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draft uniform law on the interpretation of contracts in general:

analysis of the replies to the Questionnaire

prepared by the Secretariat

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INTRODUCTION

1. In the context of its work on the drawing up of an international trade Code, the Steering Committee composed of Professors David (University of Aix-Marseilles), Popescu (University of Bucharest) and Schmitthoff (City University of London) has so far completed work on a draft on the formation of international contracts in general (Study L - Doc. 11, UNIDROIT 1977). At its last meeting, held in April 1977, it requested the Secretariat of UNIDROIT to distribute the draft uniform rules on the interpretation of contracts, accompanied by a questionnaire (Study L - Doc. 12, UNIDROIT 1977), with a view to obtaining comments thereon from academics, specialised Institutes and other Organisations dealing with international trade.

2. As was the case with the draft on formation, that concerning interpretation has met with considerable interest. So far more than thirty replies have reached the Secretariat. Among these, particular reference may be made to the detailed observations from UNCTAD, the Economic Commission for Europe, the Economic and Social Commission for Asia and the Pacific, the Belgrade Institute of Comparative Law, the Palermo Institute of Comparative Private Law and Professors Barrera Graf of the University of Mexico, Bianca of the University of Rome, Bydlinski of the University of Vienna, Drobnig of the Max-Planck-Institut für ausländisches und internationales Privatrecht in Hamburg, Enderlein of the Institut für ausländisches Recht und Rechtsvergleichung in Potsdam, Eörsi of the University of Budapest, Fontaine of the Centre de Droit des obligations in Louvain, Goldman of the University of Law, Economic and Social Sciences in Paris, Gordon of the Glasgow University Law Faculty, Hjerner of Stockholm University, Lando of Copenhagen University, Limpens of Brussels University, Rajski of Warsaw University, Sauveplanne of Utrecht University, Takakuwa of Tokyo University, Tallon of the Service de Recherches Comparatives in Paris, Tunc of the Centre d'Etudes Juridiques Comparatives in Paris, Ulmer of Heidelberg University and van Hoogstraten of the Hague Conference on Private International Law.

3. This document contains a comparative analysis of the replies received to date. For the sake of clarity, the Secretariat has grouped together the remarks and observations of a general character, which are followed by an article by article analysis of the replies.

GENERAL OBSERVATIONS

4. Almost all the replies laid stressed on the desirability of preparing uniform rules on the interpretation of international contracts in general. In this connection the point was made that in practice in international trade, the interpretation of the various contracts, especially when they are concluded on the basis of general conditions or standard contacts, often poses delicate problems. In consequence UNIDROIT's initiative in this field - the first in this particular direction - would fill an important gap.

5. One reply, while admitting that there is little uniformity in the manner in which international contracts are interpreted, nevertheless considered that it was uncertain whether these differences were based upon differing concepts in different countries of the rules and methods of interpretation or whether they reflected individual differences in sentiment and political outlook on the part of those called upon to interpret specific contracts. Some judges tend to be more pragmatic and less "semantic" than others and might therefore be guided more by their notions of justice and equity. Such differences, however, might also occur within the same country and it would not be easy to eliminate them by way of a law. Against the enactment of detailed rules on interpretation it might also be argued that it is impossible to establish a coherent set of rules mainly because it will be impossible to create a hierarchy of them. Looking at the present draft one might ask whether Article 1, which provides for interpretation "in accordance with good faith and the principles of fair dealing", is a paramount clause. Does it have priority over the actual common intent of the parties mentioned in Article 5, paragraph 1 when the intent is not in accordance with the principles of fair dealing ? Does it override the in dubio contra-proferentem rule in Article 11 so that a fair and reasonable outcome is to be preferred even if this would be pro proferentem ? The reply, however, concluded that the present UNIDROIT draft was certainly useful, if only for certain of its provisions which introduced new principles of interpretation or principles not adhered to in all countries (which would seem to be the case especially with Articles 7 to 10). As to the other provisions, they might be considered more as mere guidelines and as such might be useful.

6. Another reply expressed the opinion that the future uniform rules should take the form of simple rules or guidelines rather than that of a true uniform law. It was in fact argued that since rules governing interpretation do not confer rights on the parties or impose obligations upon them, and are nothing more than simple guidelines for the judge or the arbitrator, they ought not to have the force of law. What is necessary in practice is that they should be formulated in uniform terms at a universal level.

