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PROGRESSIVE CODIFICATION OF INTERNATIONAL TRADE LAW

Draft Uniform Law on the Interpretation of International Contracts in general revised by the Steering Committee on the Progressive Codification of International Trade Law

and

Explanatory Report

(prepared by the Secretariat)

Rome, June 1978

DRAFT UNIFORM LAW ON THE INTERPRETATION OF CONTRACTS IN GENERAL

Article 1

The interpretation of a contract shall be in accordance with the principles of good faith, of fair dealing and of international cooperation.

Article 2

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

Article 3

Each term of a contract shall be interpreted by reference to all the other terms of the contract, and in determining the meaning of the terms of the 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 a manner appropriate to the nature of the particular contract.

Article 5

1. A contract shall be interpreted according to the intention common to the parties.

2. In the absence of proof to the contrary, the common intention of the parties shall be the intention which contracting parties, placed in the same circumstances, at the time the contract was concluded, would normally have had.

Article 6

In interpreting a contract, due consideration shall be given to all relevant circumstances, including any preliminary negotiations between the parties, any course of dealing 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.

Article 7

Subject to the provisions of Articles 5 and 6, the expressions, provisions or terms of the contract shall be interpreted according to the meaning given to them by the recognised practice of international trade.

Article 8

1. General conditions are incorporated in the contract only if one party has referred to them and the other party has accepted them.

2. In all the other cases they are incorporated in the contract only if they have been adopted by an association to which both parties belong or if they have been expressly agreed to in previous transactions between the parties or are in common usage in the particular trade with which the contract is connected.

3. The absence of acceptance of the general conditions referred to by one party does not prevent the contract from being concluded, unless one of the parties promptly informs the other that in these circumstances he does not intend to be bound by the contract.

Article 9

No clause contained in general conditions 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 effective, unless it has been expressly accepted by that party.

Article 10

A special provision agreed by the parties shall prevail over conflicting provisions of general conditions.

Article 11

Contract terms proposed by one of the parties shall, in case of ambiguity, be interpreted in favour of the other party.

EXPLANATORY REPORT

INTRODUCTION

1. In the context of its work on the drawing up of an international trade Code, the Steering Committee composed of Professors René David (University of Aix-Marseille), Tudor Popescu (University of Bucharest) and Clive M. Schmitthoff (City University of London)(1) has so far completed work on a draft on the formation of international contracts in general (Study L - Doc. 11, UNIDROIT 1977). At its meeting of 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. The Secretariat received more than thirty replies and, among these, particular reference may be made to the detailed observations of 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. Almost all the replies laid stress 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 contracts, often poses delicate problems. In consequence UNIDROIT's initiative in this field - the first in this particular direction - would fill an important gap.

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(1) The Secretary to the Committee is Prof. Michael Joachim Bonell (UNIDROIT).

4. 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 priciples 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 priciples 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.

5. 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 was necessary in practice was that they should be formulated in uniform terms at a universal level.

6. In this respect, however, the Steering Committee pointed out that, although the opinion according to which rules governing the interpretation of contracts are simple guidelines based on purely grammatical and logical considerations had in the past received some support, nowadays the opposite view prevails and it is generally admitted that the choice between one or another principle or criterion of interpretation is a legal problem and not only one of grammar or logic.

7. It goes furthermore 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 or principles.

8. The draft finally adopted by the Committee 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 this respect it should however be borne in mind 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

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 regard 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).

In this respect some of the replies to the UNIDROIT questionnaire expressed the opinion that it is 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; and while some of the replies favoured the first view, being based on the idea that in order to distinguish 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, others took the latter view on account of the need for a harmonious development of international trade between countries with different social and economic structures or which have reached differing stages of development. This was also the opinion of the Steering Committee which therefore decided to add to the original wording of the article an explicit reference to "international cooperation".

Articles 2, 3 and 4

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 content of these rules. The rule laid down in Article 2, under which in the event of ambiguity the terms of the contract shall be interpreted in such a way as to give effect to them, rather than to deprive them of any effect, represents a well-known and universally recognised priciple ("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; Lüderitz, 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, and in determining the meaning of the terms of the 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, Anm. 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 manner 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.

Article 5

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 coinci-

dence 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. Lüderitz, Auslegung von Rechtgeschäften, 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: after all, the principle laid down in the first paragraph has already been adopted both by the Czechoslovakian International Commercial Code (Article 23) and the DDR Law on International Commercial Contracts (§6).

For those cases where the actual common intention of the parties cannot be established, the original version of the present article provided that the interpretation of the contract should first be based on the intention of one of the parties, if this intention can be established, and the other party knew, or ought to have known, what that intention was (paragraph 2); only if either the intention of one party cannot be established or the other party could not reasonably realise that when entering into the agreement the former had such an intention, must resort be had to the intention that reasonable persons would have had in the same situation as the parties (paragraph 3)

A number of criticisms were levelled against such a solution by some of those who replied to UNIDROIT's questionnaire.

On the one hand the opinion was expressed that criteria 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 only to that ofa reasonable person, are incompatible with the fundamental concept of a contract as a meeting of the minds of the parties.

On the other hand, the two paragraphs were criticised on the ground that they favoured an interpretation based on criteria of too subjective a character. In this connection the example was given 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. Which of the two provisions 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 paragraph 3 and to support A's interpretation - which would seem to be the better view - would considerably reduce the scope of paragraph 2. This provision would then only be of value for a party who could not be expected to know the intent of reasonable people in the same situation as the parties.

