UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016[1]

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.*
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.

Chapter 1 — General Provisions

Article 1.1 (Freedom of contract)
The parties are free to enter into a contract and to determine its content.
Article 1.2 (No form required)
Nothing in these Principles requires a contract, statement or any other act to be made in or evidenced by a particular form. It may be proved by any means, including witnesses.
Article 1.3 (Binding character of contract)
A contract validly entered into is binding upon the parties. It can only be modified or terminated in accordance with its terms or by agreement or as otherwise provided in these Principles.
Article 1.4 (Mandatory rules)
Nothing in these Principles shall restrict the application of mandatory rules, whether of national, international or supranational origin, which are applicable in accordance with the relevant rules of private international law.
Article 1.5 (Exclusion or modification by the parties)
The parties may exclude the application of these Principles or derogate from or vary the effect of any of their provisions, except as otherwise provided in the Principles.
Article 1.6 (Interpretation and supplementation of the Principles)
(1) In the interpretation of these Principles, regard is to be had to their international character and to their purposes including the need to promote uniformity in their application.
(2) Issues within the scope of these Principles but not expressly settled by them are as far as possible to be settled in accordance with their underlying general principles.
Article 1.7 (Good faith and fair dealing)
(1) Each party must act in accordance with good faith and fair dealing in international trade.
(2) The parties may not exclude or limit this duty.
Article 1.8 (Inconsistent behaviour)
A party cannot act inconsistently with an understanding it has caused the other party to have and upon which that other party reasonably has acted in reliance to its detriment.
Article 1.9 (Usages and practices)
(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.
(2) The parties are bound by a usage that is widely known to and regularly observed in international trade by parties in the particular trade concerned except where the application of such a usage would be unreasonable.
Article 1.10 (Notice)
(1) Where notice is required it may be given by any means appropriate to the circumstances.

1 For other language versions → Introduction no. 12.
* Parties wishing to provide that their agreement be governed by the Principles might use one of the *Model Clauses for the use of the Unidroit Principles of International Commercial Contracts* (see http://www.unidroit.org/instruments/commercial-contracts/upicc-model-clauses).

(2) A notice is effective when it reaches the person to whom it is given.
(3) For the purpose of paragraph (2) a notice "reaches" a person when given to that person orally or delivered at that person's place of business or mailing address.
(4) For the purpose of this Article "notice" includes a declaration, demand, request or any other communication of intention.
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.

Article 1.12 (Computation of time set by parties)
(1) Official holidays or non-business days occurring during a period set by parties for an act to be performed are included in calculating the period.
(2) However, if the last day of the period is an official holiday or a non-business day at the place of business of the party to perform the act, the period is extended until the first business day which follows, unless the circumstances indicate otherwise.
(3) The relevant time zone is that of the place of business of the party setting the time, unless the circumstances indicate otherwise.

Chapter 2 — Formation and Authority of Agents

Section 1: Formation

Article 2.1.1 (Manner of formation)
A contract may be concluded either by the acceptance of an offer or by conduct of the parties that is sufficient to show agreement.
Article 2.1.2 (Definition of offer)
A proposal for concluding a contract constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance.
Article 2.1.3 (Withdrawal of offer)
(1) An offer becomes effective when it reaches the offeree.
(2) An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.
Article 2.1.4 (Revocation of offer)
(1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before it has dispatched an acceptance.
(2) However, an offer cannot be revoked

(a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or
(b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

Article 2.1.5(Rejection of offer)
An offer is terminated when a rejection reaches the offeror.

Article 2.1.6 (Mode of acceptance)
(1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.
(2) An acceptance of an offer becomes effective when the indication of assent reaches the offeror.
(3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act without notice to the offeror, the acceptance is effective when the act is performed.
Article 2.1.7 (Time of acceptance)
An offer must be accepted within the time the offeror has fixed or, if no time is fixed, within a reasonable time having regard to the circumstances, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.
Article 2.1.8 (Acceptance within a fixed period of time)
A period of acceptance fixed by the offeror begins to run from the time that the offer is dispatched. A time indicated in the offer is deemed to be the time of dispatch unless the circumstances indicate otherwise.
Article 2.1.9 (Late acceptance. Delay in transmission)
(1) A late acceptance is nevertheless effective as an acceptance if without undue delay the offeror so informs the offeree or gives notice to that effect.
(2) If a communication containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without undue delay, the offeror informs the offeree that it considers the offer as having lapsed.
Article 2.1.10 (Withdrawal of acceptance)
An acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective.
Article 2.1.11 (Modified acceptance)
(1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.
(2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects to the discrepancy. If the offeror does not object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.
Article 2.1.12 (Writings in confirmation)
If a writing which is sent within a reasonable time after the conclusion of the contract and which purports to be a confirmation of the contract contains additional or different terms, such terms become part of the contract, unless they materially alter the contract or the recipient, without undue delay, objects to the discrepancy.
Article 2.1.13 (Conclusion of contract dependent on agreement on specific matters or in a particular form)
Where in the course of negotiations one of the parties insists that the contract is not concluded until there is agreement on specific matters or in a particular form, no contract is concluded before agreement is reached on those matters or in that form.
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;
(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.
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.

Article 2.1.16 (Duty of confidentiality)

Where information is given as confidential by one party in the course of negotiations, the other party is under a duty not to disclose that information or to use it improperly for its own purposes, whether or not a contract is subsequently concluded. Where appropriate, the remedy for breach of that duty may include compensation based on the benefit received by the other party.

Article 2.1.17 (Merger clauses)

A contract in writing which contains a clause indicating that the writing completely embodies the terms on which the parties have agreed cannot be contradicted or supplemented by evidence of prior statements or agreements. However, such statements or agreements may be used to interpret the writing.

Article 2.1.18 (Modification in a particular form)

A contract in writing which contains a clause requiring any modification or termination by agreement to be in a particular form may not be otherwise modified or terminated. However, a party may be precluded by its conduct from asserting such a clause to the extent that the other party has reasonably acted in reliance on that conduct.

Article 2.1.19 (Contracting under standard terms)

(1) Where one party or both parties use standard terms in concluding a contract, the general rules on formation apply, subject to Articles 2.1.20 - 2.1.22.

(2) Standard terms are provisions which are prepared in advance for general and repeated use by one party and which are actually used without negotiation with the other party.

Article 2.1.20 (Surprising terms)

(1) No term contained in standard terms which is of such a character that the other party could not reasonably have expected it, is effective unless it has been expressly accepted by that party.

(2) In determining whether a term is of such a character regard shall be had to its content, language and presentation.

Article 2.1.21 (Conflict between standard terms and non-standard terms)

In case of conflict between a standard term and a term which is not a standard term the latter prevails.

Article 2.1.22 (Battle of forms)

Where both parties use standard terms and reach agreement except on those terms, a contract is concluded on the basis of the agreed terms and of any standard terms which are common in substance unless one party clearly indicates in advance, or later and without undue delay informs the other party, that it does not intend to be bound by such a contract.

Section 2: Authority of Agents

Article 2.2.1 (Scope of the Section)

(1) This Section governs the authority of a person ("the agent") to affect the legal relations of another person ("the principal") by or with respect to a contract with a third party, whether the agent acts in its own name or in that of the principal.

(2) It governs only the relations between the principal or the agent on the one hand, and the third party on the other.

(3) It does not govern an agent's authority conferred by law or the authority of an agent appointed by a public or judicial authority.

Article 2.2.2 (Establishment and scope of the authority of the agent)

(1) The principal's grant of authority to an agent may be express or implied.

(2) The agent has authority to perform all acts necessary in the circumstances to achieve the purposes for which the authority was granted.

Article 2.2.3 (Agency disclosed)

(1) Where an agent acts within the scope of its authority and the third party knew or ought to have known that the agent was acting as an agent, the acts of the agent shall directly affect the legal relations between the principal and the third party and no legal relation is created between the agent and the third party.

(2) However, the acts of the agent shall affect only the relations between the agent and the third party, where the agent with the consent of the principal undertakes to become the party to the contract.

Article 2.2.4 (Agency undisclosed)

(1) Where an agent acts within the scope of its authority and the third party neither knew nor ought to have known that the agent was acting as an agent, the acts of the agent shall affect only the relations between the agent and the third party.

(2) However, where such an agent, when contracting with the third party on behalf of a business, represents itself to be the owner of that business, the third party, upon discovery of the real owner of the business, may exercise also against the latter the rights it has against the agent.

Article 2.2.5 (Agent acting without or exceeding its authority)

(1) Where an agent acts without authority or exceeds its authority, its acts do not affect the legal relations between the principal and the third party.

(2) However, where the principal causes the third party reasonably to believe that the agent has authority to act on behalf of the principal and that the agent is acting within the scope of that authority, the principal may not invoke against the third party the lack of authority of the agent.

Article 2.2.6 (Liability of agent acting without or exceeding its authority)

(1) An agent that acts without authority or exceeds its authority is, failing ratification by the principal, liable for damages that will place the third party in the same position as if the agent had acted with authority and not exceeded its authority.

(2) However, the agent is not liable if the third party knew or ought to have known that the agent had no authority or was exceeding its authority.

Article 2.2.7 (Conflict of interests)

(1) If a contract concluded by an agent involves the agent in a conflict of interests with the principal of which the third party knew or ought to have known, the principal may avoid the contract. The right to avoid is subject to Articles 3.2.9 and 3.2.11 to 3.2.15.

(2) However, the principal may not avoid the contract

(a) if the principal had consented to, or knew or ought to have known of, the agent's involvement in the conflict of interests; or

(b) if the agent had disclosed the conflict of interests to the principal and the latter had not objected within a reasonable time.

Article 2.2.8 (Sub-agency)

An agent has implied authority to appoint a sub-agent to perform acts which it is not reasonable to expect the agent to perform itself. The rules of this Section apply to the sub-agency.

Article 2.2.9 (Ratification)

(1) An act by an agent that acts without authority or exceeds its authority may be ratified by the principal. On ratification the act produces the same effects as if it had initially been carried out with authority.

(2) The third party may by notice to the principal specify a reasonable period of time for ratification. If the principal does not ratify within that period of time it can no longer do so.

(3) If, at the time of the agent's act, the third party neither knew nor ought to have known of the lack of authority, it may, at any time before ratification, by notice to the principal indicate its refusal to become bound by a ratification.

Article 2.2.10 (Termination of authority)

(1) Termination of authority is not effective in relation to the third party unless the third party knew or ought to have known of it.

(2) Notwithstanding the termination of its authority, an agent remains authorised to perform the acts that are necessary to prevent harm to the principal's interests.

Chapter 3 — Validity

Section 1: General Provisions

Article 3.1.1 (Matters not covered)

This Chapter does not deal with lack of capacity.

Article 3.1.2 (Validity of mere agreement)

A contract is concluded, modified or terminated by the mere agreement of the parties, without any further requirement.

Article 3.1.3 (Initial impossibility)
(1) The mere fact that at the time of the conclusion of the contract the performance of the obligation assumed was impossible does not affect the validity of the contract.
(2) The mere fact that at the time of the conclusion of the contract a party was not entitled to dispose of the assets to which the contract relates does not affect the validity of the contract.
Article 3.1.4 (Mandatory character of the provisions)
The provisions on fraud, threat, gross disparity and illegality contained in this Chapter are mandatory.

Section 2: Grounds for Avoidance

Article 3.2.1 (Definition of mistake)
Mistake is an erroneous assumption relating to facts or to law existing when the contract was concluded.
Article 3.2.2 (Relevant mistake)
(1) A party may only avoid the contract for mistake if, when the contract was concluded, the mistake was of such importance that a reasonable person in the same situation as the party in error would only have concluded the contract on materially different terms or would not have concluded it at all if the true state of affairs had been known, and

(a) the other party made the same mistake, or caused the mistake, or knew or ought to have known of the mistake and it was contrary to reasonable commercial standards of fair dealing to leave the mistaken party in error; or

(b) the other party had not at the time of avoidance reasonably acted in reliance on the contract.

(2) However, a party may not avoid the contract if

(a) it was grossly negligent in committing the mistake; or

(b) the mistake relates to a matter in regard to which the risk of mistake was assumed or, having regard to the circumstances, should be borne by the mistaken party.

Article 3.2.3 (Error in expression or transmission)
An error occurring in the expression or transmission of a declaration is considered to be a mistake of the person from whom the declaration emanated.
Article 3.2.4 (Remedies for non-performance)
A party is not entitled to avoid the contract on the ground of mistake if the circumstances on which that party relies afford, or could have afforded, a remedy for non-performance.
Article 3.2.5 (Fraud)
A party may avoid the contract when it has been led to conclude the contract by the other party's fraudulent representation, including language or practices, or fraudulent non-disclosure of circumstances which, according to reasonable commercial standards of fair dealing, the latter party should have disclosed.
Article 3.2.6 (Threat)
A party may avoid the contract when it has been led to conclude the contract by the other party's unjustified threat which, having regard to the circumstances, is so imminent and serious as to leave the first party no reasonable alternative. In particular, a threat is unjustified if the act or omission with which a party has been threatened is wrongful in itself, or it is wrongful to use it as a means to obtain the conclusion of the contract.
Article 3.2.7 (Gross disparity)
(1) A party may avoid the contract or an individual term of it if, at the time of the conclusion of the contract, the contract or term unjustifiably gave the other party an excessive advantage. Regard is to be had, among other factors, to

(a) the fact that the other party has taken unfair advantage of the first party's dependence, economic distress or urgent needs, or of its improvidence, ignorance, inexperience or lack of bargaining skill, and

(b) the nature and purpose of the contract.

(2) Upon the request of the party entitled to avoidance, a court may adapt the contract or term in order to make it accord with reasonable commercial standards of fair dealing.
(3) A court may also adapt the contract or term upon the request of the party receiving notice of avoidance, provided that that party informs the other party of its request promptly after receiving such notice and before the other party has reasonably acted in reliance on it. Article 3.2.10(2) applies accordingly.

Article 3.2.8 (Third persons)
(1) Where fraud, threat, gross disparity or a party's mistake is imputable to, or is known or ought to be known by, a third person for whose acts the other party is responsible, the contract may be avoided under the same conditions as if the behaviour or knowledge had been that of the party itself.
(2) Where fraud, threat or gross disparity is imputable to a third person for whose acts the other party is not responsible, the contract may be avoided if that party knew or ought to have known of the fraud, threat or disparity, or has not at the time of avoidance reasonably acted in reliance on the contract.
Article 3.2.9 (Confirmation)
If the party entitled to avoid the contract expressly or impliedly confirms the contract after the period of time for giving notice of avoidance has begun to run, avoidance of the contract is excluded.
Article 3.2.10 (Loss of right to avoid)
(1) If a party is entitled to avoid the contract for mistake but the other party declares itself willing to perform or performs the contract as it was understood by the party entitled to avoidance, the contract is considered to have been concluded as the latter party understood it. The other party must make such a declaration or render such performance promptly after having been informed of the manner in which the party entitled to avoidance had understood the contract and before that party has reasonably acted in reliance on a notice of avoidance.
(2) After such a declaration or performance the right to avoidance is lost and any earlier notice of avoidance is ineffective.
Article 3.2.11 (Notice of avoidance)
The right of a party to avoid the contract is exercised by notice to the other party.
Article 3.2.12 (Time limits)
(1) Notice of avoidance shall be given within a reasonable time, having regard to the circumstances, after the avoiding party knew or could not have been unaware of the relevant facts or became capable of acting freely.
(2) Where an individual term of the contract may be avoided by a party under Article 3.2.7, the period of time for giving notice of avoidance begins to run when that term is asserted by the other party.
Article 3.2.13 (Partial avoidance)
Where a ground of avoidance affects only individual terms of the contract, the effect of avoidance is limited to those terms unless, having regard to the circumstances, it is unreasonable to uphold the remaining contract.
Article 3.2.14 (Retroactive effect of avoidance)
Avoidance takes effect retroactively.
Article 3.2.15 (Restitution)
(1) On avoidance either party may claim restitution of whatever it has supplied under the contract, or the part of it avoided, provided that the party concurrently makes restitution of whatever it has received under the contract, or the part of it avoided.
(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.
Article 3.2.16 (Damages)
Irrespective of whether or not the contract has been avoided, the party who knew or ought to have known of the ground for avoidance is liable for damages so as to put the other party in the same position in which it would have been if it had not concluded the contract.
Article 3.2.17 (Unilateral declarations)
The provisions of this Chapter apply with appropriate adaptations to any communication of intention addressed by one party to the other.

Section 3: Illegality

Article 3.3.1 (Contracts infringing mandatory rules)
(1) Where a contract infringes a mandatory rule, whether of national, international or supranational origin, applicable under Article 1.4 of these Principles, the effects of that infringement upon the contract are the effects, if any, expressly prescribed by that mandatory rule.
(2) Where the mandatory rule does not expressly prescribe the effects of an infringement upon a contract, the parties have the right to exercise such remedies under the contract as in the circumstances are reasonable.
(3) In determining what is reasonable regard is to be had in particular to:

(a) the purpose of the rule which has been infringed;
(b) the category of persons for whose protection the rule exists;
(c) any sanction that may be imposed under the rule infringed;
(d) the seriousness of the infringement;
(e) whether one or both parties knew or ought to have known of the infringement;
(f) whether the performance of the contract necessitates the infringement; and
(g) the parties' reasonable expectations.

Article 3.3.2 (Restitution)
(1) Where there has been performance under a contract infringing a mandatory rule under Article 3.3.1, restitution may be granted where this would be reasonable in the circumstances.
(2) In determining what is reasonable, regard is to be had, with the appropriate adaptations, to the criteria referred to in Article 3.3.1(3).
(3) If restitution is granted, the rules set out in Article 3.2.15 apply with appropriate adaptations.

Chapter 4 — Interpretation

Article 4.1 (Intention of the parties)
(1) A contract shall be interpreted according to the common intention of the parties.
(2) If such an intention cannot be established, the contract shall be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances.
Article 4.2 (Interpretation of statements and other conduct)
(1) The statements and other conduct of a party shall be interpreted according to that party's intention if the other party knew or could not have been unaware of that intention.
(2) If the preceding paragraph is not applicable, such statements and other conduct shall be interpreted according to the meaning that a reasonable person of the same kind as the other party would give to it in the same circumstances.
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.

Article 4.4 (Reference to contract or statement as a whole)
Terms and expressions shall be interpreted in the light of the whole contract or statement in which they appear.

Article 4.5 (All terms to be given effect)
Contract terms shall be interpreted so as to give effect to all the terms rather than to deprive some of them of effect.
Article 4.6 (Contra proferentem rule)
If contract terms supplied by one party are unclear, an interpretation against that party is preferred.
Article 4.7 (Linguistic discrepancies)
Where a contract is drawn up in two or more language versions which are equally authoritative there is, in case of discrepancy between the versions, a preference for the interpretation according to a version in which the contract was originally drawn up.
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.

Chapter 5 — Content and Third Party Rights

Section 1: Content

Article 5.1.1 (Express and implied obligations)
The contractual obligations of the parties may be express or implied.
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.

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.
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.
Article 5.1.5 (Determination of kind of duty involved)
In determining the extent to which an obligation of a party involves a duty of best efforts in the performance of an activity or a duty to achieve a specific result, regard shall be had, among other factors, to

(a) the way in which the obligation is expressed in the contract;
(b) the contractual price and other terms of the contract;
(c) the degree of risk normally involved in achieving the expected result;
(d) the ability of the other party to influence the performance of the obligation.

Article 5.1.6 (Determination of quality of performance)
Where the quality of performance is neither fixed by, nor determinable from, the contract a party is bound to render a performance of a quality that is reasonable and not less than average in the circumstances.

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 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.
Article 5.1.8 (Termination of a contract for an indefinite period)
A contract for an indefinite period may be 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.
Article 5.1.9 (Release by agreement)
(1) An obligee may release its right by agreement with the obligor.
(2) An offer to release a right gratuitously shall be deemed accepted if the obligor does not reject the offer without delay after having become aware of it.

Section 2: Third Party Rights

Article 5.2.1 (Contracts in favour of third parties)
(1) The parties (the "promisor" and the "promisee") may confer by express or implied agreement a right on a third party (the "beneficiary").
(2) The existence and content of the beneficiary's right against the promisor are determined by the agreement of the parties and are subject to any conditions or other limitations under the agreement.
Article 5.2.2 (Third party identifiable)
The beneficiary must be identifiable with adequate certainty by the contract but need not be in existence at the time the contract is made.
Article 5.2.3 (Exclusion and limitation clauses)
The conferment of rights in the beneficiary includes the right to invoke a clause in the contract which excludes or limits the liability of the beneficiary.
Article 5.2.4 (Defences)
The promisor may assert against the beneficiary all defences which the promisor could assert against the promisee.
Article 5.2.5 (Revocation)
The parties may modify or revoke the rights conferred by the contract on the beneficiary until the beneficiary has accepted them or reasonably acted in reliance on them.
Article 5.2.6 (Renunciation)
The beneficiary may renounce a right conferred on it.

Section 3: Conditions

Article 5.3.1 (Types of condition)
A contract or a contractual obligation may be made conditional upon the occurrence of a future uncertain event, so that the contract or the contractual obligation only takes effect if the event occurs (suspensive condition) or comes to an end if the event occurs (resolutive condition).
Article 5.3.2 (Effect of conditions)
Unless the parties otherwise agree:

(a) the relevant contract or contractual obligation takes effect upon fulfilment of a suspensive condition;

(b) the relevant contract or contractual obligation comes to an end upon fulfilment of a resolutive condition.

