

**Illustrative draft of possible structure,
especially for Books I to III**

(Revised after meeting of Structure Group on 8th and 9th November 2004)

Preamble

Book I General provisions

Book II Contracts and other Juridical Acts

Chapter 1 General provisions on contracts

Chapter 2 Formation of a contract

Chapter 3 Authority of agents in relation to contracts

Chapter 4 Validity of contracts (including illegality)

Chapter 5 Interpretation of contracts

Chapter 6 Contents and effects of contracts

Chapter 7 Application of above rules to other juridical acts

Book III Contractual and non-contractual [rights and] obligations

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Chapter 2 Non-performance of contractual obligations

Chapter 3 Particular remedies for non-performance of contractual obligations

Chapter 4 Application of above rules to non-contractual obligations

Chapter 5 Conditional rights and obligations (*Provisional heading and placing,
pending further discussion*)

Chapter 6 Plurality of debtors and creditors

Chapter 7 Change of parties

Assignment of right to performance

Substitution of new debtor

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Book V Benevolent intervention

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Appendix I Definitions of terms

PREAMBLE

(To be drafted later)

BOOK I

GENERAL PROVISIONS

Book I Article 1:101: Scope

- (1) These Principles are intended to apply generally in relation to contracts and other juridical acts, contractual and non-contractual obligations and corresponding rights, the transfer of movable property, security rights over movable property, and trusts.
- (2) However, the Principles are not intended to apply to:
 - (a) matters involving the status or legal capacity of natural persons;
 - (b) matters relating to wills and succession;
 - (c) rights in property arising out of a matrimonial relationship;
 - (d) rights and obligations, including maintenance obligations, arising out of a family relationship, parentage, marriage or affinity;
 - (e) rights and obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the rights and obligations under such negotiable instruments arise out of their negotiable character;
 - (f) matters relating to employment law;
 - (g) matters relating to land law;
 - (h) arbitration agreements and agreements on the choice of court,
 - (i) matters governed by the law of companies and other bodies corporate or unincorporated, such as the creation, by registration or otherwise, legal capacity internal organisation or winding up of companies and other bodies corporate or unincorporated and the personal liability of officers and members as such for the obligations of the company or body.
- (3) The scope of particular Books may be further restricted.

Book I Article 1:102: Interpretation

- (1) These Principles are to be interpreted in such a way as to promote:
 - (a) respect for human rights and fundamental freedoms;
 - (b) good faith and fair dealing; and
 - (c) legal certainty and uniformity of application.
- (2) In the interpretation of these Principles the definitions in Appendix 1 apply.

Book I Article 1:103: Notice

- (1) The rules in this Article apply in relation to the giving of notice for any purpose under these Principles.

Book I Article 1:104: Computation of time

- (1) The rules in this Article apply in relation to the computation of time for any purpose under these Principles.

BOOK II

CONTRACTS AND OTHER JURIDICAL ACTS

CHAPTER 1 : GENERAL PROVISIONS ON CONTRACTS

Book II Article 1:101: 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 any applicable mandatory rules.
- (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.

Book II Article 1:102: 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.

Book II Article 1:103: Good Faith and Fair Dealing

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

Book II Article 1:104: Duty to Co-operate

Each party owes to the other a duty to co-operate in order to give full effect to the contract.

Book II Article 1:105: Reasonableness

For the purposes of this Book reasonableness is to be judged by what persons acting in good faith and in the same situation as the parties would consider to be reasonable. In particular, in assessing what is reasonable the nature and purpose of the contract, the circumstances of the case and the usages and practices of the trades or professions involved should be taken into account.

Book II Article 1:106: Imputed Knowledge and Intention

If any person who with a party's assent was involved in making a contract, or who was entrusted with performance by a party or performed with a party's assent:

- (a) knew or foresaw a fact, or ought to have known or foreseen it; or
- (b) acted intentionally or with gross negligence, or not in accordance with good faith and fair dealing,

this knowledge, foresight or behaviour is imputed to the party.

CHAPTER 2 : FORMATION OF CONTRACTS

[This would be PECL Chapter 2, with minor adjustments.]

CHAPTER 3 : AUTHORITY OF AGENTS IN RELATION TO CONTRACTS

[This would be PECL Chapter 3, with minor adjustments.]

