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PROGRESSIVE CODIFICATION OF INTERNATIONAL TRADE LAW

Draft Uniform Law

on the Interpretation of Contracts in general

with Questionnaire

(prepared by the Secretariat of UNIDROIT)

Rome, May 1977

## INTRODUCTION

1. In the framework of its work on the preparation of an international trade code, the Secretariat of UNIDROIT, assisted by a Steering Committee composed of Professors David (University of Aix-Marseilles), Popescu (University of Bucharest) and Schmitthoff (University of the City of London) has so far prepared a draft set of rules on the formation of international contracts in general which, together with a Questionnaire, has been submitted to a large number of academics, specialised Institutes and other Organisations dealing with international trade (Study L - Doc. 8, UNIDROIT 1975). Almost all those to whom the Questionnaire was addressed have replied and thus demonstrated the wide interest which UNIDROIT's initiative in this field has aroused, not only among theorists, but also among the different Organisations dealing directly with the regulation of international trade.

2. There is a wide measure of agreement with the decision taken by the Steering Committee to begin the general part of the projected international trade code with a chapter on the fundamental problem of the formation of contracts. As to the substance of the draft uniform rules on the formation of international contracts in general which have been prepared, many remarks and useful suggestions for modification have been made. On the basis of a comparative analysis of the various observations prepared by the Secretariat (Study L - Doc. 9, UNIDROIT 1976), the Steering Committee proceeded to a revision of the original draft, the final text of which, accompanied by an explanatory report (Study L - Doc. 11, UNIDROIT 1977) is now ready for submission to an ad hoc Study Group to be convened by the President of UNIDROIT.

3. In accordance with the instructions given to it by the Steering Committee the Secretariat has in the meantime carried out a preliminary study on the problem of interpretation of international contracts with a view to working out draft uniform rules in this field: these rules are intended to constitute the second part or chapter of the future Code.

4. It goes without saying that the problem of the interpretation of the single contracts is of particular importance in 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 worked out by single firms or by trade associations, their interpretation must obviously be made on the basis of specific criteria and principles.

5. Bearing this in mind, the Secretariat has prepared a preliminary draft which is intended to cover all three of the above-mentioned aspects of the problem, i.e. the interpretation of contracts in a strict sense, the relevance which in the interpretation of international commercial contracts should be given to courses of dealing, practices and usages and the interpretation of contracts concluded on the basis of general conditions or standard forms of contract. As to the substance of the single articles, they partly reflect provisions already contained in international or national legislative instruments and partly aim at sanctioning principles and criteria which so far have only been worked out and adopted by legal writers or case-law. In asking for any comments and critical remarks on them the Secretariat would however draw attention to the fact that the proposed uniform rules on the interpretation of contracts should in principle correspond to the specific requirements of international trade and therefore attempt to reconcile the different domestic rules at present existing in this field only to the extent that the latter are consistent with such a basic criterion.

Article 1

The interpretation of contracts shall be in accordance with good faith and the principles of fair dealing.

This article is intended to constitute a sort of "general clause" ("Generalklausel") within the proposed draft uniform rules on the interpretation of international contracts. As a matter of fact, in stating that the latter shall be construed in accordance with good faith and the principles of fair trade, it not only expresses in general terms the underlying philosophy behind all the other articles contained in the draft, but also lays down a fundamental criterion to which reference may be made whenever a given problem cannot in practice be solved on the basis of one of the specific provisions.

With respect to the proposed formulation of the article, the criterion of "good faith" has not only been expressly adopted by a number of national laws (e.g. § 157 of the German BGB; Art. 1366 of the Italian Codice Civile) but is universally recognised and therefore too well known to need any further explanation here. On the other hand the reference in this context to the "principles of fair dealing" is relatively new. One could of course argue that such principles are in practice nothing other than the application between merchants of the general criterion of good faith (cf. Section 2-103 (1) (b) of the U.C.C., according to which "good faith in the case of merchants means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade"); their express mention should however demonstrate in a more effective way that in interpreting commercial transactions, particularly when concluded at an international level, it is not sufficient to base oneself on the confidence which the parties might have established between themselves; due consideration must also be given to the expectation which the generality of the operators has of fair dealing in the respective trade sector (cf. Art. 23, para. 1 of the Czechoslovakian International Commercial Code).