7. Some replies raised the question of the desirability of altering the present order of the articles of the draft. It was in particular suggested that the rules regarding interpretation in general should in the first place be regrouped (Articles 1, 5, 6 and 7) then those applicable to doubtful cases (Articles 3, 4 and 2) and finally those concerning especially the interpretation of general conditions (Articles 9, 10 and 11).

8. In conclusion these replies proposed that the projected rules should also deal with other matters such as the interpretation of statutes, cases of conflict between two versions in different languages of the same contract and the possibility of setting up arbitration machinery for interpreting standard contracts drawn up by neutral organisations.

OBSERVATIONS ON THE ARTICLES

Article 1

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

9. Almost all the replies were in favour of the idea of introducing at the beginning of the draft on interpretation of contracts a general clause of the type contained in the present article. In this connection reference was made to the general scope of the principles of "good faith" and "fair dealing" and the suggestion was therefore made that a provision of this kind should be inserted in the chapter of the future Code dealing with the formation and performance of contracts.

10. Only one reply considered that an allusion to "fair dealing" would not, in the last analysis, be appropriate since it was already included in the notion of "good faith" and that in consequence the use of the two concepts might well give rise to the most acute difficulties of interpretation.

11. With regard to the "fair dealing" clause, however, the point was made that it was not yet clear whether reference should be made to the fair dealing which is at present observed in business and commerce or rather to that which ought to govern trade relations; while one writer took the latter view on account of the need for a harmonious development of international trade between developed and developing countries, another was of the opposite opinion and seemed rather to favour the first view, basing himself on the idea that in order to differentiate the principle of "fair dealing" from that of "good faith", the former should necessarily refer to the practices which are actually established in the sector in question.

12. In opposition to the insertion of such general clauses in the draft, it was pointed out that their meaning differs from one national law to another and that they might therefore be a cause at international level also of varying interpretations and application.

13. A possible amendment to the present wording might lie in adding the words "in international trade". It was in effect pointed out that not all the principles which are valid in domestic law are necessarily so internationally.

14. Another reply favoured a clearer indication in the text of the scope of the general principles referred to here by an addition to the effect that they should be observed "in the interest of the peaceful development of international commercial exchanges between the parties, independently of their State of origin".

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.

15. There was no real objection to the inclusion of these articles, although it was pointed out that the criteria for which they make provision to a large extent do nothing more than correspond to the principles of common sense and that therefore whether or not they are expressly included in the uniform law is not a question of any great practical importance.

16. As to Article 2, a number of replies have however pointed out that the rule of validity included therein, while it may be thoroughly logical, might on the other hand run counter to the intention of the parties insofar as they might wish something which would render their contract null and void. To that extent it was open to criticism and if it was desired to retain it, then it should be modified so as to give more importance to the actual will of the parties.

17. Another reply objected to Article 3 on the grounds that it contemplated a synthetic interpretation of the contract whereas practical experience of negotiating international contracts clearly shows that the clauses are often discussed in analytic fashion. When certain clauses are expressly designated by the parties as being fundamental clauses of the contract, the rule of interpretation contained in the present article does not seem to be logical. In such cases, on the contrary, the clauses should serve as a basis for the interpretation of the contract as a whole which would subsequently determine the interpretation of subsidiary clauses.

18. Finally, several replies entered serious reservations regarding the maintenance of Article 4. It was in point of fact emphasised that in view on the one hand of the general principle enunciated in Article 1 and on the other of the criterion mentioned in Article 5, the reference to the "nature of the particular contract" would either be meaningless or would give rise to delicate problems of coordination.

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.

19. This article, which is unquestionably one of the key provisions of the draft, gave rise to objections in a number of replies.

20. Certain replies criticised the position of the article in the draft, considering that in view of its fundamental importance, it would be preferable to place it immediately after Article 1.

21. Other replies, while finding the substance of the article generally speaking acceptable, nevertheless suggested some amendments of detail. Thus, in connection with paragraph 2, it was proposed that the reference to the possibility that one party "ought to have known" what the intent of the other party was, should be deleted, as such a provision would seem to call for extremely subjective psychosociological research.

