76. Interpretation in accordance with good faith**

Contracts must always be interpreted in accordance with good faith.

## **Chapter 7. Performance of contract**

### **Article 77. Performance defined**

Performance is the fulfilment of an obligation according to its terms.

### **Article 78. Place of performance**

(1) An obligation must be performed at the place expressly or implicitly fixed by, or determinable from the contract.

(2) If the previous rule does not apply, the place of performance shall be:

(a) For monetary obligations, at the address of the obligee.

(b) For obligations, the subject-matter of which are specific goods, at the place where the goods were located when the contract was concluded.

(c) For all other obligations, at the address of the obligor.

If the obligor moves, the obligee has the right to demand payment at the current or previous address. The obligor has the same option when the place of payment is the address of the obligee.

### **Article 79. Time of performance**

(1) The contract must be performed at the time fixed by the contract, and in the absence of any provision, the following rules shall apply:

(a) If performance can take place immediately, it shall take place within the shortest time possible after the conclusion of the contract.

(b) If a lapse of time is required due to the nature of the performance, it shall be performed within the shortest time possible after the conclusion of the contract.

(2) If it is not possible to fix the time of performance in accordance with these rules, the contract must be performed at the time resulting from its nature, usages, or good faith.

### **Article 80. Earlier performance**

(1) The obligor may perform early, unless this seriously harms the interests of the other party. Earlier performance does not affect the performance of the reciprocal obligation.

(2) The obligee may waive the lapse of time established in its favour.

### **Article 81. Early enforceability of the obligation**

Performance of the contract cannot be demanded prior to the lapse of the time agreed, except:

(a) If the obligor has been declared bankrupt or insolvent.

(b) If the obligor has not established the promised guarantees or that effects a reduction in the security granted due to a cause attributable to the obligor.

(c) If the time period is only fixed in favour of the obligee.

### **Article 82. Performance by third party**

(1) The contract may also be performed by a third party, except when special conditions of the obligor have been considered or the obligee and obligor both oppose this.

(2) An interested third party is a person for whom the failure of the obligor to perform may cause economic damage

#### **Article 83. Costs**

(1) Unless otherwise agreed, each party shall bear the costs of performing its obligations.

(2) An obligee is liable for the costs arising out of a default attributable to it.

#### **Article 84. Change of circumstances**

(1) If after its conclusion, performance of the contract becomes excessively onerous or the utility of the performance considerably decreases, due to a change of circumstances, the event or magnitude of which could not have been reasonably foreseen, and if the risk of the change of circumstances has not been assumed by the affected party, the latter may request the renegotiation of the contract.

(2) Performance of the contract is not suspended during the renegotiation, unless such performance causes irreparable harm to the affected party.

(3) If, after a reasonable time, the parties have not adapted the contract, either party may request the court to adapt or terminate the contract. In adapting the contract, the court has to take into consideration the distribution of risk and the costs assumed by the parties.

#### **Article 85. Frustration of the cause of the contract**

The definitive frustration of the contract's cause, due to a change of the circumstances existing at the time of its conclusion, unforeseen by the parties and that exceeds the risk assumed by the affected party, authorizes the latter to terminate the contract.

### **Chapter 8. Non-performance of the contract**

#### **Section 1. Non-performance in general**

#### **Article 86. Non-performance defined**

(1) Non-performance is a failure to perform the contract in the agreed manner.

(2) Defective performance includes all forms of non-conformity between that which was agreed and that which was performed by the obligor.

(3) Non-performance by the obligor includes the persons it employs to perform the obligation.

### **Article 87. Fundamental non-performance**

Non-performance shall be understood as fundamental when:

- (a) The parties have agreed that it is with respect to specific obligations or specific events of non-performance.
- (b) The non-performance is intentional.
- (c) The conduct of the non-performing party gives the obligee reason to believe that it cannot rely on the other party's future performance.
- (d) It substantially deprives the obligee of what it was entitled to expect according to that which was foreseeable for the parties at the time the contract was concluded.
- (e) The obligor does not perform within the term for cure, as set forth in article 93.

### **Article 88. Acts or omissions of the obligee**

The obligee may not invoke non-performance due to its own acts or omissions.

### **Article 89. Force majeure or acts of God**

*Force majeure* or an act of God is an event beyond the control of the obligor that temporarily or permanently impedes it from performing an obligation at no risk to it and the occurrence and effects of which it could not have avoided.

