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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

PROGRESSIVE CODIFICATION OF INTERNATIONAL TRADE LAW

PART I

THE LAW OF INTERNATIONAL CONTRACTS IN GENERAL

Chapter 1 : THE FORMATION OF CONTRACTS

Chapter 2 : THE INTERPRETATION OF CONTRACTS

(Text and Explanatory Report adopted
by the Steering Committe)

Rome, January 1979

C H A P T E R 1

THE FORMATION OF CONTRACTS

Article 1

The conclusion of a contract shall not be subject to any requirement as to form, unless the law or the parties otherwise provide.

Article 2

1. The communication which a person addresses to another shall constitute an offer if it admits the inference that the offeror intends to be bound and if it is sufficiently definite to permit an acceptance.

2. This communication may be interpreted by reference to, and supplemented by, the preliminary negotiations any course of dealing which the parties have established between themselves and usage.

3. Offers to the public are to be considered, unless the contrary is clearly indicated by the person making the statement, merely as invitations to make offers.

Article 3

A contract a term of which is left by the parties to be agreed upon in further negotiations is not binding unless the parties have provided in what manner it shall be rendered definite in the event of their failure to reach agreement.

Article 4

1. The parties may expressly provide that one or more terms of their contract, specifically indicated by them, shall be determined by a third person, designated by them or in accordance with the procedure agreed by them.

2. If the third party, thus designated, cannot or will not fulfil his task, there is no contract.

3. The provisions of the two preceding paragraphs shall also apply when the parties provide for a possible revision of their contract.

Article 5

1. The offer shall not bind the offeror until it has been communicated to the offeree; it shall lapse if its withdrawal is communicated to the offeree before or at the same time as the offer.

2. After an offer has been communicated to the offeree it may be revoked unless the offer states a fixed time for acceptance or otherwise indicates that it is firm or irrevocable.

3. An indication that the offer is firm or irrevocable may be express or implied from the circumstances, the preliminary negotiations or any course of dealing which the parties have established between themselves.

Article 6

1. Acceptance of an offer consists of a declaration communicated by any means whatsoever to the offeror.

2. Acceptance may also consist of an act which may be considered to be equivalent to the declaration referred to in paragraph 1 of the present article by virtue of the offer or as a result of a course of dealing which the parties have established between themselves.

3. The offer may lay down a special mode for its acceptance. However, a term of the offer stipulating that mere silence shall amount to acceptance is invalid.

Article 7

1. An acceptance containing additions, limitations or other modifications shall be a rejection of the offer and shall constitute a counter-offer.

2. However, if a reply to an offer contains additional or different terms which do not materially alter the terms of the offer, the reply shall constitute an acceptance unless the offeror promptly objects to the discrepancy; if he does not so object, the contract is concluded on the terms of the offer with the modifications contained in the acceptance.

Article 8

1. Where, after the conclusion of a contract, one party sends the other a document which is intended to be a written confirmation of what has been agreed upon orally, but which contains terms that add to or vary those of the original agreement, silence on the part of the recipient does not amount to an acceptance of these terms, unless they are in accordance with a course of dealing which the parties have established between themselves.

2. Paragraph 1 of this article applies also where the additional or varying terms are contained in an invoice sent after the conclusion of the contract by one party or the other.

Article 9

1. An acceptance of an offer shall have effect only if it is communicated to the offeror within the time he has fixed or, if no such time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror.

2. If a time for acceptance is fixed by an offeror in a letter or in a telegram, it shall be presumed to begin to run from the day the letter was dated or the hour of the day the telegram or other written communication was handed in for despatch.

Article 10

1. If the acceptance is late, the offeror may nevertheless treat it as having arrived in due time provided that he promptly so informs the acceptor.

2. If, however, the acceptance is communicated late, it shall be treated as having been communicated in due time if the letter or other communication which contains the acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have been communicated in due time; this provision shall not however apply if the offeror has promptly informed the acceptor that he considers his offer as having lapsed.

Article 11

An acceptance may not be revoked except by a revocation which is communicated to the offeror before or at the same time as the acceptance.

Article 12

The formation of the contract is not affected by the death of one of the parties or by his becoming incapable of or restricted in contracting before acceptance unless the contrary results from the intention of the parties or the nature of the transaction.

Article 13

For the purposes of the present chapter the expression "to be communicated" means to be delivered at the address of the person to whom the communication is directed.