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In the light of the foregoing:

- 1.1. Is the inclusion of such a "general clause" in the proposed draft on interpretation felt to be necessary or at least opportune, and, if so
- 1.2. Is its present formulation considered to be satisfactory ?

Article 2

In the event of ambiguity, the contract or its individual terms shall be interpreted in such a way as to give them effect, rather than in a way which would deprive them of any effect.

Article 3

Each term of a contract shall be interpreted by reference to all the other terms of the same contract; in determining the meaning of the individual terms of a contract, reference shall be made to the contract as a whole.

Article 4

In the event of ambiguity, expressions capable of having more than one meaning shall be interpreted in such a way as is appropriate to the nature of the particular contract.

Articles 2, 3 and 4 lay down certain criteria which to a large extent correspond simply to principles of common sense and are therefore logical rather than legal in character. For instance, it was exactly for this reason that the drafters of the German BGB refrained from including them among the other rules they provided for the construction of contracts in general (see Motive, I, p. 155).

However, as the future Code is intended to apply to international transactions, that is to say contracts entered into by persons from different countries and legal systems, it would seem to be necessary or at least advisable to state such rules explicitly in order to ensure their observance in practice, whoever the competent judge or arbitrator might be.

Very little need be said as regards the contents of these rules. The rule laid down in Article 2, under which in the event of ambiguity the contract or its individual terms shall be interpreted in such a way as to give effect to them, rather than in such a way as to deprive them of any effect, represents a well-known and universally recognized principle ("actus interpretandus est potius ut valeat quam ut pereat": see e.g. Article 1367 of the Italian Codice Civile; Article 1157 of the French Code civil; Article 23 of the Czechoslovakian International Commercial Code; Luderitz, *Auslegung von Rechtsgeschäften*, Karlsruhe 1966, p. 344 et seq.; Popescu, *The Law of International Trade*, Bucharest 1976, p. 268 et seq.; see also, Article 52 of the Franco-Italian Draft Code on Obligations of 1927).

The same is true of the provisions contained in the following two articles: see, for the rule according to which "each term of a contract shall be interpreted by reference to all the other terms of the same contract; in determining the meaning of the individual terms of a contract reference shall be made to the contract as a whole" (Article 3), Article 1363 of the Italian Codice Civile; Article 982 of the Rumanian Civil Code; Article 56 of the Franco-Italian Draft Code on Obligations; Staudinger, Kommentar BGB, 11th ed., Berlin 1957, Ann. 39 zu § 133); for the rule according to which "in the event of ambiguity, expressions capable of having more than one meaning shall be interpreted in such a way as is appropriate to the nature of the particular contract" (Article 4), see Article 1369 of the Italian Codice Civile; Article 1158 of the French Code civil; Article 979 of the Rumanian Civil Code; Article 53 of the Franco-Italian Draft Code on Obligations.

In the light of the foregoing:

- 2.1. Is the adoption of the rule contained in Article 2 felt to be necessary or at least advisable ?
- 3.1. Is the adoption of the rule contained in Article 3 felt to be necessary or at least advisable ?
- 4.1. Is the adoption of the rule contained in Article 4 felt to be necessary or at least advisable ?

#### Article 5

1. A contract shall be interpreted according to the actual common intent of the parties, where such an intent can be established.

2. If the actual common intent of the parties cannot be established, the contract shall be interpreted according to the intent of one of the parties, where such an intent can be established and the other knew or ought to have known what that intent was.

3. If neither of the preceding paragraphs is applicable, the contract shall be interpreted according to the intent that reasonable persons would have had in the same situation as the parties.

Interpretation of a contract means the determination of the legal significance of a given agreement entered into by the parties. It goes without saying that no problem at all arises whenever there exists a total coincidence between the literal meaning of the declarations and the real intent of the parties. But quid, if the former is different from the latter or, even more, if an actual common intent of the parties cannot be established ?