Article 5.3.3 (Interference with conditions)

(1) If fulfilment of a condition is prevented by a party, contrary to the duty of good faith and fair dealing or the duty of co-operation, that party may not rely on the non-fulfilment of the condition.
(2) If fulfilment of a condition is brought about by a party, contrary to the duty of good faith and fair dealing or the duty of co-operation, that party may not rely on the fulfilment of the condition.
Article 5.3.4 (Duty to preserve rights)
Pending fulfilment of a condition, a party may not, contrary to the duty to act in accordance with good faith and fair dealing, act so as to prejudice the other party's rights in case of fulfilment of the condition.
Article 5.3.5 (Restitution in case of fulfilment of a resolutive condition)
(1) On fulfilment of a resolutive condition, the rules on restitution set out in Articles 7.3.6 and 7.3.7 apply with appropriate adaptations.
(2) If the parties have agreed that the resolutive condition is to operate retroactively, the rules on restitution set out in Article 3.2.15 apply with appropriate adaptations.

Chapter 6 — Performance

Section 1: Performance in General

Article 6.1.1 (Time of performance)
A party must perform its obligations:

(a) if a time is fixed by or determinable from the contract, at that time;

(b) if a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the other party is to choose a time;

(c) in any other case, within a reasonable time after the conclusion of the contract.

Article 6.1.2 (Performance at one time or in instalments)
In cases under Article 6.1.1(b) or (c), a party must perform its obligations at one time if that performance can be rendered at one time and the circumstances do not indicate otherwise.
Article 6.1.3 (Partial performance)
(1) The obligee may reject an offer to perform in part at the time performance is due, whether or not such offer is coupled with an assurance as to the balance of the performance, unless the obligee has no legitimate interest in so doing.
(2) Additional expenses caused to the obligee by partial performance are to be borne by the obligor without prejudice to any other remedy.
Article 6.1.4 (Order of performance)
(1) To the extent that the performances of the parties can be rendered simultaneously, the parties are bound to render them simultaneously unless the circumstances indicate otherwise.
(2) To the extent that the performance of only one party requires a period of time, that party is bound to render its performance first, unless the circumstances indicate otherwise.
Article 6.1.5 (Earlier performance)
(1) The obligee may reject an earlier performance unless it has no legitimate interest in so doing.
(2) Acceptance by a party of an earlier performance does not affect the time for the performance of its own obligations if that time has been fixed irrespective of the performance of the other party's obligations.
(3) Additional expenses caused to the obligee by earlier performance are to be borne by the obligor, without prejudice to any other remedy.
Article 6.1.6 (Place of performance)
(1) If the place of performance is neither fixed by, nor determinable from, the contract, a party is to perform:

(a) a monetary obligation, at the obligee's place of business;

(b) any other obligation, at its own place of business.

(2) A party must bear any increase in the expenses incidental to performance which is caused by a change in its place of business subsequent to the conclusion of the contract.
Article 6.1.7 (Payment by cheque or other instrument)
(1) Payment may be made in any form used in the ordinary course of business at the place for payment.

(2) However, an obligee who accepts, either by virtue of paragraph (1) or voluntarily, a cheque, any other order to pay or a promise to pay, is presumed to do so only on condition that it will be honoured.

Article 6.1.8 (Payment by funds transfer)

(1) Unless the obligee has indicated a particular account, payment may be made by a transfer to any of the financial institutions in which the obligee has made it known that it has an account.

(2) In case of payment by a transfer the obligation of the obligor is discharged when the transfer to the obligee's financial institution becomes effective.

Article 6.1.9 (Currency of payment)

(1) If a monetary obligation is expressed in a currency other than that of the place for payment, it may be paid by the obligor in the currency of the place for payment unless

(a) that currency is not freely convertible; or

(b) the parties have agreed that payment should be made only in the currency in which the monetary obligation is expressed.

(2) If it is impossible for the obligor to make payment in the currency in which the monetary obligation is expressed, the obligee may require payment in the currency of the place for payment, even in the case referred to in paragraph (1)(b).

(3) Payment in the currency of the place for payment is to be made according to the applicable rate of exchange prevailing there when payment is due.

(4) However, if the obligor has not paid at the time when payment is due, the obligee may require payment according to the applicable rate of exchange prevailing either when payment is due or at the time of actual payment.

Article 6.1.10 (Currency not expressed)

Where a monetary obligation is not expressed in a particular currency, payment must be made in the currency of the place where payment is to be made.

Article 6.1.11 (Costs of performance)

Each party shall bear the costs of performance of its obligations.

Article 6.1.12 (Imputation of payments)

(1) An obligor owing several monetary obligations to the same obligee may specify at the time of payment the debt to which it intends the payment to be applied. However, the payment discharges first any expenses, then interest due and finally the principal.

(2) If the obligor makes no such specification, the obligee may, within a reasonable time after payment, declare to the obligor the obligation to which it imputes the payment, provided that the obligation is due and undisputed.

(3) In the absence of imputation under paragraphs (1) or (2), payment is imputed to that obligation which satisfies one of the following criteria in the order indicated:

(a) an obligation which is due or which is the first to fall due;

(b) the obligation for which the obligee has least security;

(c) the obligation which is the most burdensome for the obligor;

(d) the obligation which has arisen first.

If none of the preceding criteria applies, payment is imputed to all the obligations proportionally.

Article 6.1.13 (Imputation of non-monetary obligations)

Article 6.1.12 applies with appropriate adaptations to the imputation of performance of non-monetary obligations.

Article 6.1.14 (Application for public permission)

Where the law of a State requires a public permission affecting the validity of the contract or its performance and neither that law nor the circumstances indicate otherwise

(a) if only one party has its place of business in that State, that party shall take the measures necessary to obtain the permission;

(b) in any other case the party whose performance requires permission shall take the necessary measures.

Article 6.1.15 (Procedure in applying for permission)

(1) The party required to take the measures necessary to obtain the permission shall do so without undue delay and shall bear any expenses incurred.

(2) That party shall whenever appropriate give the other party notice of the grant or refusal of such permission without undue delay.

Article 6.1.16 (Permission neither granted nor refused)

(1) If, notwithstanding the fact that the party responsible has taken all measures required, permission is neither granted nor refused within an agreed period or, where no period has been agreed, within a reasonable time from the conclusion of the contract, either party is entitled to terminate the contract.

(2) Where the permission affects some terms only, paragraph (1) does not apply if, having regard to the circumstances, it is reasonable to uphold the remaining contract even if the permission is refused.

Article 6.1.17 (Permission refused)

(1) The refusal of a permission affecting the validity of the contract renders the contract void. If the refusal affects the validity of some terms only, only such terms are void if, having regard to the circumstances, it is reasonable to uphold the remaining contract.

(2) Where the refusal of a permission renders the performance of the contract impossible in whole or in part, the rules on non-performance apply.

Section 2: Hardship

Article 6.2.1 (Contract to be observed)

Where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions on hardship.

Article 6.2.2 (Definition of hardship)

There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and

(a) the events occur or become known to the disadvantaged party after the conclusion of the contract;

(b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;

(c) the events are beyond the control of the disadvantaged party; and

(d) the risk of the events was not assumed by the disadvantaged party.

Article 6.2.3 (Effects of hardship)

(1) In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based.

(2) The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance.

(3) Upon failure to reach agreement within a reasonable time either party may resort to the court.

(4) If the court finds hardship it may, if reasonable,

(a) terminate the contract at a date and on terms to be fixed, or

(b) adapt the contract with a view to restoring its equilibrium.

Chapter 7 — Non-performance

Section 1: Non-performance in General

Article 7.1.1 (Non-performance defined)

Non-performance is failure by a party to perform any of its obligations under the contract, including defective performance or late performance.

Article 7.1.2 (Interference by the other party)

A party may not rely on the non-performance of the other party to the extent that such non-performance was caused by the first party's act or omission or by another event for which the first party bears the risk.

Article 7.1.3 (Withholding performance)

(1) Where the parties are to perform simultaneously, either party may withhold performance until the other party tenders its performance.

(2) Where the parties are to perform consecutively, the party that is to perform later may withhold its performance until the first party has performed.

Article 7.1.4 (Cure by non-performing party)
(1) The non-performing party may, at its own expense, cure any non-performance, provided that

(a) without undue delay, it gives notice indicating the proposed manner and timing of the cure;

(b) cure is appropriate in the circumstances;

(c) the aggrieved party has no legitimate interest in refusing cure; and

(d) cure is effected promptly.

(2) The right to cure is not precluded by notice of termination.
(3) Upon effective notice of cure, rights of the aggrieved party that are inconsistent with the non-performing party's performance are suspended until the time for cure has expired.
(4) The aggrieved party may withhold performance pending cure.
(5) Notwithstanding cure, the aggrieved party retains the right to claim damages for delay as well as for any harm caused or not prevented by the cure.
Article 7.1.5 (Additional period for performance)
(1) In a case of non-performance the aggrieved party may by notice to the other party allow an additional period of time for performance.
(2) During the additional period the aggrieved party may withhold performance of its own reciprocal obligations and may claim damages but may not resort to any other remedy. If it receives notice from the other party that the latter will not perform within that period, or if upon expiry of that period due performance has not been made, the aggrieved party may resort to any of the remedies that may be available under this Chapter.
(3) Where in a case of delay in performance which is not fundamental the aggrieved party has given notice allowing an additional period of time of reasonable length, it may terminate the contract at the end of that period. If the additional period allowed is not of reasonable length it shall be extended to a reasonable length. The aggrieved party may in its notice provide that if the other party fails to perform within the period allowed by the notice the contract shall automatically terminate.
(4) Paragraph (3) does not apply where the obligation which has not been performed is only a minor part of the contractual obligation of the non-performing party.
Article 7.1.6 (Exemption clauses)
A clause which limits or excludes one party's liability for non-performance or which permits one party to render performance substantially different from what the other party reasonably expected may not be invoked if it would be grossly unfair to do so, having regard to the purpose of the contract.
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.

Section 2: Right to Performance

Article 7.2.1 (Performance of monetary obligation)
Where a party who is obliged to pay money does not do so, the other party may require payment.
Article 7.2.2 (Performance of non-monetary obligation)
Where a party who owes an obligation other than one to pay money does not perform, the other party may require performance, unless

(a) performance is impossible in law or in fact;

(b) performance or, where relevant, enforcement is unreasonably burdensome or expensive;

(c) the party entitled to performance may reasonably obtain performance from another source;

(d) performance is of an exclusively personal character; or

(e) the party entitled to performance does not require performance within a reasonable time after it has, or ought to have, become aware of the non-performance.

Article 7.2.3 (Repair and replacement of defective performance)
The right to performance includes in appropriate cases the right to require repair, replacement, or other cure of defective performance. The provisions of Articles 7.2.1 and 7.2.2 apply accordingly.
Article 7.2.4 (Judicial penalty)
(1) Where the court orders a party to perform, it may also direct that this party pay a penalty if it does not comply with the order.
(2) The penalty shall be paid to the aggrieved party unless mandatory provisions of the law of the forum provide otherwise. Payment of the penalty to the aggrieved party does not exclude any claim for damages.
Article 7.2.5 (Change of remedy)
(1) An aggrieved party who has required performance of a non-monetary obligation and who has not received performance within a period fixed or otherwise within a reasonable period of time may invoke any other remedy.
(2) Where the decision of a court for performance of a non-monetary obligation cannot be enforced, the aggrieved party may invoke any other remedy.

Section 3: Termination

Article 7.3.1 (Right to terminate the contract)
(1) A party may terminate the contract where the failure of the other party to perform an obligation under the contract amounts to a fundamental non-performance.
(2) In determining whether a failure to perform an obligation amounts to a fundamental non-performance regard shall be had, in particular, to whether

(a) the non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract unless the other party did not foresee and could not reasonably have foreseen such result;

(b) strict compliance with the obligation which has not been performed is of essence under the contract;

(c) the non-performance is intentional or reckless;

(d) the non-performance gives the aggrieved party reason to believe that it cannot rely on the other party's future performance;

(e) the non-performing party will suffer disproportionate loss as a result of the preparation or performance if the contract is terminated.

(3) In the case of delay the aggrieved party may also terminate the contract if the other party fails to perform before the time allowed it under Article 7.1.5 has expired.
Article 7.3.2 (Notice of termination)
(1) The right of a party to terminate the contract is exercised by notice to the other party.
(2) If performance has been offered late or otherwise does not conform to the contract the aggrieved party will lose its right to terminate the contract unless it gives notice to the other party within a reasonable time after it has or ought to have become aware of the offer or of the non-conforming performance.
Article 7.3.3 (Anticipatory non-performance)
Where prior to the date for performance by one of the parties it is clear that there will be a fundamental non-performance by that party, the other party may terminate the contract.
Article 7.3.4 (Adequate assurance of due performance)
A party who reasonably believes that there will be a fundamental non-performance by the other party may demand adequate assurance of due performance and may meanwhile withhold its own performance. Where this assurance is not provided within a reasonable time the party demanding it may terminate the contract.
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.

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.
Article 7.3.7 (Restitution with respect to long-term contracts)
(1) On termination of a long-term contract 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.

Section 4: Damages

Article 7.4.1 (Right to damages)
Any non-performance gives the aggrieved party a right to damages either exclusively or in conjunction with any other remedies except where the non-performance is excused under these Principles.
Article 7.4.2 (Full compensation)
(1) The aggrieved party is entitled to full compensation for harm sustained as a result of the non-performance. Such harm includes both any loss which it suffered and any gain of which it was deprived, taking into account any gain to the aggrieved party resulting from its avoidance of cost or harm.
(2) Such harm may be non-pecuniary and includes, for instance, physical suffering or emotional distress.
Article 7.4.3 (Certainty of harm)
(1) Compensation is due only for harm, including future harm, that is established with a reasonable degree of certainty.
(2) Compensation may be due for the loss of a chance in proportion to the probability of its occurrence.
(3) Where the amount of damages cannot be established with a sufficient degree of certainty, the assessment is at the discretion of the court.
Article 7.4.4 (Foreseeability of harm)
The non-performing party is liable only for harm which it foresaw or could reasonably have foreseen at the time of the conclusion of the contract as being likely to result from its non-performance.
Article 7.4.5 (Proof of harm in case of replacement transaction)
Where the aggrieved party has terminated the contract and has made a replacement transaction within a reasonable time and in a reasonable manner it may recover the difference between the contract price and the price of the replacement transaction as well as damages for any further harm.
Article 7.4.6 (Proof of harm by current price)
(1) Where the aggrieved party has terminated the contract and has not made a replacement transaction but there is a current price for the performance contracted for, it may recover the difference between the contract price and the price current at the time the contract is terminated as well as damages for any further harm.
(2) Current price is the price generally charged for goods delivered or services rendered in comparable circumstances at the place where the contract should have been performed or, if there is no current price at that place, the current price at such other place that appears reasonable to take as a reference.
Article 7.4.7 (Harm due in part to aggrieved party)
Where the harm is due in part to an act or omission of the aggrieved party or to another event for which that party bears the risk, the amount of damages shall be reduced to the extent that these factors have contributed to the harm, having regard to the conduct of each of the parties.
Article 7.4.8 (Mitigation of harm)
(1) The non-performing party is not liable for harm suffered by the aggrieved party to the extent that the harm could have been reduced by the latter party's taking reasonable steps.
(2) The aggrieved party is entitled to recover any expenses reasonably incurred in attempting to reduce the harm.

Article 7.4.9 (Interest for failure to pay money)
(1) If a party does not pay a sum of money when it falls due the aggrieved party is entitled to interest upon that sum from the time when payment is due to the time of payment whether or not the non-payment is excused.
(2) The rate of interest shall be the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place for payment, or where no such rate exists at that place, then the same rate in the State of the currency of payment. In the absence of such a rate at either place the rate of interest shall be the appropriate rate fixed by the law of the State of the currency of payment.
(3) The aggrieved party is entitled to additional damages if the non-payment caused it a greater harm.
Article 7.4.10 (Interest on damages)
Unless otherwise agreed, interest on damages for non-performance of non-monetary obligations accrues as from the time of non-performance.
Article 7.4.11 (Manner of monetary redress)
(1) Damages are to be paid in a lump sum. However, they may be payable in instalments where the nature of the harm makes this appropriate.
(2) Damages to be paid in instalments may be indexed.
Article 7.4.12 (Currency in which to assess damages)
Damages are to be assessed either in the currency in which the monetary obligation was expressed or in the currency in which the harm was suffered, whichever is more appropriate.
Article 7.4.13 (Agreed payment for non-performance)
(1) Where the contract provides that a party who does not perform is to pay a specified sum to the aggrieved party for such non-performance, the aggrieved party is entitled to that sum irrespective of its actual harm.
(2) However, notwithstanding any agreement to the contrary the specified sum may be reduced to a reasonable amount where it is grossly excessive in relation to the harm resulting from the non-performance and to the other circumstances.

Chapter 8 — Set-off

Article 8.1 (Conditions of set-off)
(1) Where two parties owe each other money or other performances of the same kind, either of them ("the first party") may set off its obligation against that of its obligee ("the other party") if at the time of set-off,

(a) the first party is entitled to perform its obligation;

(b) the other party's obligation is ascertained as to its existence and amount and performance is due.

(2) If the obligations of both parties arise from the same contract, the first party may also set off its obligation against an obligation of the other party which is not ascertained as to its existence or to its amount.
Article 8.2 (Foreign currency set-off)
Where the obligations are to pay money in different currencies, the right of set-off may be exercised, provided that both currencies are freely convertible and the parties have not agreed that the first party shall pay only in a specified currency.
Article 8.3 (Set-off by notice)
The right of set-off is exercised by notice to the other party.
Article 8.4 (Content of notice)
(1) The notice must specify the obligations to which it relates.
(2) If the notice does not specify the obligation against which set-off is exercised, the other party may, within a reasonable time, declare to the first party the obligation to which set-off relates. If no such declaration is made, the set-off will relate to all the obligations proportionally.
Article 8.5 (Effect of set-off)
(1) Set-off discharges the obligations.
(2) If obligations differ in amount, set-off discharges the obligations up to the amount of the lesser obligation.
(3) Set-off takes effect as from the time of notice.

Chapter 9 — Assignment of Rights, Transfer of Obligations, Assignment of Contracts

Section 1: Assignment of Rights

Article 9.1.1 (Definitions)
"Assignment of a right" means the transfer by agreement from one person (the "assignor") to another person (the "assignee"), including transfer by way of security, of the assignor's right to payment of a monetary sum or other performance from a third person ("the obligor").
Article 9.1.2 (Exclusions)
This Section does not apply to transfers made under the special rules governing the transfers:

(a) of instruments such as negotiable instruments, documents of title or financial instruments, or

(b) of rights in the course of transferring a business.

Article 9.1.3 (Assignability of non-monetary rights)
A right to non-monetary performance may be assigned only if the assignment does not render the obligation significantly more burdensome.
Article 9.1.4 (Partial assignment)
(1) A right to the payment of a monetary sum may be assigned partially.
(2) A right to other performance may be assigned partially only if it is divisible, and the assignment does not render the obligation significantly more burdensome.
Article 9.1.5 (Future rights)
A future right is deemed to be transferred at the time of the agreement, provided the right, when it comes into existence, can be identified as the right to which the assignment relates.
Article 9.1.6 (Rights assigned without individual specification)
A number of rights may be assigned without individual specification, provided such rights can be identified as rights to which the assignment relates at the time of the assignment or when they come into existence.
Article 9.1.7 (Agreement between assignor and assignee sufficient)
(1) A right is assigned by mere agreement between the assignor and the assignee, without notice to the obligor.
(2) The consent of the obligor is not required unless the obligation in the circumstances is of an essentially personal character.
Article 9.1.8 (Obligor's additional costs)
The obligor has a right to be compensated by the assignor or the assignee for any additional costs caused by the assignment.
Article 9.1.9 (Non-assignment clauses)
(1) The assignment of a right to the payment of a monetary sum is effective notwithstanding an agreement between the assignor and the obligor limiting or prohibiting such an assignment. However, the assignor may be liable to the obligor for breach of contract.
(2) The assignment of a right to other performance is ineffective if it is contrary to an agreement between the assignor and the obligor limiting or prohibiting the assignment. Nevertheless, the assignment is effective if the assignee, at the time of the assignment, neither knew nor ought to have known of the agreement. The assignor may then be liable to the obligor for breach of contract.
Article 9.1.10 (Notice to the obligor)
(1) Until the obligor receives a notice of the assignment from either the assignor or the assignee, it is discharged by paying the assignor.
(2) After the obligor receives such a notice, it is discharged only by paying the assignee.
Article 9.1.11 (Successive assignments)
If the same right has been assigned by the same assignor to two or more successive assignees, the obligor is discharged by paying according to the order in which the notices were received.
Article 9.1.12 (Adequate proof of assignment)
(1) If notice of the assignment is given by the assignee, the obligor may request the assignee to provide within a reasonable time adequate proof that the assignment has been made.

(2) Until adequate proof is provided, the obligor may withhold payment.
(3) Unless adequate proof is provided, notice is not effective.
(4) Adequate proof includes, but is not limited to, any writing emanating from the assignor and indicating that the assignment has taken place.
Article 9.1.13 (Defences and rights of set-off)
(1) The obligor may assert against the assignee all defences that the obligor could assert against the assignor.
(2) The obligor may exercise against the assignee any right of set-off available to the obligor against the assignor up to the time notice of assignment was received.
Article 9.1.14 (Rights related to the right assigned)
The assignment of a right transfers to the assignee:

(a) all the assignor's rights to payment or other performance under the contract in respect of the right assigned, and

(b) all rights securing performance of the right assigned.