CHAPTER 4 VALIDITY OF CONTRACTS (INCLUDING ILLEGALITY)

[This would be PECL Chapter 4, with minor adjustments, plus illegality, which is currently in PECL Chapter 15.]

CHAPTER 5 INTERPRETATION OF CONTRACTS

[This would be PECL Chapter 5, with minor adjustments.]

CHAPTER 6 CONTENTS AND EFFECTS OF CONTRACTS

[This would be the earlier part of PECL Chapter 6, with minor adjustments, plus something on conditions, which are currently in PECL Chapter 16. Some of the later articles in PECL Chapter 6 relate to contractual obligations, rather than to the contract as a juridical act and would be better in Book III. The precise distribution is still for discussion.]

CHAPTER 7 APPLICATION OF CONTRACT RULES TO OTHER JURIDICAL ACTS

Book II Article 7:101: Scope of Chapter

- (1) This Chapter applies to juridical acts other than contracts.
- (2) In particular, it applies to:
 - (a) unilateral promises intended to be binding without acceptance;
 - (b) offers and acceptances;
 - (c) unilateral grants of authority to act as a representative;
 - (d) unilateral grants of consent to something or permission to do something;
 - (e) unilateral acts of ratification, approval, cancellation, withdrawal, revocation, avoidance or termination; and
 - (f) unilateral acts granting, transferring or waiving rights.

Book II Article 7:102: General application of contract rules

The rules in Chapters 1 to 6 of this Book apply, with the adaptations made in this Chapter and any other appropriate adaptations, to other juridical acts.

Book II Article 7:103: General provisions

(1) In relation to the making of a unilateral juridical act the rules in this Article apply in place of the rules in Chapter 1, on general provisions relating to contracts.

(2) A person is free to make a unilateral juridical act and to determine its contents, subject to the requirements of good faith and fair dealing, and any applicable mandatory rules.

(3) A person making a unilateral juridical act may exclude the application of any of the Principles or derogate from or vary their effects, except as otherwise provided by these Principles.

(4) A person making, or giving effect to, a unilateral juridical act must act in accordance with good faith and fair dealing. The person may not exclude or limit this duty.

(5) In relation to a unilateral juridical act reasonableness, for the purposes of this Book, is to be assessed objectively. In particular, in assessing what is reasonable the nature and purpose of the act, the circumstances of the case and the usages and practices of any trades or professions involved are to be taken into account.

(6) If any person who with the assent of the maker of a unilateral juridical act was involved in making the act, or who was entrusted with performance of an obligation under the act by the maker or performed with the maker's assent:

- (a) knew or foresaw a fact, or ought to have known or foreseen it; or
- (b) acted intentionally or with gross negligence, or not in accordance with good faith and fair dealing,

this knowledge, foresight or behaviour is imputed to the maker of the act.

Book II Article 7:104: Formation

(1) In relation to the making of a unilateral juridical act the rules in this Article apply in place of the rules in Book II, Chapter 2, on the formation of contracts.

(2) A unilateral juridical act is made if:

- (a) the party making the act intends to be legally bound or to achieve the relevant legal effect;

- (b) the act is sufficiently certain; and
 - (c) the act reaches the person to whom it is addressed or, if it is addressed to the public, is made public by advertisement, public notice or otherwise.
- (3) Unless otherwise provided in relation to a particular type of juridical act, a unilateral juridical act need not be made or evidenced in writing nor is it subject to any other requirement as to form. The act may be proved by any means, including witnesses.
- (4) The intention of a person to be legally bound to another person by a unilateral juridical act is to be determined from the maker's statements or conduct as they could reasonably be expected to be understood by the other person.
- (5) There is sufficient certainty for the purposes of paragraph (2) if the terms of the act:
- (a) have been sufficiently defined by the party making it so that the act can be given effect, or
 - (b) can be determined under these Principles.

Book II Article 7:105: Authority of Agents

The rules of Chapter 3 on the authority of agents apply to the authority of an agent or other intermediary to make a non-contractual juridical act on behalf of the principal as they apply to the authority to bind the principal in relation to a contract with a third party, any reference to a third party being read as a reference to a party to whom the juridical act is addressed.

