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**Article 1.4  
(Mandatory Rules)**

**Revised Comments**

by

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**ARTICLE 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.**

**COMMENT**

**1. Mandatory rules prevail**

Given the particular nature of the Principles as a non-legislative instrument, neither the Principles as such nor the individual contracts concluded in accordance with them can be expected to prevail over mandatory rules of domestic law, whether of national, international or supranational origin, applicable in accordance with the relevant rules of private international law. Mandatory rules of national origin are those enacted by States autonomously (e.g. particular form requirements for specific types of contracts; invalidity of penalty clauses; licensing requirements; environmental regulations; etc.), while mandatory rules of international or supranational origin are those derived from international conventions or general public international law (e.g. Hague-Visby Rules; UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects; United Nations Convention against Corruption; United Nations Universal Declaration of Human Rights, etc.) or adopted by supranational organisations (e.g. European Community competition law, etc.).

**2. Broad notion of “mandatory rules”**

The mandatory rules referred to in this Article are predominantly laid down by specific legislation. However, in the various national legal systems restrictions on freedom of contract may also derive from unwritten general principles of public policy whether of national, international or supranational origin (e.g. prohibition of commission or inducement of crimes; prohibition of corruption; protection of human dignity; prohibition of discrimination on the basis of gender, race or religion; prohibition

of undue restraint of trade; etc). For the purpose of this Article the notion of “mandatory rules” is to be understood in a broad sense so as to cover both specific statutory provisions and unwritten general principles of public policy.

### **3. Mandatory rules applicable in case of incorporation of the Principles as terms of contract**

Where – as is the traditional and still prevailing approach adopted by domestic courts with respect to soft law instruments – the parties’ reference to the Principles is considered merely to be an agreement to incorporate them in the contract (see Comment 4 lit. a), third paragraph, to the Preamble), the Principles and the individual contracts concluded in accordance with them will first of all encounter the limit of the principles and rules of the domestic law governing the contract from which parties may not contractually derogate (so-called ordinary or domestically mandatory rules). Moreover, the mandatory rules of the forum State and possibly of other countries will also apply, provided that they claim application whatever is the law governing the contract and, in the case of the mandatory rules of other countries, there is a sufficiently close connection between those countries and the contract in question (so-called overriding or internationally mandatory rules).

### **4. Mandatory rules applicable in case of reference to the Principles as law governing the contract**

Where – as may be the case if the dispute is brought before an arbitral tribunal – the Principles are applied as the law governing the contract (see Comment 4 lit. a), fourth paragraph, to the Preamble), they no longer encounter the limit of the ordinary mandatory rules of any domestic law. As far as the overriding mandatory rules of the forum State or of other countries are concerned their application basically depends on the circumstances of the case. Generally speaking, since in international arbitration the arbitral tribunal lacks a predetermined *lex fori*, it may, but is under no duty to, apply the overriding mandatory rules of the country on whose territory it renders the award. In determining whether to take into consideration the overriding mandatory rules of the forum State

or of any other country with which the case at hand has a significant connection, the arbitral tribunal, bearing in mind its task to “make every effort to make sure that the Award is enforceable at law” (so expressly e.g. Art. 35 of the ICC Arbitration Rules), may be expected to pay particular attention to the overriding mandatory rules of those countries where enforcement of the award is likely to be sought. Moreover, the arbitral tribunal may feel bound to apply in any case those overriding mandatory rules reflecting principles widely accepted as fundamental in legal systems throughout the world (so-called transnational public policy or *ordre public transnational*).

**5. Recourse to rules of private international law relevant in each given case**

In view of the considerable differences in the ways in which domestic courts and arbitral tribunals determine the mandatory rules applicable to international commercial contracts, the present Article deliberately refrains from stating which mandatory rules apply and refers instead to the relevant rules of private international law for the solution to be taken in each given case (see e.g. Art. 9 of *EC Regulation No. 593/2008 (Rome I)* (replacing Art. 7 of the *1980 Rome Convention on the Law applicable to Contractual Obligations*); Art.11 of the *1994 Inter-American Convention on the Law Applicable to International Contracts*; § 3-101(f) *Uniform Commercial Code* (as amended in 2001); § 187 (2)(b) *Restatement (Second) of Conflict of Laws*; Arts. 28, 34 and 36 *UNCITRAL Model Law on International Commercial Arbitration*; Art. V *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*).