



**EN**

**GOVERNING COUNCIL  
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**Item No. 4 on the agenda: International Commercial Contracts –**

**Adoption of additional rules and comments to the UNIDROIT Principles of  
International Commercial Contracts concerning long-term contracts**

(prepared by the Secretariat)

<i>Summary</i>	<i>Consideration and adoption of the Working Group on Long-Term Contracts' recommended amendments and additions to the 2010 UNIDROIT Principles of International Commercial Contracts and the preparation and publication of a new edition</i>
<i>Action to be taken</i>	<i>Adoption of the recommended amendments and additions and approval for the Secretariat to proceed with the preparation and publication of the fourth edition of the Principles ("2016 UNIDROIT Principles of International Commercial Contracts") for publication by December 2016</i>
<i>Mandate</i>	<i>Work Programme 2014-2016</i>
<i>Priority level</i>	<i>Medium</i>
<i>Related documents</i>	<i>UNIDROIT 2015 – Study L - Misc. 31 (Report of the first session); UNIDROIT 2016 – Study L - Misc. 32 (Report of the second session)</i>

**I. ADOPTION OF THE RECOMMENDED AMENDMENTS AND ADDITIONS TO THE UNIDROIT PRINCIPLES 2010**

1. At its 92<sup>nd</sup> session in May 2013, the Governing Council of UNIDROIT was seized of a Memorandum prepared by the Secretariat concerning possible future work on long-term contracts (cf. UNIDROIT 2013 – C.D. (92) 4(b)). The Memorandum recalled that the UNIDROIT Principles as they now stand already contain a number of provisions which take into account, at least to a certain extent, the special needs of long-term contracts. Yet at the same time the Memorandum pointed out that there were still issues particularly relevant in the context of long-term contracts that the Principles in their present form did not address at all or only in part.

2. At its 93<sup>rd</sup> session in May 2014, the Governing Council was seized of a second Memorandum of the Secretariat containing an analytical survey of specific issues that might be addressed in the envisaged work on long-term contracts in the context of the UNIDROIT Principles (cf. UNIDROIT 2013 – C.D. (92) 4(b)). On the basis of this Memorandum, the Governing Council decided to instruct the Secretariat to set up a restricted Working Group composed of experts that had shown particular interest in the proposed work on long-term contracts for the purpose of formulating proposals for possible amendments and additions to the black letter rules and comments of the current edition of the Principles with a view to covering the special needs of long-term contracts.

3. The Working Group was set up and composed of the following experts: Michael Joachim BONELL, Emeritus Professor of Law, University of Rome I, Consultant UNIDROIT (*Chairman of the Group*); Christine CHAPPUIS, Professor of Law, Faculty of Law, University of Geneva, Member of the *Groupe de travail Contrats Internationaux*; Neil COHEN, Jeffrey D. Forchelli Professor of Law, Brooklyn Law School, New York; François DESSEMONTET, Emeritus Professor of Law, University of Lausanne; Paul FINN, Former Judge, Federal Court of Australia, Adelaide; Paul-A. GELINAS, Avocat aux Barreaux de Paris et de Montréal, Paris; Sir Vivian RAMSEY, Former Judge, Technology and Construction Court, Royal Courts of Justice, London; Christopher R. SEPPÄLÄ, Partner, White & Case LLP, Legal Advisor to the FIDIC Contracts Committee; and Reinhard ZIMMERMANN, Professor of Law, Director at the Max-Planck-Institut für ausländisches und internationales Privatrecht, Hamburg.

4. In addition, the following Observers participated in the Working Group: Giuditta CORDERO Moss, Professor of Law, University of Oslo, Member of the Norwegian Oil & Energy Arbitration Association; Cyril EMERY, Legal Officer, UNCITRAL Secretariat, Vienna; Pietro GALIZZI, Legal Affairs Department, Senior Vice President, ENI SpA, Milan; Pilar PERALES VISCASILLAS, Professor of Law, Universidad Carlos III de Madrid, Member of the CISG Advisory Council; and Don WALLACE, Jr., Chairman of the International Law Institute, Washington, DC.

5. The Working Group's first session was held at UNIDROIT's seat in Rome from 19 to 22 January 2015. The session was devoted to the examination of a position paper on "The UNIDROIT Principles of International Commercial Contracts and Long-term Contracts" prepared by the Chairman of the Working Group and containing a list of issues with related proposals or questions, for further consideration by the Working Group. After careful examination and lengthy discussion, the Working Group decided to focus on particular issues and reached conclusions with respect to each of them. Various members of the Group were appointed to serve as Rapporteurs and prepare drafts based on those conclusions for the next session. The Working Group's deliberations and conclusions are recorded in detail in the Report for the first session (see UNIDROIT 2015 – Study L - Misc. 31).

6. The Working Group's second session was held in Hamburg from 26 to 29 October 2015 at the kind invitation of the Max Planck Institute for Comparative and International Private Law. The deliberations at the session were based on a Note summarising the conclusions of the Group's first session prepared by the UNIDROIT Secretariat and drafts on each particular topic prepared by the following Rapporteurs in advance of the session:

- (a) Notion of "long-term contracts" – M.J. Bonell and N. Cohen;
- (b) Contracts with open terms – Sir Vivian Ramsey;
- (c) Agreements to negotiate in good faith – N. Cohen;
- (d) Contracts with evolving terms – M.J. Bonell;
- (e) Supervening events – N. Cohen;
- (f) Co-operation between the parties – M.J. Bonell;
- (g) Restitution after ending contracts entered into for an indefinite period – R. Zimmermann;
- (h) Termination for compelling reasons – Sir Vivian and R. Zimmermann; and
- (i) Post-contractual obligations – C. Chappuis.

After careful examination of the Note and various drafts, the Working Group reached agreement on its recommended amendments and additions to the UNIDROIT Principles 2010. The Working Group's deliberations are reflected in the Report for the second session (see UNIDROIT 2015 – Study L - Misc. 31 ("Report of the second session"), which sets forth the relevant excerpts of the Note and contains, in Annexes 3-11 of that Report, both the drafts initially examined at the session (Docs. 128-136) and the revised drafts ultimately agreed by the Working Group (Docs. 128 rev.-136 rev.).

7. At the kind invitation of the University of Oslo's Faculty of Law, an event entitled "UNIDROIT Principles of International Commercial Contracts: Issues Relating to Long-Term Contracts" was held in Oslo from 3 to 4 March 2016, at which the recommended amendments and additions were the subject of lengthy and fruitful discussions.<sup>1</sup> There was significant praise for the work of the Rapporteurs and the Working Group at the meeting. Serious concerns, however, were expressed with respect to the recommended provisions on termination for compelling reason, including by two members of the Working Group who acknowledged that the concerns expressed reflected reservations that they had raised during the Working Group's deliberations.

8. With this Memorandum, the Secretariat submits to the Governing Council for its consideration and adoption the Working Group's recommended amendments and additions to the provisions of the UNIDROIT Principles 2010 listed below, with the exception of Articles 6.3.1-6.3.2 on termination for compelling reason which would be new provisions. Such amendments and additions are, as identified below, reflected in redline in the Annexes to this document and discussed in the indicated portions of the Report of the second session:

- **Preamble** – amendments to the footnote and Comment 2 (see Annex 1 and Item No. 2(a) of the Report of the second session);
- **Article 1.11** – addition to black letter law and of a new Comment 3 (see Annex 1 and Item No. 2(a) of the Report of the second session);
- **Article 2.1.14** – amendments to black letter law and Comments 1-3, and addition of a new Comment 4 (see Annex 2 and Item No. 2(c) of the Report of the second session);
- **Article 2.1.15** – amendments to Comment 2 and addition of a new Comment 3 (see Annex 3 and Item No. 2(e) of the Report of the second session);
- **Article 4.3** – amendments to Comment 3 (which would become Comment 4) and addition of a new Comment 3 (see Annex 4 and Item No. 2(f) of the Report of the second session);
- **Article 4.8** – amendments to Comments 1-3 (see Annex 2 and Item No. 2(c) of the Report of the second session);
- **Article 5.1.3** – amendments to Comment (which would become Comment 1) and addition of a new Comment 2 (see Annex 6 and Item No. 2(h) of the Report of the second session);

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<sup>1</sup> The event included the following panellists: Michael Joachim BONELL (University of Rome I), Sverre BLANDHOL (University of Oslo), Knut BOYE (Simonsen Vogt Wiig), Are BRAUTASET (Statoil ASA), Christine CHAPPUIS (University of Geneva), Neil COHEN (Brooklyn Law School), Giuditta CORDERO-MOSS (University of Oslo), Maria Beatrice DELI (ICC and AIA), Sondre DYRLAND (Wiersholm), David ECHENBERG (General Electric), José Angelo ESTRELLA FARIA (Secretary-General, UNIDROIT), Charles GREY (Yara ASA), Erlend HAASKJOLD (Arntzen de Besche), Kai-Uwe KARL (GE Oil & Gas), Anette KAVALEFF (Kavaleff Consulting), Johannes KOEPP (Baker Botts), Kåre LILLEHOLT (University of Oslo), Lauren MITTENTHAL (Siemens), Gustaf MÖLLER (Krogerus), Risteard DE PAOR (White & Case), Georgios PETROCHILOS (Three Crowns), Linn Hoel RINGVOLL (Kluge), Catherine ROGERS (Penn State School of Law), Christopher SEPPÄLÄ (White & Case), Patricia SHAUGHNESSY (Stockholm University), Thomas SVENSEN (BAHR), Erik THYNESS (Wiersholm), and Amund TØRUM (Schjødt). Among other participants, the event was also attended by François Dessemontet (University of Lausanne), Pietro GALIZZI (ENI), Paul-A. GÉLINAS (Avocat aux Barreaux de Paris et de Montréal), Alberto MAZZONI (President, UNIDROIT), and Don WALLACE (International Law Institute). The event's programme is available at <https://www.jus.uio.no/ifp/english/research/events/2016/final-programme-unidroit.pdf>.