Article 9.1.15 (Undertakings of the assignor)
The assignor undertakes towards the assignee, except as otherwise disclosed to the assignee, that:

(a) the assigned right exists at the time of the assignment, unless the right is a future right;

(b) the assignor is entitled to assign the right;

(c) the right has not been previously assigned to another assignee, and it is free from any right or claim from a third party;

(d) the obligor does not have any defences;

(e) neither the obligor nor the assignor has given notice of set-off concerning the assigned right and will not give any such notice;

(f) the assignor will reimburse the assignee for any payment received from the obligor before notice of the assignment was given.

Section 2: Transfer of Obligations

Article 9.2.1 (Modes of transfer)
An obligation to pay money or render other performance may be transferred from one person (the "original obligor") to another person (the "new obligor") either

(a) by an agreement between the original obligor and the new obligor subject to Article 9.2.3, or

(b) by an agreement between the obligee and the new obligor, by which the new obligor assumes the obligation.

Article 9.2.2 (Exclusion)
This Section does not apply to transfers of obligations made under the special rules governing transfers of obligations in the course of transferring a business.
Article 9.2.3 (Requirement of obligee's consent to transfer)
The transfer of an obligation by an agreement between the original obligor and the new obligor requires the consent of the obligee.
Article 9.2.4 (Advance consent of obligee)
(1) The obligee may give its consent in advance.
(2) If the obligee has given its consent in advance, the transfer of the obligation becomes effective when a notice of the transfer is given to the obligee or when the obligee acknowledges it.
Article 9.2.5 (Discharge of original obligor)
(1) The obligee may discharge the original obligor.
(2) The obligee may also retain the original obligor as an obligor in case the new obligor does not perform properly.
(3) Otherwise the original obligor and the new obligor are jointly and severally liable.
Article 9.2.6 (Third party performance)
(1) Without the obligee's consent, the obligor may contract with another person that this person will perform the obligation in place of the obligor, unless the obligation in the circumstances has an essentially personal character.

Chapter 3 — Validity

Section 1: General Provisions

Article 3.1.1 (Matters not covered)

This chapter does not deal with lack of capacity.

A. A Self-Explanatory Distinction

International contract negotiation involves a variety of legal issues beyond the contractual core issues (→ Introduction no. 17 at H.). The choice of the UNIDROIT Principles (best made in combination with an arbitration clause → Preamble no. 3-6) covers **(i)** the legal regime which is applicable to the contract itself, subject to additionally or alternatively applicable mandatory law (Art. 1.4), plus **(ii)** a few related issues such as the effects of agency on contract formation (Arts. 2.2.1-10) or limitation periods (Chapter 10) for which the UNIDROIT Principles provide rules. Many other questions are **qualified otherwise** by the applicable **private international law** (of the competent state court or arbitration tribunal). The question if the contracting parties are capable to enter into a binding agreement (which is essential for **legal risk management**) is one of the core issues which is qualified differently[1] (so that the determination of the legal capacity of a contract party will not be governed by the *lex contractus*). The **private international law**[2] and/or the applicable **arbitration law** and/or the applicable **arbitration rules** will often lead to the home jurisdiction of the acting company[3] (which might legally not exist if it has not been properly founded[4]) or natural person (e.g. issues of age, illness).[5] 1

Article 3.1.2 (Validity of mere agreement)

A contract is concluded, modified or terminated by the mere agreement of the parties, without any further requirement.

1 Morán Bovio/*Herrera* Art. 3.1, no. 1, p. 172.
2 Vogenauer/*Huber* Art. 3.1.1. no. 8.
3 *See* e.g., for the combination of the UNIDROIT Principles with an arbitration clause, Art. V para. 1 lit. a of the New York Convention, as argued by *Born* International Commercial Arbitration, Volume I, § 4.07 [B], p. 627 ff. and *Brödermann*, in: FS Wegen (2015), p. 591, 595.
4 National laws differ and may provide e.g. for direct liability odf the putative shareholder (e.g. of a joint venture 'company') or for indirect liability.
5 Vogenauer/*Huber* Art. 3.1.1. no. 6.

A. Merely Consensual Contracts

1 Art. 3.1.2 shapes the **freedom of contract** principle (Art. 1.1) **beyond** the issue of **form** (covered by Arts. 1.2[1] and 1.4).[2] Fostering the international and thereby also the cross-cultural perspective (Preamble, para. 1), it explicitly underlines that **'mere agreement'** of the parties suffices to conclude a contract[3] (subject to proper 'formation', Arts. 2.1.1 *et seq.*, and to 'validity', Arts. 3.1.3-3.2.8).[4] Art. 3.1.2 thereby overcomes differences between the civil and the common law world (requiring 'consideration')[5] or between different civil law concepts (partially requiring a '*cause*'[6] or a 'real contract' e.g. with handing over of a good);[7] all such national requirements are excluded.

B. Limits

2 Usually the banned national requirements will not be 'internationally mandatory' in the sense of Art. 1.4. They will thereby not apply if the UNIDROIT Principles fully applies such as in arbitration scenarios, as opposed to mere 'incorporation'(→ Art. 1.4 no. 3, 5).

Article 3.1.3 (Initial impossibility)

(1) The mere fact that at the time of the conclusion of the contract the performance of the obligation assumed was impossible does not affect the validity of the contract.
(2) The mere fact that at the time of the conclusion of the contract a party was not entitled to dispose of the assets to which the contract relates does not affect the validity of the contract.

A. A Compromise following the CISG

1 Initial impossibility (i.e. at the time of contract conclusion) is treated differently around the globe and leads in the national laws from the Romanistic tradition to the

1 Morán Bovio/*Herrera* Art. 3.2, no. 1, p. 176.
2 Vogenauer/*Huber* Art. 3.1.2. no. 2, 12.
3 Official Comments, Art. 3.1.2, p. 96; Morán Bovio/*Herrera* Art. 3.2, no. no. 1, p. 176.
4 Vogenauer/*Huber* Art. 3.1.2. no. 3.
5 Official Comments, Art. 3.1.2 no. 1, p. 96; Morán Bovio/*Herrera* Art. 3.2, no. 1, p. 176; Vogenauer/*Huber* Art. 3.1.2. no. 8.
6 Official Comments, Art. 3.1.2 no. 2, p. 96; Morán Bovio/*Herrera* Art. 3.2, no. 1, p. 176 (tradición romanista); Vogenauer/*Huber* Art. 3.1.2. no. 5, *see*, for example, Art. 1108 Belgian Civil Code while French law does not require a cause anymore in its Art. 1128 French Civil Code (version 2016, as part of the reform of the French law of obligation which was inspired by the UNIDROIT Principles, *see Fanvarque-Cosson* in: *Eppur si muove* (2016), vol. II, p. 1350, 1359).
7 Official Comments, Art. 3.1.2 no. 3, Illustration 2, p. 97; Morán Bovio/*Herrera* Art. 3.2, no. 1, p. 176; Vogenauer/*Huber* Art. 3.1.2. no. 10.

invalidity of the contract.[1] Following the CISG, and **subject to overriding mandatory law**[2] which would take preference (Arts. 1.4, 3.3.1), **para. 1** treats initial impossibility not as matter of validity but as an issue of **non-performance**[3] (Art. 7.2.2.(a) and (b))[4] **or mistake** (Art. 3.2.2).[5] **Para. 2** includes 'lack of title'-situations into 'initial impossibility',[6] while 'lack of capacity' is solely addressed in Art. 3.1.1.[7]

Article 3.1.4 (Mandatory character of the provisions)

The provisions on fraud, threat, gross disparity and illegality contained in this chapter are mandatory.

A. Part of the Mandatory Core of UNIDROIT Principles pursuant to Art. 1.5

As a set of rules based on the goal of fair dealing in international trade (*cf.* Arts. 1.7, 1.6; → Art. 1.6 no. 4), Art. 3.1.4 does not allow any deviation under Art. 1.5 from the principles which tackle with **"'serious' grounds for invalidity",**[1] namely fraud (Art. 3.2.5, including 'intentional' misrepresentation),[2] threat (Art. 3.2.6), gross disparity (Art. 3.2.7) and illegality (Art. 3.3.1-2). From the perspective of international trade, Art. 3.1.4 thereby contributes to the self-sufficiency of the UNIDROIT Principles as a body of rules of law which, if chosen in combination with an arbitration clause, can govern a cross-border international commercial contract in the spirit of fair trade (Art. 1.7) without a need for domestic mandatory law (with a domestic vocation) to step in (→ Art. 1.4 no. 2-4). It has been argued that Art. 3.1.4 should also apply to **'grossly negligent misrepresentation'**,[3] which should be a matter of discussion with due regard to the circumstances of the case when interpreting the conduct of the misrepresenting person (*cf.* Art. 4.2(2)). Art. 3.1.4 applies in various circumstances even if such ground for avoidance is imputable to a third party (as more closely defined in Art. 3.2.8).

1 E.g. in France, *see* Arts. 1163(2), 1178(1) 1st sentence French Civil Code (2016 version); Morán Bovio/*Herrera* Art. 3.3 no. no. 1, p. 178.
2 Vogenauer/*Huber* Art. 3.1.2. no. 9-10.
3 *Cf.* Official Comments, Art. 3.1.3 no. 1, pp. 97-98; Morán Bovio/*Herrera* Art. 3.3, no. 1, p. 178.
4 Morán Bovio/*Herrera* Art. 3.3 no. 1. p. 179 (referring to the entire chapter 7 in the initial 1994 version of the UNIDROIT Principles; Vogenauer/*Huber* Art. 3.1.2. no. 5.
5 Vogenauer/*Huber* Art. 3.1.3. no. 3. *See* also e.g. a similar development in German with § 311a BGB (inserted into the German Civil Code in 2002).
6 Vogenauer/*Huber* Art. 3.1.2. no. 6, *see* also no. 8 (on the irrelevance of '*lack of cause*' which, to some extent, is also covered by Art. 3.1.3 and not only by Art. 3.1.2; in this sense Official Comments, Art. 3.1.3 no. 1, pp. 97-98).
7 Official Comments, Art. 3.1.3 no. 2, p. 98; Vogenauer/*Huber* Art. 3.1.2. no. 7.
1 Official Comments to Art. 3.1.4, p. 99; Vogenauer/*du Plessis* Art. 3.1.4. no. 1.
2 Vogenauer/*du Plessis* Art. 3.1.4. no. 7 (distinguishing it from "negligent representation").
3 Vogenauer/*du Plessis* Art. 3.1.4. no. 7.

B. Limits

1. By Contract

2 The mandatory effect of the provisions can find certain limits by contract: **(i) in the contract** itself by providing (*a*) details (**'ancillary' provisions**)[4] on how avoidance should take place (example from practice: an obligation oriented at Art. 2.2.10(2) in order to safeguard the interests of the innocent party); (*b*) more extensive grounds for avoidance[5] **(ii)** by **subsequent confirmation** (Art. 3.2.9) and/or – *de maiore ad minus* – **waiver** of rights in a **settlement**.[6]

2. By Law

3 When the UNIDROIT Principles are **merely incorporated** into a contract which is subjected to a national law (→ Preamble no.15-16; as opposed to a choice of the UNIDROIT Principles as the 'governing rules of law' → Preamble no. 3-5), the **domestic mandatory law** may step in, especially if it leads to tougher consequences (e.g. 'null and void'[7] as opposed to 'voidable'), → Art. 1.4 no. 5. A court (Art. 1.11 1st hyphen) is likely to respect the incorporated UNIDROIT Principles provisions if they are tougher,[8] but is also likely that it leaves an UNIDROIT Principles-question undecided if a contract is 'void' already pursuant to the applicable national law.

Section 2: Grounds for Avoidance

Article 3.2.1 (Definition of mistake)

Mistake is an erroneous assumption relating to facts or to law existing when the contract was concluded.

A. A Broad Concept of Mistake ...

1 Jointly with Art. 3.2.3 (on errors of transmission), Art. 3.2.1 stands for a broad concept of 'mistake'. It permits in principle as a ground for avoidance **erroneous assumptions**[1] (at the time of the contract conclusion)[2] **both in fact** (e.g. on quality or

4 Vogenauer/*du Plessis* Art. 3.1.4 no. 2.
5 Vogenauer/*du Plessis* Art. 3.1.4 no. 6 (e.g. invalidity in case of initial impossibility).
6 Official Comments to Art. 3.1.4, p. 99; Vogenauer/*du Plessis* Art. 3.1.4 no. 3.
7 E.g. §§ 134, 138 German Civil Code 'BGB'.
8 *Cf.* Vogenauer/*du Plessis* Art. 3.1.4 no. 11.
1 Vogenauer/*du Plessis* Art. 3.2.1 no. 3.
2 Official Comments, Art. 3.2.1 no. 2, p. 100; Morán Bovio/*Herrera* Art. 3.4, no. 1, p. 183 (whereby the commented initial Art. 3.4 in the 1994 version of the UNIDROIT Principles correlates with Art. 3.2.1 Version 2010); Vogenauer/*du Plessis* Art. 3.2.1 no. 9.

a party's capacity to perform a service)[3] **and/or in law**;[4] – the latter in view of the complexity of cross-border trade[5] and the difficulties of scouting possibly applicable (mandatory) law (→ Art. 1.4). The concept of mistake in the UNIDROIT Principles is thereby distinct from some national laws.[6]

B. ... With Numerous Boundaries[7] (Test Scheme)

The broad concept of 'mistake' becomes balanced through a **tight regime** of limits[8] (a **'seriousness requirement'**)[9] which renders rare avoidance based on a mistake:[10] **(i)** There must be a real **error** at the time of contract conclusion[11] (as opposed e.g. to a mistaken expectation[12] or possibly an error with regard to the motivation for which the mistaken party bears the risk under Art. 3.2.2 (2) (b) 2nd alternative);[13] **(ii)** it must meet the requirements of the **positive qualification** in Art. 3.2.2.(1); **(iii)** it may not fall under one of the **exceptions** in Art. 3.2.2(2) (**gross negligence; risk allocation**); **(iv)** no exclusion under Art. 3.2.4 (**priority of remedies** for non-performance);[14] **(v)** a declaration of avoidance within a certain **time limit** (Art. 3.2.11-3.2.12); **(vi)** a possible limitation of the avoidance to certain terms (Art. 3.2.13 on **partial avoidance**); **(vii) no exclusion by confirmation** or **contract amendment** (Arts. 3.2.9-3.2.10). 2

C. Legal Consequences

A mistake that passes these tests leads to **(i) a right to avoid** the contract[15] (Art. 3.2.2(1)) retroactively (Art. 3.2.15) wholly or partially (Art. 3.2.13) by a timely **notice** (Art. 3.2.11), and **(ii)**, if applicable under the circumstances, a right of **restitution** (Art. 3.2.15) and/or to **damages** (Art. 3.2.16) in the amount of its 'reliance' or 'negative' interest.[16] Avoidance as a result of a mistake by a third party is covered by Art. 3.2.8. 3

3 Vogenauer/*du Plessis* Art. 3.2.1 no. 5 (distinguishing such errors at no. 6 and in Art. 3.2.2 no. 8, 38 from **errors of 'motivation'** which, if classified as 'mistake', are likely to fall under the limitation in Art. 3.2.2.(2)(b)).
4 Morán Bovio/*Herrera* Art. 3.4, no. 1, p. 183.
5 Official Comments, Art. 3.2.1 no. 1, p. 100; Vogenauer/*Huber* Art. 3.2.1 no. 7.
6 E.g. German law, Vogenauer/*Huber* Art. 3.2.1 no. 1; *cf.* also *Kramer/Probst* Mistake, in: von Mehren (Ed.), no. 18-27 (for Germany *see* no. 24).
7 Enumeration based on Vogenauer/*Huber* Art. 3.2.2 no. 2, except for boundary (vi).
8 Vogenauer/*Huber* Art. 3.2.2 no. 3, 41.
9 Vogenauer/*Huber* Art. 3.2.2 heading no. II., Art. 3.2.3 no. 9.
10 Vogenauer/*Huber* Art. 3.2.2 no. 47.
11 Official Comments, Art. 3.2.1 no. 2, p. 100; Morán Bovio/*Herrera* Art. 3.4, no. 1, p. 183.
12 Vogenauer/*Huber* Art. 3.2.1 no. 10; Art. 3.2.2 no. 43.
13 Vogenauer/*Huber* Art. 3.2.1 no. 6 and Art. 3.2.2 no. 44 (referring both to the risk allocation in Art. 3.2.2(2)(b) in case the issue is decided otherwise).
14 Morán Bovio/*Herrera* Art. 3.4, no. 1 (at the end), p. 183 (whereby the referenced initial Art. 3.7 in the 1994 version of the UNIDROIT Principles correlates with Art. 3.2.4 Version 2016).
15 Morán Bovio/*Herrera* Art. 3.4, no. 1, p. 183.
16 Vogenauer/*Huber* Art. 3.2.16 no. 6.

Article 3.2.2 (Relevant mistake)

(1) A party may only avoid the contract for mistake if, when the contract was concluded, the mistake was of such importance that a reasonable person in the same situation as the party in error would only have concluded the contract on materially different terms or would not have concluded it at all if the true state of affairs had been known, and

(a) the other party made the same mistake, or caused the mistake, or knew or ought to have known of the mistake and it was contrary to reasonable commercial standards of fair dealing to leave the mistaken party in error; or

(b) the other party had not at the time of avoidance reasonably acted in reliance on the contract.

(2) However, a party may not avoid the contract if

(a) it was grossly negligent in committing the mistake; or

(b) the mistake relates to a matter in regard to which the risk of mistake was assumed or, having regard to the circumstances, should be borne by the mistaken party.

A. Two-Prong 'Reasonableness-Test' (Para. 1)

1 The rather restrictive[1] qualification requirements in Art. 3.2.2 reflect a melange of Austrian and Dutch law and also contain some components of e.g. French and US law.[2] Para. 1 provides for a **positive qualification** of 'mistake' by a two-prong test. *Firstly*, the mistake has to pass a 'reasonableness-test' as described by the self-explanatory words. Similar to e.g. Art. 4.2.2(2), it refers to the **'reasonable person in the same situation'** (although not literally 'of the same kind', this addition may be induced, *argumentum* Art. 1.6). Would such a person have concluded the contract not at all or only to materially different conditions if it had known the truth? In particular, conditions on price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability are usually **material**.[3] In contrast, errors concerning *(a)* the value of the goods or services or *(b)* – if regarded as mistake (→ Art. 3.2.1 no. 2 at B. (i)) – expectations and motivations are usually not material.[4]

2 *Secondly*, the other party needs to be **"worthy of being protected in its reliance on the validity of the contract"**.[5] **Para. 1 lit a)** excludes such 'worthiness' in three cases[6] where the other party was **involved** in the occurrence of the mistake:[7] **(i)** a common mistake (e.g. sale of a stolen car while nobody knows of the theft);[8]

1 Vogenauer/*Huber* Art. 3.2.2 no. 3 (with further references).
2 Vogenauer/*Huber* Art. 3.2.2 no. 3.
3 Argumentum Art. 19(3) CISG, as pointed out by Vogenauer/*Huber* Art. 3.2.2 no. 7.
4 Official Comments, Art. 3.2.2 no. 1, pp. 101-102; Morán Bovio/*Herrera* Art. 3.5, no. 1, p. 186; Vogenauer/*Huber* Art. 3.2.2 no. 8.
5 Vogenauer/*Huber* Art. 3.2.2 no. 9, in the same sense also Morán Bovio/*Herrera* Art. 3.5, no. 1, p. 186 para. 3.
6 Official Comments, Art. 3.2.2 no. 2, pp. 102-103.
7 Vogenauer/*Huber* Art. 3.2.2 no. 9-21.
8 Official Comments, Art. 3.2.2 no. 2, Illustration 1, p. 102; Vogenauer/*Huber* Art. 3.2.2 no. 11-12.

(ii) a mistake caused by the other party (e.g. an incorrect 'representation' – beyond normal advertisement – even if made innocently),[9] but not by a third party (→ Art. 3.2.8(1)); **(iii)** unintentional[10] violation of a duty to information (e.g. where the other party, acting as a reasonable person, 'ought to have known' that there is a mistake),[11] measured against 'reasonable commercial standards'[12] (Art. 1.7).[13] **Para. 1 lit b)** exempts mistakes if the other party does not require protection[14] because it did **not** 'act' or 'should not have acted' **in reliance** on the contract.[15]

B. Exception for Gross Negligence and Assumed or Allocated Risks (Para. 2)

Para 2 excludes (from the right to avoidance under para. 1) **two** kinds of mistakes 3
of which the **risk belongs to the mistaken party**. *First,* para. 2 **lit. a)** excludes avoidance for mistakes due to **gross negligence**,[16] which, in international trade, always surpasses fair trading (Art. 1.7). *Second*, para. 2 **lit. b)** exempts mistakes which belong into the **sphere of risks of the mistaken party**, either because of an **express risk assumption** in the contract (by the purpose of the contract,[17] conscious ignorance about a regulated issue,[18] allocation of custom duties under INCOTERMS),[19] or because of an **interpretation** (Arts. 4.1-4.3) of the contract and **surrounding circumstances**[20] (e.g. a risk of the real market value or of procurement,[21] risk of an **'error of motivation'** if qualified as 'mistake'→ Art. 3.2.1 no. 2 at B. (i); risk of **signing an unread contract**).[22]
An **error about** the applicable **(mandatory) law** (Art. 1.4) due to an **omission of research** can be both grossly negligent[23] (para. 2 lit a) and part of the risk allocated to the mistaken party (para. 2 lit b) depending on the circumstances.