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C H A P T E R 2

THE INTERPRETATION OF CONTRACTS

Article 14

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

Article 15

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 16

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 17

Subject to the provisions of Articles 15 and 16, 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 18

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 19

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 20

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 21

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 22

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 23

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

Article 24

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

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EXPLANATORY REPORT

Introduction

1.- Efforts towards the unification, or at least the harmonisation, of the different national laws have hitherto been concentrated principally on particular subjects, such as the international sale of goods, negotiable instruments, the various modes of transport, intellectual property, etc. Such an approach has doubtless produced considerable results, but - as has been rightly pointed out by Professor René David -"the limited nature of unification poses the problem of how to use national rules and techniques which have escaped unification to supplement the uniform law".

Obviously there is a need for a system of general principles and rules, to be elaborated on an international level, in order to avoid compromising the value and effectiveness of any existing uniform law by referring in its interpretation and integration, to the single national systems.

2.- It is with this view in mind that UNIDROIT has taken the initiative in attempting to bring about the progressive codification of international trade law.

After preliminary inquiries on the feasibility of such a programme, the Governing Council of the Institute instructed the Secretariat to set up a restricted Committee of experts with the task of orienting work on the preparation of the proposed uniform international trade code.

This Steering Committee, composed of Professors David, Schmitthoff and Popescu, representing respectively the civil law systems, the common law systems and the systems of the socialist countries, met for the first time in 1974 and decided to limit, for the present, the plan of codification to the general part of the law of contract and to deal with specific contracts only at a later stage, especially as a number of these (e.g. the contract of sale and many types of transport contracts) are already governed by international conventions and uniform laws.

3.- As to the scope of application of the code, there was general agreement on the advisability of restricting it to international commercial contracts only, but to leave aside for the time being the difficult problem of defining what is exactly meant by an "international" and "commercial" contract. This and other preliminary questions such as the mandatory or non-mandatory nature of the code or its single provisions or the exact definition of some other basic concepts (good faith, public policy, etc.) should be dealt with at a later stage and then included in an introductory paragraph or section of the code.

4.- With respect to the general part of the future code, the Committee decided to deal with the following subjects and problems in the order set out below: (a) formation of contracts; (b) interpretation of contracts, with special reference to contracts concluded on the basis of general conditions and standard forms; (c) conditions of validity; (d) performance of contracts, with reference to those cases where the contract is terminated otherwise than by fulfilment of the obligations undertaken thereunder, as, for example, by novation, time-limitation, etc.; (e) non-performance of contracts; (f) damages awarded for non-performance; (g) unjust enrichment and restitution; (h) proof.

5.- As to the working method to be adopted, it was held that for each of the above mentioned items the Secretariat of UNIDROIT should undertake the necessary preliminary comparative law studies, and then prepare a first draft of uniform rules. For this purpose particular attention was to be paid to international legislative work (e.g. the Uniform Laws on International Sale; the General Conditions of the Council for Mutual Economic Assistance-CMEA), federal rules (e.g. the American Uniform Commercial Code) and national legislation specifically dedicated to international trade relations (e.g. the Czechoslovak International Trade Code; the German Democratic Republic Law on International Economic Contracts), which are already in force and were drawn up in the light of the special needs of international trade. This does not preclude, of course, account being taken also of statute law, "doctrine" and case-law of States; however, as the proposed international commercial code is intended to provide a satisfactory set of rules for those relationships that come about, by definition, across national frontiers, whereas the traditional national laws are essentially based on the requirements of normal internal relationships, the Committee was of the opinion that the code should not attempt chiefly to reconcile the latter, but rather to lay down the principles and solutions which seem to be best adapted to the special requirements of international trade. Once the preliminary draft was prepared, it was, together with a questionnaire, to be sent to the largest possible number of academics, specialised institutes and other Organisations interested in international trade, with a request for their assistance in this first stage of the work by sending observations and critical comments. On the basis of the replies received, the Steering Committee would proceed to a revision of the preliminary draft; it would then be submitted to an enlarged group of experts for final discussion and approval.

6.- With respect to the problem of the binding force the future code will have when elaborated, theoretically three possibilities are open: the code could be the subject of an international Convention whereunder States would undertake to bring it into force within their national systems of law; the code could be approved in the form of a model law which each national legislator would be free to adopt in whole or in part; the code could assume a purely private character which, simply because of the authority of the institution which elaborated it, would be used by arbitrators when called upon to decide on disputes concerning international trade relationships. The Committee felt that for the time being it would have been premature to take any final decision in this respect: after all, whatever form the code will ultimately take, this should not affect the working method to be followed in the course of its elaboration, and although it is hoped that the uniform rules will at some time in the future be incorporated in an international Convention, they would in any event serve a useful purpose, even if adopted as simple rules for the guidance of judges and arbitrators.