- **Article 5.1.4** – addition of a new Comment 3 (see Annex 3 and Item No. 2(e) of the Report of the second session);
- **Article 5.1.7** – amendments to black letter law and Comments 2-3 (see Annex 2 and Item No. 2(c) of the Report of the second session);
- **Article 5.1.8** – amendments to black letter law and existing Comment (which would become Comment 1) and addition of a new Comment 2 (see Annex 7 and Item No. 2(d) of the Report of the second session);
- **Articles 6.3.1-6.3.2** – addition of new black letter law and Comments (see Annex 8 and Item No. 2(b) of the Report of the second session);
- **Article 7.1.7** – addition of a new Comment 5 (see Annex 5 and Item No. 2(g) of the Report of the second session);
- **Article 7.3.5** – amendments to Comment 3 and addition of a new Comment 4 (see Annex 9 and Item No. 2(i) of the Report of the second session);
- **Article 7.3.6** – amendments to Comment 1 (see Annex 1 and Item No. 2(a) of the Report of the second session); and
- **Article 7.3.7** – amendments to black letter law and both Comments 1 and 2 (see Annex 1 and Item No. 2(a) of the Report of the second session).

## **II. PREPARATION AND PUBLICATION OF THE FOURTH EDITION (“UNIDROIT PRINCIPLES 2016”)**

9. Provided that the Governing Council adopts the amendments and additions to the UNIDROIT Principles 2010, the Secretariat seeks approval to proceed with the preparation and publication of the fourth edition of the UNIDROIT Principles, to be known as the “2016 UNIDROIT Principles of International Commercial Contracts”. Such preparation would entail editorial work to ensure that the style and language is consistent throughout the new English and French editions. If approval is received, the Secretariat would endeavour to have the new edition published by December 2016.

## **III. ACTION TO BE TAKEN**

10. *The Governing Council is invited to consider and adopt the amendments and additions to the 2010 UNIDROIT Principles of International Commercial Contracts recommended by the Working Group on Long-Term Contracts and authorise the Secretariat to prepare and publish a new edition to be known as the “2016 UNIDROIT Principles of International Commercial Contracts”.*



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**Principles of International Commercial Contracts**  
**Working Group on Long-Term Contracts**

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**Annex 1**  
**Proposed Amendments/Additions to the UNIDROIT Principles**  
**on the Notion of “Long-Term Contracts”**

Rapporteurs: Professors M.J. Bonell and Neil Cohen

## PREAMBLE

*(Purpose of the Principles)*

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.<sup>(\*)</sup>

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.

### COMMENT

The Principles set forth general rules which are basically conceived for “international commercial contracts”.

#### 1. “International” contracts

[...]

#### 2. “Commercial” contracts

The restriction to “commercial” contracts is in no way intended to take over the distinction traditionally made in some legal systems between “civil” and “commercial” parties and/or transactions, i.e. to make the application of the Principles dependent on whether the parties have the formal status of “merchants” (*commerçants, Kaufleute*) and/or the transaction is commercial in nature. The idea is rather that of excluding from the scope of the Principles so-called “consumer transactions” which are within the various legal systems being increasingly subjected to special rules, mostly of a mandatory character, aimed at protecting the consumer, i.e. a party who enters into the contract otherwise than in the course of its trade or profession.

~~The criteria adopted at both national and international level also vary with respect to the distinction between consumer and non-consumer contracts. The Principles do not provide any express definition, but the assumption is that the concept of “commercial” contracts should be understood in the broadest possible sense, so as to include not only trade transactions for the supply or exchange of goods or services, but also other types of economic transactions, such as investment and/or concession agreements, contracts for professional services, etc.~~

The Principles were originally conceived mainly for ordinary exchange contracts such as sales contracts to be performed at one time. In view of the increasing importance of more

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<sup>(\*)</sup>~~Parties wishing to provide that their agreement be governed by the Principles might use the following words, adding any desired exceptions or modifications:~~

~~“This contract shall be governed by one of the Model Clauses for the Use of the UNIDROIT Principles (2010) [except as to Articles ...]”~~

~~Parties wishing to provide in addition for the application of the law of a particular jurisdiction might use the following words:~~

~~“This contract shall be governed by the UNIDROIT Principles (2010) [except as to Articles...], supplemented when necessary by the law of [jurisdiction X]”. — *International Commercial Contracts* (see <http://www.unidroit.org/instruments/commercial-contracts/upicc-model-clauses>).~~

complex transactions – in particular long-term contracts – the Principles have subsequently been adapted to take into account also the characteristics and needs of these transactions. For a definition of the notion of “long-term contract”, see Article 1.11.

### 3. The Principles and domestic contracts between private persons

[...]

#### ARTICLE 1.11

*(Definitions)*

In these Principles

- “court” includes an arbitral tribunal;
- where a party has more than one place of business the relevant “place of business” is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract;
  - “long-term contract” refers to a contract which is to be performed over a period of time and which normally involves, to a varying degree, complexity of the transaction and an ongoing relationship between the parties;
  - “obligor” refers to the party who is to perform an obligation and “obligee” refers to the party who is entitled to performance of that obligation;
  - “writing” means any mode of communication that preserves a record of the information contained therein and is capable of being reproduced in tangible form.

#### COMMENT

##### 1. Courts and arbitral tribunals

[...]

##### 2. Party with more than one place of business

[...]

##### 3. Long-term contracts

The Principles, both in the black letter provisions and the comments, refer to “long-term contracts” as distinguished from ordinary exchange contracts such as sales contracts to be performed at one time. Three elements typically distinguish long-term contracts from ordinary exchange contracts: duration of the contract, an ongoing relationship between the parties, and complexity of the transaction. For the purpose of the Principles, the essential element is the duration of the contract, while the latter two elements are normally present to varying degrees, but are not required. The extent to which, if at all, one or the other of the latter elements must also be present for the application of a provision or the relevance of a comment referring to

long-term contracts depends on the rationale for that provision or comment. For instance, Articles 6.3.1 et seq. presuppose an ongoing relationship, and Comment 2 to Article 5.1.3 presupposes an ongoing relationship between the parties and a transaction involving performance of a complex nature.

Depending on the context, examples of long-term contracts may include contracts involving commercial agency, distributorship, out-sourcing, franchising, leases (e.g. equipment leases), framework agreements, investment or concession agreements, contracts for professional services, operation and maintenance agreements, supply agreements (e.g. raw materials), construction/civil works contracts, industrial cooperation, contractual joint-ventures, etc.

Provisions and comments of the Principles that explicitly refer to long-term contracts are the Preamble, Comment 2; Article 1.11, Comment 3; Article 2.1.14, Comments 1, 3, and 4; Article 2.1.15, Comment 3; Article 4.3, Comments 3 and 4; Article 4.8, Comments 1, 2 and 3; Article 5.1.3, Comment 2; Article 5.1.4, Comment 3; Article 5.1.8 and Comment 2; Article 6.2.2, Comment 5; Article 6.3.1, Comments 1-5; Article 6.3.2 and Comment; Article 7.1.7, Comment 5; Article 7.3.5, Comments 4; Article 7.3.6, Comment 1; Article 7.3.7 and Comment 1.

Several other provisions and comments are also particularly relevant in the context of long-term contracts. See Articles 1.7; 1.8; 2.1.1, Comment 2; 2.1.2, Comments 1 and 2; 2.1.6; 2.1.13; 2.1.14; 2.1.15; 2.1.16; 2.1.17; 2.1.18; 3.3.1 and 3.3.2; 5.1.2; 5.1.7, Comment 3; 5.1.8; Article 5.3.1, Comment 5; Article 5.3.4; 6.1.1; 6.1.4; 6.1.5; 6.1.11; 6.1.14 to 6.1.17; 6.2.1 to 6.2.3; 7.1.3; 7.1.4; 7.1.5; 7.1.6; 7.1.7; 7.3.5.

#### 4. “Obligor” – “obligee”

[...]

#### 45. “Writing”

[...]