9 Vogenauer/*Huber* Art. 3.2.2 no. 13-15.
10 Morán Bovio/*Herrera* Art. 3.5, no. 1, p. 186 (otherwise the omission of information constitutes a 'violation of good faith'); Vogenauer/*Huber* Art. 3.2.2 no. 18 with reference to Art. 3.2.5 as the more specialised principle in case of intention.
11 Morán Bovio/*Herrera* Art. 3.5, no. 1, p. 186 (para. 4 at the end); as distinct from imputation of a mistake attributable to a third party, *see* → Art. 3.2.8(1)); as noted by Vogenauer/*Huber* Art. 3.2.2 no. 19.
12 *See* Vogenauer/*Huber* Art. 3.2.2 no. 21.
13 Morán Bovio/*Herrera* Art. 3.5, no. 1, p. 186 para. 4.
14 Vogenauer/*Huber* Art. 3.2.2 no. 22.
15 Morán Bovio/*Herrera* Art. 3.5, no. 1, p. 186 para. 4; *see* Vogenauer/*Huber* Art. 3.2.2 no. 23-26.
16 Official Comments, Art. 3.2.2 no. 3, p. 103; Morán Bovio/*Herrera* Art. 3.5, no. 1, p. 187 ('culpa grave'); Vogenauer/*Huber* Art. 3.2.2 no. 28, 46.
17 Vogenauer/*Huber* Art. 3.2.2 no. 30.
18 Vogenauer/*Huber* Art. 3.2.2 no. 32 (referring to a similar rule in § 154 Restatement (Second) of Contracts (USA)).
19 Vogenauer/*Huber* Art. 3.2.2 no. 34.
20 Morán Bovio/*Herrera* Art. 3.5, no. 1, p. 187; Vogenauer/*Huber* Art. 3.2.2 no. 35-40.
21 *Cf.* Official Comments, Art. 3.2.2 no. 3, Illustration 2, p. 104; Vogenauer/*Huber* Art. 3.2.2 no. 40, 37.
22 Vogenauer/*Huber* Art. 3.2.3 no. 16.
23 Vogenauer/*Huber* Art. 3.2.2. no. 46; *Brödermann* in: § 6 IPR in: MünchAnwaltshandb. IntWirtschR, no. 191.

C. Legal Consequences

4 Subject to passing the other tests of the test scheme set forth at → Art. 3.2.1 no. 2 at B, the consequences set forth in → Art. 3.2.1 no. 3 at C. apply.

Article 3.2.3 (Error in expression or transmission)

An error occurring in the expression or transmission of a declaration is considered to be a mistake of the person from whom the declaration emanated.

A. Errors in Expression or Transmission as Mistakes

1 Art. 3.2.3 adds to the broad concept of 'mistake'[1] in Art. 3.2.1 (and **protects the mistaken party** even with respect to mistakes in expression of third parties, Art. 3.2.8(1)).[2] If, **after** proper **interpretation** (Arts. 4.2-4.3; e.g. with the *falsa demonstratio non nocet*-rule),[3] there remains a **discrepancy** between the wording of the contract and the real intention there is an **error in expression**[4] which may take the **specific form**[5] of **an error in transmission** (e.g. a typing or spelling error [as contrasted with a calculation error[6]], whereby the different ways around the globe to write numbers can be a cause). It is distinct from a misunderstanding of a notice after reaching the addressee,[7] Art. 1.10(2)).[8]

B. Legal Consequences

2 Avoidance due to an error under Art. 3.2.3 gives rise to the same consequences as an error under Art. 3.2.1 (*see* there no. 3 at C.).[9] Yet, such errors are subject to the **same boundaries** (the test scheme) as other mistakes (→ Art. 3.2.1 no. 2 at B.). In practice, Art. 3.2.2(1)(b) may play a role (*res integra* rule),[10] as well as Art. 3.2.2(2)(a) (gross negligence) or (b) (e.g. if the mistaken party ought to have known about the unreliability of the chosen communication method).[11] In contrast, a joint error of both parties (Art. 3.2.2(1)(a)) about a factual basis (e.g. '40' instead

1 *See* Vogenauer/*Huber* Art. 3.2.3 no. 2.
2 Morán Bovio/*Herrera* Art. 3.6, no. 1, p. 191-192 para. 1.
3 Vogenauer/*Huber* Art. 3.2.3 no. 4; *see* Marcianus D. 35.1.33: "*Falsa demonstratio neque legatario neque fideicommissario nocet neque heredi instituto...*".
4 Morán Bovio/*Herrera* Art. 3.6, no. 1, p. 191 (referring to 'discordancia entre lo querido y lo declarado').
5 Vogenauer/*Huber* Art. 3.2.3 no. 5 (with a helpful text book example in no. 7).
6 Vogenauer/*Huber* Art. 3.2.2 no. 14.
7 Morán Bovio/*Herrera* Art. 3.6, no. 1, p. 192 para. 4.
8 Official Comments, Art. 3.2.3 no. 2, p. 105; Vogenauer/*Huber* Art. 3.2.3 no. 6.
9 Morán Bovio/*Herrera* Art. 3.6, no. 1, p. 191 (whereby the commented Art. 3.6 in the version of 1994 correlates with Art. 3.2.3 in the version 2016).
10 Vogenauer/*Huber* Art. 3.2.3 no. 10.
11 Official Comments, Art. 3.2.3 no. 1, pp. 104-105; Vogenauer/*Huber* Art. 3.2.3 no. 12.

of '60' containers) might not lead to an exclusion of avoidance (no risk allocation to one party under Art. 3.2.2(2)(b)).[12]

Article 3.2.4 (Remedies for non-performance)

A party is not entitled to avoid the contract on the ground of mistake if the circumstances on which that party relies afford, or could have afforded, a remedy for non-performance.

Remedies for Non-Performance Trumps Avoidance

Emphasizing again the *favor contractus* principle (Art. 1.6; chapter 7 providing for termination only as a last resort),[1] Art. 3.2.4 gives **priority** to (any one and all,[2] even only theoretical)[3] rights for non-performance (chapter 7, Art. 7.1.1. *et seq.*) as compared to a right for avoidance due to a mistake.[4] As a result, the consequences of **most mistakes** relating to "existence, quality, or characteristics of the object of the contract"[5] will be **covered by chapter 7** and not chapter 3.[6] However, in rare cases the mistaken party may be entitled to damages under Art. 3.2.16.[7] 1

Article 3.2.5 (Fraud)

A party may avoid the contract when it has been led to conclude the contract by the other party's fraudulent representation, including language or practices, or fraudulent non-disclosure of circumstances which, according to reasonable commercial standards of fair dealing, the latter party should have disclosed.

A. Intended Leading into Error and Thereby Gaining and Advantage[1]

According to the **mandatory**[2] (→ Art. 3.1.4) provision in Art. 3.2.5, fraud (by a party or even a third person under the circumstances covered in Art. 3.2.8)[3] requires *firstly* a **'state of mind: fraudulent intention'**[4] which includes *(a)* **deliberate** misrepresentation **or 'reckless representations'** ('constructive intention', *do-* 1

12 Vogenauer/*Huber* Art. 3.2.3 no. 15 (giving the container example).
1 Vogenauer/*Huber* Art. 3.2.4 no. 4.
2 Vogenauer/*Huber* Art. 3.2.4 no. 6.
3 Vogenauer/*Huber* Art. 3.2.4 no. 7 (referring to the '*could have afforded*'-wording in Art. 3.2.4).
4 Official Comments, Art. 3.2.4 no. 1, p. 105.
5 Enumeration of Vogenauer/*Huber* Art. 3.2.4 no. 8.
6 Morán Bovio/*Herrera* Art. 3.7, no. 1, p. 194; Vogenauer/*Huber* Art. 3.2.4 no. 8.
7 Vogenauer/*Huber* Art. 3.2.4 no. 9, 11-16.
1 Official Comments, Art. 3.2.5 no. 2, p. 107.
2 *Cf.* Vogenauer/*du Plessis* Art. 3.2.5 no. 30.
3 Official Comments, Art. 3.2.8 no. 1, p. 112; Vogenauer/*du Plessis* Art. 3.2.5 no. 28-29.
4 Vogenauer/*du Plessis* Art. 3.2.5 no. 6.

lus eventualis)[5] – as distinguished from gross negligence (covered by Art. 3.2.2(2)(a))[6] – and *(b)* a goal "**to gain an advantage** to the detriment of the other party".[7] *Secondly*, the intention must substantiate in some **conduct**. It is (*a*) usually an **act: 'false representation'** (which avoids any distinction between representations of 'fact' or 'opinion'),[8] **express or implied**, i.e. by words or actions ('language or practices', e.g. hiding of a page),[9] and (*b*) sometimes an **omission** ('fraudulent non-disclosure') in violation of 'reasonable commercial standards of fair dealing' (Art. 1.7)[10] to be applied with due respect to the circumstances (e.g. the kind and purpose of contract; does the silence relate to the party's own performance?;[11] a **surprising term** in the standard terms;[12] special expertise; cost and/or ease to acquire the information; the nature of the information; the apparent importance of the information to the other party).[13] The fraud must have *thirdly* a **causal link** to the contract conclusion[14] and often induces a **'special case of mistake'**[15] and may **overlap with 'gross disparity'** (Art. 3.2.7(1)(a)) if one does not require 'error'[16] with regard to the broad wording of Art. 3.2.5.

B. Legal Consequences

2 Unless the deceived party confirms the contract (Art. 3.2.9), it can **avoid** it (or the affected individual terms, Art. 3.2.13)[17] by a timely **notice** (Arts. 3.2.11-3.2.12) with the (*ex tunc*) effects as per Arts. 3.2.14–3.2.15 including duties of restitution.[18] Avoidance as a result of a threat by a third party is covered by Art. 3.2.8.[19] Irrespective of avoidance, the deceived party can claim **damages** in the amount of its 'reliance' or 'negative' interest[20] (Art. 3.2.16).

Article 3.2.6 (Threat)

A party may avoid the contract when it has been led to conclude the contract by the other party's unjustified threat which, having regard to the circumstances, is so imminent and serious as to leave the first party no reasonable alternative. In particular, a threat is unjustified if the act or omission with which a party has been threatened is wrongful in itself, or it is wrongful to use it as a means to obtain the conclusion of the contract.

5 Vogenauer/*du Plessis* Art. 3.2.5 no. 7.
6 Vogenauer/*du Plessis* Art. 3.2.5 no. 8.
7 Official Comments, Art. 3.2.5 no. 2, p. 107 (bold print supplemented); Morán Bovio/*Herrera* Art. 3.8, no. 1, p. 196; Vogenauer/*du Plessis* Art. 3.2.5 no. 9.
8 Vogenauer/*du Plessis* Art. 3.2.5 no. 11 (referring e.g. to a similar open approach in § 168 Restatement (Second) of Contracts (USA)).
9 Vogenauer/*du Plessis* Art. 3.2.5 no. 12.
10 Vogenauer/*du Plessis* Art. 3.2.5 no. 15-16.
11 Vogenauer/*du Plessis* Art. 3.2.5 no. 16-20.
12 Vogenauer/*du Plessis* Art. 3.2.5 no. 22.
13 The latter examples stem from Art. 49(3) CESL; Vogenauer/*du Plessis* Art. 3.2.5 no. 21.
14 Morán Bovio/*Herrera* Art. 3.8, no. 1, p. 197 para. 1; Vogenauer/*du Plessis* Art. 3.2.5 no. 23-24.
15 Official Comments, Art. 3.2.5 no. 1, pp. 106-107; Vogenauer/*du Plessis* Art. 3.2.5 no. 4.
16 Debated, *see* Vogenauer/*du Plessis* Art. 3.2.5 no. 2-5 (with due regard to the drafting history).
17 Vogenauer/*du Plessis* Art. 3.2.5 no. 26.
18 Vogenauer/*du Plessis* Art. 3.2.5 no. 26.
19 Morán Bovio/*Herrera* Art. 3.8, no. 2.b, p. 198 (whereby the referenced Art. 3.11 of the 1994 version of the UNIDROIT Principles correlates with Art. 3.2.8 in the 2016 version).
20 Vogenauer/*du Plessis* Art. 3.2.5 no. 27.

A. Two Kinds of Unjustified Threats

The **mandatory**[1] (→ Art. 3.1.4) provision in Art. 3.2.6 does not define threat, but it 1
describes that the threat, 'having regard to the circumstances' (→ Arts. 4.2–4.3), must be 'so **imminent and serious**[2] as to leave the first party no reasonable alternative'[3] and thereby **lead** the other party **to conclude the contract ('causality')**.[4] A party accused of a threat may defend itself by proving that the contract would have been concluded anyhow ('absence of a reasonable alternative').[5] According to its **literal meaning** a 'threat' requires "pressure applied to the will by a declaration of the harm that will follow non-compliance."[6] It is more than a warning "pointing out that certain consequences will unavoidably ensue if a party does not consent".[7] It is distinct from 'absolute force' or 'physical violence' which prohibits an agreement under Art. 2.1.1.[8] The threat (by a party or even a third person under the circumstances covered in Art. 3.2.8)[9] needs to be '**unjustified**'.[10] In this respect, *sentence 2* distinguishes **two groups of cases**: **(i)** Sentence 2, *alternative 1*, bans threats if, under the circumstances,[11] the threatened **act or omission 'is wrongful in itself'**.[12] This may be a **socially unacceptable behaviour**[13] like physical harm,[14] harm to the threatened or a third person's[15] property, economic interests or reputation.[16] **(ii)** According to sentence 2, *alternative 2*, the **purpose of a threat** can make the pointing at an otherwise lawful act or omission (such as a right to terminate a contract or to bring a law suit or a criminal complaint) wrongful if the threatened act or omission is used **as a means to obtain conclusion of contract**,[17] especially if the threatened action is unrelated to the intended contract conclusion.[18] In case of a renegotiation of a contract, a declaration to contemplate breach-

1 *Cf.* Vogenauer/*du Plessis* Art. 3.2.6 no. 24.
2 Morán Bovio/*Herrera* Art. 3.9, no. 2.a, p. 200 (observing the equal situation under Spanish law).
3 Emphasis added, *see* Official Comments, Art. 3.2.6 no. 1, pp. 107-108; and the discussion by Vogenauer/*du Plessis* Art. 3.2.6 no. 12-13.
4 Vogenauer/*du Plessis* Art. 3.2.6 no. 15-16.
5 Vogenauer/*du Plessis* Art. 3.2.6 no. 15-16.
6 Oxford English Dictionary, 2d ed. 1989, Vogenauer/*du Plessis* Art. 3.2.6 no. 4.
7 Vogenauer/*du Plessis* Art. 3.2.6 no. 4.
8 Vogenauer/*du Plessis* Art. 3.2.6 no. 3.
9 Vogenauer/*du Plessis* Art. 3.2.6 no. 17.
10 Official Comments, Art. 3.2.6 no. 2, p. 108; Morán Bovio/*Herrera* Art. 3.9, no. 2.a, p. 200 para. 4 ('injusta').
11 Vogenauer/*du Plessis* Art. 3.2.6 no. 8.
12 *See* Official Comments, Art. 3.2.6 no. 3, Illustration 2, p. 108.
13 Vogenauer/*du Plessis* Art. 3.2.6 no. 6.
14 *Loc. cit.* previous note.
15 Vogenauer/*du Plessis* Art. 3.2.6 no. 14.
16 Official Comments, Art. 3.2.6 no. 3, p. 108; Vogenauer/*du Plessis* Art. 3.2.6 no. 7; *see* also already Morán Bovio/*Herrera* Art. 3.9, no. 1, p. 199 para. 2 (regarding the impact on economic interests).
17 Morán Bovio/*Herrera* Art. 3.9, no. 2.b (para. 1 at the end), p. 201.
18 *Cf.* Official Comments, Art. 3.2.6 no. 2, Illustration 1, p. 108; Vogenauer/*du Plessis* Art. 3.2.6 no. 11 (with examples).

ing a contract, duly interpreted (Arts. 4.2-4.3), may or may not be a threat in the sense of Art. 3.2.6, depending on the (possibly changed)[19] circumstances (→ Art. 7.3.3 as a possible tool for defence).[20]

B. Legal Consequences

2 Unless the threatened party confirms the contract (Art. 3.2.9), it can **avoid** it (or the affected individual terms, Art. 3.2.13)[21] by a timely **notice** (Arts. 3.2.11–3.2.12) with the (retroactive) effects as per Arts. 3.2.14-3.2.15 including duties of restitution.[22] Avoidance as a result of a threat by a third party is regulated in Art. 3.2.8.[23] Irrespective of avoidance (Art. 3.2.16), 'the party that made the threat'[24] (or who is responsible for a third party that made the threat,[25] Art. 3.2.8(1)) is liable for **damages** in the amount of the threatened party's 'reliance' or 'negative' interest.[26]

Article 3.2.7 (Gross disparity)

(1) A party may avoid the contract or an individual term of it if, at the time of the conclusion of the contract, the contract or term unjustifiably gave the other party an excessive advantage. Regard is to be had, among other factors, to

(a) the fact that the other party has taken unfair advantage of the first party's dependence, economic distress or urgent needs, or of its improvidence, ignorance, inexperience or lack of bargaining skill, and

(b) the nature and purpose of the contract.

(2) Upon the request of the party entitled to avoidance, a court may adapt the contract or term in order to make it accord with reasonable commercial standards of fair dealing.

(3) A court may also adapt the contract or term upon the request of the party receiving notice of avoidance, provided that that party informs the other party of its request promptly after receiving such notice and before the other party has reasonably acted in reliance on it. Article 3.2.10(2) applies accordingly.

19 Vogenauer/*du Plessis* Art. 3.2.6 no. 8-9.
20 *Loc. cit.* previous note.
21 Vogenauer/*du Plessis* Art. 3.2.6 no. 19.
22 Vogenauer/*du Plessis* Art. 3.2.6 no. 19.
23 Morán Bovio/*Herrera* Art. 3.9, no. 1, p. 199 (referencing to Art. 3.11 of the initial version which correlates with Art. 3.2.8).
24 Vogenauer/*du Plessis* Art. 3.2.6 no. 20.
25 Vogenauer/*du Plessis* Art. 3.2.6 no. 20.
26 Vogenauer/*du Plessis* Art. 3.2.5 no. 27.

A. Avoidance in case of Excessive Advantage

As a **mandatory** principle pursuant to Art. 3.1.4, and subject to intervening mandatory law (Art. 1.4 and Arts. 3.3.1-3.3.2),[1] Art. 3.2.7 watches out that the principle of fair dealing (Art. 1.7) is respected already at contract conclusion[2] (Art. 1.1). **Para. 1 sentence 1** gives a right to avoidance if the other party (or possibly a third person from its sphere, Art. 3.2.8) has taken an '**excessive advantage**' at the time of contract conclusion of the other[3] (*first condition*) which is '**unjustifiable**' (*second condition*),[4] whereby actual or constructive knowledge of the weakness of the other party is not necessary (while ignorance might be a defence argument).[5] **(i)** An advantage is 'excessive' if it "**shock(s) the conscience of a reasonable person**"[6] with due regard to the circumstances of the contract as a whole[7] or of the relevant term.[8] **(ii)** According to **para. 1 sentence 2**, an advantage is **not 'justified' if** *(a)* it takes advantage of certain forms of weakness[9] as set forth in **lit. a)** while superior bargaining power due to market conditions[10] or ignorance of the other party[11] (as compared what is 'objectively knowable')[12] alone would not suffice to take an unfair advantage (Art. 1.1); *(b)* if the **nature and purpose of the contract** excludes any justification (**lit. b**);[13] **or** *(c)* **other factors** exclude a justification (such as ethics prevailing in a particular trade).[14] In practice, if one party has a reason to be extremely tough on certain terms (e.g. on interest rates), it is risk minimising and avoids debate if the tough term evidences the justification by relating to the reasons for such terms.[15] 1

1 Vogenauer/*du Plessis* Art. 3.2.7 no. 6 (arguing priority of Art. 3.2.1-3.2.2 over Art. 3.2.7 because the solution in Art. 3.2.1-3.2.2 might respect better underlying policy arguments, while both set of rules lead eventually to Art. 3.2.15).
2 Official Comments, Art. 3.2.7 no. 1, pp. 109-110.
3 *See* Vogenauer/*du Plessis* Art. 3.2.7 no. 2-3 on the background.
4 Morán Bovio/*Herrera* Art. 3.10 ,no. 1, p. 203 (para. 2: 'injustificada').
5 Vogenauer/*du Plessis* Art. 3.2.7 no. 14 and note 247 (debated).
6 Official Comments, Art. 3.2.7 no. 1, pp. 109-110; Morán Bovio/*Herrera* Art. 3.10, no. 1, p. 203 (para. 2, referring to the Official Comments); Vogenauer/*du Plessis* Art. 3.2.7 no. 7.
7 Morán Bovio/*Herrera* Art. 3.10, no. 1, p. 203 (para. 2, referring to the Official Comments); Vogenauer/*du Plessis* Art. 3.2.7 no. 7 (as opposed to applying a mathematical formula) quoting *Bonell* Tulane Journal of International and Comparative Law 1995 (3), 73, 88.
8 Vogenauer/*du Plessis* Art. 3.2.7 no. 8.
9 Vogenauer/*du Plessis* Art. 3.2.7 no. 10-14.
10 Official Comments, Art. 3.2.7 no. 2(a), p. 110; Vogenauer/*du Plessis* Art. 3.2.7 no. 11.
11 Vogenauer/*du Plessis* Art. 3.2.7 no. 12.
12 Arbitral Award March 1998 ICC case 9029 (1999), Rome, Unilex (the 17th of the cited paragraphs); Vogenauer/*du Plessis* Art. 3.2.7 no. 12.
13 Official Comments, Art. 3.2.7 no. 2(b), pp. 110-111; *see* for rare examples *Bonell* Tulane Journal of International and Comparative Law 1995 (3), 73, 89-90; Vogenauer/*du Plessis* Art. 3.2.7 no. 15-17.
14 Official Comments, Art. 3.2.7 no. 2(c), p. 111; Vogenauer/*du Plessis* Art. 3.2.7 no. 18.
15 Example from practice in a Dutch-Turkish contract with an extremely high interest rate: by putting the entire amount of the lender at risk by a 'no cure-no pay' agreement, as the loan was needed to finance an action with probably positive yet uncertain outcome.