With respect to the first case the various national laws adopt, at least apparently, quite different solutions. In fact, while in the Common law systems there traditionally exists the so-called plain meaning rule, according to which "where there is no ambiguity in the words, they should be construed according to their obvious meaning" (cf. Blackstone, Commentaries on the Law of England, 1765, p. 379; British Movietonews Ltd. v. London and District Cinemas Ltd. [1952] A.C. 166), the civil law systems generally adopt the inverse principle according to which "On doit dans les conventions rechercher quelle a été la commune intention des parties contractantes plutôt que de s'arrêter au sens littéral des termes" (Art. 1156 of the French Code Civil, but see also § 133 of the German BGB; Art. 1362 of the Italian Codice Civile). However, as has been rightly pointed out (David, Les contrats en droit anglais, Paris 1973, p. 327), the differences are "... plus de degré que de principe et de nature". In fact, not only are the consequences of the plain meaning rule attenuated in practice (cf. Luderitz, Auslegung von Rechtsgeschäften, Karlsruhe 1966, p. 65 et seq.; Tillmans v. S.S. Knutsford [1908] A.C. 406; see also Section 2-208 (2) of the U.C.C.), but also in the civil law systems the intention of the parties will only be deemed to prevail over the literal meaning of the terms of the agreement when a different intention was actually common to both parties and as such can be proved (cf. Betti, Teoria generale del negozio giuridico, Turin 1952, p. 342; Flume, Das Rechtsgeschäft, Berlin-Heidelberg-New York 1965, p. 299 et seq.).

It is along these lines that an internationally uniform solution could be achieved, and this is exactly the purpose of the present article, which corresponds almost entirely to Article 3 of the UNIDROIT Draft of a Law for the Unification of Certain Rules relating to Validity of Contracts of International Sale of Goods: after all, the principle laid down in the first paragraph has already been adopted both by the Czechoslovakian International Commercial Code (Art. 23) and the GDR Law on International Commercial Contracts (§ 6).

Next a few words of comment on paragraphs 2 and 3 of the present article.

Both of them deal with the case where an actual common intention of the parties cannot be established, and the solutions provided for such an event represent a direct application of the general principle of good faith ex Article 1: in fact, according to paragraph 2, the interpretation of the contract is first to be based on the intention of one of the parties provided, however, that this intention can be established and that the other party knew, or ought to have known, what that intention was; if, on the other hand, either the intention of one party cannot be established or

the other party, although using an ordinary degree of diligence, could not realise that when entering into the agreement the former had such an intention, according to paragraph 3 resort must be had to the intent that reasonable persons would have "had in the same situation as the parties", i.e. to the meaning which a contract of the kind the parties have concluded normally has within the particular ambit (trade sector; market place; professional category etc.) to which the parties belong.

In the light of the foregoing:

- 5.1. Is the principle according to which "a contract shall be interpreted according to the actual common intent of the parties, where such an intent can be established" felt to be acceptable ?
- 5.2. Are the rules according to which "if the actual common intent of the parties cannot be established, the contract shall be interpreted according to the intent of one of the parties, where such an intent can be established and the other knew or ought to have known what that intent was" and, in cases where these conditions are not fulfilled that "... the contract shall be interpreted according to the intent that reasonable persons would have had in the same situation as the parties" felt to be satisfactory ?

#### Article 6

1. In applying Article 2, due consideration shall be given to all relevant circumstances, including any negotiations between the parties, any practices which they have established between themselves, any usages which reasonable persons in the same situation as the parties usually consider to be applicable, and any conduct of the parties subsequent to the conclusion of the contract.

2. Such circumstances shall be considered, even though they have not been embodied in writing or in any other special form; in particular, they may be proved by witnesses.



This article, which corresponds almost entirely to Article 4 of the UNIDROIT Draft of a Law for the Unification of Certain Rules relating to Validity of Contracts of International Sale of Goods, deals with the relevance in the interpretation of international commercial contracts of courses of dealing, usages and customs.

In this context, it is well-known that the principles and criteria to be found in the various national systems are not, at least at first sight, always the same.