### ARTICLE 7.3.6

*(Restitution with respect to contracts  
to be performed at one time)*

(1) On termination of a contract to be performed at one time either party may claim restitution of whatever it has supplied under the contract, provided that such party concurrently makes restitution of whatever it has received under the contract.

(2) If restitution in kind is not possible or appropriate, an allowance has to be made in money whenever reasonable.

(3) The recipient of the performance does not have to make an allowance in money if the impossibility to make restitution in kind is attributable to the other party.

(4) Compensation may be claimed for expenses reasonably required to preserve or maintain the performance received.



## COMMENT

## 1. Contracts to be performed at one time

~~This Paragraph (1) of this Article refers only to contracts to be performed at one time. A different regime applies to contracts or under which at least the characteristic performance is has to be made over a period of at one time, while a different rule applies to long-term contracts (see Article 7.3.7), paragraph (1)). The most common example of a contract to be performed at one time is an ordinary contract of sale where the entire object of the sale has to be transferred at one particular moment. This Article however refers also to, e.g. construction contracts in which the contractor is under an obligation to produce the entire work to be accepted by the customer at one particular time. A turnkey contract provides an important example.~~

Under a commercial contract one party will usually have to pay money for the performance received. That obligation is not the one that is characteristic of the contract. Thus, a contract of sale where the purchase price has to be paid in instalments, will fall under this Article provided that the seller's performance is to be made at one time.

## 2. Right of parties to restitution on termination

[...]

## ARTICLE 7.3.7

*(Restitution with respect to long-term contracts  
to be performed over a period of time)*

(1) On termination of a long-term contract ~~to be performed over a period of time~~ restitution can only be claimed for the period after termination has taken effect, provided the contract is divisible.

(2) As far as restitution has to be made, the provisions of Article 7.3.6 apply.

## COMMENT

1. ~~Contracts to be performed over a period~~ Long-term contracts

Unlike the rule in paragraph (1) of ~~time~~

~~Contracts to be performed over a period of time are at least as commercially important as Article 7.3.6 with respect to~~ contracts to be performed at one time, ~~such as contracts~~ paragraph (1) of this Article provides that, on termination of ~~sale where the object of the sale~~ a long-term contract, restitution can only be claimed for the period after termination has ~~to be transferred at one particular moment. These contracts include leases (e.g. equipment leases), contracts involving distributorship, out sourcing, franchising, licensing and commercial agency, as well as service contracts in general. This Article also covers contracts of sale where the goods have to be delivered in instalments. Performances~~ taken effect, provided the contract is divisible. Indeed, because under such contracts ~~an~~ performance might have been made over a long period of time before the contract is terminated, ~~and~~ it may ~~thus~~ be inconvenient to unravel ~~these performances that performance~~. Furthermore, termination is a remedy with prospective effect only. ~~(see Article 7.3.5).~~ Restitution can, therefore, only be claimed in respect of the period after termination.

### Illustration

1. A contracts to service ~~company~~ B's computer hardware and software for a period of five years. After three years of regular service A is obliged by illness to discontinue the services and the contract is terminated. B, who has paid A for the fourth year, can claim restitution of the advance payment for that year but not for the money paid for the three years of regular service.

Since contracts are terminated only for the future, any outstanding payments for past ~~performances~~performance can still be claimed. This Article does not prevent a claim for damages being brought.

### Illustrations

2. Company A leases equipment to company B for three years at a rental of EUR 10,000 a month. B pays punctually for the first two months but then fails to make any further payments despite repeated requests by A. After a lapse of five months A terminates the lease. A is entitled to retain the EUR 20,000 already received (see Article 7.3.7 (1)) and to recover the EUR 50,000 accrued due (on the basis of the contract of lease which is terminated only for the future), together with whatever damages for breach it has sustained (see Article 7.3.5 (2)).

3. A, a hospital, engages B to carry out cleaning services for the hospital, the contract to run for three years. After a year B informs A that it cannot continue with the cleaning services unless the price is doubled. A refuses to agree and B ceases to provide the service. On terminating the contract A can recover damages for any additional expense it incurs in hiring another cleaning firm (see Article 7.4.1 in conjunction with Article 7.3.5 (2)), while B is entitled to retain the payments it has received for services already provided (see Article 7.3.7 (1)).

The rule that restitution can only be claimed for the period after termination has taken effect does not apply if the contract is indivisible.

### Illustration

4. A undertakes to paint ten pictures depicting one and the same historical event for B's festival hall. After delivering and having been paid for five paintings, A abandons the work. In view of the fact that the decoration of the hall is supposed to consist of ten paintings to be painted by the same painter and showing different aspects of one historical event, B can claim the return of the advances paid to A and must return the five paintings to A.

## 2. Restitution

This Article is a special rule which, for long-term contracts ~~to be performed over a period of time~~, excludes restitution for ~~performances~~performance made in the past. To the extent that there is restitution under this Article, it is governed by the provisions under of Article 7.3.6.



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**Principles of International Commercial Contracts**  
**Working Group on Long-Term Contracts**

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**Annex 2**  
**Proposed Amendments/Additions to the UNIDROIT Principles**  
**on Contracts with Open Terms**

Rapporteur: Sir Vivian Ramsey

### ARTICLE 2.1.14

*(Contract with terms deliberately left open)*

(1) If the parties intend to conclude a contract, the fact that they intentionally leave a term to be agreed upon in further negotiations or to be determined by one of the parties or by a third person does not prevent a contract from coming into existence.

(2) The existence of the contract is not affected by the fact that subsequently

(a) ~~the parties reach no agreement on the term; or~~

(b) the party who is to determine the term does not do so; or

(c) the third person does not determine the term,

provided that there is an alternative means of rendering the term definite that is reasonable in the circumstances, having regard to the intention of the parties.

#### COMMENT

##### 1. Contract with terms deliberately left open

A contract may be silent on one or more issues because the parties simply did not think of them during the negotiations. Provided that the parties have agreed on the terms essential to the type of transaction concerned, a contract will nonetheless have been concluded and the missing terms will be supplied on the basis of Articles 4.8 or 5.1.2 (see Comment 1 on Article 2.1.2). Quite different is the case dealt with in this Article: here the parties intentionally leave open one or more terms because they are unable or unwilling to determine them at the time of the conclusion of the contract, and refer for their determination to an agreement to be made by them at a later stage, or to a determination to be made by one of them or by a third person.

This latter situation, which is especially frequent in, although not confined to, long-term ~~transactions~~contracts, gives rise in essence to two problems: first, whether the fact that the parties have intentionally left terms open prevents a contract from coming into existence and second, if this is not the case, what will happen to the contract if the parties subsequently fail to reach agreement or if the party or third person ~~fails~~who is to make the determination does not do so.

##### 2. Open terms not in themselves an impediment to valid conclusion of contract

Paragraph (1) states that if the parties intended to conclude a contract, the fact that they have intentionally left a term to be agreed upon in further negotiations or to be determined by one of the parties or by a third person does not prevent a contract from coming into existence.

In cases where it is not expressly stated, the parties' intention to conclude a contract notwithstanding the terms left open may be inferred from other circumstances, such as the non-essential character of the terms in question, the degree of definiteness of the agreement as a whole, the fact that the open terms relate to items which by their very nature can be determined only at a later stage, the fact that the agreement has already been partially executed, etc.

#### Illustration

1. A, a shipping line, enters into a detailed agreement with B, a terminal operator, for the use of B's container terminal. The agreement fixes the minimum volume of containers to be discharged or loaded annually and the fees payable, while the fees for additional containers are left to be determined if and when the minimum volume is reached. Two months later A learns

that B's competitor would offer better conditions and refuses to perform, claiming that the agreement with B never resulted in a binding contract because the question of the fees had not been settled. A is liable for non-performance because the detailed character of the agreement as well as the fact that both A and B began performance immediately indicate clearly that their intention was to enter into a binding agreement.

### 3. Failure of mechanism provided for by parties for determination of open terms

If the parties are unable to reach agreement on the open terms or if the party or the third person who is to make the determination does not ~~determine them~~ do so, the question arises as to whether or not the contract comes to an end. According to paragraph (2) of this Article the existence of the contract is not affected "provided that there is an alternative means of rendering the term definite that is reasonable in the circumstances, having regard to the intention of the parties". ~~A first alternative exists whenever the missing term can be supplied on the basis of Article 5.1.2; if~~

The alternative means of supplying the missing term will generally be application of the "gap-filling" provisions in Section 1 of Chapter 5 and Section 1 of Chapter 6, for example, by determining the price under Article 5.1.7(1) or by fixing the time for performance under Article 6.1.1 where those provisions can appropriately supply the relevant term. There may be situations, particularly in respect of long-term contracts, where those provisions may not be appropriate even where they cover the subject matter of the missing term. In such situations, the term will be supplied by Article 4.8 or Article 5.1.2.

