

**Title:**

IV.7.5 - Severability of contract provisions

**Content:****No. IV.7.5 – Severability of contract provisions**

(a) Unless otherwise agreed by the parties or prohibited by law, each of the provisions of a contract is severable and distinct from the others.

(b) If at any time during the existence of the contract one of its provisions, which is severable and distinct from the others pursuant to Subsection (a), is determined to be or to have become invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions of the contract shall not in any way be affected or impaired.

(c) The parties shall negotiate in good faith pursuant to [Principle IV.6.7](#) to replace such invalid, illegal or unenforceable provision with a valid, legal and enforceable provision the economic effect of which comes as close as possible to that of the invalid, illegal or unenforceable provision.

**Commentary:**

**1** Pursuant to Subsection (a) the provisions contained in a contract are independent of each other. As a consequence of this independence, Subsection (b) stipulates that the invalidity, illegality or unenforceability of one of those provisions does not "infect" the remainder of the contract. The policy behind that rule is the presumed intention of the parties to international business contracts to avoid termination or invalidity of their contract, i.e. to uphold the contract's validity as much as possible. That policy also underlies [Principle IV.5.3](#) which relates to the interpretation of international business contracts.

**2** Pursuant to the fundamental [Principle IV.1.1](#) (party autonomy), the parties may always provide that their contract shall "stand and fall" with a certain contract provision, for example because that provision is of paramount importance for the commercial purpose which the parties pursue with the conclusion of the contract so that the contract shall not survive the invalidity of that provision. Even if the contract does not contain an express stipulation to that effect, such tacit intention may be derived through interpretation of the contract. However, in that latter scenario the rule contained in [Principle IV.5.3](#) - which strongly favors the validity of the contract - requires clear and unambiguous indications for that common intention in the contract. Also, mandatory law may require that the invalidity, illegality or unenforceability of a certain contract provision affects the contract as a whole.

**3** The invalidity of a key provision of the contract may result in an exchange materially different from the bargain initially struck by the parties if the contract remains valid pursuant to Subsection (a). For that reason, Subsection (c) imposes on the parties a duty to renegotiate an economic adjustment of their bargain pursuant to [Principle IV.6.7](#). In such a scenario, the party whose position under the contract is materially and adversely affected by the upholding of the contract without the invalid clause may demand from the other side to enter into negotiations with the aim of replacing the invalid, illegal or unenforceable provision with a valid, legal and enforceable contract clause the economic effect of which comes as close as possible to that of the invalid, illegal or unenforceable provision. If the parties do not succeed in negotiating a substitute clause which meets the economic requirements of Subsection (c), the claim for modification may be brought before a court or international arbitral tribunal, provided that the procedural law of the court ("*lex fori*") or the arbitration law at the seat of the arbitration ("*lex arbitri*") allows for such creative decision-making by the court or arbitral tribunal.

**4** Subsection (c) is subject to the general Principle of good faith ([Principle I.1.1](#)). A party may therefore not claim renegotiation pursuant to Subsection (c) if the invalidity, illegality or unenforceability of the clause is due to its own serious misconduct or fault.

**5** For arbitration clauses that are contained in a contract, [Principle XIII.2.4](#) contains the reverse rule: the invalidity of the

contract does not automatically affect the validity of the arbitration clause, *i.e.* the arbitrators have jurisdiction to decide on the invalidity of the contract even though the contract is void or invalid. If, however, the contract is void *ab initio*, that invalid will usually also affect the arbitration clause contained therein.