22. In this connection, another reply gave the example in which A ought to have known that B meant to refer to Canadian dollars and B ought to have known that A meant to refer to American dollars, since that would be the intent which reasonable persons would have had in the same situation as the parties; the author of the reply wondered which provision should apply in such circumstances. To support B's interpretation if B had not given any sign of his actual intent would not be fair to A. To apply Article 5, paragraph 3 and to support A's interpretation - which would seem to be the better view - would considerably reduce the scope of Article 5, paragraph 2. This provision would then only be a support for a party who could not be expected to know the intent of reasonable people in the same situation as the parties. Article 5, paragraph 2 should therefore be deleted and Article 5, paragraph 3 should become paragraph 2 which would read "If the actual common intention of the parties cannot be established the contract shall be interpreted according to the intent that reasonable persons would have had in the same situation as the parties".

23. As regards paragraph 3 of the article, objection was taken to the reference in the English text of the draft to "the intent of reasonable persons" and it was suggested that it would be preferable to speak of "reasonable understanding of the parties' declarations and other conduct".

24. Still in connection with the reference in paragraph 3 to "reasonable persons", the general comment was made that this notion, which is not familiar to Civil Law systems, might give rise to considerable uncertainty in practice. Indeed, it is significant that while the concept was given expression in the 1964 Hague Uniform Law on the international sale of goods, it does not appear in the UNCITRAL draft Convention. It would therefore be preferable either to delete it altogether from the present text or to formulate it in a more concrete fashion, for example by the introduction of the term "persons engaged in a particular branch of business or of the commercial sector, of the place of the market, of the professional category etc."

25. According to another reply, Article 5 in its present drafting would seem to apply only to contracts which have already been concluded. In order, therefore, to extend its application to communications, statements and declarations by, and conduct of, one of the parties during the formation of the

contract, an amendment was proposed to the present text of paragraphs 2 and 3 of the article along the following lines :

"2. Communications, statements and declarations by, and conduct of, a party are to be interpreted according to his intent when the other party knew or ought to have known what that intent was.

3. If the preceding paragraph is not applicable, communications, statements and declarations by, and conduct of, a party are to be interpreted according to the understanding that a reasonable party would have had in the same circumstances."

26. Another reply suggested the addition, at the beginning of paragraphs 2 and 3 of Article 5, of the following phrase: "Subject to the provisions of Articles 8 to 11 ...". Such an amendment would lay stress on the fact that the principles enunciated in these paragraphs for the interpretation of contracts in general are not applicable to contracts concluded on the basis of general conditions.

27. A number of replies went so far as to propose the straightforward deletion of paragraphs 2 and 3 of Article 5. It was in particular noted that the rules set out therein seemed to reiterate the general principle contained in Article 1. One solution might therefore lie in the present paragraph 1 being followed by a brief provision to the effect that "in the absence of such intent, what is decisive is the intent of one of the parties when the other knew or ought to have known what that intent was."

28. Other replies were opposed to the very substance of Article 5.

29. On the one hand the opinion was expressed that the criteria contained in Article 5 are incompatible with the fundamental concept of a contract as a meeting of the minds of the parties. This was thought to be particularly true of paragraphs 2 and 3 which, with a view to establishing the common intent of the parties, permit recourse to be had to that of only one of them or even merely to that of a reasonable person. As to the first paragraph, it should be amended so as to provide that it is not the unspoken, but only the declared, intent of the parties which must be taken into consideration in the interpretation of contracts.

30. On the other hand, two replies criticised the article under consideration on the grounds that it favoured an interpretation based on criteria of too subjective a character. The solution was not only in contradiction with the principles set out in Articles 2 to 4 and Article 7 of the draft, but also unacceptable in the context of international commercial transactions. In fact, whenever doubts arise in connection with the latter as to the interpretation of the terms used by the parties, in the first place an attempt should be made to establish the meaning given to them in the commercial sector under consideration and not that attributed to them by the parties or by one of them. It was therefore proposed that paragraphs 2 and 3 be deleted and that it be stated in paragraph 1 that as a general rule interpretation should be based on objective criteria and that only in exceptional cases should recourse be had to the intent of the parties. Article 5 should therefore be drafted as follows : "The contract and its individual terms shall be interpreted in such a way as they would be understood by reasonable persons in the situation of the parties. However, the actual common intent of the parties shall prevail when such an intent can be established."