Book II Article 7:106: Invalidity

- (1) The rules of Chapter 4 on the invalidity of contracts apply to the invalidity of non-contractual juridical acts, any reference to the party entitled to avoid the contract being read as a reference to the party making the juridical act and entitled to avoid it, and any reference to the other contracting party being read as a reference to the person to whom the juridical act is addressed.
- (2) However:
- (a) the Article on Unfair Terms not Individually Negotiated does not apply to unilateral juridical acts; and
 - (b) a party who has made a gratuitous unilateral juridical act may avoid it for mistake if the party would not have made the act knowing the true situation.

Book II Article 7:107: Interpretation

- (1) In relation to the interpretation of a unilateral juridical act the rules in this Article apply in place of the rules in Chapter 5, on the interpretation of contracts.
- (2) A unilateral juridical act is to be interpreted according to the intention of the party making it, in so far as this intention can reasonably be gathered from its terms read in the light of the relevant circumstances.
- (3) If it is established that the party making the juridical act intended the act to have a particular meaning, and at the time of the conclusion of the act the person to whom it was addressed was, or could reasonably be expected to have been, aware of the first party's intention, the act is to be interpreted in the way intended by the first party.
- (4) If an intention cannot be established according to (2) or (3), the act is to be interpreted according to the meaning that a reasonable person relying on the act would give to it in the circumstances.
- (5) In interpreting the act, regard is to be had, in particular, to:
 - (a) the circumstances in which the act was made, including any preliminary discussions;
 - (b) the conduct of the party making the act, even subsequent to the making of the act;
 - (c) the nature and purpose of the act;
 - (d) the interpretation which has already been given to similar clauses by the party making the act and any practices established by that party;
 - (e) the meaning commonly given to terms and expressions in the branch of activity concerned and the interpretation similar clauses may already have received ;
 - (f) usages; and
 - (g) good faith and fair dealing.
- (6) Where there is doubt about the meaning of a term in a gratuitous unilateral act, a restrictive interpretation of the term is to be preferred.
- (7) Terms are to be interpreted in the light of the whole act in which they appear.
- (8) An interpretation which renders the terms of the act lawful, or effective, is to be preferred to one which would not.
- (9) Where an act is drawn up in two or more language versions none of which is stated to be authoritative, there is, in case of discrepancy between the versions, a preference for the interpretation according to the version in which the act was originally drawn up.

Book II Article 7:108: Contents and effects

- (1) In relation to the contents and effects of a unilateral juridical act the rules in this Article apply in place of the rules in Chapter 6, on the contents and effects of contracts.
- (2) In addition to the express terms, a unilateral juridical act may contain implied terms which stem from:
 - (a) the intention of the party making the act,
 - (b) the nature and purpose of the act, and
 - (c) good faith and fair dealing.
- (3) Where any term of a unilateral juridical act is to be determined by a third person, and that person cannot or will not do so, the party making the juridical act is presumed to have empowered the court to appoint another person to determine it. If a term fixed by a third person is grossly unreasonable, a reasonable price or term is substituted.
- (4) Where any term of a unilateral juridical act is to be determined by reference to a factor which does not exist or has ceased to exist or to be accessible, the nearest equivalent factor is substituted.
- (5) If a unilateral juridical act obliges the party making it to render a performance but does not specify the quality, the party must tender performance of at least average quality.
- (6) If a unilateral juridical act gives rise to an obligation, permission or authority for an indefinite period the party making the act may end the obligation, permission or authority by giving notice of reasonable length.
- (7) A party who has assumed an obligation by a unilateral juridical act is bound to fulfil the obligation even if performance becomes more onerous. If, however, performance of the obligation becomes excessively onerous because of an unforeseen change of circumstances, a court may:
 - (a) terminate the obligation at a date and on terms to be determined by the court;
or
 - (b) adapt the obligation in order to make it just and equitable in the new circumstances.

BOOK III

CONTRACTUAL AND NON-CONTRACTUAL [RIGHTS AND] OBLIGATIONS

CHAPTER 1 PERFORMANCE OF CONTRACTUAL OBLIGATIONS

[This would be PECL Chapter 7, with minor adjustments.]

CHAPTER 2 NON-PERFORMANCE OF CONTRACTUAL OBLIGATIONS

[This would be PECL Chapter 8, with minor adjustments.]

CHAPTER 3 PARTICULAR REMEDIES FOR NON-PERFORMANCE OF CONTRACTUAL OBLIGATIONS

[This would be PECL Chapter 9, with minor adjustments, and with the addition of what is currently in PECL Chapter 17, on the capitalisation of interest.]