Thus, for example, according to German law, when there is no express reference by the parties to the contract to the various practices and usages which have grown up in international trade dealings, their effectiveness is normally considered to depend on the extent to which it is possible to recognise them as Handelsbräuche, to which paragraph 346 of the HGB refers for the construction of contracts between merchants. Once recognised as such they bind the parties for the sole reason that the latter belong to the relevant professional category or have done business in a given commercial market, it being totally irrelevant that they were in fact unaware of the content or even of the very existence of the practices and usages in question (cf. Oertmann, *Rechtsordnung und Verkehrssitte*, Leipzig 1914, p. 386 et seq.). At first sight, at least, the situation seems to be different in the Common Law countries, where the prevailing approach to contractual relations is in practice usually founded on the intention of the parties and therefore in principle tends to exclude the notion that they may be bound by something to which they have not expressly agreed or which cannot in any other way be attributed to their intention. This does not however mean that in practice, even in these systems, usages or practices which may be defined as "... a particular course of dealing or line of conduct generally adopted by persons engaged in a particular department of business life ..." (12 Halsbury's Laws of England, 4th ed. London 1975, paragraph 445) are of no importance for the purpose of interpretation or for the completion of the terms of individual contracts, especially when they are commercial ones; it should furthermore be noted that while in the past reference was always made to the presumed intention of the parties, the currently prevailing view is that is merely sufficient that the usages or practices are notorious, certain and reasonable (Cheshire and Fifoot's Law of Contract, 8th ed. London 1972, p. 141 et seq.; Wortley, *Mercantile Usage and Custom*, in *Rebelsz* vol. 24 (1959), p. 262 et seq.) or that they have acquired "such regularity of observance in a place, vocation or trade as to justify an expectation that they will be observed with respect to the transaction in question" (cf. Section 1-205 (2) of the U.C.C.). Turning to French Law, there is also a general tendency to seek the legal basis of the practices and usages of international trade at a contractual level, referring for this purpose to

Articles 1159 and 1160 of the Code Civil. It follows that as "usages conventionnels" or "usages interprétatifs", their efficacy should, at least in principle, depend on the express or presumed intention of the parties: however, apart from the fact that in practice such intention (and even knowledge) is presumed by virtue of the simple fact that the respective rules and practices are commonly applied in the sector of business in which the parties in fact operate, there have, especially of late, been attempts, also from the theoretical standpoint, to explain their application directly on objective grounds, and above all on the basis of the principle of good faith and the resulting necessity of interpreting contracts in their particular social context (cf. Pedamon, *Y a-t-il lieu de distinguer les usages et les coutumes en droit commercial ?*, in *Rev. trim. droit comm.* 1959, p. 346). Finally, in Italy the discussion of the relevance of usages and practices of international trade turns essentially on the question of whether they are genuine "usi normativi" referred to in Article 1374 of the Codice Civile and as such a means of completing the terms of contracts or whether they ought not rather to be seen as examples of simple "usi negoziali o interpretativi", as they are termed, and which are intended, according to Articles 1340 and 1368 of the Codice Civile, to constitute, in the absence of the contrary intention of the parties, simple rules of construction for interpreting and clarifying clauses or terms which may be ambiguous or uncertain.

In the light of the foregoing, on the basis of a functional and not merely a conceptual comparison between the various legal systems, it should not be difficult to discover how it has become an almost universally recognised principle that, in the construction of contractual terms, regard must be had between merchants to the normal meaning of such terms and the usual practices in the respective trade sectors, and this independently of the intention or even the knowledge of the parties. Moreover, such a principle is at present recognised, although its formulation may vary, in all the most recent national or international laws dealing specifically with international commercial contracts: it is enough to refer to Articles 117 and 118 of the Czechoslovakian International Commercial Code, to paragraphs 5 and 6 of the Law on International Commercial Contracts of the German Democratic Republic, to Section 1-205 (3) of the U.C.C. and to Articles 9 of ULIS and 13 of ULFC.

The questions to be answered here are therefore the following :

- 6.1. Is the rule laid down in the present article with respect to the relevance of course of dealing, practices and usages in the interpretation of international commercial contracts felt to be satisfactory?
- 6.2. If not, what kind of solution should be preferred ?
- 6.3. Are there any other comments on the content of the article?

#### Article 7

1. Where expressions, provisions or terms of a contract commonly used in commercial practice are employed, they shall be interpreted according to the meaning usually given to them at the place of conclusion of the contract or, in cases where they relate to a specific act of performance, at the place where that act is to be performed.

2. However, if there exist rules of interpretation which are intended to apply on an international scale, they shall prevail over any different local rules of interpretation.