B. Legal Consequences

1. The 'Triple' of Consequences (Avoidance, Restitution and Reliance Damages)

2 Unless the exploited party confirms the contract (Art. 3.2.9),[16] it can **avoid** it (or the affected individual terms, Art. 3.2.13)[17] by a timely **notice** (Arts. 3.2.11-3.2.12; whereby Art. 3.2.12(2) provides for a **special time limit in case of partial avoidance** of an individual term for gross disparity) with the (retroactive) effects as per Arts. 3.2.14-3.2.15 including duties of restitution.[18] Avoidance as a result of an excessive advantage of a third party is regulated in Art. 3.2.8. Irrespective of avoidance, the party who took the excessive advantage is liable for **damages** in the amount of the threatened party's 'reliance' or 'negative' interest (Art. 3.2.16).[19]

2. Alternative Option of Adaptation

3 As an alternative to avoidance, pursuant to **para. 2** the exploited party can seek a contract adaptation by the competent court (→ Art. 1.11 1st hyphen) and nonetheless claim its reliance interest including lawyers' fees while the right to avoidance is then excluded[20] (para. 3 sentence 2, Art. 3.2.10(2)).[21] Pursuant to **para. 3** the (allegedly) exploiting party can react by a prompt notice (Art. 1.10) and request itself an adaptation of the contract by the court (Art. 1.11).[22]

C. Liquidated Damages and Penalty Clauses

4 For clauses requiring in case of non-performance the payment of 'a specified sum' to the other party, Art. 7.4.13 (2) contains a more specific rule of adaptation in case of a grossly excessive relation to the harm resulting from the non-performance.

Article 3.2.8 (Third persons)

(1) Where fraud, threat, gross disparity or a party's mistake is imputable to, or is known or ought to be known by, a third person for whose acts the other party is responsible, the contract may be avoided under the same conditions as if the behaviour or knowledge had been that of the party itself.
(2) Where fraud, threat or gross disparity is imputable to a third person for whose acts the other party is not responsible, the contract may be avoided if

16 Morán Bovio/*Herrera* Art. 3.10, no. 1, p. 204 (referring to Art. 3.12 in the 1994 version of the UNIDROIT Principles which correlates with Art. 3.2.9 in the 2016 version).
17 Vogenauer/*du Plessis* Art. 3.2.7 no. 20.
18 Vogenauer/*du Plessis* Art. 3.2.7 no. 20.
19 Vogenauer/*du Plessis* Art. 3.2.16 no. 6.
20 Official Comments, Art. 3.2.7 no. 3, p. 111; Morán Bovio/*Herrera* Art 3.10, no. 1, p. 204.
21 Morán Bovio/*Herrera* Art. 3.10, no. 1, p. 204 (by the reference to Art. 3.13 in the 1994 version of the UNIDROIT Principles which corresponds with Art. 3.2.10 in the 2016 version); Vogenauer/*du Plessis* Art. 3.2.7 no. 21.
22 Morán Bovio/*Herrera* Art. 3.10, no. 1, p. 204 para. 1; Vogenauer/*du Plessis* Art. 3.2.7 no. 22.

that party knew or ought to have known of the fraud, threat or disparity, or has not at the time of avoidance reasonably acted in reliance on the contract.

A. Third Party from the Sphere of a Contracting Party

Sometimes the contract conclusion is due to improper influence by a third party which may or may not belong to the sphere of a contracting party.[1] **Para. 1** copes with cases in which **(i)** *firstly* a contracting party is **'responsible'** ('answerable or accountable')[2] for the action of a **third** party (including 'tacit assent'),[3] either in light of **company** or partnership law (e.g. a managing director of a Ltd., a general partner of a partnership) or as a matter of **labour** law (an employee) **or** general **contract law** (e.g. agency, Secton → 2.2)[4] which may include actions upon the own initiative of the third party.[5] **(ii)** *Secondly*, any of the grounds for avoidance set forth in para. 1 must be **'imputable'** to such third party either because it sets the cause, or, alternatively and only in case of mistake, because it 'ought to have known' about the ground for avoidance (i.e. the mistake).[6] The underlying **equation** of the grounds for avoidance is based on a **'better-law-approach'** which contradicts the approach in major civil law jurisdictions because of the importance of commercial duress as compared to 'threat' which is privileged in some civil systems.[7] 1

B. Avoidance even without 'Responsibility' If the Other Party Needs No protection

Para. 2 copes with **two sets of cases** in which the party benefitting from the contract conclusion does not deserve protection as compared to the general standard of good faith and fair dealing (Art. 1.7): **(i)** it **'knew or ought to have known'** of the ground for avoidance set by the third party[8] whereby, in cases of gross disparity, knowledge of the circumstances might suffice;[9] **(ii)** it has **not (yet) acted in reliance** on the contract and, therefore, it does not harm in such cases to permit avoidance.[10] 2

1 For 'other three-party situations' *see* Vogenauer/*du Plessis* Art. 3.2.8 no. 20-21.
2 Vogenauer/*du Plessis* Art. 3.2.8 no. 5.
3 Vogenauer/*du Plessis* Art. 3.2.8 no. 8 (with examples).
4 Vogenauer/*du Plessis* Art. 3.2.8 no. 6.
5 Official Comments, Art. 3.2.8 no. 1, p. 112; Vogenauer/*du Plessis* Art. 3.2.8 no. 7.
6 Official Comments, Art. 3.2.8 no. 1, p. 112; Morán Bovio/*Herrera* Art 3.11, no. 1, p. 208-209; Vogenauer/*du Plessis* Art. 3.2.8 no. 9.
7 Vogenauer/*du Plessis* Art. 3.2.8 no. 13 and 2.
8 Morán Bovio/*Herrera* Art. 3.11, no. 1, p. 209; *see* the example given by Vogenauer/*du Plessis* Art. 3.2.8 no. 17 (a financial institution takes in a surety and advises the guarantor to take independent legal advice).
9 Carefully pointing in this direction Vogenauer/*du Plessis* Art. 3.2.8 no. 18.
10 Official Comments, Art. 3.2.8 no. 2, p. 112; Morán Bovio/*Herrera* Art. 3.11, no. 1, p. 209; Vogenauer/*du Plessis* Art. 3.2.8 no. 19.

Article 3.2.9 (Confirmation)

If the party entitled to avoid the contract expressly or impliedly confirms the contract after the period of time for giving notice of avoidance has begun to run, avoidance of the contract is excluded.

A. A Logical Consequence of Freedom of Contract (and of the Good Faith Principle)

1 Art. 3.2.9 serves a double purpose.[1] *Firstly*, as an expression of freedom of contract (Art. 1.1), it confirms the **right to waive** a right of avoidance under chapter 3 by confirmation. *Secondly*, as an expression of the principle directed against inconsistent behaviour (Art. 1.8), it cuts off any such right of avoidance after a proper confirmation.

B. Confirmation requires

2 **(i)** a **ground for avoidance** pursuant to Arts. 3.2.1-3.2.3 or 3.2.5-3.2.8; **(ii)** an express **notice** (Art. 1.10) **or** – to be applied carefully[2] – **conduct** implying a confirmation (e.g. performance or a claim of performance, without reserving the right for avoidance);[3] **(iii)** made after the **time** for issuing the notice of avoidance under Art. 3.2.12 (i.e. actual or constructive knowledge) has begun.[4]

Article 3.2.10 (Loss of right to avoid)

(1) If a party is entitled to avoid the contract for mistake but the other party declares itself willing to perform or performs the contract as it was understood by the party entitled to avoidance, the contract is considered to have been concluded as the latter party understood it. The other party must make such a declaration or render such performance promptly after having been informed of the manner in which the party entitled to avoidance had understood the contract and before that party has reasonably acted in reliance on a notice of avoidance.
(2) After such a declaration or performance the right to avoidance is lost and any earlier notice of avoidance is ineffective.

1 Vogenauer/*Huber* Art. 3.2.9 no. 1.
2 Vogenauer/*Huber* Art. 3.2.9 no. 8 suggests a 'restrictive' application.
3 Official Comments to Art. 3.2.9, p. 113; *see* also Morán Bovio/*Herrera* Art. 3.12, no. 1, p. 212 ('tácita'); Arbitration Award 21 April 1997, *Ad Hoc* arbitration (Paris), Unilex (abstract); Arbitration Award 10 December 1997, *Ad Hoc* arbitration (Buenos Aires), Unilex (abstract); Vogenauer/*Huber* Art. 3.2.9 no. 7-8, in particular note 290.
4 Morán Bovio/*Herrera* Art. 3.12, no. 1, p. 211 (whereby the referenced Art. 3.15 in the version 1994 correlates with Art. 3.2.12 in the 2016 version); *cf.* Vogenauer/*Huber* Art. 3.2.9 no. 9.

A. Function: Part of the Regime for Mistakes

Pursuant to *para. 2,* a **contract amendment** under *para. 1* → **B.** below) cuts off a right of avoidance due to **mistakes**.[1] Art. 3.2.10 is therefore part of the test scheme for avoidance due to a mistake set forth at → Art. 3.2.1 no. 2 (B.vii.). Art. 3.2.10 does not apply to joint mistakes.[2] 1

B. Right of the Other Party to Uphold the Contract in an Amended Version

In the spirit of Art. 1.7, there is no need to protect a mistaken party beyond the scope of its mistake (no need for a right to 'repent').[3] Therefore, in case of a mistake by one party during contract conclusion, **para. 1** gives the other party a **right to uphold** the contract in a **modified version** which **'reflect[s] the understanding of the mistaken party'**,[4] whereby, **(i)** pursuant to **para. 2**, the mistaken party loses its rights under Arts. 3.2.2-3.2.3,[5] **(ii)** an earlier notice of avoidance becomes ineffective (also **para. 2**),[6] **(iii)** the mistaken party may still be liable for damages under Art. 3.2.16.[7] 2

C. Requirements

Para. 1 requires **(i)** *firstly* **a prompt**[8] **notice** (Art. 1.10) or **performance** (hereinafter jointly referred to as **'action'**) of the contract by the other (i.e. the not mistaken) party indicating the willingness to perform the contract in the way as understood by the mistaken party. Such action of the other party must occur promptly **after** learning ('obtaining knowledge')[9] about the understanding of the mistaken party (i.e. a **"very short period of time"**, close to 'immediately');[10] and **(ii)** *secondly* that the mistaken party has **not yet reasonably acted in reliance** on its notice of avoidance (*para 1 sentence 2, 2d condition*),[11] if already given, e.g. by concluding another contract to replace the 'avoided' contract.[12] 3

1 Morán Bovio/*Herrera* Art. 3.13, no. 1, p. 215 (para. 2).
2 Vogenauer/*Huber* Art. 3.2.10 no. 2 (with a hint in note 299 at contract adaptation by a court if the mistake has led to gross disparity, Art. 3.2.7 (2) and (3)).
3 Vogenauer/*Huber* Art. 3.2.10 no. 1, with a helpful reference to *Probst*, 'Deception', in: *Kramer/Probst*, Defects in the Contracting Process, in von Mehren (ed.), *International Enxyclopedia of Comparative Law, vol. VII. Contracts in General*, ch 11 (2001), para. 64.
4 Vogenauer/*Huber* Art. 3.2.10 no. 9.
5 Morán Bovio/*Herrera* Art. 3.13, no. 1, p. 215.
6 Official Comments, Art. 3.2.10 no. 3, p. 114; Morán Bovio/*Herrera* Art. 3.13, no. 2.b, p. 215 (at the end); Vogenauer/*Huber* Art. 3.2.10 no. 10.
7 Official Comments, Art. 3.2.10 no. 4, p. 114; Morán Bovio/*Herrera* Art. 3.13, no. 2.b, p. 216 (whereby the referenced 3.18 in the initial version correlates with 3.2.16); Vogenauer/*Huber* Art. 3.2.10 no. 11.
8 Official Comments, Art. 3.2.10 no. 2, p. 114.
9 Vogenauer/*Huber* Art. 3.2.10 no. 5.
10 Vogenauer/*Huber* Art. 3.2.10 no. 5.
11 Morán Bovio/*Herrera* Art. 3.13, no. 2.b, p. 215 (para. 1); Vogenauer/*Huber* Art. 3.2.10 no. 6-7.
12 Vogenauer/*Huber* Art. 3.2.10 no. 6 at the end.

Article 3.2.11 (Notice of avoidance)

The right of a party to avoid the contract is exercised by notice to the other party.

A. Avoiding a Cultural Clash

1 As the approach to avoidance varies (e.g. the French based civil laws require the decision of a court;[1] others may provide for an automatic effect),[2] Art. 3.2.11 clarifies the *modus* of exercising any[3] right of avoidance under Arts. 3.2.1 *et seq.*

B. Requirement

2 Avoidance requires **a notice** (Art. 1.10),[4] whereby **'means appropriate to the circumstances'** (Art. 1.10)[5] may include unequivocal conduct[6] indicating the intention to annul the contract.[7] It is not necessary to give reasons.[8] However, only an **indication sufficient to give 'knowledge'** about the understanding of the mistaken party **starts the short time period under Art. 3.2.10** for the other party to save the contract[9]. Under ordinary circumstances, there is no 'duty' to reply to such notice[10] while it may be usually a matter of good faith and fair dealing (Art. 1.7) or practices established during the contract negotiations (Art. 1.9(1)) to confirm receipt upon request of the sender.

Article 3.2.12 (Time limits)

(1) Notice of avoidance shall be given within a reasonable time, having regard to the circumstances, after the avoiding party knew or could not have been unaware of the relevant facts or became capable of acting freely.
(2) Where an individual term of the contract may be avoided by a party under Article 3.2.7, the period of time for giving notice of avoidance begins to run when that term is asserted by the other party.

1 See Art. 1178(2) sentence 2 of the French Civil code (2016 version) (with an exception in case of party agreement); *see* Official Comments, Art. 3.2.11 no. 1, p. 115; Morán Bovio/*Herrera* Art. 3.14, no. 2.a., p. 217 (on Spanish law).
2 *Cf.* Vogenauer/*Huber* Art. 3.2.11 no. 11.
3 Vogenauer/*Huber* Art. 3.2.11 no. 2.
4 Official Comments, Art. 3.2.11 no. 1 and 3, p. 115.
5 Official Comments, Art. 3.2.11 no. 2, p. 115.
6 Arbitration Award 10 December 1997, *Ad Hoc* arbitration (Buenos Aires), Unilex (abstract); Vogenauer/*Huber* Art. 3.2.11 no. 4.
7 Vogenauer/*Huber* Art. 3.2.11 no. 2.
8 Official Comments, Art. 3.2.11 no. 2, p. 115; Vogenauer/*Huber* Art. 3.2.11 no. 2.
9 Vogenauer/*Huber* Art. 3.2.11 no. 4.
10 Vogenauer/*Huber* Art. 3.2.11 no. 5.

A. A 'Reasonable' Time Limit

Pursuant to **para. 1**, any notice of avoidance needs to be given within a 'reasonable' **time period *sui generis*** not subject to the rules in limitation periods in chapter 10, Art. 10.1(2)[1] with due regard to the circumstances, which may vary considerably depending on the type of international transaction and the jurisdictions and distances involved.[2] The **commencement** of the time limit is dependent on a **subjective factor**: **(i) knowledge** of the 'relevant facts' for a right of avoidance[3] (not: realising that the facts actually suffice for a right of avoidance),[4] **(ii) constructive knowledge** ('could not have been unaware of the relevant facts', which has been interpreted as 'gross negligence',[5] that interpretation is convincing in light of the fatal consequence of overrunning the expiration of the time limit, *see* below) or **(iii)**, in case of avoidance for threat (Art. 3.2.6), when the threatened party becomes capable to act freely.[6] By referring to 'reasonableness', Art. 3.2.12 follows a **common law** rather than a civil law approach. This is why it has been suggested to take inspiration from a similar rule in § 381(3) Restatement 2d Contracts (USA) when determining what is reasonable under the circumstances[7] (e.g. the time to take legal advice).[8] The reference to a subjective factor for its commencement is an indication that the time period "should be shorter rather than longer".[9] After its **expiration** the right to avoidance is cut off.[10] This correlates with the general *favor contractus* approach of the UNIDROIT Principles (→ Introduction no. 8) and contributes to legal security in international contracting, while the party which can rely on a ground for avoidance can control its loss by diligent action within the reasonable time frame. 1

B. A Special Rule for Avoidance of Individual Terms

Pursuant to **para. 2** in case of an avoidance of individual terms for gross disparity (Art. 3.2.7), the time for giving notice of (full or partial, Art. 3.2.13) avoidance period starts from the concrete moment when the other party invokes the contested 2

1 *See* also Vogenauer/*Huber* Art. 3.2.12 no. 9.
2 Similar to Morán Bovio/*Herrera* Art. 3.15, no. 1, p. 219.
3 Morán Bovio/*Herrera* Art. 3.15, no. 1, p. 219 (para. 2) and no. 2.a (para 2) at p. 220.
4 Vogenauer/*Huber* Art. 3.2.12 no. 2.
5 Vogenauer/*Huber* Art. 3.2.12 no. 6; *see* also already Morán Bovio/*Herrera* Art. 3.15, no. 1, p. 219.
6 Official Comments to Art. 3.2.12, p. 116; Morán Bovio/*Herrera* Art 3.15, no. 1 (para. 1), p. 219; Vogenauer/*Huber* Art. 3.2.12 no. 3.
7 Vogenauer/*Huber* Art. 3.2.12 no. 1, 7. § 381(3) Restatement (Second) of Contracts (USA) provides: "*In determining what is a reasonable time, the following circumstances are significant:*
(a) the extent to which the delay enabled or might have enabled the party with the power of avoidance to speculate at the other party's risk;
(b) the extent to which the delay resulted or might have resulted in justifiable reliance by the other party or by third persons;
(c) the extent to which the ground for avoidance was the result of any fault by either party; and
(d) the extent to which the other party's conduct contributed to the delay".
8 Vogenauer/*Huber* Art. 3.2.12 no. 6.
9 Vogenauer/*Huber* Art. 3.2.12 no. 6.
10 Morán Bovio/*Herrera* Art. 3.15, no. 1, p. 220 (para. 2).

term.[11] However, if such term is contained in standard terms, it is likely to never have become effective (Art. 2.1.20(1)).

Article 3.2.13 (Partial avoidance)

Where a ground of avoidance affects only individual terms of the contract, the effect of avoidance is limited to those terms unless, having regard to the circumstances, it is unreasonable to uphold the remaining contract.

1 Art. 3.2.13 exemplifies the *favor contractor* principle (→ Introduction no. 8) which seeks to uphold the contract if possible. A ground of avoidance affecting only **individual terms** of the contract[1] (e.g. **certain 'terms' or certain 'items'** such as a certain part of a scope of work)[2] is **usually limited to those terms** (= *the rule*), **unless the circumstances** (which includes the behaviour of the party which sets the ground for avoidance)[3] **suggest otherwise** (to be proven by the party which is desirous to avoid the entire contract),[4] e.g. in cases where the contested terms would be also material to contract conclusion pursuant to Art. 2.1.11 (= *the exception*).[5]

2 In practice, a **'severability'-clause** will often step in providing, if well drafted, that another (hypothetical) provision (e.g. 'to be determined by the arbitral tribunal')[6] will be deemed to replace the void clause whereby the new (hypothetical) provision shall come as close as possible to e.g. **(i)** the goal of the void clause, **(ii)** the economic goal of the contract or **(iii)** the purpose of the contract (this depends on the clause).

Article 3.2.14 (Retroactive effect of avoidance)

Avoidance takes effect retroactively.