CHAPTER 4 APPLICATION OF ABOVE RULES TO NON-CONTRACTUAL OBLIGATIONS

Section 1: Scope

Book III Article 4:101: Scope of Chapter

- (1) This Chapter applies, unless otherwise provided in particular articles, only to:
 - (a) obligations arising under non-contractual juridical acts;
 - (b) obligations under Book V arising out of benevolent intervention in another's affairs;
 - (c) obligations under Book VI to make reparation for damage caused to another;
 - (d) obligations under Book VII to reverse an unjustified enrichment;
 - (e) obligations of a trustee under Book X.
- (2) Legislation creating any other obligation may adopt the rules in this Chapter, with or without adaptations, for the purposes of the obligation so created.

Section 2: Performance

Book III Article 4:201: Place of performance

- (1) If the place of performance of a non-contractual obligation is not fixed by or determinable from the juridical act or rule creating the obligation it is:
 - (a) in the case of an obligation to pay money, the creditor's place of business at the time when the obligation falls to be performed;
 - (b) in the case of an obligation other than to pay money, the place which is most reasonable having regard to the nature and purpose of the obligation.
- (2) If a creditor has more than one place of business, the place of business for the purpose of the preceding paragraph is that which has the closest relationship to the obligation.
- (3) If a creditor does not have a place of business, or if the obligation arises in a non-business context, the creditor's habitual residence is substituted.

Book III Article 4:202: Time of Performance

A non-contractual obligation is to be performed:

- (a) if a time is fixed by or determinable from the juridical act or rule creating the obligation, at that time;
- (b) if a period of time is fixed by or determinable from the juridical act or rule creating the obligation, at any time within that period;
- (c) in any other case, within such time after the obligation arises as is reasonable having regard to the nature and purpose of the obligation.

Book III Article 4:203: Early Performance

- (1) A person may decline a tender of performance of a non-contractual obligation made before it is due except where acceptance of the tender would not unreasonably prejudice that person's interests.
- (2) A person's acceptance of early performance does not affect the time fixed for the performance by that person of any reciprocal obligation.

Book III Article 4:204: Order of Performance

- (1) Where two persons owe each other reciprocal obligations, performance of both being due, then to the extent that the performances can be rendered simultaneously, the

persons are bound to render them simultaneously unless the circumstances indicate otherwise.

(2) This article applies to situations where both obligations are non-contractual and to situations where the obligations are respectively contractual and non-contractual.

Book III Article 4:205: Alternative Performance

Where a non-contractual obligation may be discharged by one of alternative performances, the choice belongs to the debtor, unless the juridical act or rule creating the obligation provides otherwise.

Book III Article 4:206: Other rules on performance

The rules in [PECL Articles 7:106 (Performance by a Third Person), 7:107 (Form of Payment), 7:108 (Currency of Payment), 7:109 (Appropriation of Performance), 7:110 (Property not Accepted), 7:111 (Money not Accepted) and 7:112 (Costs of Performance)] apply with any appropriate adaptations to the non-contractual obligations specified in Article 4:101, any reference to the contract being read as a reference to the juridical act or rule creating the obligation.

Section 3: Non-Performance and Remedies In General

Book III Article 4:301: Remedies Available

(1) Whenever a person does not perform a non-contractual obligation within the scope of this Chapter and the non-performance is not excused under Article 4:305, the creditor may resort to any of the remedies set out in Section 4 of this Chapter.

(2) Where the non-performance is excused under Article 4:305, the creditor may resort to any of the remedies set out in Section 4 except claiming performance and damages.

(3) A creditor may not resort to any of the remedies set out in Section 4 to the extent that the creditor's own act caused the non-performance.

Book III Article 4:302: Cumulation of Remedies

Remedies which are not incompatible may be cumulated. In particular, a creditor is not deprived of a right to damages by exercising a right to any other remedy.

Book III Article 4:303: Cure by Non-Performing Debtor

A debtor whose tender of performance is not accepted by the creditor because it does not conform to what is due may make a new and conforming tender where the time for performance has not yet arrived.

Book III Article 4:304 Performance Entrusted to Another

A debtor who entrusts performance of the obligation to another person remains responsible for performance.