7.- So far, draft uniform rules concerning the first two chapters of the future code, that is to say the chapters on the formation and on the interpretation of international contracts in general, have been prepared. Before adopting the final version of the rules, the Steering Committee asked the Secretariat to distribute a preliminary draft of them, accompanied by an explanatory report and a questionnaire with a view to obtaining comments thereon from academics, specialised Institutes and other Organisations dealing with international trade.

This initiative 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 Bärmann of the Institut für das internationale Recht des Spar- und Kreditwesens in Mainz, 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 Rechts 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, Sacco of the University of Turin, Sauveplanne of Utrecht University, Smith and Black of the Scottish Law Commission, 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.

8.- The draft uniform rules on formation are substantially based on the 1964 Hague Uniform Law on the Formation of Contracts for the International Sale of Goods (ULFIS). The reason why rules drawn up for the contract of sale alone have been felt to be equally valid as a basis for preparing rules to apply to contracts in general is to be found in the fact that, with rare exceptions (e.g. contracts of association), all the other typical international trade contracts are of a bilateral or synallagmatic nature, of which sale is obviously the best example.

There certainly are some aspects or problems touching on the formation of contracts which, for the purpose of a set of rules dealing with contracts in general, require more detailed or even different treatment from that of the same subject in the aforementioned Hague Uniform Law, restricted as it is to contracts for the sale of moveable goods. In this respect mention may be made of so-called offers to the public, of the case where the parties, when concluding the contract, leave one or more of its terms open, but nevertheless intend to enter into a binding agreement and in fact refer for the determination of the outstanding terms to an agreement to be made by them at a later stage or to a third person, or of so-called letters of confirmation - all problems which arise quite often in international trade practice and which have therefore been expressly dealt with for the first time in the present draft.

9.- The problem of the interpretation of 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 <u>per definitionem</u> 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 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 p.inciples.

The draft uniform rules on the interpretation of contracts in general, adopted by the Steering Committee and intended to constitute the second chapter of the future code, 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.

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CHAPTER 1

Article 1

This article lays down the rule that there shall be no requirements as to form for the conclusion of contracts, except, of course, those cases in which the law itself or the parties provide otherwise. This is the rule laid down in the internal law of most of the civil law countries, as also in many of the general conditions of the United Nations Economic Commission for Europe. On the contrary, a written form is required "ad substantiam" in the national law of many Socialist countries (e.g. arts. 14 and 125 of the Soviet law on the basic principles of civil legislation) and in the CMEA General Conditions (but see the opposite rule adopted by art. 24 of the Czechoslovak International Trade Code and by § 35 of the GDR Law on International Economic Contracts) while the written form "ad probationem" is required for contracts for the sale of goods worth more than 500 dollars in the American U.C.C. (section 2-201).

In laying down the principle that there should as a rule be no requirements as to the form of the contract, this article avoids speaking of "offer" and "acceptance" (cf. the wording of art. 3 of ULFIS), on the ground that in practice cases not infrequently arise in which contracts are only concluded after protracted negotiations, perhaps after the intervention of an intermediary, so that it becomes extremely difficult to determine which acts are to be deemed to constitute "offer" and "acceptance".

Article 2

In an effort to define the notion of an offer, this article lays down two essential requirements. The communication must:

(a) admit the inference that the offeror intends to be bound;

(b) be sufficiently definite to permit the conclusion of the contract by mere acceptance.

The first requirement serves to differentiate between a genuine offer and a mere "invitation to make offers". It is self-evident that, in making a precise distinction between these two notions, account must also be taken of the various factors set out in paragraph 2 of the present article.

On the other hand, as to the second requirement, it is understood that, in establishing whether a specific offer can be considered sufficiently definite or not, reference must be made now and then to the factors expressly mentioned in the second paragraph of this article, i.e. "the preliminary negotiations, any course of dealing which the parties have established between themselves and usage". This should facilitate a practical solution to the divergencies on this subject between the different national legal

systems: one only has to think of the fairly strict rules provided, for example, in the Czechoslovak Code (art. 108, para. 1) and, on the other hand, of the very flexible rules laid down exclusively for sale contracts in the U.C.C. (section 2-204 (3)).