Where the parties have deferred the determination of the missing term to a third person to be nominated by ~~an instance~~ a named institution or person such as the President of ~~the~~ Tribunal, or ~~of the~~ Chamber of Commerce, etc., ~~it may also consist in the appointment of~~ the nominated third person does not determine the term, a new third person ~~may be nominated.~~ The cases in which ~~a given contract may be upheld by resorting~~ it will be necessary to such alternative means will, however, nominate a new third person are likely to be quite rare in practice. Few problems should arise as long as the term to be implemented is of minor importance. If, on the other hand, the term in question is essential to the type of transaction concerned, there must be clear evidence of the intention of the parties to uphold the contract: among the factors to be taken into account in this connection are whether the term in question relates to items which by their very nature can be determined only at a later stage, whether the agreement has already been partially executed, etc.

#### Illustration

2. The facts are the same as in Illustration 1, except that when the minimum volume of containers to be loaded or unloaded is reached the parties fail to agree on the fees payable in respect of the additional containers. A stops performing, claiming that the contract has come to an end. A is liable for non-performance, since the fact that the parties have started performing without making future agreement on the missing term a condition for the continuation of their business relationship is sufficient evidence of their intention to uphold the contract even in the absence of such agreement. The fees for the additional containers will then generally be determined according to the criteria laid down in Article 5.1.7.

### 4. Open terms in long-term contracts

As stated above and particularly in the case of long-term contracts, the parties may leave a term to be agreed when that term applies only to obligations at a later stage of the contract. For example, the parties may agree a price which is only to apply during the first year of the

contract, leaving open the price to apply for the second or subsequent years. Equally, the parties may leave open the date for delivery because, for instance, the delivery of a piece of machinery may depend on the completion of a building before it is delivered. In such circumstances the term as to price may not be appropriately supplied by reference to Article 5.1.7 nor may time of performance be appropriately supplied by reference to Article 6.1.1. The appropriate term would then be supplied by Article 4.8 or Article 5.1.2.

### Illustrations

3. The facts are the same as in Illustration 1, except that the fees payable in respect of the additional containers are fixed for the first year but there is no provision as to the fees to be charged for the second or subsequent years. In such a case it may not be appropriate to determine the fees in accordance with Article 5.1.7 by reference to a price “at the time of the conclusion of the contract”. Instead, it may be appropriate to fix a fee by reference to the date at the end of the first year. A term to that effect could be supplied under Article 4.8 or Article 5.1.2.

4. X is a power company and has decided to construct a new power station. X is purchasing a generator from Y. The generator will be installed directly onto the foundations in the generator building at the power station after that building has been completed. A generator can be delivered no earlier than 3 years after it is ordered. X has not yet entered into a construction contract for the power station but the generator building will only take 6 months to complete once the construction contract starts. X places a contract now for the generator so that it will be ready in time but cannot yet fix a time for delivery. The parties leave the date of delivery as “to be agreed”. If they do not agree a date for delivery, it may not be appropriate to determine the time for delivery as being “within a reasonable time after conclusion of the contract” between X and Y, in accordance with the provisions of Article 6.1.1. It may be appropriate to fix a term by reference to the completion of the generator building. A term to that effect could be supplied under Article 4.8 or Article 5.1.2.

## ARTICLE 4.8

*(Supplying an omitted term)*

(1) Where the parties to a contract have not agreed with respect to a term which is important for a determination of their rights and duties, a term which is appropriate in the circumstances shall be supplied.

(2) In determining what is an appropriate term regard shall be had, among other factors, to

- (a) the intention of the parties;
- (b) the nature and purpose of the contract;
- (c) good faith and fair dealing;
- (d) reasonableness.

### COMMENT

#### 1. Supplying of omitted terms and interpretation

Articles 4.1 to 4.7 deal with the interpretation of contracts in the strict sense, i.e. with the determination of the meaning which should be given to contract terms which are unclear. This Article addresses a different though related issue, namely that of the supplying of omitted terms.

Omitted terms or gaps occur when, after the conclusion of the contract, a question arises which the parties have not regulated in their contract at all, either because they preferred not to deal with it or simply because they did not foresee it.

However, in other cases the parties may intentionally leave open terms, with the terms to be agreed upon in further negotiations or to be determined by one of the parties or by a third person. This will occur with particular frequency in long-term contracts. If the parties fail to agree or the party or third person fails to determine the term, Article 2.1.14 applies.

## 2. When omitted terms are to be supplied

In many cases of omitted terms or gaps in the contract the Principles will themselves provide a solution to the issue (see, for example, Articles 5.1.6 ~~(Determination of quality of performance)~~, 5.1.7 ~~(Price determination)~~, 6.1.1 ~~(Time of performance)~~, 6.1.4 ~~(Order of performance)~~, 6.1.6 ~~(Place of performance)~~ and 6.1.10 ~~(Currency not expressed)~~. ~~See also, in general, Article 5.1.2 on implied obligations~~). However, even when there are such suppletive, or “stop-gap”, rules of a general character-filling” solutions which may be generally applicable, they may not ~~be applicable~~ apply in a given case, particularly in long-term contracts because they would not provide a solution appropriate in the circumstances in view of the expectations of the parties or the special nature of the contract. This Article then applies, without prejudice to the application of Article 5.1.2, where appropriate.

## 3. Criteria for the supplying of omitted terms

The terms supplied under this Article must be appropriate to the circumstances of the case, particularly in relation to long-term contracts. In order to determine what is appropriate, regard is first of all to be had to the intention of the parties as inferred from, among other factors, the terms expressly stated in the contract, any preamble to the contract, prior negotiations or any conduct subsequent to the conclusion of the contract.

### Illustration

1. The parties to a construction contract agree on a special interest rate to be paid by the purchaser in the event of delay in payment of the price. Before the beginning of the work, the parties decide to terminate the contract. When the constructor delays restitution of the advance payment the question arises of the applicable interest rate. In the absence of an express term in the contract dealing with this question, the circumstances may make it appropriate to apply the special interest rate agreed for delay in payment of the price by the purchaser also to delay in restitution by the constructor.

If the intention of the parties cannot be ascertained, the term to be supplied may be determined in accordance with the nature and purpose of the contract, and the principles of good faith and fair dealing and reasonableness.

### Illustration

2. A distribution franchise agreement provides that the franchisee may not engage in any similar business for a year after the termination of the agreement. Although the agreement is silent on the territorial scope of this prohibition, it is, in view of the particular nature and purpose of the franchise agreement, appropriate that the prohibition be restricted to the territory where the franchisee had exploited the franchise.

**ARTICLE 5.1.2**  
*(Implied obligations)*

**Implied obligations stem from**

- (a) the nature and purpose of the contract;**
- (b) practices established between the parties and usages;**
- (c) good faith and fair dealing;**
- (d) reasonableness.**

**COMMENT**

This Article describes the sources of implied obligations. Different reasons may account for the fact that they have not been expressly stated. The implied obligations may for example have been so obvious, given the nature or the purpose of the obligation, that the parties felt that the obligations “went without saying”. Alternatively, they may already have been included in the practices established between the parties or prescribed by trade usages according to Article 1.9. Yet again, they may be a consequence of the principles of good faith and fair dealing and reasonableness in contractual relations.

**Illustrations**

1. A rents a full computer network to B and installs it. The contract says nothing as to A’s possible obligation to give B at least some basic information concerning the operation of the system. This may however be considered to be an implied obligation since it is obvious, and necessary for the accomplishment of the purpose of such a contract, that the provider of sophisticated goods should supply the other party with a minimum of information (see Article 5.1.2(a)).
2. A broker who has negotiated a charterparty claims the commission due. Although the brokerage contract is silent as to the time when the commission is due, the usages of the sector can provide an implied term according to which the commission is due, for example, only when the hire is earned, or alternatively when the charterparty was signed, regardless of whether or not the hire will effectively be paid (see Article 5.1.2(b)).
3. A and B, who have entered into the negotiation of a co-operation agreement, conclude an agreement concerning a complex feasibility study, which will be most time-consuming for A. Long before the study is completed, B decides that it will not pursue the negotiation of the co-operation agreement. Even though nothing has been stipulated regarding such a situation, good faith requires B to notify A of its decision without delay (see Article 5.1.2(c)).

**ARTICLE 5.1.7**

*(Price determination)*

- (1) Where a contract does not fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have made reference to the price generally charged at the time of the conclusion of the contract for such performance in comparable circumstances in the trade concerned or, if no such price is available, to a reasonable price.**
- (2) Where the price is to be determined by one party and that determination is manifestly unreasonable, a reasonable price shall be substituted notwithstanding any contract term to the contrary.**



(3) Where the price is to be fixed by one party or a third person, and that party or third person cannot or will does not do so, the price shall be a reasonable price.

(4) Where the price is to be fixed by reference to factors which do not exist or have ceased to exist or to be accessible, the nearest equivalent factor shall be treated as a substitute.

## COMMENT

### 1. General rule governing price determination

A contract usually fixes the price to be paid, or makes provision for its determination. If however this is not the case, paragraph (1) of this Article presumes that the parties have made reference to the price generally charged at the time of the conclusion of the contract for such performance in comparable circumstances in the trade concerned. All these qualifications are of course significant. The provision also permits the rebuttal of the presumption if there is any indication to the contrary.

