I.2.3 - Presumption of professional competence and equality of parties

(a) The professional competence and equality of the parties to an international commercial contract is presumed.

(b) Parties to such contracts may not argue that they were not aware of the significance of the contractual provisions and obligations to which they have agreed.

Commentary:
1 The Principle is based on the understanding known from domestic laws that everybody who is doing business carries an increased responsibility for his or her business activities. This increased responsibility is justified especially with respect to the conclusion of contracts with other businessmen and the assumption of legal rights and duties which arise out of these contracts. Commercial parties must be aware of the extent and significance of and the risks associated with the contractual commitments which they have entered into in the course of their business. They must also accept trade usages, even if they did not positively know them, as long as they ought to have known them, which, again, involves the presumption of professional competence of international businessmen.

2 The application of subsection (b) leads e.g. to the consequence that a seller bears the supply risk if the contract with his customer does not contain a provision which provides for a different distribution of the supply risk. Also, the force majeure defense is not available to a party who is facing an increased economic burden of performance unless the contract contains a provision which lists or defines such scenarios as force majeure events.

3 Moreover, international arbitral tribunals are particularly reluctant to accept the hardship defense when there is no gap or lacuna in the contract and when the intent of the parties has been clearly expressed. In these cases, the Principle of pacta sunt servanda prevails. The reason why arbitral tribunals are particularly cautious in these cases is that it is generally much less likely in international commercial transactions that the parties have been unaware of the risk of a remote contingency or unable to formulate it precisely, given their presumed professional sophistication.

4 Subsections (a) and (b) increase the burden of proof for a professional party that intends to avoid a contract for errors in law or fact. As a result of the presumption of Subsection (a), a professional party must carry the consequences of its own mistakes to a wider extent than private, i.e. non-commercial parties.