Paragraph 3 of this article deals with the problem of so-called "offers to the public", i.e. declarations which are addressed to an indeterminate number of persons (e.g. people visiting a department store, the readers of a newpaper, those who frequent a public place or a stock exchange, etc.). Neither U.L.F.I.S., nor the U.C.C., nor yet again the Czechoslovak Code or the GDR Law on International Economic Contracts contain any provision on this particular question, and it has been argued that this is due to the fact that such cases arise less frequently in international trade practice (cf. Mertens - Rehbinder, Internationales Kaufrecht, 1975, p. 321 et seq.). Many replies to the UNIDROIT Questionnaire expressed a different view however and held that a specific regulation of "offers to the public" by the future International Code would be all the more desirable inasmuch as the various national laws provide widely differing solutions to the problem. Indeed, while certain legal systems consider offers to the public to be, at least in principle, merely invitations to make offers (see, as far as the Common Law is concerned, Cheshire and Fifoot's Law of Contract, 8th ed. 1972, p. 26 et seq.), according to others they have the nature and validity of authentic offers (e.g. art. 1336 of the Italian Civil Code). The provision contained in paragraph 3 of this article is clearly intended to achieve a compromise solution, but it must be understood that in order to amount to a genuine offer an "offer to the public" must not only show an express indication in this sense by the person making the statement, but also fulfil the other requirement provided by paragraph 1, i.e. to be sufficiently definite as to permit the conclusion of the contract by more acceptance.

Articles 3 and 4

According to paragraph 1 of Article 2 an offer, apart from revealing the intention of the offeror to be bound, must also be sufficiently definite to permit the conclusion of the contract by acceptance. This means that if an offer does not meet the required degree of definiteness in its terms, it will be considered to be a mere invitation to treat and therefore cannot provide the basis for a valid contract. In practice, however, it quite frequently occurs that the parties, when concluding their contract, leave one or more of its terms open, but nevertheless intend to enter into a binding agreement and in fact refer for the determination of the outstanding terms to an agreement to be made by them at a later stage or to a third person.

In these cases the problem arises whether, notwithstanding such omissions, the contract may be considered to be valid and enforceable and, if so, what are the criteria on the basis of which the missing terms are to be determined.

The articles under consideration distinguish between the two hypotheses and with respect to the first adopt the solution that so-called agreements to agree are to be considered not binding, unless the parties have made provision for the manner in which the term left open is to be made definite in the event of failure to reach agreement (Article 3) (see, for analogous solutions provided for by the various national laws, among others, Section 2-204 (3) U.C.C.; Articles 113 and 123 of the Czechoslovak Code; Treitel, The Law of Contract, 3rd ed. 1970, p. 52 et seq.; Staudinger's Kommentar BGB, 11th ed. 1957, Vorb. 17 on § 145; Sacco, Il Contratto, Turin 1975, p. 561 et seq.).

Such a possibility is expressly admitted, on the other hand, as far as the reference to a third person is concerned, provided that a) the parties directly designate the person entrusted with this task or at least agree on the procedure to be followed for his designation, and b) such a third person is called upon not to determine the whole content of the contract but only one or more specific terms expressly indicated by the parties (Article 4, para. 1). The first requirement is in line with the results achieved by the I.C.C. Working Party on "Specialized Types of Arbitration" (see Draft standard clause and rules on the regulation of contractual relations: Appendices II and III of Doc. No. 420/205 of February 2, 1977), while the second requirement aims at avoiding the use of the so-called blank signature ("biancosegno") apparently admitted, for instance, by Article 1349 of the Italian Codice Civile.

According to paragraph 2 of Article 4, the determination of the missing terms by the third person is considered to be an essential condition for the validity of the contract: in other words, if the third person designated by the parties cannot or will not fulfil his task, for any reason whatsoever, the contract will have no binding force.

Finally, as particularly in connection with long-term contracts it often occurs in practice that the parties refer to the determination of a third person with a view to making it possible to adapt their contract to changing circumstances which could upset the equilibrium of their original agreement (see e.g. the so-called hardship clause), paragraph 3 of Article 4 expressly also extends the provisions of the two preceding paragraphs to such cases of revision of the contract.

Article 5

The problem of the revocability or irrevocability of the offer is one of the most widely discussed questions regarding the formation of contracts: indeed, whereas in many civil law countries (the only significant exceptions being France, Italy and the Netherlands) an offer usually binds the offeror for a length of time established by himself or for the time an offeree would normally require to accept it (see Austrian ABGB, § 862; German BGB, § 145; Swiss Code of Obligations, art. 3, as well as the Scandinavian countries), the Common law countries recognise the opposite rule on account of their well-known conceptual difficulty in acknowledging the existence of any legal relationship without a corresponding consideration (see David, "Les contrats en droit anglais", Paris 1973, p. 92 et seq.). It should however be noted that recently the binding character of the offer has not only been recognized by the Czechoslovak Code (art. 108 para. 2), the CMEA General Conditions (art. 1 para. 3) and the GDR Law on International Economic Contracts (§ 29), but also, albeit to a limited extent, in the relationships between merchants and, subject to specific objective formal requirements, by the U.C.C. itself (section 2-205).