A. Retroactivity

1 Pursuant to Art. 3.2.14, avoidance operates *ex tunc*. The contract is **deemed to have never existed**.[1] Neither party has a claim under the putative 'contract' (or, in case of partial avoidance (Art. 3.2.13), the putative 'term'). Supplies made under

11 Vogenauer/*Huber* Art. 3.2.12 no. 4.
1 Official Comments to Art. 3.2.13, p. 117; Morán Bovio/*Herrera* Art. 3.16, no. 1 (para. 1, implicitly), p. 222.
2 Official Comments to Art. 3.2.13, Illustration 1 (relating to the construction of two buildings under one contract while the ground for avoidance relates only to one of them), p. 117; Vogenauer/*Huber* Art. 3.2.13 no. 2.
3 Vogenauer/*Huber* Art. 3.2.13 no. 7.
4 Morán Bovio/*Herrera* Art. 3.16, no. 1 (para. 2), p. 222; Vogenauer/*Huber* Art. 3.2.13 no. 8.
5 Vogenauer/*Huber* Art. 3.2.13 no. 4 *et seq.*
6 The variation whereby the parties shall negotiate the contents of the replacement clause puts handcuffs on the decision power of an arbitral tribunal in case of dispute resulting in an arbitration proceeding.
1 Official Comments to Art. 3.2.14, p. 117; Morán Bovio/*Herrera* Art. 3.17, no. 1, p. 224 (para. 2); Vogenauer/*du Plessis* Art. 3.2.14 no. 1.

the putative 'contract' must be returned, Art. 3.2.15. This regime is distinct from the regime for termination (Arts. 7.3.5(1) and 7.3.7(1)).[2]

B. Limits

(i) Restitution is subject to the limits set forth in Art. 3.2.15. **(ii)** In case of partial avoidance a **severability clause** will often temper the effects of avoidance (→Art. 3.2.13 no. 2). **(iii)** The retroactive avoidance (provided by the **contractual regime** of the UNIDROIT Principles, Preamble paras. 1-2) does not affect clauses which are distinct from the *lex contractus* and **qualified separately** by the applicable private international law (of the competent state court or arbitration tribunal).[3] Thereby, the retroactive effect does usually not affect **dispute resolution, choice of law** or **choice of UNIDROIT Principles**-clauses.[4] **(iv)** In light of Art. 3.2.15(2) and (4) (as part of the *contractual* regime of the UNIDROIT Principles)[5] there will be rarely room for the application of the law of unjust enrichment or *negotiorum gestio* which might be otherwise conceivable in some circumstances, where the time limit under Art. 3.2.12(1) has started late. 2

Article 3.2.15 (Restitution)

(1) On avoidance either party may claim restitution of whatever it has supplied under the contract, or the part of it avoided, provided that the party concurrently makes restitution of whatever it has received under the contract, or the part of it avoided.
(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.

A. Principle of Concurrent Restitution in Kind (Para. 1)

Art. 3.2.15 focusses on the consequences of retroactive avoidance **with a view to the supplies already exchanged** under the putative 'contract'. If and to the extent a party claims (wholly or partially, Art. 3.2.13) avoidance under Arts. 3.2.1 *et seq.*, para. 1 draws the ***quasi*-contractual** (and logical) **consequence of the retroactive effect** (Art. 3.2.14) of avoidance by providing for a mutual quasi-contractual **right** 1

2 Vogenauer/*du Plessis* Art. 3.2.14 no. 5.
3 *Cf.* Official Comments to Art. 3.2.14, p. 117.
4 Vogenauer/*du Plessis* Art. 3.2.14 no. 1, 4; *Brödermann*, Unif. Law Rev. 2011, 589, 593 *et seq.*
5 *See* the debate reported by Vogenauer/*du Plessis* Art. 3.2.15 no. 2.

mance as the exception, *"only granted if damages are not adequate"*[4] **(iii) Section 7.3 on 'termination'** provides a *right to termination* with limitations in the case of 'fundamental' contract violations; and **(iv) Section 7.4 on 'damages'.** provides a *right to damages* based on a principle of 'full compensation' (Art. 7.4.1) but limited by a concept of 'foreseeability' (Art. 7.4.1).

D. Often a Choice Between Several Options

4 These rights and remedies are in **no particular hierarchical order** and may be **combined** with due regard to the general principle of good faith and fair dealing (Art. 1.7). It implies the logical exclusions of legally inconsistent remedies[5] (e.g. no termination while pending cure pursuant to Art. 7.1.4). It is also permissible **to change remedies**[6] as long as this does not interfere with a reasonable expectation of the other party which should be reasonably protected (Arts. 1.7-1.8). Art. 7.2.5 provides an explicit example.[7] The remedies are subject to **limitation periods** (**Chapter 10**).[8]

E. Individual Adaptations Possible

5 While the UNIDROIT Principles system of remedies reflects a balanced compromise which does not favour either side of a synallagmatic contract, the parties are free to derogate from the principles (Art. 1.5). Most notably, it may be sensible to consider **risk minimising clauses** such as full **exemption clauses** or **limitation of liability** clauses (which, in the language of the UNIDROIT Principles, are both 'exemption clauses' in the sense of **Art. 7.1.6**). Without such clauses, each party remains simply fully responsible for its own sphere (except for *force majeure* scenarious) which may reflect the intention of the parties, e.g. in a contract governing the cooperation of two service providers.[9]

6 Sometimes it may be sensible to concentrate in detail on the **consequences of termination**, with distinctions depending on the reason for the termination, or to exclude termination all together,[10] at least for a certain time period. Other examples are found in clauses allowing a **grace period** with different consequences than those provided for in Art. 7.1.5 (→ Art. 7.1.5 no. 4). Sometimes, usually in spot contracts, **time may be of the essence**, in which case the parties may wish to exclude the chance of an additional time period for performance (Arts. 7.1.4, 7.1.5)

4 Note Vogenauer/*Schelhaas* Art. 7.2.2 no. 1 with reference in note 14 (p. 888) *inter alia* to *Farnsworth*, Contracts (with ed. 2004) para 12.6 ("Specific performance remains the exception rather than the rule under contract for the .... of goods"), and to § 2-716 (1) UCC.
5 *Cf.* Official Comments to Art. 7.1.1 at pp. 227-228; Vogenauer/*Schelhaas* Introduction to Section 7.1 of the UNIDROIT Principles no. 4.
6 Vogenauer/*Schelhaas* Introduction to Section 7.1 of the UNIDROIT Principles no. 10 with an example (switching from a request to performance to another remedy after learning new facts which make performance unlikely).
7 Vogenauer/*Schelhaas* Introduction to Section 7.1 of the UNIDROIT Principles no. 3.
8 Vogenauer/*Schelhaas* Introduction to Section 7.1 of the UNIDROIT Principles no. 13.
9 Example from the author's practice relating to two cooperation agreements of its law firm with counsels in China and the U.K.
10 Vogenauer/*Schelhaas* Introduction to Section 7.1 of the UNIDROIT Principles no. 14.

which will usually be reflected in the pricing as the obligor (Art. 1.11 4th hyphen) who then bears a higher risk than under ordinary circumstances. Clauses providing for **payment for non-performance** (liquidated damages, penalties) are subject to judicial control avoiding excessive and unreasonable clauses (Art. 7.4.13).[11]

Section 1: Non-performance in General

Article 7.1.1 (Non-performance defined)

Non-performance is failure by a party to perform any of its obligations under the contract, including defective performance or late performance.

A. A Unitary Concept ...[1]

Art. 7.1.1 *et seq.* contain the regime for **any violations** against the **principle of bindingness** of contracts (*pacta sunt servanda,* → Art. 1.3): **(i) non-excused or** – temporarily or definitely – **excused**[2] **non-performance** (→ Arts. 7.1.7(2) and (1) on the exclusion of damages in case of *force majeure*;[3] Art. 7.2.2(a)-(b) on the limitation of the right to *performance*; 7.1.4(2) on *termination*); **(ii)** with respect to any obligation regarding **quantity** (Arts. 6.1.2, 6.1.3; total non-performance), **quality** (Art. 5.1.6), **time** (Art. 6.1.1.) and **place** (Art. 6.1.6); **(iii)** whether these obligations are perceived as **main or accessory** obligations.[4] The regime recognises the civil law addiction to specific performance while giving substantial room to the common law aversion against it[5] (→ Art. 7.2.2). 1

B. ... Based on 'Spheres' as Defined in the Contract, Not on Fault

The regime of remedies in Arts. 7.1.1 *et seq.* is not based on 'fault'[6] but rather on mere 'objective facts' as they develop. There is either performance or non-performance with due regard to the **distinction between the 'spheres'** of **the parties** (Arts. 7.1.2, 7.1.3). This concept has an **impact on several levels**, e.g. **(i)** on **terminology**: the UNIDROIT Principles use the neutral term 'non-performance' (and avoid the term 'breach of contract');[7] like in Art. 35 CISG, a non-conforming performance can be a specific type of non-performance;[8] **(ii)** on **contributory actions** or omissions (→ Art. 7.1.2); **(iii)** there is **no general need** to put the other party 'in 2

11 Vogenauer/*Schelhaas* Introduction to Section 7.1 of the UNIDROIT Principles no. 14.
1 Vogenauer/*Schelhaas* Art. 7.1.1 no. 1.
2 Official Comments to Art. 7.1.1, pp. 227-228.
3 Vogenauer/*Schelhaas* Art. 7.1.1 no. 2.
4 Vogenauer/*Schelhaas* Art. 7.1.1 no. 1 with reference to the duty to cooperate (Art. 5.1.3) and the duty of confidentiality (Art. 2.1.16); critical with regard to the lack of distinction Morán Bovio/*Morán Bovio* Art. 7.1.1, no. 3a, p. 324.
5 Summary of an observation made by Vogenauer/*Vogenauer* Art. 1.3 no. 7.
6 Vogenauer/*McKendrick*, Introduction to Section 7.4. of the PICC no. 2.
7 Vogenauer/*Schelhaas* Art. 7.1.1 no. 6.
8 Vogenauer/*Schelhaas* Art. 7.1.1 no. 9.

default' (*mise en demeure, Mahnung*);[9] the UNIDROIT Principles describe the consequences of a non-performance of contracted actions without requiring a 'warning' (with the exception of termination for delay in performance where a notice allowing additional time is required, Arts. 7.1.5(3) and 7.3.1(3)).[10] The *force majeure* concept (Art. 7.1.7) covers impediments beyond the control and sphere of either party. **Fault** is **irrelevant** when a **specific result** (e.g. the construction and/or delivery of a product) **is due** (strict liability; → Art. 5.1.4(1)), but it indirectly becomes an issue in the context of the personalised and contextualised reasonableness test under Art. 5.1.4(2) in case of **'best efforts' obligations**[11] (which includes consulting services).[12]

C. Impact on Contract Drafting

3 At the drafting stage of a contract governed by the UNIDROIT Principles the sphere oriented concept requires the utmost attention to be paid to the **demarcation of the 'sphere of the obligor'** (Art. 1.11 4th hyphen) *versus* the 'sphere of the obligee' (→ again Art. 1.11 4th hyphen), the description and interpretation (**Chapter 4**) of the modalities of the obligations (**Chapter 5**) and of the duties related to performance (**Chapter 6**),[13] including, most importantly, the duties of the obligee to cooperate under Art. 5.1.3 (→ Art. 7.1.2 no. 1).

Article 7.1.2 (Interference by the other party)

A party may not rely on the non-performance of the other party to the extent that such non-performance was caused by the first party's act or omission or by another event for which the first party bears the risk.

A. A Shield[1] for the Obligor

1 Art. 7.1.2 (which was inspired by Art. 80 CISG)[2] sets a **demarcation line between the 'spheres' of the parties** and thereby sets limits to the 'non-performance' of the obligor. It is an expression of the general principle of good faith (Art. 1.7) prohibiting *venire contra factum proprium*.[3] It has **two limbs**:[4]

9 Vogenauer/*Schelhaas* Art. 7.1.1 no. 5.
10 Vogenauer/*Schelhaas* Art. 7.1.1 no. 5.
11 Vogenauer/*Schelhaas* Art. 7.1.1 no. 4.
12 For an example of the use of the UNIDROIT Principles in contracts on legal consulting services *see Brödermann*, Choice of Law and Choice of UNIDROIT Principles Clauses in the Shadow of the Dispute Resolution Clause, in: Hamburg Law Review 2016/1, p. 21, 26 *et seq.*
13 In this sense also Vogenauer/*Schelhaas* Art. 7.1.1 no. 8.
1 *Cf.* Vogenauer/*Schelhaas* Art. 7.1.2 no. 7 at p. 835 ('shielding it from any remedies').
2 (1991) P.C. – Misc. 15, pp. 54, 55. Morán Bovio/*Morán Bovio* Art. 7.1.2, no. 2b, p. 326; Vogenauer/*Schelhaas* Art. 7.1.2 no. 1.
3 Vogenauer/*Schelhaas* Art. 7.1.1 no. 2 with reference to Arbitral Award 25 January 2002, Arbitration Court of the Lausanne Chamber of Commerce and Industry, Unilex (a case in which the author served as counsel).
4 Morán Bovio/*Morán Bovio* Art. 7.1.2, no. 1, p. 325.

(i) If the obligee (→ Art. 1.11 4th hyphen) interferes in the sphere of the obligor (→ Art. 1.11 4th hyphen), e.g. by a **lack of cooperation**[5] (→ Art. 5.1.3) – by, for instance, prohibiting access to the land where the obligor has to perform construction work[6] or generally not allowing performance of the other party[7] –, the resulting failure of the obligor to perform does **not qualify as 'non-performance'** under the UNIDROIT Principles[8] (Art. 7.1.2 1st limb).
In contrast, interference by the obligee (e.g. belated or insufficient cooperation) is 2
not relevant if it was **caused by the obligor** in the first place, e.g. by a belated notice of the obligor of his intent to start working at the premises of the obligee at a certain point in time[9] (in such circumstances, the reasonableness test under Art. 5.1.3 is not met. The obligor may not reasonably expect cooperation of the obligee on such short notice).[10]
(ii) 'Interference' by the obligee includes **events for which it bears the risk**[11] 3
(Art. 7.1.2 2nd limb). This may include a 'blameless failure' of a duty to cooperate.[12] This concept excludes *force majeure* cases (Art. 7.1.7).[13]

B. Partial Relevance of the Interference

If the **contributory actions** or omissions of the obligee cause the failure to per- 4
form of the obligor only **partially** ('to the extent that'), it is necessary to apportion the 'non-performance' (and the possibility to rely thereon) in parts due to either sphere.[14] The rule in Art. 7.4.7 provides an "application of the general principle" in Art. 7.1.2.[15]

C. Most Relevant for Duties to Achieve a Specific Result

Art. 7.1.2 is most relevant for duties to achieve a specific result (Art. 5.1.4(1)). If 5
the obligor owes merely best efforts under the circumstances (Art. 5.1.4(2)), as determined under Art. 5.1.5, there is often (if not usually)[16] no non-performance against which the obligor would need Art. 7.1.2 as a shield.

5 Vogenauer/*Schelhaas* Art. 7.1.2 no. 2.
6 Official Comments, Art. 7.1.2 no. 1, Illustration 1, pp. 228-229; Vogenauer/*Schelhaas* Art. 7.1.2 no. 3.
7 Vogenauer/*Schelhaas* Art. 7.1.2 no. 1, 3.
8 *See* again Official Comments, Art. 7.1.2 no. 1, Illustration 1, pp. 228-229; Vogenauer/*Schelhaas* Art. 7.1.1 no. 3, 11.
9 Vogenauer/*Schelhaas* Art. 7.1.2 no. 5.
10 Morán Bovio/*Morán Bovio* Art. 7.1.2, no. 1 (*in fine*) p. 325; Vogenauer/*Schelhaas* Art. 7.1.2 no. 5.
11 Official Comments, Art. 7.1.2 no. 2, p. 229.
12 Vogenauer/*Schelhaas* Art. 7.1.2 no. 4.
13 Vogenauer/*Schelhaas* Art. 7.1.2 no. 7.
14 Official Comments, Art. 7.1.2 no. 1, pp. 228-229; Vogenauer/*Schelhaas* Art. 7.1.1 no. 10.
15 Official Comments, Art. 7.4.7 no. 1; Vogenauer/*McKendrick* Art. 7.4.7 no. 1.
16 Vogenauer/*Schelhaas* Art. 7.1.2 no. 6 ('usually').

Article 7.1.3 (Withholding performance)

(1) Where the parties are to perform simultaneously, either party may withhold performance until the other party tenders its performance.
(2) Where the parties are to perform consecutively, the party that is to perform later may withhold its performance until the first party has performed.

A. A Shield for Both Parties Based on Timing

1 In line with legal tradition (*'exceptio non adempleti contractus'*)[1] and most jurisdictions,[2] Art. 7.1.3 recognises the right to withholding (i.e. suspending temporarily)[3] performance, which may amount even to a **general principle of law.**[4] It is helpful if the contract, duly interpreted (Arts. 4.1, 4.3 *et seq.*), describes the sequence of duties to delineate **simultaneous and consecutive undertakings** regulated in **para. 1** (for situations of simultaneous performance, → Art. 6.1.4(1)) and **para. 2** (for consecutive performance,[5] → Art. 6.1.4(2)) differently (further, Art. 7.1.4(4) contains a special provision for withholding performance pending cure).[6] Under the UNIDROIT Principles, **no notice** is required[7] (while it is "advisable … in order to coerce the other party to perform").[8] As long as the withholding right exists, the withholding party's omission to perform its own duty **does not constitute 'non-performance'** under Art. 7.1.1.[9] The other party must perform to "end the stalement" and may not rely on remedies under Chapter 7.[10]

B. Requirements

1. Non-performance of the Other Party of an Obligation with Sufficient Connection to the Duty Underlying the Withheld Performance

2 As national laws vary on the details, it is helpful that the UNIDROIT Principles provide guidance through their general concept. **(i)** The obligation of the other party must be **due**, Art. 6.1.1.[11] **(ii)** It follows from the sphere oriented neutral approach (→ Art. 7.1.1 no. 2) that the **reasons** for non-performance are **irrelevant**[12]

1 Official Comments to Art. 7.1.3 at p. 230.
2 Vogenauer/*Schelhaas* Art. 7.1.3 no. 1 with references to Dutch, French (*see* Art. 1219 French Civil Code (2016 version)), German, Italian, Spanish and Swiss law in note 43. See also Morán Bovio/*Morán Bovio*, Art. 7.1.3, no. 2.a., p. 328 in regard to Spanish law.
3 Vogenauer/*Schelhaas* Art. 7.1.3 no. 3.
4 Arbitral Award (Paris), ICC case no. 8547 (1999), Unilex; referenced already by Vogenauer/*Schelhaas* Art. 7.1.3 no. 1 note 49.
5 *See* Vogenauer/*Atamer* Art. 6.1.4 no. 13 (towards the end of that comment).
6 Vogenauer/*Schelhaas* Art. 7.1.3 no. 5.
7 Critisized by Morán Bovio/*Morán Bovio* Art. 7.1.3, no. 3.a., p. 328.
8 Vogenauer/*Schelhaas* Art. 7.1.3 no. 14.
9 *Morán Bovio/Morán Bovio* Art. 7.1.3, no. 1, p. 327; Vogenauer/*Schelhaas* Art. 7.1.3 no. 30.
10 Again Vogenauer/*Schelhaas* Art. 7.1.3 no. 30.
11 Vogenauer/*Schelhaas* Art. 7.1.3 no. 11 (noting convincingly that otherwise withholding performance would be premature and useless).
12 Vogenauer/*Schelhaas* Art. 7.1.3 no. 9 (with further references in note 49 that this correlates e.g. with French but e.g. not with Belgian law).

(withholding performance is even permissible in case of *force majeure*).[13] The non-performance can be **total or partial** (*argumentum* Art. 6.1.3); it can be **defective performance.**[14] It is irrelevant if partial performance was accepted or rejected[15] (although, to avoid inconsistent behaviour – Art. 1.8 – the withholding party should reserve its rights upon acceptance of partial performance).[16] Non-performance may be due to circumstances arising after or existing before contract conclusion.[17] **(iii)** The **principle of good faith and fair dealing** (Art. 1.7) **provides a limit** in several directions.[18] *(a)* In case of **non fundamental non-performance** or **partial performance**, a full use of the withholding rights may be excessive under the (exceptional)[19] circumstances,[20] whereby the divisibility of the scope of work and the allocation of concrete instalments of the price to parts of the performance suggests a limitation of the right to (fully) withhold performance.[21] *(b)* While the performance (to be) withheld can be but need not be a **synallagmatic undertaking** (i.e. "reciprocal obligations that are conditional on each other"[22] such as delivery and payment)[23] because Art. 7.1.3 does not contain such a limitation,[24] the obligations need to be **sufficiently connected** or **related** as a consequence of the good faith principle in Art. 1.7[25] (e.g. a series of similar contracts between the same parties).[26] Non-performance of a related secondary obligation (such as assembly of goods to be delivered under the primary obligation) will usually justify full withholding rights.[27] Under Arts. 1.1, 1.3, and 1.5, the **parties are free to define** the connections[28] (e.g. the simultaneous delivery of an instruction manual for the use of complex goods).