On the basis of these objections the Steering Committee decided to delete the former paragraph 2 of Article 5 and to redraft paragraph 3 in such a way as to make it clear that in the context of international commercial transactions interpretation should as a general rule be based on objective criteria, i.e. whenever the actual common intention of the parties cannot be established, the terms of the contract shall be construed according to the meaning given to them in the commercial sector under consideration and not that, which might be different, attributed to them by one only of the parties. In this respect reference may however be made only to the time at which the contract was concluded, so that neither party may rely on a different interpretation which has subsequently been developed in that trade sector.

Article 6

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 it 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 RabelsZ 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.

Article 7

Commercial transactions, particularly those concluded at 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 "document against payment", document against acceptance", "letter of credit", etc.).

As different rules and practices may obtain with regard to a single clause or expression of this kind in different parts of the world, there is however the problem of how to resolve the conflicts which inevitably occur whenever the contracting parties do not belong to the same geographical 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 Bundesgerichthof 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 refrains from adopting any of the traditional criteria, mentioned above, providing simply that if with regard to a single clause or expression used by the parties in their contract there exist rules and usages of interpretation recognised at an international level (e.g. Incoterms, Uniform Customs and Practices for Documentary Credits etc., elaborated by an international independent agency such as the International Chamber of Commerce) they should prevail over purely local rules of interpretation. 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 Kalsruhe 12 February 1975, RIW 1975, 225; award of the arbitral tribunal of the I.C.C. n° 1788 of 1971; with respect to Uniform Customs and Practices 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.

Article 8

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, the present article originally provided that general conditions prepared by one party are effective against the other party not only if they have been expressly agreed to, but also if the other party knew or ought to have known of their existence.

Almost all of those who replied to the Questionnaire expressed the view that such a solution would be too favourable to the party who has prepared the general conditions either himself or through his own trade association and who is often in practice in an economically stronger position than the other contracting party.

In fact, with a few exceptions (cf. Article 1341 para. 1 of the Italian Codice Civile), the different national legal systems will only recognise the effectiveness of general conditions where there has been 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 where one party has at least given the other"reasonable notice"of their existence and their contents which 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, 3rd ed., London 1970, p. 173 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 ABG-Gesetz of 1976).

These additional requirements are however generally restricted to consumer transactions, whereas a more liberal attitude prevails with respect to business transactions: more precisely in the case of business transactions, the last-mentioned legal systems also consider general conditions to be incorporated in a contract, even where no notice has been 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 Rabelzeitschrift vol. 24 (1958), p. 267; Hollier v. Rambler Motors Ltd. (1972) 1 All England Law Reports, p. 401; Section 55 (5c) 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. 1st 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 ABG-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 AWD 1973, p. 631; Weber, Die Allgemeinen Geschaftsbedingungen, Berlin 1967, p. 325 et seq.).

This being so, the present article has been reformulated so that it now provides that as a rule general conditions shall only be incorporated in the contract if one party has referred to them and the other party has accepted them (paragraph 1). At the same time it admits, however, that even in the absence of such requirements effect may be given to general conditions, provided that a) they have been adopted by an association to which both parties belong or b) they have been expressly agreed to between the parties in previous transactions or are in common usage in the particular trade with which the contract is connected (paragraph 2).

Paragraph 3 refers to the case where one of the parties or, as in practice often happens in business transactions, both parties refer to their own general conditions when making their offer or their acceptance, and the other party does not accept them. According to the rule laid down in paragraph 1, in these circumstances such general conditions will not be incorporated in the contract, but the question is then raised as to whether or not, without such conditions, a contract can be considered to have been concluded.

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 Standard-Bedingungen 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 states that unless one party promptly informs the other that he only intends to be bound by the contract if the other party accepts his general conditions, the contract shall be deemed to have been concluded without such conditions.

Article 9

According to Article 8 paragraph 1, general conditions prepared by one party do not need to be expressly accepted by the other party in order to be incorporated in the contract. Moreover, in the cases envisaged by Article 8 paragraph 2, general conditions may become effective even without one of the parties having made any reference to them.

This being so, it seems advisable, in the interest of protecting the adhering party, to restrict the scope of application of the above criteria to those general conditions the use of which is genuinely common, that is to say general conditions containing provisions which the adhering party could reasonably have expected to find in 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 8 March 1967, in BGE vol. 93, I, 323).

Article 10

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 agreemnts also be valid or should the express provisions be permitted to prevail only if they are agreed upon in writing? As it is 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-Brauner-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 Rechtgeschäften, 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 the Law of Contracts).

On the basis of these premises the present article states that the special provisions shall prevail over conflicting provisions contained in the general conditions, it being understood that this is true 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.

Article 11

It is a well known principle that, in the case of doubt as to the meaning and scope of contractual terms any ambiguity will be construed against the party who prepared the particular term. In some legal systems the contra proferentem rule is limited in its application to terms included in general conditions or standard forms of contract (see Article 1370 of the Italian Codice Civile; § 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.), whereas in others it is applicable to any clause which one party proposes to the other (see Article 1162 of the French Code Civil; § 815 of the Austrian Civil Code).

The present article follows the latter approach. There is however, no doubt that the practical importance of this rule will arise primarily in those cases where the ambiguous term is contained in the general conditions of only one of the parties and where that party is seeking to base his claim on just that ambiguous term.