Given that, in actual fact, even in a system which lays down that offers shall be revocable, there is always the possibility of stipulating an irrevocable offer, just as there is the possibility of stipulating a revocable offer under a system which lays down that offers shall be irrevocable, the present article, in accordance with art. 5 of U.L.F.I.S. and in order to satisfy the requirements of international trade, aims at a compromise, half-way between the two contrasting viewpoints: on the one hand, it establishes the rule that the offer shall be revocable until such time as the offeree has sent his acceptance to the offeror or has at least completed some act which could be considered as equivalent to acceptance; on the other hand, it admits an exception to this rule, precisely in those cases in which the offer indicates a time for acceptance or in those where the offer is expressly declared to be a "firm" offer. The fact that an offer is a "firm" offer may also be inferred, failing any indication to the contrary by the offeror himself, from "the circumstances, the preliminary negotiations or any course of dealing which the parties have established between themselves." (para. 3).

Article 6

This article, which closely follows art. 6 of ULFIS, aims at finding a solution to two sets of problems: on the one hand, the method or methods by which the offer may be accepted; on the other hand, the moment from which acceptance is effective.

The solutions adopted in respect of the first of these points are as follows:

(a) express acceptance i.e. expressed by a special oral or written declaration addressed or sent by the offeree to the offeror;

(b) tacit acceptance (presumed or implied) resulting from any act which "by virtue of the offer or as a result of a course of dealing which the parties have established between themselves" shows beyond any doubt the offeree's intention to accept the offer (for example, a typical act of performance) and which can therefore be considered as being equivalent to an express acceptance;

(c) acceptance by the method specially prescribed in the offer, but without the offeror being able to stipulate in his offer (i.e. unilaterally) that the offeree's silence will be regarded as acceptance.

It is not specified whether and to what extent mere silence on the part of the offeree may possibly be regarded as tacit acceptance. Silence may, however, be regarded as acceptance by virtue of a course of dealing which the parties have established between themselves (see Mertens - Rehbinder, op. cit., p. 333; Dölle, Kommentar zum Einheitlichen Kaufrecht, 1976, p. 717).

As regards the time from which acceptance takes effect, it should be noted that the so-called receipt theory has been adopted in the case of express acceptance ("Acceptance ... consists of a declaration communicated by any means whatsoever to the offeror"), but the acceptor is not, on the other hand, required to inform the offeror of the act he has performed (equivalent to acceptance) in the case of tacit acceptance.

A comparison of the law currently in force in different countries reveals a general acceptance, as regards certain aspects, of the solutions proposed in the present article: this is the case with regard to express acceptance defined as a declaration which is communicated to the offeror as also for tacit or implied acceptance, which consists of an act which expresses the intention of the offeree to accept as, for example, by part performance ("commencement d'exécution"), by the despatching of the goods or by the payment of the price, or by a promise to despatch the goods or to pay the price (see, for example: § 151 of the German BGB; art. 1327 of the Italian Civil Code; § 844 of the Austrian ABGB; art. 114 of the Czechoslavak Code; § 30 (4) of the GDR Law on International Economic Contracts and, although limited to

sales only, section 2-206 (1b) of the U.C.C.). Such a solution certainly meets the needs of international trade, at least where it is necessary that performance of the contract should begin as soon as possible.

The solution based on the receipt theory is not, however, generally accepted for the time from which acceptance has effect. As we know, the Common Law countries generally adopt the opposite rule, that is the "mail box rule", while still other countries, such as Italy, Egypt and Rumania, provide for an intermediate solution (see arts. 1326, para. 1 and 1335 of the Italian Civil Code).

Lastly, as regards tacit acceptance, which the acceptor is not required to notify to the offeror, it should be pointed out that only the U.C.C. (Section 2-206(2)) and the GDR Law on International Economic Contracts (§ 30 (4)) require that notice be specifically given to the offeror in order for tacit acceptance to take effect while in other legal systems, as for example Italian law, failure to give such notice merely entails the offeree's being required to compensate any damage (art. 1327 para. 2 of the Italian Civil Code).