### **Article 90. Total or partial impossibility to performance**

- (1) The total and final supervening impossibility to performing a contractual obligation due to an act of God extinguishes the obligation and releases the obligor. In this event, the obligee may choose to terminate the contract or require the assignment of the rights and actions that, due to the impossibility, the obligor held against a third party.
- (2) When the impossibility is partial or temporary, the obligee may suspend performance or reduce it by an equal proportion, unless, as a result of the impossibility, it substantially deprives it of what it was entitled to expect according to that which was foreseeable at the time the contract was concluded. In the event of the latter, the option set forth in paragraph (1) shall apply.

## **Section 2. Means of relief for the obligee**

### **Article 91. Means of relief**

- (1) In the event of non-performance, the obligee may, at its discretion and as appropriate, exercise one of the following means of relief for the non-performance:
  - (a) Specific performance;
  - (b) Price reduction;
  - (c) Termination of the contract;
  - (d) Suspension of performance; and

(e) Damages.

(2) Damages may be claimed separately or in conjunction with the remaining means of relief.

#### **Article 92. Notice of defective performance**

(1) In the event of defective performance, the obligee shall give notice of the non-conforming performance within a reasonable time after it should have become aware of it.

(2) If notice is not given, the obligee may not demand performance or terminate the contract.

#### **Article 93. Period for cure**

(1) Unless non-performance is fundamental, the obligee must allow an additional period of reasonable length for cure non-performance.

(2) During the additional period, the obligee cannot exercise any mean of relief incompatible with the cure, notwithstanding its right to claim damages.

(3) If the obligor fails to effect cure within the time allowed, or declares that non-performance shall not be cured, the creditor may exercise any of the means of relief.

#### **Article 94. Specific performance**

(1) Specific performance can always be demanded for monetary obligations.

(2) In the case of non-monetary obligations, specific performance is subject to the following limitations:

(a) It may not be demanded when performance is impossible. However, the obligee may require that the non-performing party assign its rights and actions against third parties;

(b) Even though it is possible, specific performance may not be demanded when it is extremely burdensome for the obligor, taking into consideration that the obligee may satisfy its interest by choosing another means of relief.

(c) It may not be demanded when it represents an injury to personal dignity.

#### **Article 95. Repair and replacement of defective performance**

(1) Regarding defective performance, specific performance includes the repair or cure of the non-conformity or replacement, subject to the limitations contained in the previous article.

(2) Replacement always requires fundamental non-performance.

#### **Article 96. Price reduction**

(1) In the event of defective performance, the obligee may accept this and reduce the price in proportion with the difference between the value of the performance at



the time it was carried out and the value it would have had at that same time if the performance had occurred.

(2) Reduction in price is not compatible with compensation for reduction in the value of performance.

(3) In any case, the obligee may demand compensation for other damages.

#### **Article 97. Termination due to non-performance**

(1) Any party to a contract may terminate it when the other party incurs fundamental non-performance.

(2) Reciprocal non-performance shall not prevent the termination of the contract.

(3) A contract may be terminated by a court or by notice.

#### **Article 98. Termination by notice**

Termination exercised by written notice to the other party shall be effective upon receipt.

#### **Article 99. Effects of termination**

(1) Termination extinguishes the effects of a contract. Notwithstanding, it does not affect the clauses agreed to by the parties for the settlement of disputes or those related to non-performance itself, or any other clause which is to operate even after the termination.

(2) Restitutions may be demanded in accordance with articles 119 and 123.

#### **Article 100. Effects on third parties**

The rules provided in article 51 regarding third parties, are applicable as per termination.

#### **Article 101. Termination clauses**

(1) The parties may incorporate into the contract clauses that provide the aggrieved party with the power to terminate it.

(2) The clauses must indicate the obligations, if not performed, causes termination.

(3) These clauses shall not deprive the aggrieved party of the possibility to choose any other means of relief.

#### **Article 102. Suspension of performance**

Each party may refuse to perform if the other does not perform, unless performance by one must take place prior to performance by the other due to the nature of the contract or an agreement between the parties.

#### **Article 103. Earlier suspension of performance**

A party may refuse to perform the contract when, prior to the date of performance, it is evident that the obligor will not perform. Suspension shall cease if the non-performing party performs or adequately guarantees performance.

#### **Article 104. Damages**

When non-performance results in damages, the obligor is liable for compensation. If non-performance is the result of an act of God, there shall be no grounds for damages.

#### **Article 105. Damages subject to compensation**

The recovery of damages covers monetary and non-monetary harm.

#### **Article 106. Interest and damages**

Non-performance of a monetary obligation requires the obligor to pay interest, notwithstanding compensation for other harm.

#### **Article 107. Foreseeability of harm**

(1) The non-performing party shall be liable for harm it could have foreseen at the time of the conclusion of the contract and that results from its non-performance.