2. Anticipatory Suspension

3 Similar to the concept in Art. 71 CISG and many national laws,[29] *de maiore ad minus* from the principle in Art. 7.3.3, it is possible (at the withholding party's own

13 Vogenauer/*Schelhaas* Art. 7.1.3 no. 9 (underlining that Art. 7.1.7 only precludes damages and claims for performance).
14 Vogenauer/*Schelhaas* Art. 7.1.3 no. 8.
15 Vogenauer/*Schelhaas* Art. 7.1.3 no. 29.
16 Again Vogenauer/*Schelhaas* Art. 7.1.3 no. 29.
17 Vogenauer/*Schelhaas* Art. 7.1.3 no. 10 (pointing out that, in extreme cases, where the difficulties of the other parties to perform were obvious at contract conclusion, exercising withholding rights may be contrary to good faith, Art. 1.7).
18 *See* previous note and e.g. Vogenauer/*Schelhaas* Art. 7.1.3 no. 20.
19 Vogenauer/*Schelhaas* Art. 7.1.3 no. 27.
20 Official Comments to Art. 7.1.3 at p. 230; Vogenauer/*Schelhaas* Art. 7.1.3 no. 13.
21 Vogenauer/*Schelhaas* Art. 7.1.3 no. 28 (with reference to Art. III.-3:401(4) DCFR).
22 Vogenauer/*Schelhaas* Art. 7.1.3 no. 15 based on *Jones/Schlechtriem*, 'Breach of Contract' in von Mehren (ed.), International Encyclopedia of Comparative Law, Vo. VII: Contracts in General, Ch 15 (2008), para. 81.
23 Vogenauer/*Schelhaas* Art. 7.1.3 no. 18 (with further examples).
24 Contrast: Art. 7.1.5 (2) sentence 1 ('reciprocal obligations'), as pointed out by Vogenauer/*Schelhaas* Art. 7.1.3 no. 15.
25 Official Comments to Art. 7.1.3 at p. 230; Vogenauer/*Schelhaas* Art. 7.1.3 no. 16.
26 Vogenauer/*Schelhaas* Art. 7.1.3 no. 21 ('previous dealings') and no. 22 (distinguishing contracts between different parties, e.g. one for the performance of the main obligation and the other one for providing a security).
27 Vogenauer/*Schelhaas* Art. 7.1.3 no. 19.
28 Vogenauer/*Schelhaas* Art. 7.1.3 no. 17.
29 Morán Bovio/*Morán Bovio* Art. 7.1.3, no.2.b., p. 328; *Jones/Schlechtriem*, 'Breach of Contract' in von Mehren (ed.), International Encyclopedia of Comparative Law, Vol. VII: Contracts in General,

risk of a wrong assessment) to 'provisionally withhold' one's own performance **if it is clear that there will be non-performance** by the other party as due under the contract.[30]

3. 'Clean Hands'

4 It follows from Arts. 7.1.2, 5.1.3 and 1.7 that the right to withholding performance under Art. 7.1.3 is **barred** if the party desirous to invoke the withholding shield did cause non-performance by the other party through its own behaviour (→ Art. 7.1.2).[31]

C. Parallel Options to Withholding Performance (subject to meeting the individual requirements of the other provisions)

5 **(i) Request for Performance** (Arts. 7.2.1, 7.2.2);[32] **(ii)** termination (Art. 7.3.1), e.g. if the length of non-performance of the other side amounts to fundamental non-performance;[33] **(iii)** claim for **damages** (Art. 7.4.1).[34] At the **drafting** stage of the contract, additional rights of **security**, including e.g. general retention of property, may be considered.[35] Legal consequences with respect to **property law** (e.g. retention of title) are beyond the scope of the UNIDROIT Principles.[36]

Article 7.1.4 (Cure by non-performing party)

(1) The non-performing party may, at its own expense, cure any non-performance, provided that

(a) without undue delay, it gives notice indicating the proposed manner and timing of the cure;

(b) cure is appropriate in the circumstances;

Ch 15 (2008), para. 91-92 (with regard to e.g. Argentina, Austria, France (Art. 1613 French Civil Code has remained unchanged in the 2016 version), Spain and Switzerland), 139-156; Vogenauer/*Schelhaas* Art. 7.1.3 no. 25.

30 Convincing argumentation of Vogenauer/*Schelhaas* Art. 7.1.3 no. 25.

31 Official Comments, Art. 7.1.2 no. 1, Illustration 1, pp. 228-229; Vogenauer/*Schelhaas* Art. 7.1.3 no. 26 (Art. 7.1.3 read together with Arts. 7.1.2, 5.1.3 and 1.7).

32 Vogenauer/*Schelhaas* Introduction to Section 7.1 of the UNIDROIT Principles no. 5.

33 Vogenauer/*Schelhaas* Introduction to Section 7.1 of the UNIDROIT Principles no. 5; and Art. 7.1.3 no. 3.

34 Vogenauer/*Schelhaas* Introduction to Section 7.1 of the UNIDROIT Principles no. 5.

35 *Cf.* also Vogenauer/*Schelhaas* Art. 7.1.3 no. 4 (with reference to different perception of the relationship of such right of retention to withholding performance) and no. 25.

36 Vogenauer/*Schelhaas* Art. 7.1.3 no. 31 pointing in note 81 to different conceptions of retention rights (e.g. § 273 German Civil Code and generally to *Treitel*, Remedies for Breach of Contract: A Comparative Account (1991) pp. 313-316; *Jones/Schlechtriem*, 'Breach of Contract' in von Mehren (ed.), International Encyclopedia of Comparative Law, Vol. VII: Contracts in General, Ch 15 (2008), para. 117, and, for French law, to *Ghestin*, 'L'exception d'inexécution' in Fontaine/Viney (eds.), Les sanctions de l'inexécution des obligations contractuelles, Etudes de droit comparé (2001), pp. 3, 13-22.

(c) the aggrieved party has no legitimate interest in refusing cure; and

(d) cure is effected promptly.

(2) The right to cure is not precluded by notice of termination.

(3) Upon effective notice of cure, rights of the aggrieved party that are inconsistent with the non-performing party's performance are suspended until the time for cure has expired.

(4) The aggrieved party may withhold performance pending cure.

(5) Notwithstanding cure, the aggrieved party retains the right to claim damages for delay as well as for any harm caused or not prevented by the cure.

A. A Right to Cure for the Obligor

Para. 1–2 grants a non-performing party **a right**[1] (not: a duty)[2] **to cure** any kind of non-performance[3] **unless (i)** it is explicitly **excluded** (Art. 1.5), **(ii) not appropriate** in the circumstances[4] (*para. 1 lit. b*) (e.g. if timely performance is of the essence,[5] if the time required would itself amount to fundamental non-performance,[6] if the cure would leave evidence of the prior non-performance,[7] or – usually and depending on the circumstances – if more than one attempt to cure would be needed, *argumentum para. 1 lit. d*),[8] **or (iii)** the aggrieved party has a **legitimate interest in refusing** cure (*para. 1 lit. c*).[9] 1

Examples for such 'legitimate interest' include **(i)** a risk of damage through the cure,[10] **(ii)** negative impact on an ongoing business,[11] **(iii)** any risk of costs in connection with the cure,[12] **(iv)** the obligee (→ Art. 1.11 4th hyphen) *(a)* has reason to believe that the obligor (→ Art. 1.11 4th hyphen) will be unable to perform the cure, *(b)* performed knowingly in a non-conforming way or *(c)* delivered already within a timeframe which amounts to fundamental non-performance.[13] In contrast, the desire to stop the relationship provides no legitimate interest (*argumentum para. 2*).[14] 2

Further, the right to cure is **subject to three conditions for the non-performing party**. **(i)** It needs to give a **detailed notice**[15] (→ Art. 1.10) 'without undue delay', in a reasonable manner,[16] with specifics on the timing and the manner of the cure 3

1 Morán Bovio/*Morán Bovio* Art. 7.1.4, no. 1 at p. 329.

2 Vogenauer/*Schelhaas* Art. 7.1.4 no. 4.

3 Vogenauer/*Schelhaas* Art. 7.1.4 no. 5 (underlining: regardless of when it was rendered).

4 Official Comments, Art. 7.1.4 no. 1, p. 231.

5 Vogenauer/*Schelhaas* Art. 7.1.4 no. 11.

6 Official Comments, Art. 7.1.4 no. 3, pp. 231-232; Vogenauer/*Schelhaas* Art. 7.1.4 no. 12.

7 *Cf.* Official Comments, Art. 7.1.4 no. 6, pp. 232-233; Vogenauer/*Schelhaas* Art. 7.1.4 no. 14 (arguing that 'appropriateness' would require restauration to 'perfect' condition).

8 *See* Official Comments, Art. 7.1.4 no. 6, pp. 232-233; Vogenauer/*Schelhaas* Art. 7.1.4 no. 15.

9 *See* also Art. 48(1) CISG ("*unreasonable inconvenience or uncertainty of reimbursement*").

10 Official Comments, Art. 7.1.4 no. 4 and Illustration 1, p. 232; Vogenauer/*Schelhaas* Art. 7.1.4 no. 16.

11 Vogenauer/*Schelhaas* Art. 7.1.4 no. 16.

12 Vogenauer/*Schelhaas* Art. 7.1.4 no. 18.

13 Vogenauer/*Schelhaas* Art. 7.1.4 no. 16 drawing on the list of examples in Art. III.-3:203 DCFR.

14 Official Comments, Art. 7.1.4 no. 4, p. 232; Vogenauer/*Schelhaas* Art. 7.1.4 no. 17.

15 Vogenauer/*Schelhaas* Art. 7.1.4 no. 9.

16 Official Comments, Art. 7.1.4 no. 2, p. 231; Vogenauer/*Schelhaas* Art. 7.1.4 no. 10.

(**para. 1 lit a**). Such notice will create a presumption that the conditions in **para 1 lit. b** and **c** are met[17] and create a **duty of cooperation** (→ Art. 5.1.3 no. 1 at (ii)) upon the obligee.[18] **(ii)** It needs to effect cure **promptly**[19] **(para. 1 lit. d)**, i.e. within a reasonably short time period under the circumstances.[20] **(iii)** It has to pay the **costs** (*para 1*, opening sentence), e.g. for transport, loans and materials.[21] As long as these conditions are met, the non-performing party may even cure if it has received a notice of termination (**para. 2**).

4 Through these cumulative[22] requirements, the right to cure becomes a **balanced tool** preserving the contract,[23] mitigation of harm (→ Art. 7.4.8) and to minimizing economic waste.[24] It is thereby in line with the UNIDROIT Principles' general approach of fair dealing (Art. 1.7). It correlates with the CISG[25] and the law in a number of civil and common law jurisdictions.[26]

B. Parallel Options for the Obligee (subject to meeting the individual requirements of the other provisions)

5 The obligee has to co-operate and tolerate the curing action of the obligor (→ Arts. 7.1.2 and 5.1.3 no. 1 at (ii)). However, while the other party is trying to cure, the party receiving cure may **(i) withhold performance**[27] (Art. 7.1.3)[28] as explicitly provided for in **para. 4**; **(ii) suspend (certain) rights** of the obligor (i.e. the curing party), which are inconsistant with its non-performance (**para. 3**), i.e. termination of the contract, the conclusion of a replacement transaction or claiming damages or restitution[29]; **(iii) send** itself a **notice under Art. 7.1.5** granting time for cure[30] (e.g. by setting a date for 'latest acceptance' that is reasonable under the circumstances in reaction to a notice under para. 1 lit. a); **(iv) require itself cure** under

17 Official Comments, Art. 7.1.4 no. 4, p. 232; Morán Bovio/*Morán Bovio* Art. 7.1.4, no. 1 at p. 329; Vogenauer/*Schelhaas* Art. 7.1.4 no. 19.
18 Vogenauer/*Schelhaas* Art. 7.1.4 no. 26 *et seq.* (noting the consequences, i.e. the loss of right to exclude non-performance to the extent that it could have been cured while the right of action subsists for damages caused by the unproper performance. *See* Official Comments, Art. 7.1.4 no. 10, Illustration 3, p. 234: unproper repair of a roof; refusal to permit cure; damage caused by leakage may still be recoverd, but not the costs of repair by another service provider).
19 Official Comments, Art. 7.1.4 no. 5, p. 232.
20 Vogenauer/*Schelhaas* Art. 7.1.4 no. 21; *Farnsworth*, Contracts (2004) para. 8.18, p. 571 and § 242 Restatement (Second) of Contracts (USA).
21 Vogenauer/*Schelhaas* Art. 7.1.4 no. 7 (with a reference to the similar provision in § 635 para. 2 German Civil Code ‚BGB' which lists these kinds of costs).
22 Vogenauer/*Schelhaas* Art. 7.1.4 no. 6.
23 For example, a German business man, since 15 years in international trade in Asia and Europe, was approached with this concept of a right to cure even after termination. He accepted it as 'common sense' in the interest of safeguarding the contractual relationship.
24 Official Comments, Art. 7.1.4 no. 1, p. 231; Vogenauer/*Schelhaas* Art. 7.1.4 no. 3.
25 Arts. 37, 48 CISG; Morán Bovio/*Morán Bovio* Art. 7.1.4, no. 2.b., p. 331.
26 Vogenauer/*Schelhaas* Art. 7.1.4 no. 2 refers to German, Swedish, Dutch and US law; and to Arts. III-§:201-III.3:204 DCFR as well as Art. 109 CESL.
27 Official Comments, Art. 7.1.4 no. 7, p. 233.
28 Vogenauer/*Schelhaas* Introduction to Section 7.1 of the UNIDROIT Principles no. 6; Vogenauer/*Schelhaas* Art. 7.1.4 no. 25.
29 Official Comments, Art. 7.1.4 no. 7, p. 233; Vogenauer/*Schelhaas* Art. Art. 7.1.4 no. 23.
30 Vogenauer/*Schelhaas* Art. 7.1.4 no. 4 (underlining that there is no obligation to grant time under Art. 7.1.5).

Art. 7.2.3;[31] **(v)** claim for **damages resulting from the initial non-performance (para. 5)**[32] (although, realistically, these will be often only known after the cure) and **(vi)** only after the additional time period for cure has lapsed (**para. 3**), ask for any **other remedy** (e.g. under Arts. 7.4.1 *et seq.*),[33] such as the conclusion of a **replacement transaction** or **termination**.[34] An obligee who wishes to keep control and to remain able to cut off a right to cure by giving notice of termination in case of fundamental non-performance (→ Art. 7.3.1)[35] may consider to exclude the applicability of **para. 2** in the contract (Art. 1.5).[36] In light of the conditions at para. 1 lit. b and c, it may be helpful for complex contracts to define in the contract circumstances (such as goals or time constraints) to be considered when assessing 'appropriateness' of the cure and/or a legitimate interest to refuse cure.[37]

Article 7.1.5 (Additional period for performance)

(1) In a case of non-performance the aggrieved party may by notice to the other party allow an additional period of time for performance.
(2) During the additional period the aggrieved party may withhold performance of its own reciprocal obligations and may claim damages but may not resort to any other remedy. If it receives notice from the other party that the latter will not perform within that period, or if upon expiry of that period due performance has not been made, the aggrieved party may resort to any of the remedies that may be available under this Chapter.
(3) Where in a case of delay in performance which is not fundamental the aggrieved party has given notice allowing an additional period of time of reasonable length, it may terminate the contract at the end of that period. If the additional period allowed is not of reasonable length it shall be extended to a reasonable length. The aggrieved party may in its notice provide that if the other party fails to perform within the period allowed by the notice the contract shall automatically terminate.
(4) Paragraph (3) does not apply where the obligation which has not been performed is only a minor part of the contractual obligation of the non-performing party.

31 Vogenauer/*Schelhaas* Art. 7.1.4 no. 13.
32 Vogenauer/*Schelhaas* Introduction to Section 7.1 of the UNIDROIT Principles no. 6, 9; Vogenauer/*Schelhaas* Art. 7.1.4 no. 24.
33 Vogenauer/*Schelhaas* Introduction to Section 7.1 of the UNIDROIT Principles no. 6.
34 *Cf.* Vogenauer/*Schelhaas* Art. 7.1.4 no. 23.
35 Official Comments, Art. 7.1.4 no. 8, p. 233.
36 *See* the critzism of Vogenauer/*Schelhaas* Art. 7.1.4 no. 22.
37 *See* Vogenauer/*Schelhaas* Art. 7.1.4 no. 8 and 19 on burden of proof.

A. A Proactive Way[1] for the Obligee to Cope with Non-Performance

1 Inspired by the CISG[2] and German law,[3] Art. 7.1.5 provides a tool for the obligee (→ Art. 1.11 4th hyphen) to cope with non-performance of the obligor (and not merely observe if the obligor (→ Art. 1.11 4th hyphen) uses its tool under Art. 7.1.4). The obligee can send to the obligor a **notice** (→ Art. 1.10)[4] with a **straightforward deadline** (a **specific date**)[5] for performance[6] within an additional time frame (called in Germany: "*Nachfrist*") in case of **(i) defective performance** (*argumentum* Art. 7.1.1)[7] and **(ii) delay**[8] for which Art. 7.1.5 is mainly conceived[9] (even after receipt of a notice from the obligee pursuant to Art. 7.1.4),[10] i.e. after surpassing the 'due time' pursuant to Art. 6.1.1.[11] In the spirit of fair dealing (Art. 1.7) such notice grants additional time to the obligor and provides thereby a **second chance**[12] to the obligor to perform as committed and due, but the obligee is not obliged[13] to give it (there is no need to put the obligor 'in default' as under many national laws)[14] as the obligor is protected by Art. 7.1.4.(1)-(3). For this reason, there is also no general explicit 'reasonableness' requirement with respect to the determination of the additional timeframe[15] (except as in para. 3; → no. 2 below). Because of the German routes of this concept, the procedure of granting additional time is also referred to as ***Nachfrist* mechanism** or *Nachfrist* procedure.[16]

B. A Privileged Way to Termination in Case of Delay (Para. 3)

2 **(i)** In case of delay (not: defective performance)[17] with respect to more than a minor part of the contractual obligation (**para. 4**),[18] a notice under Art. 7.1.5 setting a

1 Vogenauer/*Schelhaas* Art. 7.1.5 no. 1.
2 Morán Bovio/*Morán Bovio* Art. 7.15, no. 2.b., p. 333; Vogenauer/*Schelhaas* Art. 7.1.5 no. 2 (referring to Arts. 47, 49(1) lit. b, 63 CISG).
3 §§ 323, 437 No. 2 German Civil Code "BGB", as described by Vogenauer/*Schelhaas* Art. 7.1.5 no. 2.
4 Vogenauer/*Schelhaas* Art. 7.1.5 no. 7.
5 Vogenauer/*Schelhaas* Art. 7.1.5 no. 8 (otherwise the notice is ineffective, *argumentum* Schlechtriem&Schwenzer/*Müller-Chen* Art. 47 paras. 4).
6 *See* Vogenauer/*Schelhaas* Art. 7.1.5 no. 10 (underlining that a mere statement reflecting the non-performance of the obligor would not suffice).
7 Vogenauer/*Schelhaas* Art. 7.1.5 no. 3.
8 Official Comments, Art. 7.1.5, p. 235; Vogenauer/*Schelhaas* Art. 7.1.5 no. 3.
9 *See* again Official Comments, Art. 7.1.5 no. 1, p. 235.
10 Vogenauer/*Schelhaas* Art. 7.1.4 no. 4 (underlining that there is no obligation to grant time under Art. 7.1.5).
11 Vogenauer/*Schelhaas* Art. 7.1.5 no. 6.
12 Official Comments, Art. 7.1.5 no. 1, p. 235; Vogenauer/*Schelhaas* Art. 7.1.5 no. 4.
13 Vogenauer/*Schelhaas* Art. 7.1.5 no. 4.
14 Vogenauer/*Schelhaas* Art. 7.1.5 no. 5, for a critical view from a Spanish perspective Morán Bovio/*Morán Bovio* Art. 7.1.5, no. 3.a. at p. 334 (*in fine*).
15 Critical again Morán Bovio/*Morán Bovio* Art. 7.1.5, no. 3.a, p. 334 para. 3; Vogenauer/*Schelhaas* Art. 7.1.5 no. 9.
16 Vogenauer/*Schelhaas* Art. 7.1.5 no. 2.
17 Vogenauer/*Schelhaas* Art. 7.1.5 no. 23 (underlining the function of a notice in case of defective performance as a mere 'warning shot' with reference to Comment C to PECL Art. 8:106).
18 Vogenauer/*Schelhaas* Art. 7.1.5 no. 24 discusses examples (e.g. a forgotten door in the painting of a factory).

'reasonable' deadline[19] (with due regard to the circumstances such as the length of the contractual delivery period, the apparent interest of the obligee in expedited performance, the complexity of the task, the delay already accrued or the mode of delivery)[20] provides a **basis for a termination** of the contract "even if the delay in performance is not fundamental"[21] (**para. 3 sentence 1** and Art. 7.3.1(3); → Art. 7.3.1 no. 8). **(ii)** Pursuant to **para. 3 sentence 3** the obligee can even **provide for 'automatic' expiry** of the contract at the end of the additional period.[22] These options are particularly helpful in cases where the obligee is uncertain if the initial delay amounts already to a fundamental delay as required for a termination under Art. 7.3.1.[23] **(iii)** Absent 'reasonableness' of the set period, **para. 3 sentence 2 extends the time period** for cure 'automatically' **to a reasonable length**.[24] A notice of termination sent *after* expiry of an unreasonably short deadline which fails to provide a reasonable time for cure is ineffective unless there is already fundamental non-performance according to Art. 7.3.1[25] (which is rare in case of delay; but e.g. if time is of the essence).[26] If the obligor performs during the additional time period in a defective way, a new situation arises which is not covered by para. 3 focusing on delay.[27]

C. Parallel Options for the Obligee (Para. 2)

3 See Art. 7.1.4 no. 5 at B. (similar range of options):[28] **(i)** to **withhold performance** (Art. 7.1.5(2) sentence 1), in particular payment of the unfinished work;[29] **(ii)** claim for **damages resulting from the initial non-performance** (Art. 7.1.5(2) sentence 1)[30] (although again, realistically, these will be often only known after the cure) and, to the extent that they provide a functional equivalent to damages, **claim contractual penalties and liquidated damages**,[31] **(iii)** ask for any other remedy[32] (e.g. under Arts. 7.4.1 *et seq.*) with respect to the failure to perform which is subject to the notice under Art. 7.1.5 (1),[33] but only *after (a)* the additional time period

19 Vogenauer/*Schelhaas* Art. 7.1.5 no. 9, 19 (not as long as the original time frame under Art. 6.1.1 has not elapsed).
20 Vogenauer/*Schelhaas* Art. 7.1.5 no. 19 (with detailed references, for each of these criteria, to German contract law which inspired both the CISG and Art. 7.1.5).
21 Vogenauer/*Schelhaas* Art. 7.1.5 no. 1, 17.
22 Vogenauer/*Schelhaas* Art. 7.1.5 no. 18 ('fruitless lapse of the period').
23 Vogenauer/*Schelhaas* Art. 7.1.5 no. 4.
24 Vogenauer/*Schelhaas* Art. 7.1.5 no. 20.
25 Vogenauer/*Schelhaas* Art. 7.1.5 no. 21 (discussing details such as non-payment in case of a putative yet invalid termination because the reasonable time period has not yet elapsed).
26 Vogenauer/*Schelhaas* Art. 7.1.5 no. 17.
27 Vogenauer/*Schelhaas* Art. 7.1.5 no. 25 discusses alternatives.
28 Vogenauer/*Schelhaas* Introduction to Section 7.1 of the UNIDROIT Principles no. 6.
29 Vogenauer/*Schelhaas* Art. 7.1.5 no. 11.
30 Vogenauer/*Schelhaas* Art. 7.1.5 no. 12 (referring to CISG case law and comments on Art. 47 CISG, e.g. Schlechtriem&Schwenzer/*Müller-Chen* Art. 47 paras. 19).
31 Vogenauer/*Schelhaas* Art. 7.1.5 no. 13.
32 Vogenauer/*Schelhaas* Art. 7.1.5 no. 14 points at Arts. 7.2.1-7.2.2 (request for performance) and Art. 7.2.3 (repair or replacement).
33 Vogenauer/*Schelhaas* Art. 7.1.5 no. 15 observes rightly that coping with a new breach of contract is not covered by the restriction of remedies under para. 2 sentence 2.

for cure has lapsed (even if it was set for a "longer than a 'reasonable' period"[34]) or *(b)* the obligor has sent a notice (Art. 1.10) that it will not perform within that period (**para. 2 sentence 2**).