Article 7

This article, which corresponds to art. 7 of ULFIS, was in general deemed to be satisfactory by those who replied to the UNIDROIT Questionnaire.

As a matter of fact, the rule set forth in the first paragraph is nowadays universally accepted (see, e.g. § 150 (2) of the German BGB; art.1336 para. 5 of the Italian Civil Code; for English law, cf. Treitel, op.cit., p. 18; see also art. 112 of the Czechoslovak Code; § 31 of the GDR Law on International Economic Contracts; § 1 para. 1 (b) of the CMEA General Conditions).

More open to discussion is perhaps the provision contained in the second paragraph: there are in fact certain legal systems, such as the Common Law and the Socialist systems, where an acceptance of the kind envisaged by the provision under consideration is considered in reality to be nothing more than a counter-offer, in acknowledgement of the general rule set out in the first paragraph. It should nevertheless be noted that other systems expressly recognise in the case of an acceptance containing modifications or additions which do not, however, bring about any substantial alteration in the original terms of the offer and, failing some quick reaction by the offeror, that such modifications or additions must be considered as having been tacitly accepted by the latter and as such become part of the final agreement (see on these lines, § 6-2 of the Scandinavian law on the general part of the law of contract and, although limited to the relationship between merchants ("commercants"), section 2-207 (2) of the UCC).

Article 8

This article deals with two situations which are encountered fairly often in international trade practice. The one is where a contract has already been made either orally or by informal correspondence and one party sends to the other a document ("letter of confirmation"), the purpose of which is simply to confirm what has already been agreed upon, but which may sometimes also contain terms or conditions as yet not discussed between the parties; the other situation is one in which one party, after the conclusion of a contract, sends to the other an invoice or other document which relates to performance, but also contains terms that add to or vary those of the original contract. In both cases the question arises whether or not such additional or varying terms unilaterally proposed by one party after the conclusion of the contract are binding on the other party if he does not expressly object to them once he has been given notice thereof.

The stands taken by the different legal systems on this subject vary considerably: in fact, as regards the so-called letter of confirmation, only the German and, to a certain extent, the Austrian and Swiss "doctrine" and case-law seem to accept that the silence of the addressee amounts to a tacit acceptance by him ("Schweigen auf Bestätigungsschreiben bedeutet Annahme") (see Rabel, Das Recht des Warenkaufs, Berlin-Tübingen 1957, I, p. 97 et seq., Sonnenberger, Verkehrssitten im Schuldvertrag, München 1970, p. 216 et seq.), whilst for invoices a similar rule would seem to be admitted only in France and Belgium ("facture acceptée") (see Berlioz, Le contrat d'adhésion, Paris, 1973, p. 64 et seq.). In all the other systems silence on the part of the addressee may be considered as acceptance of the terms or conditions at issue only in exceptional circumstances, e.g. if they have been inserted in prior contracts or are commonly used in similar transactions and consequently correspond to a course of dealing between the parties or to a veritable usage of the particular sector of trade concerned (see Schlesinger, op. cit., p. 135 et seq.; European Court of Justice, 14 December 1976, No. 25/76).

This is precisely the solution envisaged by the article under consideration. After all, even according to German law, no acceptance will be inferred from silence if the sender of the letter of confirmation fraudulently introduces terms different from those which were previously negotiated, i.e. the additional or varying terms are of such an unusual nature that he could not reasonably have expected them to be accepted by the addressee (cf. BGH 20 March 1974, in DRechtspr. 1974, 1059).

Article 9

The purpose of this article is to specify the time during which acceptance must be made in order to be effective. From the outset one should mention the two typical cases which have to be distinguished: first, where the offer has been made inter praesentes or by telephone (except, however, when the person speaking on the telephone is not himself a party to the offer and is only acting as a messenger, merely passing on the messages he has received) and, secondly, undoubtedly much more common in international contracts, the case where the offer reaches the offeree in writing (by letter or by telegram, by telex or even a message given via the telephone). In the first of these cases, it is understood that acceptance shall be "immediate", unless the circumstances of the case do not indicate that there shall be some time for reflection. In the second case, on the other hand, one has to distinguish according to whether or not the offeror has set a time-limit on acceptance: on the one hand, acceptance is clearly ineffective if it fails to reach the offeror in the time laid down - this time runs from the date on which the letter or telegram containing the offer was sent. On the other hand, acceptance must be made "within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror". Lastly, it should be noted that these rules apply not only to cases where there is an express acceptance but also where there is a tacit or presumed acceptance, i.e. where the offeree signifies his acceptance by performing one of the acts which, under Art. 6, paragraph 2, indicate his intention to accept.