Commercial transactions, particularly those concluded at an international level, often refer to typical clauses or expressions which are as such commonly employed in all parts of the world (e.g. delivery terms such as "cif", "fob", "fas" etc., or payment terms as "documents against payment", "documents against acceptance", "letter of credit", etc.). The present article deals with the problem of how to solve the conflicts which inevitably occur whenever, with regard to a single clause or expression of this kind, different rules and practices obtain in different parts of the world and the contracting parties do not belong to the same geographical region or area.

The solutions provided by the various national laws are to a large extent at variance as regards the choice of the connecting factor, some taking the place where the contract was concluded (cf. Article 1159 of the French Code Civil; Article 1368, paragraph 1 of the Italian Codice Civile),

others that where the offer and acceptance took place (see e.g. the German Bundesgerichtshof 20 May 1952, in BGHZ 6, 127, Oberlandesgericht Hamburg 2 September 1974, in MDR 1975, 845), others still the place where the firm providing the products or services has its seat (Art. 1368, paragraph 2 of the Italian Codice Civile) and yet others the place where the contractual obligations are to be performed (see Section 1-205 (5) of the U.C.C.).

However, as has recently been rightly pointed out, the problem is essentially one of interpretation and not of conflicts between rules of positive law (Sonnenberger, Verkehrssitten im Schuldvertrag, Munich 1970, p. 198), and in consequence, at least as regards the typical relations of international trade, it does not seem capable of being solved in abstracto, on the basis of a single, more or less rigid and formal criterion. It is for this reason that the present article, taking into account the difference which in practice exists between the various situations, provides that the single clauses or expressions should be interpreted according to the meaning usually given to them at the place of conclusion of the contract, when such contracts are normally concluded in a given market, and according to their meaning at the place of performance, when the question is simply one of determining the way in which performance is to be effected, or some technical aspects of it carried out (first paragraph); that in any case rules of interpretation, such as Incoterms, Uniform Customs and Practice for Documentary Credits, etc., which have been elaborated by an international independent agency (I.C.C.; UNCITRAL, etc.) and are intended to apply in a uniform manner on an international scale should prevail over purely local rules of interpretation (second paragraph). For a confirmation of such a solution, that is to say the application in a given case of this kind of rules, even if not expressly referred to by the parties, simply because of their nature of internationally well known and widely accepted rules of interpretation of the respective clauses, see, with reference to Incoterms, among other, OLG Munich 19 December 1957, in AWD 1959, 79; BGH 22 January 1959, ibid. 1959, 20; Trib. Genoa 6 April 1966, in Dir. maritt. 1966, 336; OLG Karlsruhe 12 February 1975, RIW 1975, 225; award of the arbitral tribunal of the I.C.C. n° 1689 of 1970; award of the arbitral tribunal of the I.C.C. n° 1788 of 1971; with respect to Uniform Customs and Practice for Documentary Credits, Cass. it. 30 July 1960, in BBTC 1960, II, 486; Cass. franc. 13 April 1967, in Clunet 1967, 184; BGH 21 March 1973, NJW 1973, 899; with reference to Uniform Rules for the Collection of Commercial Paper, OLG Hamburg 27 October 1969, in MDR 1970, 335.

In the light of the foregoing :

- 7.1. Is the rule that clauses and expressions commonly used in commercial practice shall be interpreted according to the meaning usually given to them at the place of conclusion of the contract or, in cases where they relate to a specific act of performance, at the place where that act is to be performed, felt to be satisfactory ?
- 7.2. If not, what other criteria should be adopted for the solution of conflicts which in practice may arise between different local rules of interpretation ?
- 7.3. Is the rule that if there exist rules of interpretation which are intended to apply on an international scale, they shall prevail over any different rules of interpretation, felt to be satisfactory ? or
- 7.4. Should the relevance of such international rules of interpretation depend on an express reference to them by the parties to the contract ?

#### Article 8

1. General conditions prepared by one party are, in the absence of express agreement, effective against the other party only if at the time of conclusion of the contract the latter knew or should have known of their existence.

2. If each party refers to its own general conditions, those which were the last to be sent and which have not been rejected shall be effective.

3. If the other party rejects the general conditions which were the last to be sent or if each party rejects the general conditions of the other, the contract shall be deemed to have been concluded without such general conditions, unless the party who has received the declaration from which it is apparent that there is no agreement on the general conditions or on the different conditions of the other party, immediately objects to the conclusion of the contract.