Book III Article 4:305: Excuse Due to an Impediment

- (1) A debtor's non-performance is excused if it is due to an impediment beyond the debtor's control and the debtor could not reasonably have been expected to have avoided or overcome the impediment or its consequences.
- (2) Where the impediment is only temporary the excuse provided by this article has effect for the period during which the impediment exists.
- (3) The non-performing debtor must ensure that notice of the impediment and of its effect on the ability to perform is received by the creditor within a reasonable time after the debtor knew or ought to have known of these circumstances. The creditor is entitled to damages for any loss resulting from the non-receipt of such notice.

Section 4: Particular Remedies for Non-Performance

Book III Article 4:401: Monetary Obligations

The creditor is entitled to recover money which is due.

Book III Article 4:402: Non-monetary Obligations: Specific Performance

- (1) The creditor is entitled to specific performance of an obligation other than one to pay money, including the remedying of a defective performance.
- (2) Specific performance cannot, however, be obtained where:
 - (a) performance would be unlawful or impossible; or
 - (b) performance would cause the debtor unreasonable effort or expense; or
 - (c) the performance consists in the provision of services or work of a personal character or depends upon a personal relationship, or
 - (d) the creditor may reasonably obtain performance from another source.
- (3) The creditor will lose the right to specific performance if the creditor fails to seek it within a reasonable time after the creditor has or ought to have become aware of the non-performance.

Book III Article 4:403: Damages Not Precluded

The fact that a right to performance is excluded under this Section does not preclude a claim for damages.

Book III Article 4:404: Right to Damages

- (1) The creditor is entitled to damages for loss caused by the other party's non-performance which is not excused under Article 4:305.
- (2) The loss for which damages are recoverable includes:
 - (a) non-pecuniary loss ; and
 - (b) future loss which is reasonably likely to occur.
- (3) This Article does not apply to non-performance of any obligation under Book VI to make reparation for damage caused to another.

Book III Article 4:405: General Measure of Damages

- (1) The general measure of damages is such sum as will put the creditor as nearly as possible into the position in which it would have been if the obligation had been duly performed. Such damages cover the loss which the creditor has suffered and the gain of which the creditor has been deprived.
- (2) This Article does not apply to non-performance of any obligation under Book VI to make reparation for damage caused to another.

Book III Article 4:406: Foreseeability

- (1) The debtor is liable only for loss which the debtor foresaw or could reasonably have foreseen at the time when the obligation arose as a likely result of the non-performance, unless the non-performance was intentional or grossly negligent.
- (2) This Article does not apply to non-performance of any obligation under Book VI to make reparation for damage caused to another.

Book III Article 4:407: Loss Attributable to Creditor

- (1) The debtor is not liable for loss suffered by the creditor to the extent that the creditor contributed to the non-performance or its effects.
- (2) This Article does not apply to non-performance of any obligation under Book VI to make reparation for damage caused to another.

Book III Article 4:408: Reduction of Loss

- (1) The debtor is not liable for loss suffered by the creditor to the extent that the creditor could have reduced the loss by taking reasonable steps.
- (2) The creditor is entitled to recover any expenses reasonably incurred in attempting to reduce the loss.
- (3) This Article does not apply to non-performance of any obligation under Book VI to make reparation for damage caused to another.

Book III Article 4:409: Delay in Payment of Money

- (1) If payment of a sum of money is delayed, the creditor is entitled to interest on that sum from the time when payment is due to the time of payment at the average commercial bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place where payment is due.
- (2) The creditor may in addition recover damages for any further loss so far as these are recoverable under this Section.

Book III Article 4:410: When Interest to be Added to Capital

- (1) Interest payable according to the preceding Article is added to the outstanding capital every 12 months.
- (2) Paragraph (1) of this Article does not apply if the parties have provided for interest upon delay in payment.

Book III Article 4:411: Specified Payment for Non-performance

(1) Where the juridical act or rule creating the obligation provides that the debtor, on failing to perform, is to pay a specified sum to the creditor for such non-performance, the creditor is to be awarded that sum irrespective of actual loss.

(2) However, the specified sum may be reduced to a reasonable amount where it is grossly excessive in relation to the loss resulting from the non-performance and the other circumstances.

Book III Article 4:412: Currency by which Damages to be Measured

Damages are to be measured by the currency which most appropriately reflects the aggrieved party's loss.