Article 6

1. In applying Article 5, 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.

31. The majority of the replies expressed full satisfaction with the provisions contained in this article.

32. One reply however expressed the opinion that the rule according to which due consideration should be given in the interpretation of the contract to all relevant circumstances and in particular to any negotiations between the parties, any practices which have been established between themselves and any usages which reasonable persons in the same situation as the parties usually consider to be applicable and to the conduct of the parties subsequent to the conclusion of the contract, should apply in all cases and not amount to a mere adjunct to the principles set out in Article 5. Any reference to this article should therefore be removed from the text of Article 6, paragraph 1.

33. Further in connection with the relations between Articles 5 and 6, a reply to the contrary effect suggested that the present reference to Article 5 in the first paragraph of Article 6 should be clarified in the sense that the principles contained in Article 6 concern only the application of the first paragraph of Article 5.

34. As to the different factors to be taken into consideration in accordance with paragraph 1 of Article 6, a suggestion was made that the reference to "negotiations between the parties" should be deleted as everything which takes place prior to the conclusion of the contract may be very different from the tenor of the contract as concluded.

35. On the other hand another reply stressed the desirability of adding to the different elements at present mentioned in Article 6 letters of intent which may have been exchanged between the parties.

36. Another suggestion was to add to paragraph 1 a provision similar to that contained in Article 7 of the Law on International Economic Contracts of the German Democratic Republic which provides that "in particular neither party may rely on an interpretation of the contract which is incompatible with his behaviour in connection with the contract".

37. Most of the criticisms however were directed at the reference in the article to usages.

38. On the one hand it was pointed out that the subordination of the application of usages to the condition that reasonable persons in the same situation as the parties would have considered them to be applicable might create uncertainty. It would therefore unquestionably be preferable to choose a more objective criterion and to state that all those usages which are regularly observed in the trade sector under consideration should be applicable. One reply expressed the opinion that everything which is usually stipulated in international contracts ("Handelsüblichkeit") should be assimilated to those usages ("Handelsbräuche").

39. A totally different view emerged from other replies to the effect that in the context of interpretation only those usages which are actually known by the parties should be taken into consideration. In the opinion of one author, the connection between the usages in question and the intention and the knowledge of the parties would already result from the reference in Article 6 to Article 5.

40. Finally, it was recalled that the criteria adopted in this article for determining which usages should be applicable coincided exactly with those provided for in the Uniform Law of 1964 on international sale. As is already known, the UNCITRAL draft Convention on international sale has in this connection adopted a solution which is somewhat different in that the only usages which it holds to be applicable are those "which the parties knew or had reason to know and which in international trade is widely known and regularly observed by parties to contracts of the type involved in the particular trade concerned". The author therefore wondered whether it would not be preferable to adopt the same solution in this draft.

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.

41. This article, which lays down the criteria for the solving of possible conflicts regarding the different meaning given to terms in different places, was criticised in a number of replies.

42. A drafting amendment to paragraph 1 was proposed as follows: "Terms or expressions employed in trade 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."

43. Most of the criticisms directed against the substance of the article concerned the adoption in paragraph 1 of the criterion of the place of conclusion of the contract.

44. One reply considered that there should be clarification as to which place is to be deemed to be that where the contract was concluded: the most appropriate solution would seem to lie in considering it to be that where the offeror received the reply of the offeree.

45. Many replies expressed formal objections concerning the use of the criterion of the place of conclusion of the contract. It was argued that the place at which international commercial contracts are concluded is very often incidental and that in consequence it has little relationship with the contract itself. Furthermore it should not be forgotten that international trade contracts are rarely concluded inter praesentes and that, as far as contracts at a distance are concerned, the criteria which are followed in determining the place of conclusion vary considerably from one legal system to another.

46. The criterion of the place of performance was also criticised on the grounds that in practice contracts may be performed in successive steps and therefore in different places.

47. For the reasons mentioned above, some replies went as far as to suggest the straightforward deletion of paragraph 1 and to propose that the conflicts anticipated by it should be settled in accordance with the general principles of interpretation contained in the draft.