Most of the typical transactions of international trade are concluded on the basis of general conditions or standard forms of contract, elaborated by individual firms (as normally happens in the industrial products sector) or by the respective professional associations (as in the raw materials and agricultural products sector), or even by specialised international and independent agencies (such as International Chamber of Commerce, the Economic Commission for Europe, UNCITRAL, etc.).

In this respect two kinds of problems arise: first, the determination of the effectiveness of these instruments in cases where the parties did not expressly refer to them in their contract; secondly, the identification of the principles and criteria to be adopted in interpreting their content.

As to the first question, paragraph 1 of the present article lays down the rule according to which general conditions prepared by one party are, in the absence of express agreement, effective against the other party only if at the time of the conclusion of the contract the latter knew or ought to have known of their existence. In other words, general conditions which one party has unilaterally elaborated either directly or through his own trade association are, in the absence of an express agreement, applicable only if at the time of the conclusion of the contract the other party knew or at least should reasonably have known that the former intended to avail himself of the said conditions.

At first sight such a solution is at present adopted in only a few national laws (cf. Article 1341, paragraph 1 of the Italian Codice Civile), whereas other legal systems require for the effectiveness of general conditions either an express agreement between the parties (in the form of an express reference to them or even by requiring a signature of the document containing the whole text of the conditions) or at least that one party gives to the other "reasonable notice" of their existence and their contents: that is to say enables the latter effectively to obtain knowledge of them before or at the time of the conclusion of the contract (see, with respect to the Common Law systems, Treitel, *The Law of Contract*, 3<sup>rd</sup> ed., London 1970, p. 173 et seq.; Cheshire and Fifoot's *Law of Contract*, 8<sup>th</sup> ed. London 1972, p. 123 et seq.; Raiser G., *Die gerichtliche Kontrolle von Formularbedingungen im amerikanischen und deutschen Recht*, Karlsruhe, p. 17 et seq.; for the French Law, Rieg, *Contrat-type et contrat d'adhésion*, in *Etudes de droit contemporain*, vol. XXXIII, Paris 1970, p. 105 et seq.; for the German Law, § 2 of the AGB - Gesetz of 1976). These additional requirements are however in the latter systems generally restricted to so-called consumer transactions whereas a more liberal attitude with respect to contracts between merchants prevails: thus, in practice, general conditions are deemed to be incorporated in a given contract, even without notice of them being given by one party to the other, provided that they have been expressly agreed to in

previous transactions ("incorporation by course of dealing") or their use is generally known within the particular trade sector ("incorporation by usage") (see, for the Common Law systems, Wortley, *Mercantile Usage and Custom*, in *Rebelszeitschrift* vol. 24 (1958), p. 267; *Hollier v. Rambler Motors Ltd.* (1972) 1 All England Law Reports, p. 401; Section 55 (5 c) of the Supply of Goods (Implied Terms) Act of 1973; for the French Law, Berlioz, *Le contrat d'adhésion*, Paris 1973, p. 63 et seq.; Cass. 1<sup>st</sup> March 1971, in *Recueil Dalloz* 1971, p. 597; App. Paris 9 May 1974, in *Rev. crit. dr. intern. privé* 1975, p. 99; for the German Law, § 24 of the recent *AGB-Gesetz* which excludes the applicability of the above mentioned § 2 to contracts between merchants; BGH 18 June 1971, in *Juristische Rundschau* 1972, p. 25; BGH 13 July 1971, in *AND* 1973, p. 631; Weber, *Die Allgemeinen Geschäftsbedingungen*, Berlin 1967, p. 325 et seq.).

This being so it should not be difficult to accept at an international level the solution provided for in paragraph 1 of the present article. After all, when subordinating the effectiveness of general conditions to the fact that the adhering party knew or at least should have known of their existence at the time of the conclusion of the contract, it is implicitly stated that in practice the conditions must, in the absence of notice of them being given by one party to the other, have previously been adopted either between the parties themselves or by the generality of the operators in the respective trade sector.

It often happens in practice between merchants that both parties to the contract intend to avail themselves of their own general conditions and for that purpose expressly refer to them in their declaration of offer or of acceptance. With respect to such "battles of forms" the present article distinguishes between the case where the conditions which were the last to be sent are not rejected by the other party and the case where on the contrary each party expressly opposes the application of the conditions of the other.