This Article is inspired by Article 55 CISG. The rule has the necessary flexibility to meet the needs of international trade.

It is true that in some cases the price usually charged on the market may not satisfy the reasonableness test which prevails elsewhere in this Article. Recourse would then have to be made to the general provision on good faith and fair dealing (see Article 1.7), or possibly to some of the provisions on mistake, fraud and gross disparity (see Chapter 3, Section 2).

Some international contracts relate to operations which are unique or at least very specific, in respect of which it is not possible to refer to the price charged for similar performance in comparable circumstances. According to paragraph (1) the parties are then deemed to have made reference to a reasonable price and the party in question will fix the price at a reasonable level, subject to the possible review by courts or arbitral tribunals.

### Illustrations

1. A, a firm specialised in express mailing throughout the world, receives from B a parcel to be delivered as soon as possible from country X to country Y. Nothing is said as to the price. A should bill B with the price usually charged in the sector for such a service.
2. The next order which A receives from B is one to deliver another parcel as soon as possible to remote and not easily accessible country Z, where a team of explorers is in need of urgent supplies. Again, nothing is said as to price, but since no possible market comparison can be made A must act reasonably when fixing the price.

### 2. Determination of price by one party

In some cases the contract expressly provides that the price will be determined by one of the parties. This happens frequently in several sectors, for example the supply of services. The price cannot easily be determined in advance, and the performing party is in the best position to place a value on what it has done.

In those cases where the parties have made such a provision for determining the price, it will be enforced. To avoid possible abuses however, paragraph (2) enables judges or arbitrators to replace a manifestly unreasonable price by a reasonable one. This provision is mandatory.

If the party does not determine the price, paragraph (3) provides that the price, possibly determined by judges or arbitrators, shall be reasonable.

### 3. Determination of price by third person

A provision that the price will be determined by a third person can give rise to serious difficulty if that third person is unable to accomplish the mission (not being the expert he or she was thought to be) or ~~refuses to~~does not do so. Paragraph (3) provides that the price, possibly determined by judges or arbitrators, shall be reasonable. If the third person determines the price in circumstances that may involve fraud, threat or gross disparity ~~or threat~~, Article 3.2.8(2) may apply.

The parties are free to fix the standards or procedure with which the third person must comply in determining the price. The parties can challenge the determination if it does not comply with those standards or that procedure. The parties may also set out the grounds on which the determination of a price by a third person can be challenged, which may vary depending on the nature of the determination. As an example, if the agreed standard concerns an opinion as to “market price” the parties may agree that the price determined by an expert can be challenged on the basis that it is “manifestly unreasonable”. In another case, if the standard concerns the ascertainment of a fact, such as “mid-point of an index”, the parties may agree the price can be challenged if it is “erroneous”.

### 4. Determination of price by reference to external factors

In some situations the price is to be fixed by reference to external factors, typically a published index, or quotations on a commodity exchange. In cases where the reference factor ceases to exist or to be accessible, paragraph (4) provides that the nearest equivalent factor shall be treated as a substitute.

#### Illustration

3. The price of a construction contract is linked to several indexes, including the “official index of charges in the construction sector”, regularly published by the local Government. Several instalments of the price still have to be calculated when that index ceases to be published. The Construction Federation, a private trade association, decides however to start publishing a similar index to replace the former one and in these circumstances the new index will serve as a substitute.



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**Principles of International Commercial Contracts**  
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**Annex 3**  
**Proposed Amendments/Additions to the UNIDROIT Principles**  
**on Agreements to Negotiate in Good Faith**

Rapporteur: Professor Neil Cohen

**ARTICLE 2.1.15**  
*(Negotiations in bad faith)*

(1) A party is free to negotiate and is not liable for failure to reach an agreement.

(2) However, a party who negotiates or breaks off negotiations in bad faith is liable for the losses caused to the other party.

(3) It is bad faith, in particular, for a party to enter into or continue negotiations when intending not to reach an agreement with the other party.

**COMMENT**

**1. Freedom of negotiation**

[...]

**2. Liability for negotiating in bad faith**

A party's right freely to enter into negotiations and to decide on the terms to be negotiated is, however, not unlimited, and must not conflict with the principle of good faith and fair dealing laid down in Article 1.7. One particular instance of negotiating in bad faith which is expressly indicated in paragraph (3) of this Article is that where a party enters into negotiations or continues to negotiate without any intention of concluding an agreement with the other party. Other instances are where one party has deliberately or by negligence misled the other party as to the nature or terms of the proposed contract, either by actually misrepresenting facts, or by not disclosing facts which, given the nature of the parties and/or the contract, should have been disclosed. As to the duty of confidentiality, see Article 2.1.16.

A party's liability for negotiating in bad faith is limited to the losses caused to the other party (paragraph (2)). In other words, the aggrieved party may recover the expenses incurred in the negotiations and may also be compensated for the lost opportunity to conclude another contract with a third person (so-called reliance or negative interest), but may generally not recover the profit which would have resulted had the original contract been concluded (so-called expectation or positive interest).

~~Only if the parties have expressly agreed on a duty to negotiate in good faith, will all the remedies for breach of contract be available to them, including the remedy of the right to performance.~~

**Illustrations**

1. A learns of B's intention to sell its restaurant. A, who has no intention whatsoever of buying the restaurant, nevertheless enters into lengthy negotiations with B for the sole purpose of preventing B from selling the restaurant to C, a competitor of A's. A, who breaks off negotiations when C has bought another restaurant, is liable to B, ~~who ultimately succeeds in selling the restaurant at a lower price than that offered by C,~~ for B's losses. These losses may include the difference in price and whatever other losses may be established.

2. A, who is negotiating with B for the promotion of the purchase of military equipment by the armed forces of B's country, learns that B will not receive the necessary import licence from its own governmental authorities, a pre-requisite for permission to pay B's fees. A does not reveal this fact to B and finally concludes the contract, which, however, cannot be enforced by reason of the missing ~~license~~ licence. A is liable to B for the costs incurred after A had learned of the impossibility of obtaining the required licence.

3. A enters into lengthy negotiations for a bank loan from B's branch office. At the last minute the branch office discloses that it had no authority to sign and that its head office has decided not to approve the draft agreement. A, who could in the meantime have obtained the loan from another bank, is entitled to recover the expenses entailed by the negotiations and the profits it would have made during the delay before obtaining the loan from the other bank.

### 3. Agreement to negotiate in good faith

By contrast, if the parties have specifically agreed on a duty to negotiate in good faith, all appropriate remedies for non-performance will be available, including the right to performance (such as by directing the parties to negotiate) and other remedies reflecting the expectation or positive interest (to the extent that the requirements for such remedies can be demonstrated).

An agreed-upon duty to negotiate in good faith means, at the least, a duty to negotiate (or re-negotiate) seriously with an intent to conclude an agreement, but not that an agreement must be reached. Of course, this duty does not displace other duties under the Principles (e.g. Articles 1.8 and 2.1.16). In the case of a complex long-term contract, parties who agree on a duty to negotiate in good faith may wish to further define that duty in light of the nature of the contract and its commercial context. For example, they may set standards of confidentiality, agree on a timetable for the negotiation, etc.

#### Illustration

4. Contractor A and supplier B enter into a pre-bid agreement whereby they undertake to negotiate in good faith for the supply of equipment in the event that A succeeds in becoming prime contractor for a major construction project. A is awarded the construction contract, but after preliminary contacts with B refuses to continue the negotiations. B may request enforcement of the duty to negotiate in good faith.

### **34. Liability for breaking off negotiations in bad faith**

[...]

#### **ARTICLE 5.1.4**

*(Duty to achieve a specific result.*

*Duty of best efforts)*

(1) To the extent that an obligation of a party involves a duty to achieve a specific result, that party is bound to achieve that result.

(2) To the extent that an obligation of a party involves a duty of best efforts in the performance of an activity, that party is bound to make such efforts as would be made by a reasonable person of the same kind in the same circumstances.

#### **COMMENT**

##### **1. Distinction between the duty to achieve a specific result and the duty of best efforts**

[...]

## 2. Distinction provides criteria for determining whether a party has performed its obligations

[...]

### 3. Long-term contracts

In international contract practice, especially in the context of long-term contracts, when provision is made for parties to work together to resolve issues that may arise, it is common to speak of a duty “to use best efforts” to resolve such issues rather than a duty “to negotiate in good faith.” When the parties to a long-term contract have agreed on such a duty to use best efforts, that duty may amount, for all practical purposes, to a duty to negotiate in good faith (see Article 2.1.15, Comment 3).



