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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

PROGRESSIVE CODIFICATION OF INTERNATIONAL TRADE LAW

Note prepared by the Secretariat of UNIDROIT
on the preliminary study undertaken with a view to
elaborating uniform rules on the interpretation of
international contracts

Rome, July 1976

1.- At its first meeting the Working Committee, set up by the President of UNIDROIT to orientate future work on unifying the general part of the law of contract within the larger framework of a progressive codification of international trade law, asked the Secretariat first to prepare a revised version of the Popescu - draft on formation and to send it, together with a questionnaire, to qualified personalities and institutions, in order to elicit suggestions for modifying or completing it and then to start a preliminary study on the problem of interpretation of international contracts with a view to working out uniform rules in this field also, which would be included in the future Code. At this stage of its research, the Secretariat has drawn up a plan of its future work for submission to the members of the Working Committee and would very much appreciate it, if they could indicate whether they consider the plan to be acceptable or not.

2.- It goes without saying that the problems of the interpretation of the single contracts is of particular importance in the international trade practice. Thus, with regard to their interpretation in a strict sense, that is to say the determination of the meaning of what has been expressly stipulated by the parties in a given case, difficulties arise on account of the fact that the latter necessarily belong to different countries and therefore have to communicate with each other by using expressions and concepts which are not always familiar to them. Furthermore, as the contracts per definitionem are entered into by two merchants, particular relevance has to be given to the various practices and usages commonly observed within a specific trade sector or professional category, when clarifying the exact meaning of certain clauses or in completing the terms of the agreement. Finally, as the transactions of international trade are frequently concluded by means of general conditions or standard forms of contract, unilaterally elaborated by single firms or by trade associations, their interpretation must obviously be made on the basis of specific criteria and principles.

3.- In the light of the foregoing, it would seem that the future work on interpretation could be carried out, by using the following plan.

The first part of the study should deal with the interpretation of international contracts on the basis of common hermeneutic rules or criteria. In this context reference should be made to the well known hermeneutic rules codified or in practice applied within the various national systems, as well as to relevant provisions included in uniform laws or other instruments intended to apply specifically to international contracts only. It does not then seem impossible to enucleate a set of principles and rules which are universally adopted and recognised in this respect (e.g. the rule according to which in a con-

tract it is necessary to search for the common intent of the parties, rather than stopping at the literal meaning of the terms used; actus interpretandus est potius ut valeat quam ut pereat; ambiguous or uncertain terms shall be construed in accordance with the meaning that is more fitting to the nature of the contract; etc.).

4.- The second part of the study should be dedicated to the problem of the possible relevance in the interpretation of international contracts of courses of dealing, practices and usages. After a comparison of the relevant provisions of the various national systems (e.g. Articles 1159, 1160, 1135 of the French Civil Code; 1340, 1368, 1374 of the Italian Civil Code; Paragraphs 157 and 242 BGB, 346 HGB; the common law doctrine of the "terms implied by usages"; etc.) and those included in the Uniform Law on the International Sale of Goods (Article 9), in the Uniform Commercial Code (Sections 2-208; 1-205), the Czechoslovakian International Trade Code (Articles 117-118) and the recent Law on International Economic Contracts of the German Democratic Republic (Paragraph 5), a distinction should be drawn between practices and usages as a means of interpreting and clarifying single clauses or terms of a contract which may be ambiguous or uncertain (the "usages interprétatifs" of French law) and practices and terms expressly agreed upon by the parties (the "usages légaux" of French Law). In this context the main problem to be faced concerns the extent to which these two categories of practices and usages may apply, even if not expressly referred to by the parties, on the basis of objective and normative criteria of construction. Furthermore, since it is possible that in practice, with regard to a typical clause or expression or to a given type of transaction, different practices and usages may obtain in different parts of the world, another problem arises in connection with the way in which it is intended to solve the conflicts which would inevitably occur whenever the contracting parties do not belong to the same geographical region or area.

5.- Finally, the third part of the study should deal with the particular problem of interpretation of international contracts concluded on the basis of general conditions and standard forms of contract. Also in this regard the problem to be solved primarily concerns the applicability of general conditions to which the parties did not expressly refer in their contract or which one or both of them include for the first time in the letter of confirmation sent to the other after the conclusion of the contract. A first analysis of the solutions adopted in the different national systems shows that the

answer may not be the same for all cases, but that it differs according to whether the general conditions in question are unilaterally worked out by a single firm or trade association or on the other hand derive from a more or less "neutral" local or international organisation and/or are in any event commonly adopted in a particular trade sector or local market. But once the applicability of the respective general conditions or standard forms of contract to a given transaction is established, there arises the delicate problem of interpreting their content. In this connection, apart from a few universally adopted rules of interpretation (e.g. "in dubio contra proferentem"), the various national legal systems adopt considerably different solutions, mainly because at least in some of them particular rules or techniques of construction have been developed as a means of controlling the substance of such general conditions or standard forms of contract (see e.g. the so-called "Unklarheitsregel" in German and Swiss Law or the Common Law doctrine of "fundamental breach of contract"). For the purpose of the future Uniform Law it must of course be decided whether such techniques, which under the various national laws are normally conceived with so-called consumer sales in mind, should also be extended, at least partly, to international transactions between merchants.