For the first case it provides that the contract shall be deemed to be concluded on the basis of the conditions which have not been rejected (paragraph 2). This solution, which has been adopted e.g. by § 33 (2) of the GDR Law on International Commercial Contracts, is only apparently in contrast with the general rule of Article 7 of the UNIDROIT draft Uniform Law on the Formation of Contracts in general (Study I - Doc. 11, UNIDROIT 1976) according to which "An acceptance containing additions, limitations or other modifications shall be a rejection of the offer and shall constitute a counter-offer" and only "a reply ... which contains additional or different terms which do not materially alter the terms of the offer shall constitute an acceptance unless the offeror promptly objects to the discrepancy ...": there the

real problem is to determine whether or not the offer and the acceptance amount to a contract, whereas here the parties certainly agree on the essential terms of their contract and the uncertainty concerns only the applicability of one or the other set of general conditions, a problem of interpretation which should be solved in favour of those conditions which were the last to be sent and did not provoke any reaction on the part of the other party.

The situation becomes of course more complex when each party objects to the applicability of the general conditions of the other, as one may argue that in such cases even an agreement on the essential elements of the contract is missing. However, in accordance with the view at present prevailing in many national systems (see § 33 (3) of the GDR Law on International Commercial Contracts; Schlechtriem, *Die Kollision von Standardbedingungen beim Vertragsschluss*, in *Festschrift f. Wahl*, Heidelberg 1973, p. 67 et seq.; Schmidt-Niggemann, *Die Vereinbarung von AGB durch stillschweigende Annahme nach französischem Recht*, in *AWD* 1974, p. 312 et seq.), paragraph 3 of the present article states that, unless the party who has received the declaration from which it is apparent that there is no agreement on the general conditions (or on the different conditions of the other party) immediately objects to the conclusion of the contract, the contract shall be deemed to have been concluded without the conditions of one or the other party.

In the light of the foregoing:

- 8.1. Is the general rule relating to the effectiveness of general conditions prepared by one party as provided for by paragraph 1 felt to be satisfactory ?
- 8.2. Are the criteria adopted in paragraphs 2 and 3 for the different cases which may arise in connection with a so-called "battle of forms" felt to be satisfactory ?



Article 9

Notwithstanding the provisions of Article 5, no clause contained in general conditions shall be effective which by reason of its content, language or presentation is of such a character that the other party could not reasonably have expected it.

According to Article 8 paragraph 1, general conditions prepared by one party are, even in the absence of an express agreement, effective against the other party if the latter knew or should have known of their existence at the time of the conclusion of the contract. The justification of this principle, which is doubtless more favourable to the formulating party, is that if the use by this party of his general conditions is sufficiently well known that the other party should reasonably have known of it, the fact that he did not expressly object to their application because he was unaware of their existence and/or their content is due to his own negligence and may therefore be regarded as being equivalent to their acceptance. However, such a solution suggests that the silence of the adhering party implies acceptance only of those conditions the adoption of which is really usual, that is to say which contain provisions the existence of which the other party could have reasonably expected to find in general conditions of that kind.

The present article consequently states that, notwithstanding the applicability - according to Article 8 - of the general conditions as a whole, any clause contained therein which by reason of its content, language or presentation is of such a character that the other party could not reasonably have expected it, shall be deemed to be ineffective. The purpose of this rule, which corresponds to § 3 of the recent German AGB-Gesetz, is clear: in order to prevent the party who prepared the general conditions taking unfair advantage of the adhering party, where such conditions contain provisions which, on account of their content, prove to be particularly burdensome or at least unexpected to the adhering party, the other must in some way or another draw his attention to them, so as to permit him to assess their real significance; if not, the formulating party cannot reasonably rely on their application (see, for such a solution, Section 2-316 (2) of the U.C.C. which for certain exemption clauses requires that "the writing must be conspicuous"; Article 1341 of the Italian Codice Civile, which however goes even further in providing that certain clauses, if contained in general conditions, must be specifically accepted in writing by the adhering party; in Swiss Law, Bundesgericht 1 March 1961, in BGE vol. 87, I, 51; Bundesgericht 8 March 1967, in BGE vol. 93, I, 323).