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**Principles of International Commercial Contracts**  
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**Annex 4**  
**Proposed Amendments/Additions to the UNIDROIT Principles**  
**on Contracts with Evolving Terms**

Rapporteur: Professor Michael Joachim Bonell

### ARTICLE 4.3

*(Relevant circumstances)*

In applying Articles 4.1 and 4.2, regard shall be had to all the circumstances, including

- (a) preliminary negotiations between the parties;
- (b) practices which the parties have established between themselves;
- (c) the conduct of the parties subsequent to the conclusion of the contract;
- (d) the nature and purpose of the contract;
- (e) the meaning commonly given to terms and expressions in the trade concerned;
- (f) usages.

#### COMMENT

##### 1. Circumstances relevant in the interpretation process

[...]

##### 2. “Particular” and “general” circumstances compared

[...]

##### ~~3. “Merger” clauses~~

##### 3. Practices established between parties and conduct subsequent to the conclusion of the contract relevant particularly in interpretation of long-term contracts

Conduct subsequent to the conclusion of the contract can assist in determining what the parties intended their obligations to be. This may be the case particularly in the context of long-term contracts which involve complex performance and are “evolutionary” in nature, i.e. may require adaptations in the course of performance. Such contracts may involve repeated performance by one party with the opportunity for the other to assert that such performance does not conform to the contract.

As a rule the subsequent conduct of the parties can only be an interpretative tool, i.e. be used to explain or amplify, but not to contradict, the terms of the contract as originally agreed between the parties.

#### Illustrations

5. Supplier A enters into a five-year contract with Shopping Mall B to supply B’s need for “salt” to clear ice in its parking lot and on its sidewalks. For the first two winters, Supplier A provides an ice-melting substance which is not a “salt,” with no objection being raised by B. At the start of the next winter, B objects that the substance is not a “salt” as stated in the contract. The fact that for two winters both A and B performed as though the supplied substance satisfied the contract permits the inference that the parties intended the contract’s reference to “salt” to include such an ice-melting substance.

6. Contractor A agrees to provide Client B with concrete slabs of a particular thickness in a building at a unit price of X without specifying whether that price applies to a square metre of those slabs or cubic metres of concrete. The parties perform over several months without any objection as though the unit price applied to square metres of slabs. A dispute subsequently



arises regarding the proper unit of measure. The fact that for several months A and B had performed as though the proper unit of measure was square metres of slabs permits the inference that the parties intended that to be the proper unit of measure.

To avoid any uncertainty as to the effects of subsequent conduct on the content of the contract, the parties may wish to adopt particular mechanisms for possible variations and adjustments of the contract in the course of performance. They may, for instance, provide for the issuance of “variation orders” by one party for acceptance by the other party (e.g. in construction contracts the “Employer’s Representative” and the “Contractor’s Representative”, respectively), or establish special bodies composed of representatives of both parties or of independent experts (so-called “contract management committees”, “auditing bodies” or the like), with the task of monitoring both parties’ performance and possibly also of suggesting adjustments to the contract so as to bring it in line with developments. Obviously, the more precisely the parties regulate the procedure for adjustments to the contract, the less relevant any informal conduct of the parties would be to the interpretation of the contract.

### Illustrations

7. A construction contract between Employer A and Contractor B provides that A’s “Representative” has the authority to give instructions regarding additions, omissions or other changes in work to be performed by B. So long as those additions, omissions or other changes fall within the overall scope of work under the contract, B will be bound to perform them and they will have the effect of changing the relevant work provided for in the original contract.

8. Contractor A enters into a Design, Build and Operate (DBO) contract with Company B to design and build a factory and operate it for twenty years. The contract provides for the parties to appoint jointly an independent and impartial Auditing Body whose purpose is to audit and monitor the compliance of each of the parties with the operation management requirements set out in the contract. The contract may also provide that, if the Auditing Body determines that a party has failed to comply, that party must take appropriate corrective action. Therefore, if in a given case the Auditing Body determines that A has not complied with its obligations under the contract, A is bound to take the appropriate action.

## 4. “Merger” and “No oral modification” clauses

Parties to international commercial transactions in general, and to complex long-term contracts in particular, frequently include a provision indicating that the contract document completely embodies the terms on which they have agreed. ~~For the effect of these so-called “merger” or “integration”~~ (so-called “merger” or “entire agreement” clauses) and that any modification to the contract or specific terms of it must be made in writing (so-called “no oral modification clauses”). For the effect of the former type of clauses, in particular whether and to what extent they exclude the relevance of preliminary negotiations between the parties, albeit only for the purpose of the interpretation of the contract, see Article 2.1.17. As to the latter type of clauses, see Article 2.1.18, and the limitation of the rule therein contained by virtue of the principle of prohibition of inconsistent behaviour laid down in Article 1.8.

### Illustration

9. Manufacturer A enters into an agreement with Distributor B for the distribution of its products in country X. The agreement expressly states that the distributorship is non-exclusive and, in fact, in country X A's products are distributed also by Distributor C. The agreement between A and B also contains a "no-oral modification" clause according to which any modification of its terms has to be in writing and approved by A's parent company. Subsequently C ceases its activity and B acts, to A's knowledge, as though it has become the exclusive distributor of A's products in country X by, among others things, holding itself out as such to C's clients, without any reaction on the part of A. When A replaces C with a new distributor, B may not object that by their conduct A and B have modified their original agreement, turning it into an exclusive agreement.



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**Principles of International Commercial Contracts**  
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**Annex 5**  
**Proposed Amendments/Additions to the UNIDROIT Principles**  
**on Supervening Events**

Rapporteur: Professor Neil Cohen

**ARTICLE 7.1.7**  
*(Force majeure)*

(1) Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

(2) When the impediment is only temporary, the excuse shall have effect for such period as is reasonable having regard to the effect of the impediment on the performance of the contract.

(3) The party who fails to perform must give notice to the other party of the impediment and its effect on its ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, it is liable for damages resulting from such non-receipt.

(4) Nothing in this Article prevents a party from exercising a right to terminate the contract or to withhold performance or request interest on money due.

**COMMENT**

**1. The notion of force majeure**

[...]

**2. Effects of force majeure on the rights and duties of the parties**

[...]

**3. Force majeure and hardship**

This Article must be read together with Chapter 6, Section 2 of the Principles dealing with hardship (see Comment 6 on Article 6.2.2).

**4. Force majeure and contract practice**

[...]

**5. Long-term contracts**

Force majeure, like hardship, is typically relevant in long-term contracts (see Comment 5 on Article 6.2.2), and the same facts may present both hardship and force majeure (see Comment 6 on Article 6.2.2). In the case of hardship, the Principles encourage negotiation between the parties to the end of continuing the relationship rather than dissolving it (see Article 6.2.3).

Similarly, in the case of force majeure, parties to long-term contracts can anticipate that, in light of the duration and nature of the relationship and, possibly, large initial investments whose value would be realised only over time, they would have an interest in continuing rather than terminating their business relationship. Accordingly, the parties may wish to provide in their contract for the continuation, whenever feasible, of the business relationship even in the case of force majeure, and envisage termination only as a last resort. Such provisions can take a number of forms.

### Illustration

3. A long-term contract contains a provision to the effect that, except where it is clear from the outset that an impediment to a party's performance is of a permanent nature, the obligations of the party affected by the impediment are temporarily suspended for the length of the impediment, but for no more than 30 days, and any right of either party to terminate the contract is similarly suspended. The provision also states that, at the end of that time period, if the impediment continues the parties will negotiate with a view to agreeing to prolong the suspension on terms that are mutually agreed. It also states that, if such agreement cannot be reached, disputed matters will be referred to a dispute board pursuant to the *ICC Dispute Board Rules*. The parties are bound by that procedure.



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**Annex 6**  
**Proposed Amendments/Additions to the UNIDROIT Principles**  
**on Co-operation between the Parties**

Rapporteur: Professor Michael Joachim Bonell

### ARTICLE 5.1.3

*(Co-operation between the parties)*

**Each party shall cooperate with the other party when such co-operation may reasonably be expected for the performance of that party's obligations.**

#### COMMENT

##### 1. Duty of co-operation as an application of the general principle of good faith and fair dealing

A contract is not merely a meeting point for conflicting interests but must also, to a certain extent, be viewed as a common project in which each party must cooperate. This view is clearly related to the principle of good faith and fair dealing (see Article 1.7) which permeates the law of contract, as well as to the obligation to mitigate harm in the event of non-performance (see Article 7.4.8).

This Article states the parties' duty to cooperate with each other to the extent that such co-operation may reasonably be expected for the performance of their respective obligations. Instances of such duty are expressly or implicitly provided for in the Principles either in the black letter rules (see Article 5.3.3, Article 7.1.2, and Article 7.4.8) or in the comments (see e.g. Comment 3 to Article 6.1.6, Comment 3(a) to Article 6.1.14, and Comment 10 to Article 7.1.4). However, there are many other instances in which the parties may be requested to cooperate with each other in the course of contract formation or contract performance.

