IV.2.1 - Contractual consent

(a) A contract is concluded when one party has communicated to another an offer, and that other party has accepted it, or when the parties have united in a concurrent expression of intention, designed to create a contractual obligation or contractual obligations.

(b) A valid contractual consent requires that the parties intend to be legally bound and that they have sufficiently identified the terms of the contract with respect to the parties and the subject matter.

Commentary:
1 Subsection (a) mentions two scenarios in which a contract can be concluded. In the first scenario, one party issues an offer and the other party accepts that offer. In this scenario, the contract is concluded once the offer has been accepted, unless that acceptance contains additions, limitations or other modifications which, when compared with the offer, constitute a material alteration of the offer. In that later case, the reply which purports to be an acceptance constitutes a rejection of the offer and a counter-offer. That counter-offer must be accepted by the party who issued the initial offer for the contract to be concluded.

2 Subsection (b) lists the two requirements which every declaration of will must meet in order to be qualified as a binding offer or acceptance, a subjective and an objective one.

3 The subjective one relates to the fact that for offer and acceptance to be legally valid and binding, they must be issued by the parties with an intention to be legally bound. Usually, such intention is not declared expressly and must be inferred from the circumstances of the case. If a statement is made by one party without such intention, that statement must be qualified as a non-binding declaration of interest or an invitation to make an offer ("invitatio ad offerendum").

4 The objective requirement relates to the fact that offer and acceptance must identify the essential elements ("essentialia negotii") of the contract which the parties intend to conclude, i.e. the identity of the parties, and, in case of a sales contract, the nature of the goods to be delivered by the seller and the price to be paid by the buyer. These elements can be determined by application of the general principles of interpretation. Essentially, the offer must be so specific that the offeree can conclude the contract by simply saying "yes". Put differently, the acceptance must be the mirror image of the offer. However, a contract can be concluded with the price or other essential elements being fixed at a subsequent stage if the parties indicate that they want to be bound even though that essential element has not yet been fixed.

5 There is a connection between both requirements. The more detailed and specific an offer is, the more likely it is that the party wants to be bound by it.