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UNIFORM RULES ON INTERNATIONAL CONTRACTS IN GENERAL

Chapter 1 : THE FORMATION OF CONTRACTS

Chapter 2 : THE INTERPRETATION OF CONTRACTS

(Text prepared by the Secretariat following the discussions
at the meeting of the UNIDROIT Study Group held in Rome,
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UNIFORM RULES ON INTERNATIONAL CONTRACTS IN GENERAL

Article X

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

Comment

New. - It has been suggested that a new article of a general character be placed at the beginning of the Rules. Following the example of analogous provisions contained in some of the most recent instruments dealing with international trade law (e.g. CSSR International Trade Code; GDR Law on International Economic Contracts; U.C.C.), this would lay down a general obligation of good faith so as to cover not only the formation of the contract, but also its interpretation and performance. The adoption of Article X would entail the deletion of Article 14 of the 1979 draft.

Chapter 1

THE FORMATION OF CONTRACTS

Article 1

A contract shall be deemed to be concluded where the parties have agreed upon all the terms on which, according to the intention expressed by one of them in the course of negotiations, agreement was to be reached.

Comment

New. - Where transactions are stipulated inter presentes it frequently happens that the parties draft and sign together a document containing the terms of the contract after lengthy and often informal negotiations around a table. But also in transactions inter absentes especially where an important transaction is concerned, it may happen that the parties, instead of limiting themselves to mere declarations of offer and acceptance, reach agreement only after prolonged correspondence consisting in the exchange of various kinds of statement (invitations to treat, requests for clarification; letters of intent; etc.) It was therefore suggested that a new provision be included at the beginning of the Chapter on formation determining the exact stage at which a contract shall be deemed to be concluded (as a precedent cf. art. 30 GDR Law cit.).

Article 2

If information given by one party in the course of negotiations has been declared to be confidential, and no contract is subsequently concluded, such information shall not be disclosed by the other party who is otherwise liable for damages.

Comment

New. - It was felt necessary to include a provision expressly dealing with the problem of confidential information obtained in the course of negotiations, although the solution provided by the present article might already be deduced from the general principles laid down in Article X.

Article 3

1. Unless the law or the parties otherwise provide, a contract need not be concluded in or evidenced by writing and is not subject to any other requirement as to form.
2. If one of the parties wishes the contract to be concluded in a particular form, he shall expressly declare his intention to the other party from the outset of negotiations.
3. For the purposes of these Rules "writing" means any agreement contained in a document signed by the parties or contained in an exchange of letters, telegrams or communications in another visible and sufficiently permanent form.

Comment

See Art. 1 of the 1979 draft. - Except the opening words, para. 1 has been redrafted according to the wording used in the corresponding provision of the Vienna Convention on Contract for the International Sale of Goods (CISG) (art. 11). Paragraphs 2 and 3 have been added in the light of the proposals made by the Study Group (see Report on the 1st session, UNIDROIT 1979, Study L - Doc. 16, p. 4 and p. 5). As to the substance of the provisions contained therein, there seems to be no precedent for para. 2, whereas para. 3 corresponds to Art. I (2) (a) of the Geneva Convention on International Commercial Arbitration of 1961, with the addition of the last words which are designed to take account of the growing use of electronic transmission of communications.

Article 4

1. A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance.
2. A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.

Comment

See Art. 2 of the 1979 draft. - Para. 1 has been redrafted in the light of the wording used in the corresponding provision of CISG (Art. 14). The former para. 2 has been deleted, since according to the proposal made by the Study Group Art. 16 (now Art. 24) has been redrafted so as to make it clear that the rules of interpretation which it lays down for contracts as such will apply also to the interpretation of a single offer.

Article 5

1. An offer becomes effective when it reaches the offeree.
2. An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.

Comment

New. - This Article corresponds to Art. 15 of CISG. Its content basically corresponds to the provision laid down in Art. 5 para. 1 of the 1979 draft. As to the definition of the term "reaches" see below, Art. 20.

Article 6

1. Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.
2. However, an offer cannot be revoked:
 - (a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or
 - (b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

Comment

See Art. 5 para. 2 and 3 of the 1979 draft. - The article has been redrafted in accordance with the wording used in the corresponding provision of CISG (Art. 16).

Article 7

An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror.

Comment

New. - The provision is taken from Art. 17 of CISG. It is intended to ensure that the offeror should be free to contact someone else without having to worry whether the offeree will change his mind and attempt to accept an offer which he had previously rejected.