4 A possible **contractual option** is the agreement on a **grace period**. While the UNIDROIT Principles' coherent system of remedies may not favour a grace period,[35] in practice there is sometimes the need for the negotiation team on the obligee's side to 'show' internally an early performance date which is reachable only under 'good' conditions while the obligor needs a possibility for a later performance from a risk management perspective. Art. 1.5 would permit for such a **change of the risk allocation of timely performance**. It can be construed as an agreement with a later performance date (at the end of the grace period), combined with a best effort clause (Art. 5.1.4(2)) to deliver earlier. Sometimes such clause is combined with the incentive of a higher price in case of success or, to the contrary, a 'penalty' if the grace period is needed. Depending on the legal background of the other party (the grace period concept has a French origin),[36] the other contracting party is likely to react differently to a proposal of such an amendment. Art. 7.1.5 provides for the possibility of providing for an additional period for performance *after* contract conclusion, a grace period does the same already *at* contract conclusion.

Article 7.1.6 (Exemption clauses)

A clause which limits or excludes one party's liability for non-performance or which permits one party to render performance substantially different from what the other party reasonably expected may not be invoked if it would be grossly unfair to do so, having regard to the purpose of the contract.

A. The Importance in Practice

1 From a practical perspective, Art. 7.1.6 is **one of the most important provisions** for the work with the UNIDROIT Principles. Jointly with Art. 7.1.7 on *force majeure*, an exemption clause meeting the limits set forth in Art. 7.1.6 provides the only **way to excuse non-performance** under Art. 7.4.1 and thereby to **avoid a liability for damages** under a regime which is not based on fault. In practice, exemption clauses are often needed as a balancing tool of the obligor in the context of guarantees, representations and warranties as requested from the obligee. From a civil law perspective, for lawyers used to limitations of liability based on fault, an exemption clause provides a chance to introduce known concepts of (light/ordinary/gross) negligence levels into the contract, e.g. by providing different caps of liability depending on the level of fault (relating to a violation of the duty of care in the context of a duty of best efforts (Art. 5.1.4(2)).

34 Vogenauer/*Schelhaas* Art. 7.1.5 no. 22.
35 Vogenauer/*Schelhaas* Introduction to Section 7.1 of the UNIDROIT Principles no. 12.
36 *See* the explicit reference to a grace period in ex-Art. 1184 (3) French Civil Code (in its 2016 version, Art. 1224 French Civil Code does not explicitly recognise such a grace period anymore, but Art. 1347-3 (ex-Art. 1292) refers to it); Vogenauer/*Schelhaas* Introduction to Section 7.1 of the UNIDROIT Principles no. 12.

B. A Basic Assumption that Exemption Clauses are Valid

Exemption clauses are among the most important clauses in shaping the risk profile 2
of a contract. If an action or omission is covered by a valid exemption clause, the clause serves as an **excuse for non-performance** and **avoids or limits liability** for damages (Art. 7.4.1).[1] The UNIDROIT Principles **recognise such clauses** under the freedom of contract principle as valid[2] (otherwise, the restriction in Art. 7.1.6 could not make any sense). To a large part exemption clauses are even standard in certain industries (→ Art. 1.9(2)).

The term 'exemption clause' is **broad**, including both **(i) direct and indirect limi-** 3
tations and exclusions (e.g. to a specific amount or percentage; or penalty clauses with the effect of limiting liability;[3] or other 'creative' clauses triggering exemption from liability;[4] even clauses on changes of time limits or on a reversal of the burden of proof)[5] and **(ii)** clauses granting the **right to perform differently** as compared to the agreed obligation.[6]

C. A Prohibition to Rely on Grossly Unfair Exemption Clauses is Part of the Mandatory Core of UNIDROIT Principles

In line with the general commitment to fair dealing (Art. 1.7),[7] Art. 7.1.6 **strikes** 4
out the effect of exemption clauses which, duly interpreted (Arts. 4.1, 4.3 *et seq.*), seek to establish an **excessive advantage** ('grossly unfair'), regardless whether they have been 'negotiated' or whether they are contained in standard terms.[8] This **'exceptional control mechanism'**[9] is implicitly[10] part of the core of 'fair dealing' in international trade (→ Art. 1.5 no. 2) and close to the principles in Arts. 3.2.7, 3.1.4 (prohibiting 'gross disparity') and 2.1.20 (prohibiting 'surprising terms' in standard terms)[11] which apply independently.[12] The court (→ Art. 1.11 1st hyphen)

1 Vogenauer/*Mckendrick* Art. 7.4.1 no. 6.
2 Official Comments, Art. 7.1.6 no. 5, sentence 1, p. 239, and no. 1, last sentence, p. 237; Morán Bovio/*Morán Bovio*, Art. 7.1.6, no. 1 para. 2, p. 336 (with reference to good faith as a limit); Vogenauer/*Schelhaas* Art. 7.1.6 no. 1, 11.
3 Official Comments, Art. 2.1.20 no. 2, pp. 69-70; Vogenauer/*Schelhaas* Art. 7.1.6 no. 5.
4 Vogenauer/*Schelhaas* Art. 7.1.6 no. 6 discusses the example of an extreme termination clause by which the obligor can buy himself out of his liability through a small symbolic payment triggering termination.
5 Vogenauer/*Schelhaas* Art. 7.1.6 no. 7 pointing at the overview of *Fontaine/De Ly*, Drafting International Contracts: An Analysis of Contract Clauses (2006), p. 360, 366-367 (on burden of proof) and 367-368 (on limitation of time period).
6 Official Comments, Art. 7.1.6 no. 2 and Illustration 1, pp. 237-238; Vogenauer/*Schelhaas* Art. 7.1.6 no. 16.
7 Official Comments, Art. 7.1.6 no. 1, p. 237.
8 Vogenauer/*Schelhaas* Art. 7.1.6 no. 3, 19 (arguing that, in unequal bargaining situations, an exemption clause in a standard term might be more easily struck out).
9 Vogenauer/*Schelhaas* Art. 7.1.6 no. 1.
10 Official Comments, Art. 1.5 no. 3, p. 14; Vogenauer/*Cuniberti* Art. 1.5 no. 12. *Bonell* An International Restatement, p. 94-95. Debated by Vogenauer/*Vogenauer* Art. 1.5 no. 12 (his criticism is not followed here because an unambiguous wording that there is no intention to create any reliance would *avoid* reasonable reliance in the sense of Art. 1.8).
11 Vogenauer/*Schelhaas* Art. 7.1.6 no. 2 (referring for 'gross disparity' to the consequences for the individual term as set forth in Art. 3.2.13).
12 Vogenauer/*Schelhaas* Art. 7.1.6 no. 3.

will **not apply** the excessive clause. It has no power to adapt it to the circumstances[13] unless it is explicitly empowered by the parties to do so (Art. 1.5; below at no. 9-10 at E(ii)).

D. A Test of Severity

5 It is submitted that, to determine that 'it would be grossly unfair' to involve an exemption clause, Art. 7.1.6 requires to apply a test of severity[14] to the exemption clause. The test asks if, with due **regard to the 'purpose' of the contract** and the legitimate expectation of the obligee from the performance of the obligor,[15] the application of the clause, **duly interpreted** (Arts. 4.1, 4.3 *et seq.* with due regard to, *inter alia*, the purpose of the contract),[16] would lead to a 'grossly unfair' **result.**[17] This test gives a broad **discretion to the court** (→ Art. 1.11 1st hyphen). For example, the interpretation of the contract may reveal that liability for intentional conduct to the detriment of the other party was excluded, at least implicitly (→ Arts. 4.3 lit. a, d, e); this is likely to be regarded as 'grossly unfair'.

6 It may be possible to **limit the effect** of an exemption clause **by interpretation** (→ Arts. 4.1, 4.3 *et seq.*) **to** its reasonable and **'not grossly unfair' content**. For example, by reference to the principle of good faith and fair dealing (Art. 1.7) by choosing the UNIDROIT Principles – and especially in case of a 'commercial loyalty' clause[18] or similar language –, an exemption clause may be **interpreted in a restrictive way** with due regard to the purpose of the contract (Art. 4.3 lit. d) and the contract as a whole (Art. 4.4). With such restrictive interpretation, the exemption clause may not be invoked **if 'and to the extent'** that to do so would be grossly unfair. Further, any such restrictive interpretation of an exemption clause enhances the purpose of Art. 7.1.6 **as a last resort** (Art. 1.6(1)). Finally, if one considers that the issue 'if and to the extent' is not expressly settled in Art. 7.1.6, Art. 1.6 (2) requires to have regard to 'underlying principles'. In this respect, the rule in Art. 7.4.13 (2) also supports a restrictive interpretation as proposed above.

7 The Official Comments discuss **two aspects as 'cumulative'**:[19] **(i)** an exemption clause may be **'inherently unfair'** (either by itself or as considered in conjunction with the circumstances of the case, e.g. a combination of an exclusion of liability for 'grossly negligent conduct' without any possibility of insurance);[20] and **(ii)** "its application would lead to an **inherent imbalance between the performances of the parties**".[21] The illustrations given in the Official Comments include *(a)* a loss

13 Official Comments, Art. 7.1.6 no. 6 (last half sentence), p. 239; Vogenauer/*Schelhaas* Art. 7.1.6 no. 23-24.
14 *Cf.* Vogenauer/*Schelhaas* Art. 7.1.6 no. 11, 18 ('a court should … be more reluctant to strike down exemption clauses than it would be in a consumer-related transactions …').
15 Official Comments, Art. 7.1.6 no. 5, para. 3, p. 239; Vogenauer/*Schelhaas* Art. 7.1.6 no. 12.
16 Arts. 4.3 lit. d, Art. 4.8 lit. b and Art. 5.1 lit a.
17 Vogenauer/*Schelhaas* Art. 7.1.6 no. 17 (discussing examples and questions: e.g. does the clause relate to the essential obligation? Is the risk allocation reflected in the price?).
18 E.g.: 'This contract is to be interpreted and executed in a spirit of commercial loyalty' (noted by the author in a number of long-term German-Japanese contracts relating to the introduction of German pharmaceutical products to the Japanese market).
19 Official Comments, Art. 7.1.6 no. 5, para. 2 sentence 1, p. 239 ('and').
20 Official Comments, Art. 7.1.6 no. 5, para. 2, p. 239; Vogenauer/*Schelhaas* Art. 7.1.6 no. 20.
21 Emphasis added; Official Comments, Art. 7.1.6 no. 5 para. 2, p. 239.

in excess of the limitation of liability of a surveillance company whose employees, acting in the course of their employment, rob the premises[22] which suggests some **'intentional or reckless conduct'**;[23] and *(b)* a **100% exemption** of liability of an accountant undertaking to prepare the obligee's account causing 100% additional taxes to the obligee because of a serious mistake[24] which demonstrates a **severe imbalance**[25] with regard to a grossly negligent conduct not covered at all (e.g. by insured liability to an adequate amount). The reference to the 'serious mistake' in that example suggests that the severity test whether a clause can be invoked will be made **at the time that the obligee wishes to rely on it.**[26] When integrating an exemption clause as part of **standard terms** in an international business contract, complying with the limits set forth by Art. 7.1.6 (as interpreted above) is much more convenient than having to respect consumer oriented domestic mandatory law. This can be a reason to choose the UNIDROIT Principles rather than a national law (→ Art. 1.4 no. 4).

E. Limits and Contractual Options

8 **(i) Mandatory Law.** (International) mandatory law as applicable under Art. 1.4 may perturbate the effect of an exemption clause.[27] For example, a lawyer limiting its liability (for his duty of best efforts, Art. 5.1.4(2)) will have to observe the mandatory professional law on limitation of liability to which the lawyer is submitted.[28]

9 **(ii) Severability Clauses.** In extreme scenarios, cultural and legal differences (e.g. between different national laws of the parties one of which permits far reaching exemption clauses) as well as pressure on the negotiators (e.g. by stakeholders in the project) can cause agreements on an exemption clause which an arbitration tribunal might later consider as 'grossly unfair'. Moreover, exemption clauses are usually part of a multi-faceted risk management approach with different angles. It may well be that only part of the clause (e.g. a few words) are perceived as 'grossly unfair' which could contaminate the entire clause so that the entire clause 'may not be invoked' and is thus 'inapplicable".[29] *Schelhaas* goes so far to propose explicitly to exclude the applicability of the exemption clauses to intentional and **grossly negligent non-performance**, in order to avoid that the clause will be struck out in its entirety, because the court (Art. 1.11 1st hyphen) has no power to modify the ex-

22 Official Comments, Art. 7.1.6 no. 5, Illustration 5, p. 239.
23 Vogenauer/*Schelhaas* Art. 7.1.6 no. 8 with reference to the fist draft of Art. 7.1.6; and no. 14. In the example, the conduct is intentional if the surveillance agency planed the coup. It is reckless if it chose such talent as employees to do the job.
24 Official Comments, Art. 7.1.6 no. 5, Illustration 4, p. 239.
25 Official Comments, Art. 7.1.6 no. 5, p. 239; Vogenauer/*Schelhaas* Art. 7.1.6 no. 22.
26 Vogenauer/*Schelhaas* Art. 7.1.6 no. 13 (interpreting this as an '*ex post*' perspective).
27 Morán Bovio/*Morán Bovio* Art. 7.1.6, no. 2.a., p. 336 (without mentioning Art. 1.4); Vogenauer/*Schelhaas* Art. 7.1.6 no. 21 (discussing clauses excluding damage for death or personal injury, whereby the qualification of such clause may also depend on the industry).
28 E.g. for German lawyers Art. § 52 German Federal Lawyers' Act "*Bundesrechtsanwaltsordnung*" – BRAO; *see Brödermann* Hamburg Law Review 2016, p. 21, 27-29 (on limitation of liability of a German law firm under the UNIDROIT Principles).
29 Vogenauer/*Schelhaas* Art. 7.1.6 no. 15.

emption clause.[30] This goes too far for reasons. *(a)* A **restrictive interpretation** of the exemption clause as submitted above no. 6 at D, with due regard to all relevant circumstances (Arts. 4.1, 4.3 *et seq.*), is in the power of a court (but is not certain). *(b)* Depending on the circumstances of a contract, there are sometimes legitimate interests to **limit the consequences** also of **gross negligence**. In the example of a law firm limiting its liability it is common practice in many parts of the world to negotiate in exchange a higher cap of liability which is covered by insurance (e.g. a cap of 5 million Euro in case of ordinary negligence and of 10 or 20 million Euro in case of gross negligence whereby the caps agreed vary with the circumstances).

10 The parties (and their lawyers) have a **legitimate interest to protect themselves against such risks of interpretation.** The drafters of the exemption clause cannot know in advance whether the court (→ Art. 1.11 1st hyphen) later takes an approach to interpretation as suggested above no. 6 at D. or if it considers the entire exemption clause as unenforceable. The parties are free (and well advised) to integrate into their contract a **'severability'-clause** (Art. 1.5) providing, if well drafted, that another (hypothetical) provision (e.g. 'to be determined by the arbitral tribunal')[31] will be deemed to replace a void clause (or a clause which 'may not be invoked' under Art. 7.1.6), whereby the new provision shall come as close as possible to the legitimate goal of the void (or unenforceable) clause. If the parties agree on such a 'severability'-clause, they act **deliberately and reasonably** which should suffice as a test in an international B2B scenario (*argumentum* Art. 3.3.1(2) which copes with the similar problem of the consequences of infringing mandatory rules). They also act in line with an underlying principle as found in Art. 7.4.13 (2) which seems to call for moderation and upholds the contract (*favor contractus*) as much as possible under the circumstances. By only providing for the consequence of 'inapplicability' of the grossly unfair exemption clause itself, Art. 7.1.6 does not 'provide otherwise' in the sense of Art. 1.5 against a 'severability clause', so that the principle of bindingness of contracts must apply for the 'severability'-clause (Arts. 1.1, 1.3, 1.5).

11 **(iii)** In **long-term contracts** (Arts. 1.11 3rd hyphen) the severability clause is of particular importance because the perception of what is 'grossly unfair' may change over time.[32]

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.

30 Vogenauer/*Schelhaas* Art. 7.1.6 no. 15 in combination with a reference to the Official Comments (Art. 7.1.6, no. 6, p. 239).
31 The chosen example assumes a combination of a choice of UNIDROIT Principles clause with an arbitration clause (→ Preamble no. 3, 6).
32 *See* e.g. *Brödermann* in: *Eppur si muove*: The Age of Uniform Law p. 1283, 1286 and note 15 (on the change of the German perception of bribery abroad since 1999).

(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.

A. A Shield for the Obligor

In addition to exclusion of liability due to behaviour of the other party (→ Arts. 7.1.2, 7.1.3),[1] and subject to contract (Art. 1.5),[2] **para. 1** provides for a **general exclusion** of liability (Art. 7.4.1)[3] of the obligor (→ Art. 1.11 4th hyphen) for force majeure[4] events causing full or partial[5] non-performance (→ Art. 7.1.1; *see* e.g. Arts. 5.1.6, 6.1.2-6.1.3, 6.1.6),[6] which **para. 2** extends to cases of only **temporary impediments** to the performance.[7] (It may include even time thereafter in case of *consequential impediments* such as 'frost' as an obstacle to construction which would not been hit without the *force majeure* event.)[8] Like Art. 7.1.2, Art. 7.1.7 is **most relevant for duties to achieve a specific result** (Art. 5.1.4(1))[9] (→ Art. 7.1.2 no. 4). 1

B. Conditions

Force majeure based exclusion of liability depends on several conditions. Starting point is an **impediment**, i.e. an **exogenous** "**event** [i.e. external to the obligor's sphere of risk][10] which, according to the obligor, is the cause of its non-performance".[11] **In other words: (i)** Pursuant to **para. 1**, that impediment needs to be 2

1 Vogenauer/*Pichonnaz* Art. 7.1.7 no. 1 (pointing at the obligee's ‚interference' or 'failure to perform').
2 Vogenauer/*Pichonnaz* Art. 7.1.7 no. 11.
3 Morán Bovio/*Morán Bovio* Art. 7.1.7, no. 1, p. 337; Vogenauer/*Pichonnaz* Art. 7.1.7 no. 19, 47.
4 Official Comments, Art. 7.1.7 no. 1, p. 240.
5 Vogenauer/*Pichonnaz* Art. 7.1.7 no. 20, 43.
6 Vogenauer/*Pichonnaz* Art. 7.1.7 no. 20.
7 Vogenauer/*Pichonnaz* Art. 7.1.7 no. 44. Temporary impossibility to pay prevents the right to require payment under Art. 7.2.1, *see* Vogenauer/*Schelhaas* Art. 7.2.1 no. 5 and Vogenauer/*Pichonnaz* Art. 7.1.7 no. 48.
8 Official Comments, Art. 7.1.7 no. 2, Illustration 2, p. 241 and Vogenauer/*Pichonnaz* Art. 7.1.7 no. 46 (pipeline construction in Siberia).
9 As opposed to 'best efforts' duties (Art. 5.1.4 (2)): Vogenauer/*Pichonnaz* Art. 7.1.7 no. 2, 9.
10 Vogenauer/*Pichonnaz* Art. 7.1.7 no. 22 based on commentaries of Art. 79 CISG; Schlechtriem&Schwenzer/*Schwenzer* Art. 79 para. 12; Staudinger/*Magnus* (2012) Art. 79 para. 16.
11 Vogenauer/*Pichonnaz* Art. 7.1.7 no. 20 (without the brackets) with reference to similar definitions for the application of Art. 79 CISG by Kröll/Mistelis/Perales Viscascilla/*Atamer* Art. 79 para. 46; Schlechtriem&Schwenzer/*Schwenzer* Art. 79 para. 12.