The duty of co-operation must of course be confined within certain limits ~~(the provision refers to reasonable expectations), so as not to upset~~, i.e. it only exists to the extent that co-operation may reasonably be expected to enable the other party to perform, without upsetting the allocation of duties in the ~~performance of the contract. Although the principal concern of the provision is the duty not to hinder~~ contract. Within these limits each party may be under a duty not only to refrain from hindering the other party from performing its obligation(s), but also to take affirmative steps to enable the other party's performance, ~~there may also be circumstances which call for more active co-operation.~~

#### Illustrations

~~1.— A, after contracting with B for the immediate delivery of a certain quantity of oil, buys all the available oil on the spot market from another source. Such conduct, which will hinder B in performing its obligation, is contrary to the duty of co-operation.~~

21. A, an art gallery in country X, buys a sixteenth century painting from B, a private collector in country Y. The painting may not be exported without a special authorisation and the contract requires B to apply for that permission. B, who has no experience of such formalities, encounters serious difficulties with the application whereas A is familiar with such procedures. In these circumstances, and notwithstanding the contractual provision, A can be expected to give at least some assistance to B.

2. Company A and Company B enter into a contract for the sale of electricity by A to B. The contract is not performed by B, prompting A to sue B for breach of contract and damages. B objects that the contract is null and void for lack of registration in the Public Registry. According to the applicable law the registration of the contract is a joint task of the parties; since B has not done what it was required to do in order to obtain the registration, such registration could not be accomplished. B is not entitled to rely on the lack of registration of the contract, as a defence to A's claim.

3. Seller A, situated in country X, concludes with Buyer B, situated in country Y, a contract for the sale of goods to be delivered in installments. After the discovery by B of alleged defects in part of the goods delivered, A agrees to a price reduction and an extension of payment dates, but in turn asks B promptly to submit a formal notice of the defects together with other documents A needs to explain to the export and exchange control authorities of its country the reasons for the reduced price and the extended dates of payment, so as to avoid severe penalties. Since B only gradually and partially meets A's requests, A informs B that it will make the remaining deliveries conditional upon B's submission of the requested documents and the prompt payment of the goods already delivered. B may not object that in so doing A was breaching the contract (and the subsequent agreement on the extension of payment), since it was B who with its obstructionist behaviour had failed to observe its general duty of co-operation under the contract.

## 2. Co-operation between parties in the context of long-term contracts

Although this Article states the duty of co-operation in general terms for all types of contract, in practice co-operation may be particularly important in the context of long-term contracts. Particularly contracts involving performance of a complex nature may especially need co-operation throughout the life of the contract in order for the transaction to work, although always within the limit of reasonable expectations. Thus, by way of example, in a contract for the construction of industrial works the employer may be required to prevent interferences in the contractor's work by other contractors it employs to carry out other works at the site. Likewise, in a distributorship agreement the supplier is under a duty to abstain from any conduct that might hinder the distributor from achieving the contractually-agreed minimum of orders, or in a franchising agreement the franchisor may be prevented from setting up a competing business in the immediate neighbourhood of the franchisee's business even if the franchise is not exclusive.

Obviously also in the context of long-term contracts the parties' duty to cooperate exists only within the limit of reasonable expectations.

### Illustrations

4. Contractor A is awarded by B, a Governmental Agency in country X, a contract to build a 3000 house complex in country X. Since it is a greenfield project, also electricity and water have to be brought in, and the respective works have to be executed in a certain sequence so as not to conflict with each other. B awards the electrical contracts to local contractors, but then completely fails to coordinate their work with A's work with the result that A repeatedly has to interrupt its work thereby causing A considerable loss. B is liable for this loss since, in the circumstances, it should have actively coordinated the work of the local contractors so that A's work would not be interrupted in such manner.

5. Company A, situated in country X, and Company B, situated in country Y, enter into a joint venture agreement for participation in a public bidding procedure in country X. The contract is finally awarded to a third party. The procedure was manifestly improper, but B refuses to provide A with information necessary to appeal the award before the competent authority, thereby hindering A from pursuing the appeal. By its refusal, B has breached its general duty of co-operation to A under the joint venture agreement.





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**Principles of International Commercial Contracts**  
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**Annex 7**  
**Proposed Amendments/Additions to the UNIDROIT Principles**  
**on Restitution after Ending Contracts Entered into for an Indefinite Period**

Rapporteur: Professor Reinhard Zimmermann

### ARTICLE 5.1.8

*(~~Contract~~ Termination of a contract for an indefinite period)*

A contract for an indefinite period may be ~~ended~~terminated by either party by giving notice a reasonable time in advance. As to the effects of termination in general, and as to restitution, the provisions in Articles 7.3.5 and 7.3.7 apply.

#### COMMENT

##### 1. Contract for an indefinite period

The duration of a contract is often specified by an express provision, or it may be determined from the nature and purpose of the contract (e.g. technical expertise provided in order to assist in performing specialised work). However, there are cases when the duration is neither determined nor determinable. Parties can also stipulate that their contract is concluded for an indefinite period.

~~This~~The Article provides that in such cases either party may ~~end~~terminate the contractual relationship by giving notice a reasonable time in advance. What a reasonable time in advance will be will depend on circumstances such as the period of time the parties have been cooperating, the importance of their relative investments in the relationship, the time needed to find new partners, etc.

The rule can be understood as a gap-filling provision in cases where parties have failed to specify the duration of their contract. More generally, it also relates to the widely recognised principle that contracts may not bind the parties eternally and that they may always opt out of such contracts provided they give notice a reasonable time in advance.

This situation is to be distinguished from the case of hardship which is covered by Articles 6.2.1 to 6.2.3. Hardship requires a fundamental change of the equilibrium of the contract, and gives rise, at least in the first instance, to renegotiations. The rule in this Article requires no special condition to be met, except that the duration of the contract be indefinite and that it permit unilateral ~~cancellation~~termination.

#### Illustration

1. A agrees to distribute B's products in country X. The contract is concluded for an indefinite period. Either party may ~~cancel this arrangement unilaterally, provided that it gives~~terminate the contract by giving the other party notice a reasonable time in advance.

##### 2. Termination and its consequences

The effects of termination in general are those set out in Article 7.3.5. Both parties are released from their obligation to render and to receive future performance.

The fact that, by virtue of termination, the contract is brought to an end does not deprive a party to the contract of its right to claim damages for any non-performance.

#### Illustration

2. The facts are the same as in Illustration 1. After the contract has been in operation for five years, B gives notice of termination. It is subsequently determined that, for a period of six months during the year before B had given notice of termination, A failed to discharge its obligations under the contract. As a result, B suffered a loss of income. Notwithstanding the termination, B may claim damages under the rules set out in Chapter 7, Section 4.

Termination also does not affect any provision in the contract for the settlement of disputes or any other term of the contract which is to operate even after termination (see Comments 3 and 4 on Article 7.3.5).

Performance of a contract for an indefinite period might have been made over a long period of time before the contract is terminated, and it may thus be inconvenient to unravel such performance. Furthermore, termination is a remedy with prospective effect only. Restitution can, therefore, be claimed only in respect of the period after termination. This is set out in Article 7.3.7(1), with the consequence that, as far as restitution has to be made, the provisions of Article 7.3.6 apply as set out in Article 7.3.7(2).



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**Principles of International Commercial Contracts**  
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**Annex 8**  
**Proposed Amendments/Additions to the UNIDROIT Principles**  
**on Termination for Compelling Reason**

Rapporteurs: Sir Vivian Ramsey and Professor Reinhard Zimmermann

## SECTION 3: TERMINATION FOR COMPELLING REASON

### ARTICLE 6.3.1

*(Right to terminate for compelling reason)*

(1) A party may terminate a long-term contract if there is compelling reason for doing so.

(2) There is compelling reason only if, having regard to all the circumstances of the case, it would be manifestly unreasonable for the terminating party to be expected to continue the contractual relationship.

(3) The right of a party to terminate the contract is exercised by notice to the other party.

(4) Termination of the contract for compelling reason takes effect as from the time of notice.

### COMMENT

#### 1. Compelling reason

In the case of long-term contracts, particularly those characterised by an ongoing relationship of cooperation and trust between the parties, events may occur which lead to a breakdown of that relationship. When that is the case, the contract may be terminated. The right of termination under this Article is an exceptional remedy that can be resorted to only if the breakdown of the relationship is irreparable. The decisive test is whether it would be manifestly unreasonable for the terminating party to be expected to continue the contractual relationship. This has to be determined by taking into account all the circumstances of the case. The reason to terminate, in other words, has to be compelling.

#### 2. Termination for compelling reason and other provisions dealing with termination

The Principles include other provisions dealing with termination, but those provisions do not specifically address the situation where there is an irreparable breakdown in the relationship between parties to long-term contracts. Thus, termination for compelling reason is not available in cases of hardship because a fundamental alteration of the equilibrium of the contract, as envisaged by Article 6.2.2, does not involve an irreparable breakdown of the contractual relationship. In cases of hardship the disadvantaged party is entitled to renegotiations (see Article 6.2.3). Such renegotiations, in turn, would be meaningless if the breakdown is irreparable. Force majeure, under the Principles, does not give rise to a right of termination. The effect of force majeure is that it excuses the non-performing party from liability for damages (see Article 7.1.7). The mere fact that a party is prevented from performing as a result of an impediment beyond its control does not constitute compelling reason to terminate under this Article.