48. Other replies however came down in favour of the adoption of other criteria in deciding the rules and usages of interpretation applicable in a given case: the place of habitual residence of the party whose statement is to be interpreted; the usages of the professional category to which the parties belong; the usages in force in the lex fori or the lex contractus.

49. The principle enunciated in paragraph 2 was on the whole favourably received, some replies going so far as to propose that it should become the general rule. To this end, either the present order of the paragraphs might be reversed or alternatively the first paragraph could be deleted leaving paragraph 2 as the only paragraph in the article.

50. However the replies were not unanimous in recognising that international rules and usages should prevail over local rules, independently of the will of the parties as provided for in the present draft.

51. Three replies even expressed the view that the rules and usages in question should only apply when the parties have expressly referred to them.

52. Other replies indicated that their authors would be satisfied by the introduction in the present text of a clarification to the effect that the application of the rules and usages in question is to be excluded whenever the circumstances of the given case indicate that the parties, or even only one of them, could not reasonably have known them.

53. With the similar intention of clarifying the conditions for the applicability of the rules and usages in question, one reply finally suggested that it should be stated that in all cases the rules and usages should be those which are generally applied at international level. This would entail the exclusion of all rules of a unilateral character whose application would not seem to be justified on objective grounds.

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.

54. The provision of special rules regarding contracts concluded on the basis of general conditions (see Article 8 et seq.) was favourably received and stress was laid on the fact that this constituted an innovation at international level.

55. Some replies however raised the question of whether it was advisable to treat within the framework of the draft on interpretation of contracts the problems contemplated by Articles 8 and 9 (effectiveness of general conditions and the clauses contained in them) or whether it would not be preferable to deal with them in the context of the draft on the formation of contracts. Another solution could lie in the insertion of a special chapter on general conditions and standard contracts in the Code which would be independant both of that on formation and of that on interpretation.

56. As to the substance of the article, a number of criticisms were levelled against the rule in paragraph 1 to the effect that general conditions are effective against the other party simply because he ought to have known of their existence. This rule was judged to be too favourable to the party who has prepared the general conditions and who is often in practice economically the stronger of the two. Nevertheless the various alternative solutions proposed varied considerably.

57. Two replies expressed the view that what at present appears only in the commentary (page 14) should be stated in the text; namely that for the conditions to be effective they must previously have been adopted either by the parties themselves or by the generality of the operators in the trade sector in question.

58. Others considered that the word "existence" in the present text should be replaced by the word "content". In effect they emphasised that the requirement that the adhering party knew or should have known of their existence is one thing and that the requirement that he knew or should have

known of their content quite another one: only in the latter case would one avoid a party being bound by general conditions whose content he could not effectively have known in the given case.

59. The authors of other replies who experienced the same difficulties suggested that there should in all cases be a requirement, in order for the general conditions to be applicable, that the party seeking to rely on them should have expressly drawn them to the attention of the other party. There might be an exception to such a rule for those sectors (banking, insurance, transport) in which it is a well known fact that the operators only contract on the basis of their own general conditions (see Article 33, paragraph 4 of the Law on International Economic Contracts of the German Democratic Republic).

60. Another reply along the same lines proposed the following redraft of paragraph 1 : "General conditions used by one party are, in the absence of express agreement or a reference to them, effective against the other party if they are used to be incorporated in prior dealings between the parties or if reasonable persons in the situation of the other party consider them to be applicable."

61. In connection with paragraph 2, one reply would have preferred it to have laid down the rule that the general conditions which are sent first should prevail.

62. Other replies even suggested that paragraph 2 simply be deleted as the rule contained therein was neither satisfactory nor necessary. It was unsatisfactory inasmuch as once the parties had from the outset manifested their desire to apply their own general conditions, it did not seem just to deduce from the silence of the party who was the last to receive the general conditions of the other his intention to accept them. Nor was it necessary since the problem of the so-called "battle of forms" could be settled on the basis of paragraph 3 alone.

63. As regards paragraph 3, a proposal was made to simplify the text as follows: "If the party who received the general conditions which were the last to be sent rejects them and if the other party does not accept his general conditions, the contract shall be deemed to have been concluded without any of those general conditions, unless one of the parties immediately objects to the conclusion of the contract."