(2) In the event of fraud or gross negligence, the obligor shall be liable for all harm that results from its non-performance.

#### **Article 108. Contribution of the obligee to its harm**

Compensation is subject to reduction when the obligee has contributed to the non-performance by way of its acts or omissions.

#### **Article 109. Mitigation of loss**

(1) Compensation is subject to reduction when the obligee has failed to take reasonable measures to mitigate loss in good faith. Reduction shall correspond to the amount by which the loss could have been mitigated.

(2) The obligee is entitled to compensation for what it has allocated towards mitigating the loss, even if these measures have been ineffective.

### **Section 3. Clauses regarding non-performance**

#### **Article 110. Penalty clause**

A penalty clause is that in which one of the parties is to pay a sum of money to the other in case of non-performance.

#### **Article 111. Functions of the penalty clause**

(1) The penalty clause guarantees the exact and timely performance, and estimate the damages with anticipation.

(2) The penalty may be agreed in substitution of compensation for the value of the object of the obligation, of the damages beyond the value of the object, or of those derived from mere delay on performance.

**Article 112. Enforceability of the penalty clause**

The penalty may be requested with no proof of harm. Force majeure excludes payment of the penalty, unless otherwise agreed.

**Article 113. Modification of the penalty**

A court may, upon request by a party, reduce the penalty when it is manifestly excessive, taking into consideration the value of the performance, the nature and purpose of the contract, and other relevant circumstances.

**Article 114. Reduction due to defective performance**

If performance is defective and the obligee accepts it, the obligor will be entitled to proportionally reduce the penalty, unless otherwise agreed.

**Article 115. Penalty clause and period for cure**

The period of cure provided in article 93 does not preclude the obligee from the right to request the penalty for the value of the performance, when the parties have agreed that the penalty will be compatible with the specific performance of the contract.

**Article 116. Compatibility between penalties and means of relief**

Unless otherwise agreed, the obligee:

- (1) May choose between the penalty or damages.
- (2) May accumulate specific performance with the penalty for damages that exceed the value of the performance or of those derived from delayed performance.
- (3) May accumulate the penalty with damages that exceed the value of the performance with the price reduction.
- (4) May not accumulate the penalty agreed for the value of the performance with specific performance.
- (5) May not request specific performance or termination along with the penalty agreed for the value of the performance, but either one or the other.

**Article 117. Earnest money**

- (1) If the contract is entered into considering earnest money, each party may withdraw from the contract; the party that has provided earnest money, losing it; and the party that has received it, returning the earnest money and an equivalent amount.
- (2) If the parties have not agreed a time for the withdrawal losing the earnest money, they may only withdraw prior to the beginning of the performance of the contract.

(3) If parties do not exercise their right to withdraw, the earnest money shall be applied to the performance of the contract, or be returned, as appropriate.

**Article 118. Limitation and exemption clauses**

(1) The parties may incorporate into the contract clauses that limit or exclude damages.

(2) These clauses shall have no effect, if non-performance is intentional or caused by of gross negligence.

(3) Damages caused upon obligee's inalienable rights, do not admit limitation or exoneration whatsoever.

**Section 4. Restitutions**

**Article 119. Restitution in case of nullity and termination**

(1) If the contract is annulled or terminated, restitution shall be made for performance that has taken place and any fruits received, concurrently or within the time agreed by the parties, or otherwise, by the court.

(2) Restitution of useful and equivalent performances that has taken place is not required, unless the purpose of the contract requires its complete performance. Utility shall be considered in accordance to the purpose of the contract.

(3) When performances have not been useful, the provision set forth in paragraph number 1 shall be applied.

(4) When performances are not equivalent, restitution shall be limited to the value of the difference.

**Article 120. Restitution of a sum of money**

(1) Restitution of a sum of money include indexation and legal interests, accrued until complete payment.

(2) Interests are accrued from payment if the party that has received has acted in bad faith. If a party that has received a sum of money has acted in good faith, interests are accrued from the time of notice of the lawsuit, or from the time of termination.

**Article 121. Restitution not possible**

(1) When restitution is not possible, the obligee shall be entitled to the value of the performance fixed at the time of impossibility.

(2) Each party may choose between which has been set forth in the previous paragraph or to demand that the other party assign its rights or actions against third parties.

**Article 122. Suspension of restitution**

A party shall not be compelled to comply with its restitutionary obligations whilst the other does not comply with its own restitutionary obligations

**Article 123. Guarantees**

The contract's guarantees shall be extended to the obligation of restitution, until the agreed time, with the exception for those granted by third parties.