Article 10

This article which corresponds to art. 9 of ULFIS deals with the various cases where acceptance is late and to this end makes a distinction between two situations: first, the case in which the acceptance is made late, i.e. when the offeree notifies the offeror of his acceptance or performs some act equivalent to acceptance outside the time-limit fixed in Article 8 for a normal acceptance; secondly, the case in which acceptance is transmitted late. This occurs when the offeree himself declares his acceptance in time but it is nevertheless late in reaching the offeror (owing to a delay or to some other irregularity in its transmission by third parties, e.g. the postal services).

In the first case, acceptance is regarded as having no effect, unless the offeror immediately notifies the other party of his intention to disregard the delay and to consider the acceptance as valid (see e.g. art. 1326 para. 3 of the Italian Civil Code; art. 35 of the Rumanian Civil Code). Although various legal systems adopt the converse solution and consider late acceptance as a new offer (which means in practice that the original offeror has more time in which to let the other party know whether or not he intends to accept: see, e.g., § 150 (1) of the German BGB or § 4 of the Scandinavian Law on Contracts), only one of the replies received by UNIDROIT indicated a preference for this latter rule.

In the second case it is precisely the reverse principle which is laid down. Thus, provided that the offeror be shown that the offeree was not the cause of the delay, a declaration of acceptance which is late in arriving should, as a rule, be considered fully valid, and the only way to prevent the contract from being concluded is for the offeror to notify the offeree at once that his offer no longer stands (see, in the same sense, for example, § 149 of the German BGB; art. 5 para. 3 of the Swiss Code of Obligations; art. 111 of the Czechoslovak Code; § 30 (3) of the GDR Law on International Economic Contracts; art. 67 of the Polish Civil Code; § 1 para. 2 of the CMEA General Conditions). The substance of this provision has not met with criticism.

Article 11

Seeing that under Article 6 paragraph 1, "acceptance of an offer consists of a declaration communicated by any means whatsoever to the offeror", it is logical that under the present article, dealing with the problem of whether or not acceptance is revocable, revocation is admitted provided that it is brought to the notice of the offeror either before or at the same time as acceptance. Moreover, this type of provision can be found in all those legal systems which, like the present draft, follow the so-called 'receipt" theory (see, for example, § 130 (1) of the German BGB; art. 9 of the Swiss Code of Obligations; § 7 of the Scandinavian Law of Contract; Article 1328, para. 2 of the Italian Civil Code; art. 37 of the Rumanian Commercial Code; Article 109, para. 1 of the Czechoslovak Code). The situation is more complicated in the Common Law countries. Here it is the "mail box rule" which is followed: on the one hand, acceptance (and with it the conclusion of the contract) is considered to take effect from the time when the offeree sends the offeror his declaration of acceptance; logically, it should not be possible to revoke this acceptance subsequently. However, on the other hand, even these legal systems tend towards admitting that an acceptance may in practice be revoked in certain cases, always provided however that the revocation reaches the offeror either before or at the same time as his acceptance (as would be the case when the acceptance has been sent by letter, but this will only reach the offeror on a certain day X and the sender subsequently decides to revoke his acceptance by a telegram or telex message

which he knows will reach its destination before day X) (see Lagergren, Formation of Contract, in Unification of Law Governing International Sales of Goods, ed. by Honnold, Paris 1966, p. 66 et seq.).

Article 12

The effect on the offer of the offeror's or offeree's death or supervening incapacity generally depends on whether or not the particular offer is binding on the offeror. In fact, the occurrence of the above-mentioned events in the case of such a binding offer would not usually hinder the conclusion of the contract, unless of course the intention of the parties or the nature of the transaction calls for a converse solution in the specific case (see, expressly on these lines, §§ 152 and 130 (2) of the German BGB; § 862 of the Austrian ABGB; Article 109, para. 2 of the Czechoslovak Code; Art. 6.5.2.5 of the draft Netherlands Civil Code and, for the death or incapacity of the offeror only, art. 1329, para. 2 of the Italian Civil Code; vice-versa, in the case of a revocable offer the death or incapacity of one of the two parties almost always results in the termination of the offer (for the Common law systems, see Treitel, op.cit. pages 44-47), and only the Italian Civil Code stipulates that the offer remains open even in these circumstances, provided it was made by a businessman in the exercise of his business (cf. art. 1330).