64. Other replies would have preferred that the provision in question dealt with the case contemplated by it by means of a presumption that the contract had not been concluded. In effect, it was maintained that a party who rejects the other's general conditions as a rule intends to reject the contract itself. Such a party would therefore be extremely surprised to learn that he was bound by a contract even though he had rejected the additional conditions contained in the reply of the other party.

65. According to another reply, the rule at present contained in paragraph 3 should at least make an exception for those cases where, in the absence of the general conditions, the contract could not be concluded for want of sufficient content.

Article 9

Nothwithstanding 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.

66. It was generally recognised that this article was a valuable and useful one. Only three replies, based on different reasoning, called for its deletion.

67. One reply maintained that while a provision of this kind might be necessary as regards consumer transactions, it was totally inappropriate in the context of relations between businessmen who, once they have accepted general conditions, ought not to be allowed to contest them on the grounds that their character is too unexpected.

68. According to another reply, however, the end result sought by Article 9 could already be achieved through the application of Article 8 paragraph 1. In effect, since the provision in question provides that the adhering party can only be bound by those general conditions of which he could have known, he could always maintain that such was not the case in respect of especially unexpected clauses.

69. Finally, the third reply considered that Article 9 would be superfluous if, as he hoped, the excessively liberal criterion at present contained in the first paragraph of Article 8 were to be replaced by another according to which the applicability of the general conditions would be dependant upon an express reference to them.

70. Another reply would have preferred it if Article 9 had only referred to clauses which, on account of their formal presentation, might be deemed to be unexpected. The problem of clauses with a suspect content should be dealt with elsewhere.

71. Another proposal was to add the following phrase to the present text : "or could not reasonably have ascertained its meaning." In this way the article in question would also cover cases in which the general conditions were drafted in a language other than the mother tongue of the adhering party or that used at the time of the conclusion of the contract and knowledge of which on the part of the adhering party could not have been assumed.

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.

72. The principle provided for in the present article, while on the whole being well received, was criticised by certain replies on the grounds that additional clauses should not prevail over general conditions unless stipulated in writing. It was felt that to do as the present text does and to admit that such clauses, even though stipulated only orally, might prevail, would give rise to serious difficulties of proof, especially in those legal systems which require that certain contracts be in writing ad probationem (see for example Article 1341 of the French Civil Code).

73. On the contrary other replies even expressed the opinion that the parties should be able to derogate from general conditions not only by express agreement but also tacitly.

74. Two replies recalled that it often happens in practice that the general conditions themselves contain a provision according to which any modifications or additions are only valid if stipulated in writing ("Schriftformklausel"). In their opinion this article should specify that the presence of such a provision should not nullify agreements stipulated by the parties orally.

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.

75. There were few objections to the rules set out in Article 11, the utility of which in this context was generally recognised.

76. A number of replies pointed out that whereas the present text speaks of "general conditions prepared by one of the parties", the commentary (see page 19) makes it clear that by "unilateral preparation" one should understand cases where this has been done by one of the parties as well as those where the conditions have been elaborated by a professional body or trade association to which only one of the contracting bodies belongs. While fully accepting this extensive interpretation of the concept of "unilateral preparation", those replies suggested an amendment of the present text in this sense. A proposal was indeed made to reformulate Article 11 along the following lines: "Provisions contained in general conditions prepared by one of the parties or by a professional body or trade association to which only one of the contracting parties belongs shall, in case of ambiguity, be interpreted in favour of the other party." A further proposal was to insert after the word "prepared" and before "by one of the parties" the words "directly or indirectly", while another was to redraft the article as follows: "In case of doubt, the agreement shall be interpreted in favour of the debtor unless the parties have adopted the general conditions laid down with a view to excluding the predominant influence of one or the other."

77. Other replies were of the opinion that the "contra proferentem" rule should be applicable in all cases where one of the parties relies on general conditions, regardless of whether they are prepared directly by him or by a neutral organisation. In consequence the word "prepared" in the present text should be replaced by "used".

78. Finally it was recalled that in certain national legal systems, as for example in Article 1162 of the French Civil Code and in paragraph 815 of the Austrian Civil Code, the "contra proferentem" rule was not limited in its application to general conditions but applicable to any clause which one party proposes to the other. The rule should therefore have the same scope in the present draft.