Article 8

1. A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.

2. An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no 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. An oral offer must be accepted immediately unless the circumstances indicate otherwise.

3. However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down in the preceding paragraph.

Comment

See Arts. 6 and 9 para. 1 of the 1979 draft.- These provisions have been merged into a single article so as to follow the approach adopted in CISG (Art. 18).

Article 9

1. A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.

2. However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

Comment

See Art. 7 of the 1979 draft. - This article has been redrafted in accordance with the wording used in the corresponding provision of CISG (Art. 19 para.1 and 2).

Article 10

1. A period of time for acceptance fixed by the offeror in a telegram or a letter begins to run from the moment the telegram is handed in for dispatch or from the date shown on the letter or, if no such date is shown, from the date shown on the envelope. A period of time for acceptance fixed by the offeror by telephone, telex or other means of instantaneous communication, begins to run from the moment that the offer reaches the offeree.

2. Official holidays or non-business days occurring during the period for acceptance are included in calculating the period. However, if a notice of acceptance cannot be delivered at the address of the offeror on the last day of the period because that day falls on an official holiday or a non-business day at the place of business of the offeror, the period is extended until the first business day which follows.

Comment

See Art. 9 para. 2 of the 1979 draft. - The provision has been redrafted in accordance with the text of Art. 20 of CISG.

Article 11

1. A late acceptance is nevertheless effective as an acceptance if without delay the offeror orally so informs the offeree or dispatches a notice to that effect.

2. If a letter or other writing containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without delay, the offeror orally informs the offeree that he considers his offer as having lapsed or dispatches a notice to that effect.

Comment

See Art. 10 of the 1979 draft. - The article has been redrafted in accordance with the wording used in the corresponding provision of CISG (Art. 21).

Article 12

An acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective.

Comment

See Art. 11 of the 1979 draft. - The article has been redrafted in accordance with the corresponding provision of CISG (Art. 22).

Article 13

1. Where, after the conclusion of a contract, one party sends the other a document which is intended to be a written confirmation of their oral agreement 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 do not materially alter the terms of the contract or are in accordance with practices which the parties have established between themselves or with usages.

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.

Comment

See Art. 8 of the 1979 draft. - Para. 1 has been amended in two respects: after the words "unless they" the words "do not materially alter the terms of the contract or" have been added, and after the words "between themselves" the words "or with usages". The first amendment was suggested by the Study Group, in order to align the present article on the provision contained in para. 2 of Art. 9 (former Art. 7) (See Report, cit., p. 8). The second amendment is intended to eliminate the discrepancy which under the 1979 draft existed between Art. 8 para. 1 (the corresponding provision of para. 1 of the present article) on the one hand and Arts. 16 (now Art. 24) and 21 (now Art. 16) on the other: in the opinion of the Study Group such a discrepancy was not only unjustified in substance, but could lead to the result that in practice the same facts would be decided differently according to which rule was applied (see Report, cit., pp. 8 and 9).

/ Article 14 /

/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 15 /

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. /

Comment

See Arts. 3 and 4 of the 1979 draft. - The only change which has been made is the deletion of para. 3 of Art. 4 (now Art. 15): the provision contained therein concerned the problem of adaptation of the contract, which will be more extensively dealt with in Chapter 4 of the Rules (see now the Proposed

Rules on Handship prepared by Prof. Maskow, UNIDROIT 1983, Study I - Doc. 24). Both Art. 14 and Art. 15 appear between square brackets, since the Study Group was unable to reach a final conclusion on the various arguments which had been put forward both in favour and against the two articles and asked the informal Working Group to reconsider the whole matter and to prepare a new draft.

Article 16

1. Notwithstanding the provisions of these Rules governing offer and acceptance, general conditions shall only be incorporated in a contract where one party has expressly referred to them and the other party has accepted them.

2. In all other cases general conditions shall only be incorporated in a contract where they have been adopted by an association to which both parties belong, or where they have been expressly agreed to in previous transactions between the parties or where their use amounts to a usage.

3. If both parties refer to different general conditions, none of which can be incorporated in the contract under the previous paragraphs, the contract shall be considered to have been concluded without the conflicting terms, unless one party promptly informs the other that in these circumstances he does not intend to be bound by the contract.