The present article lays down, as a general rule, that the death or incapacity of one of the parties prior to the conclusion of the contract does not prevent the said contract from being formed subsequently. In so doing it reflects the fact that, in international trade, offers and acceptances are frequently made by and to firms and not by and to individuals. Moreover, the reverse solution is expressly admitted when this corresponds to the intention of the parties, or if it results from usage or the nature of the transaction (for instance, in the case of a contract intuitu personae).

It should be noted that when the draft speaks of the supervening incapacity of one of the parties, this does not cover the case of a person whose legal capacity is restricted or reduced as a result of the opening of bankruptcy proceedings or some similar procedure: these cases are covered in national law by special rules which, at least in part, are of an administrative or procedural law character and although some of the replies received by UNIDROIT to its Questionnaire were of a different opinion, it was thought that in regard to these rules a uniform international solution would be inappropriate, if not impossible, to achieve in practice.

Article 13

In determining the moment from which the offer or declaration of acceptance or else revocation of the offer or acceptance takes effect, the present draft follows the "receipt" rule, i.e. it provides that they take effect as soon as they reach the person to whom they are addressed, but not before (see Articles 5; 6, para. 1; 9, para. 1; 11).

The term "to be communicated" raises a series of problems of interpretation. First, one has to decide whether in order "to be communicated" to the person to whom the declaration is addressed, it is sufficient that it has been delivered at his address, or whether the declaration must necessarily have come to his knowledge. If one opted for the first solution, one would still have to decide whether the declaration could be handed over equally at the private address or at the business address of the person to whom it is addressed, and moreover, in this last case, one would have to decide whether the handing over of a declaration outside office hours can be considered to take effect immediately or only as from the time at which offices re-open.

The present article sets out to clarify this point in favour of the solution whereby a declaration is to be considered to have reached the person to whom it is addressed by merely being handed over at his address (see, along these lines, a decision of the E.C.S.C. Court of Justice, 10/II/57, vol. III, page 200 and also Article 1335 of the Italian Civil Code), however without making any specific provision for the other cases which must accordingly be decided by the judge's interpretation of the individual case.

There was general agreement on this provision among those who replied to UNIDROIT's Questionnaire, even though, in order to reduce uncertainty as far as possible, it has been proposed that delivery must be effected "in the normal manner and in accordance with the practice of business relations", "to the business address of the person to whom the communication is directed" and "at the time at which he might reasonably be expected to be present there".

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CHAPTER 2

Article 14

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 Civil Code) 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 Czechoslovak 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 principles 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" (for an example of the application of the principle of good faith in this sense, see Bonell, Das autonome Recht des Welthandels--Rechtsdogmatische und rechtspolitische Aspekte, in 42 RabelsZ (1978), p. 485, 503.

Article 15

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 Civil Code). 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 Czechoslovak Code (Article 23) and the GDR Law on International Economic 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 of a 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 15 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 16

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 "... 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.; Hortley, 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 Civil Code 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 Civil Code to constitute, in the absence of the contrary intention of the parties, simple rules of construction for interpreting and clarifying clauses of 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 (see Bonell, The relevance of courses of dealing, usages and customs in the interpretation of international commercial contracts, in New Directions in International Trade Law, I, Dobbs Ferry, N.Y. 1977, 109 and in particular 125 et seq.). 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 Czechoslovak Code, to paragraphs 5 and 6 of the GDR Law on International Economic Contracts, to Section 1-205 (3) of the U.C.C. and to Articles 9 of ULIS and 13 of ULFIS.

Article 17

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 Civil Code), others that where the offer and acceptance took place (see e.g. the German BGH 20 May 1952, in BGHZ 6, 127, OLG 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 Civil Code) and yet others the place where the contractual obligations are to be performed (see Sections 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; with respect to international usages in general, see e.g. the decision of the Polish Supreme Court of May 18, 1970 (CR 58/70).

Articles 18, 19 and 20

Articles 18, 19 and 20 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 18, 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 principle ("actus interpretandus est potius ut valeat quam ut pereat": see e.g. Article 1367 of the Italian Civil Code; Article 1157 of the French Code Civil; Article 23 of the Czechoslovak International Trade 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 19), Article 1363 of the Italian Civil Code; 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 20), see Article 1369 of the Italian Civil Code; 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 21

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 Civil Code), 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 AGB-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 the Common Law systems, Mortley, Mercantile Usage and Custom, in RabelsZ 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 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 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-Hüggemann, 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 22

According to Article 21 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 Civil Code, 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 23

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 Civil Code, § 4 of the German AGB-Gesetz, Art. 6.5.1.2 paragraph 5 of the draft Netherlands Civil Code.

Article 24

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 Civil Code; § 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.