In the light of the foregoing:

- 9.1. Is the provision contained in the present article felt to be satisfactory?
- 9.2. If not, what other remedies against the unlimited applicability of "surprising" clauses could be adopted in the context of the interpretation of contracts concluded on the basis of general conditions?

#### Article 10

Any provision expressly agreed by the parties shall prevail over conflicting provisions of general conditions, even though the former has been agreed upon orally and the latter have not been struck out.

Bearing in mind that general conditions are by their nature worked out in advance and in an abstract way, it is quite obvious that, whenever the parties expressly agree on one or more terms of their contract, such provisions, reflecting their real intention in the given case, prevail over conflicting provisions contained in the general conditions (cf. Article 1342, paragraph 1 of the Italian Codice Civile; § 4 of the German AGB-Gesetz). However, in practice it often occurs that the parties make their agreements only orally and without striking out the clauses of the general conditions from which they intend to derogate. Should these agreements also be valid or should the express provisions be permitted to prevail only if they are agreed upon in writing? As it well known, in this respect the various national laws provide for different solutions. Thus, while in the civil law countries the problem is more or less a question of proof (cf. Genovese, *Le condizioni generali di contratto*, Padua 1954, p. 391; Ulmer, in *Ulmer-Braudner-Hensen, AGB-Gesetz*, Cologne 1977, p. 103), in the Common Law countries, according to the parol evidence rule or the plain meaning rule the substantial validity of oral agreements may also be questioned (cf. Lüderitz, *Die Auslegung von Rechtsgeschäften*, Karlsruhe 1966, p. 172 et seq.; *Jacobs v. Batavia and General Plantations Trust* [1924] 1 Ch. 287): in practice, however, in the latter also the more recent tendency is to admit oral evidence when the document is intended to contain only part of the

terms of the contract, that is to say when the parties did not intend the writing to be exclusive, but wished it to be read in conjunction with their oral statements (cf. Walker Property Investments, Ltd. v. Walker, (1947), 177 L.T. 204; Cheshire and Fifoot's Law of Contract, cit., p. 108; § 228 Restatement of the Law of Contracts).

On the basis of these premises the present article openly states that the express provisions shall prevail over conflicting provisions contained in the general conditions, even though the former have been agreed upon orally: after all, general conditions, even if they take the form of standard forms of contract, are by their nature contractual documents intended to regulate only in part a given transaction.

In the light of the foregoing

- 10.1. Is the rule adopted by the present article felt to be satisfactory?
- 10.2. If not, should the opposite solution be adopted according to which only express agreements in writing may prevail over conflicting provisions of general conditions?

#### Article 11

Provisions contained in general conditions prepared by one of the parties shall, in case of ambiguity, be interpreted in favour of the other party.

It is a well known principle that if there is any doubt as to the meaning and scope of terms included in general conditions such ambiguity will be construed against the party seeking to rely on these terms (see Article 1370 of the Italian Codice Civile; Article 1162 of the French Code Civil; § 5 of the German AGB-Gesetz; § 236 (d) of the Restatement of Contracts; Morris v. C.W. Martin & Sons (1965) 2 All E.R. 725; Treitel, The Law of Contract, op.cit., p. 178 et seq.; Cheshire and Fifoot's Law of Contract,

op.cit., p. 129 et seq.). In adopting the "contra proferentem" rule, the present article specifies that its application is restricted to those cases where the relevant general conditions have been prepared unilaterally, regardless of whether this has been done directly by the party seeking to rely on them in practice or by a professional body or trade association to which only one of the contracting parties belongs. The reason behind the limit set on this rule is that, particularly in international trade practice, it often occurs that the parties conclude their transactions on the basis of general conditions or standard forms of contract which have been worked out by "neutral" agencies, that is to say by local trade associations or international organisations equally representative of the interests of both the contracting parties: it would seem that such general conditions fall outside the application of the "contra proferentem" rule, so that possible doubts as to their exact meaning should rather be resolved by reference to the criteria provided for in Article 4 of the present draft.

In the light of the foregoing:

- 11.1. Is the adoption of the "contra proferentem" rule as provided for by the present article felt to be satisfactory?
- 11.2. Is the restriction of the rule to general conditions which have been worked out by only one party felt to be appropriate?

