



INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW  
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WORKING GROUP FOR THE PREPARATION OF  
PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS

Article 1.8

INCONSISTENT BEHAVIOUR

(Revised draft prepared by Justice P. Finn in the light of  
the discussions of the Working Group at its 6<sup>th</sup> session held in  
Rome, 2 - 6 June 2003)

**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.**

**COMMENT**

**1. Inconsistent Behaviour and “good faith and fair dealing”**

This provision is a general application of the principle of good faith and fair dealing (Art. 1.7). It is reflected in other more specific provisions of the Principles. See, for example, Articles 2.1.4(2)(b), 2.1.18, 2.1.20 and Article 10.4, Comment 3. It imposes a responsibility on a party not to occasion detriment to another party by acting inconsistently with an understanding concerning their contractual relationship which it has caused that other party to have and upon which that other party reasonably relied.

The prohibition contained in this article can result in the creation of rights and in the loss, suspension or modification of rights otherwise than by agreement of the parties. This is because the understanding relied upon may itself be inconsistent with the agreed or actual rights of the parties. Compare Arts 1.3 and 3.2. The article does not provide the only means by which a right might be lost or suspended because of one party's conduct. See, for example, Articles 3.12 and 7.1.4(3).

**2. An understanding reasonably relied upon**

There is a variety of ways in which one party may cause another to have an understanding concerning their contract, its performance, or enforcement. The understanding may result, for example, from a representation made, from conduct, or from silence when a party would reasonably expect the other to speak to correct a known error or misunderstanding that was being relied upon.

So long as it relates in some way to the contractual relationship of the parties, the understanding for the purposes of this article is not limited to any particular subject matter. It may relate to a matter of fact or of law, to a matter of intention or to a present matter, or to how one or other of the parties can or must act.

The important limitation is that the understanding must be one on which, in the circumstances, the other party can and does reasonably rely. Whether the reliance is reasonable is matter of fact in the circumstances having regard, in particular, to the communications and conduct of the parties, to the nature and setting of the parties' dealing and to the expectations they could reasonably entertain of each other.

**Illustrations**

1. A has negotiated with B over a lengthy period for a contract of lease of B's land under which B is to demolish a building and construct a new one to A's specification. A communicates with B in terms that induce B reasonably to

understand that their contract negotiations have been completed, and that B can begin performance. B then demolishes the building and engages contractors to build the new building. A is aware of this and does nothing to stop it. A later indicates to B that there are additional terms still to be negotiated. A will be precluded from departing from B's understanding.

2. B mistakenly understands that its contract with A can be performed a particular way. A is aware of this and stands by while B's performance proceeds. B and A meet regularly. B's performance is discussed but no reference is made by A to B's mistake. A will be precluded from insisting that the performance was not that which was required under the contract.

3. A regularly uses B to do sub-contract work on building sites. That part of A's business and the employees involved in it are taken over by A1, a related business. There is no change in the general course of business by which B obtains its instruction to do work. B continues to provide sub-contract services and continues to bill A for work done believing the work is being done for A. A does not inform B of its mistake. A is precluded from denying that B's contract for work done is with it and must pay for the work done.

4. Because of difficulties it is experiencing with its own suppliers, A is unable to make deliveries on time to B under their contract. The contract imposes penalties for late delivery. After being made aware of A's difficulties, B indicates it will not insist on strict compliance with the delivery schedule. A year later B's business begins to suffer from A's late deliveries. B seeks to recover penalties for the late deliveries to date and to require compliance with the delivery schedule for the future. It will be precluded from recovering the penalties but will be able to insist on compliance with the schedule if reasonable notice is given that compliance is required for the future.

5. B is indebted to A in the sum of 10,000 dollars. Though the debt is due A takes no steps to enforce it. B assumes in consequence that A has pardoned the debt. A has done nothing to indicate that such actually is the case. It later demands payment. B cannot rely on A's inaction to resist that demand.

### **3. Detriment and preclusion**

The responsibility imposed by the article is to avoid detriment being occasioned in consequence of reasonable reliance. This does not necessarily require that the party seeking to act inconsistently must be precluded from so doing. Preclusion is only one way of avoiding detriment. There may, in the circumstances, be other reasonable means available that can avert the detriment the relying party would otherwise experience if the inconsistent action was allowed as, for example, by giving reasonable notice before acting inconsistently (see Illustration 4), or by paying for costs or losses incurred by reason of reliance.

#### Illustrations

6. A and B are parties to a construction contract which requires that additional works be in writing and be certified by the site architect. A's contract manager orally requests B to do specified additional work on a time and

materials basis and assures B it will be documented appropriately in due course. B commissions design works for the additional work at which stage A indicates that the work is not required. The cost incurred in commissioning the design work is far less than the cost that would be incurred if the additional work were to be done. If A pays B the costs incurred by B for the design work, B cannot then complain of A's inconsistent behaviour.

7. A fails to meet on time a prescribed milestone in a software development contract with B. B is entitled under the contract to terminate the contract because of that failure. B continues to require and pay for changes to the contract deliverable and acts co-operatively with A in continuing the software development program. A's continued performance is based on B's conduct subsequent to the breach. B will in such circumstances be precluded from exercising its right to terminate for the failure to meet the milestone. However, under the Principles B will be able to allow A an additional period of time for performance (Art 7.1.5) and exercise its right to terminate if the milestone is not met in that period.