No. IV.5.8 - Supplying an ommitted term

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

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

(i) the intention of the parties;
(ii) the nature and purpose of the contract;
(iii) good faith and fair dealing;
(iv) reasonableness.

Commentary:

1 The idea behind this Principle may be termed "supplementary interpretation". It occurs when, after the conclusion of the contract, a question arises which the parties have not regulated in their contract at all because they did not foresee it.

2 This situation must be distinguished from situations in which the parties have left open terms intentionally in order to agree on them in further negotiations or to have them determined by one of the parties or a third party (judge, arbitrator, expert etc.) at a later stage, during the performance of the contract or once a dispute has arisen. The present Principle does not apply in such situations.

3 Pursuant to the Principle of party autonomy, the parties' will is the primary criterion for the determination of the appropriate term. Only if such an intention cannot be ascertained with sufficient certainty, may one look at the other criteria in the order listed in para 2: the nature and purpose of the contract, good faith and fair dealing and reasonableness.