It is neither necessary, nor sufficient, for one party to be in breach of contract for the other to be granted a right to terminate for compelling reason. In cases of fundamental non-performance by one party, the other has a right to terminate under Article 7.3.1. If there also exist circumstances which make it manifestly unreasonable to continue the relationship, then that party will also be able to terminate for compelling reason.

## Illustrations

1. A, a manufacturer in country X of sophisticated machines for large volume mailings, appoints B as its exclusive distributor in country Y for a term of fifteen years. Ten years later, B is sold to C, which is a long-time direct competitor of A and, as a consequence of the sale of B to C, C would gain access to A's confidential customer information and customers in country Y. In these circumstances, it would be manifestly unreasonable to expect A to continue the distribution agreement with B. A may therefore terminate that contract for compelling reason.

2. Following its worldwide expansion into both the auditing and consulting business, Company A decides to split its activity into two business units, X and Y: X concentrating on the auditing business and Y concentrating on the consulting business. By an agreement, X and Y undertake, among other things, to coordinate their business practices so as to avoid undue overlap. Over the years, however, the relationship between the two business units deteriorates. X, attracted by the increasingly favourable prospects of the consulting business, begins to develop its own consulting practice, while Y complains that such behaviour constitutes undue interference with its own professional practice. There are numerous failed attempts to resolve their differences. In such circumstances either of them can terminate the agreement because it would be manifestly unreasonable for them to continue the contractual relationship due to their irreconcilable differences as to the precise scope of their respective business practices.

3. A, a software development company, enters into a co-operation agreement with B, another company developing software, to collaborate to produce software programmes for games on smartphones. A finds that its costs of employing software developers increase dramatically because of a shortage of specialist developers resulting from the growth in the smartphone game market. As a result, the profits made by A under the co-operation agreement decrease significantly. Whilst A may be able to demand renegotiation of the contract if the requirements of Article 6.2.2 are met, it is not manifestly unreasonable to expect A to continue the co-operation agreement and, therefore, A cannot terminate that agreement for compelling reason.

4. C and D are companies who form a joint venture agreement to develop a chain of luxury hotels. They agree to provide financing in equal shares but C is finding it difficult to raise capital to meet its financial commitment. The chain of hotels therefore cannot be developed. Whilst D may be able to invoke the provisions on termination for fundamental non-performance under Article 7.3.1, it is not manifestly unreasonable to expect D to continue the joint venture agreement. D cannot, therefore, terminate the agreement for compelling reason.

### **3. Inappropriate termination for compelling reason**

If a party gives notice of termination under this Article without there being compelling reason, this may constitute anticipatory non-performance. The other party may then terminate the contract for fundamental non-performance under Article 7.3.3. Alternatively, that party may keep the relationship alive and withhold its own performance under Article 7.3.4.

### **4. Non-mandatory nature of right to terminate**

The provisions on termination for compelling reason, in line with the general principle laid down in Article 1.5, are not of a mandatory character. The parties may thus exclude or limit their application. They may also indicate in their contract specific cases, which entitle a party to terminate for compelling reason.

## 5. Termination by notice

The right of a party to terminate a contract for compelling reason is exercised by giving notice to the other party. Termination takes effect as from the time of notice. The notice is effective when the other party receives it (see Article 1.10).

### ARTICLE 6.3.2

*(Effects of termination for compelling reason)*

As to the effects of termination of a long-term contract for compelling reason in general, and as to restitution, the provisions in Articles 7.3.5 and 7.3.7 apply.

### COMMENT

The effects of termination for compelling reason in general are those set out in Article 7.3.5. Both parties are released from their obligation to render and to receive future performance.

The fact that, by virtue of termination, the contract is brought to an end does not deprive a party to the contract of its right to claim damages for any non-performance.

Termination also does not affect any provision in the contract for the settlement of disputes or any other term which is to operate even after termination (see Comments 3 and 4 on Article 7.3.5).

Performance of a long-term contract might have been made over a long period of time before the contract is terminated for compelling reason. This may make it inconvenient to unravel such performance. Furthermore, termination is a remedy with prospective effect only. Restitution can, therefore, be claimed only in respect of the period after termination. This is set out in Article 7.3.7(1), with the consequence that, as far as restitution has to be made, the provisions of Article 7.3.6 apply as set out in Article 7.3.7(2).



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**Annex 9**  
**Proposed Amendments/Additions to the UNIDROIT Principles**  
**on Post-contractual Obligations**

Rapporteur: Professor Christine Chappuis



**ARTICLE 7.3.5**  
*(Effects of termination in general)*

(1) Termination of the contract releases both parties from their obligation to effect and to receive future performance.

(2) Termination does not preclude a claim for damages for non-performance.

(3) Termination does not affect any provision in the contract for the settlement of disputes or any other term of the contract which is to operate even after termination.

**COMMENT**

**1. Termination extinguishes future obligations**

Paragraph (1) of this Article states the general rule that termination has effects for the future in that it releases both parties from their duty to effect and to receive future performance.

**2. Claim for damages not affected**

The fact that, by virtue of termination, the contract is brought to an end, does not deprive the aggrieved party of its right to claim damages for non-performance in accordance with the rules laid down in Section 4 of this Chapter.

**Illustration**

1. A sells B specified production machinery. After B has begun to operate the machinery serious defects in it lead to a shutdown of B's assembly plant. B declares the contract terminated but may still claim damages (see Article 7.3.5(2)).

**3. Contract provisions not affected by termination**

Notwithstanding the general rule laid down in paragraph (1), there may be provisions ~~in the contract~~ or obligations which survive ~~its~~ termination. This is the case in particular with provisions or obligations relating to dispute settlement and governing law but there may be ~~others~~ other provisions or obligations which by their very nature are intended to continue to operate even after termination, or to operate only upon termination. They may relate to provisions on confidentiality, non-competition, payment of interest, or unwinding of the contractual relationship (e.g., return of inventory, documents or advertising materials; return of media or documents containing confidential information, indemnities, treatment of intellectual property rights or databases, exit costs, etc.).

~~Illustration~~

Illustrations

2. The facts are the same as in Illustration 1, except that A discloses to B confidential information which is necessary for the production and which B agrees not to ~~divulge~~ disclose for as long as it does not become public knowledge. The contract further contains a clause referring disputes to the courts of A's country. Even after termination of the contract by B, B remains under a duty not to ~~divulge~~ disclose the confidential information, and any dispute relating to the contract and its effects ~~are~~ is to be settled by the courts of A's country (see Article 7.3.5(3)).

3. A, an equipment leasing company established in country X, leases a commercial aircraft to B, an airline operating regional flights in country Z. The aircraft is registered for nationality purposes in country Z in the name of B, as operator. As international aviation regulation prevents the redeployment of the aircraft without it being de-registered from Z, B has contractually agreed to procure that de-registration upon termination. B decides to standardise its fleet and terminates the lease. There is no power of attorney previously issued to A to arrange for the de-registration and export of the aircraft. B has a duty to cooperate with A in obtaining the de-registration and necessary administrative authorisations that will allow A to relocate the aircraft to another country.

#### **4. Post-termination obligations in long-term contracts**

The issue of post-termination obligations is particularly relevant for long-term contracts. In relation to surviving provisions, the parties should consider addressing the following issues: which provisions are to survive termination, whether such provisions are binding on one or both parties after termination, how long they survive, who will bear the cost, which remedies are available in case of non-performance, etc. Surviving provisions may be dealt with in various ways: by a general clause stating that all provisions which by their nature are intended to operate even after termination will remain in force; by listing the specific provisions intended to survive; or by stating in the provision concerned that it is to remain in force notwithstanding termination. Contract drafters should pay close attention to the compatibility of the surviving duties with mandatory domestic law (e.g. limitations on prohibitions to compete).

#### Illustrations

4. The facts are the same as in Illustration 3. The contract between A and B contains an indemnification clause by the latter in favour of the former for losses attributable to the delay in de-registration of the aircraft, which is expressed to survive contractual termination. That indemnification clause operates and is enforceable independent of any damage claim under the terminated contract, though the payment thereof would impact the calculation of damages under such contract.

5. Consultant A undertakes to provide consultancy services for a new product to Client B for an indefinite period. Intellectual property rights arising out of A's services remain at all times with B, with royalties being payable for a period of fifteen years from the date of first sale. Five years after the duty to pay royalties by B to A has arisen, the contract is terminated pursuant to Article 5.1.8. B's obligation to pay royalties will survive termination during the remaining period of ten years.

6. Client A and Provider B are parties to an agreement under which a telecommunication system is to be provided by B to A. According to the agreement, B shall, upon termination, assist A in the migration of the services to an alternative provider and A is to pay the exit costs. The agreement is terminated. B is under a duty to assist A in migrating the system with A paying the exit costs.