Comment

See Art. 21 of the 1979 draft. - In para. 1 the word "expressly" has been inserted before the words "referred to". In para. 2 the words "or are in common usage in the particular trade with which the contract is connected" have been replaced by the words "or if their use amounts to a usage". The original wording met with considerable criticism from the Study Group: in particular it was pointed out that it could lead to the unacceptable result that parties from developing countries would be bound by general conditions which, though "in common usage in the particular trade with which the contract is connected" are not sufficiently known in their countries (see Report, cit., p. 10). The new formula is intended to avoid such a risk, since it clearly refers only to those general conditions the use of which amounts to a veritable usage, i.e. to a practice which both parties knew or ought to have known and which in international trade is widely known to,

and regularly observed by, parties to contracts of the type involved in the particular trade concerned (see for such a definition of the concept of "usage" the new Art. 21 of the Rules). Para. 3 too has been redrafted so as to make it clear that its scope of application is restricted to cases of a genuine "battle of forms" and therefore has nothing in common with the factual situation envisaged by Art. 9 (former Art. 7) (see, as to the proposal in this sense made by the Study Group, Report, cit., p. 11).

Article 17

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.

Comment

See Art. 22 of the 1979 draft. No changes.

Article 18

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

Comment

See Art. 23 of the 1979 draft. - No changes.

Article 19

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.

Comment

See Art. 12 of the 1979 draft. - No changes.

Article 20

For the purposes of this Chapter of the Rules, an offer, declaration of acceptance or any other indication of intention "reaches" the addressee when it is made orally to him or delivered by any other means to him personally, to his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence.

Comment

See Art. 13 of the 1979 draft. - This article has been redrafted in accordance with the wording used in the corresponding provision of CISG (Art. 24).

Article 21

For the purposes of these Rules, "usage" means any practice or method of dealing which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by parties to contracts of the type involved in the particular trade concerned.

Comment

New. - Several articles of this Chapter of the Rules refer to "usage" or "usages" (see Arts. 8, 13 and 16), as do provisions of subsequent Chapters (see e.g. Art. 23 of Chapter 2). In all these cases the problem arises as to the exact meaning of the concept of "usage", or to put it differently, which are the criteria to be adopted in order to determine whether or not a given practice or line of conduct regularly observed within a particular trade sector or at a particular market place is to be applied to a specific contract. The present article is intended to give a general definition of "usage" for the purpose of the Rules. It adopts the same criteria which are contained in Art. 9 para. 2 of CISG.

Chapter 2

THE INTERPRETATION OF CONTRACTS

Article 22

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

2. If the common intention of the parties cannot be established, the contract shall be interpreted according to the meaning which reasonable persons of the same kind as the parties would give to it in the same circumstances.

Comment

See Art. 15 of the 1979 draft. -- Para. 2 has been redrafted in the light of the formula used in Art. 8 para. 2 of CISG. As to the formula suggested by some members of the Study Group ("If the common intention of the parties cannot be established, the contract shall be interpreted according to the meaning given to it in the respective trade sector or, in the absence of such, according to the ordinary meaning": see Report, cit., p. 12), it is felt that the reference to the "meaning given to it in the respective trade sector" could give raise to considerable difficulties, whenever within a particular trade sector the meaning differs from one country or region to another. In addition, the rule laid down in Art. 24 makes it already clear that in determining the meaning which reasonable persons would give to the contract, due consideration shall be given to trade usages and practices, insofar as they meet the requirements laid down in Art. 21.

Article 23

1. Statement made by and other conduct of a party shall be interpreted according to his intention where the other party knew or could not have been unaware what that intention was.

2. If the preceding paragraph is not applicable, statements made by and other conduct of a party shall be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.

Comment

New. - This article corresponds to Art. 8 para. 1 and 2 of CISG and has been included in the Rules so as to cover the case where not the contract as such, but single statements made by or any other conduct of one of the parties are to be interpreted (see e.g. Arts. 4 para. 1; 6 para. 2; 8; etc.)

Article 24

In interpreting a contract or statements made by and other conduct of a party due consideration shall be given to all relevant circumstances, including any preliminary negotiations between the parties, any practices which they have established between themselves, usages and any conduct of the parties subsequent to the conclusion of the contract.

Comment

See Art. 16 of the 1979 draft. - Two changes have been made: instead of "course of dealing" the expression "practices" is used (see Arts. 8 and 9 of CISG), and after the word "usages" the words "which reasonable persons in the same situation as the parties usually consider to be applicable" have been omitted, since Art. 21 now contains a general definition of "usage" for the purposes of the Rules.

Article 25

Subject to the provisions of Articles 22, 23 and 24, 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 26

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 27

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 28

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 29

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

Comment

See Arts. 17, 18, 19, 20 and 24 of the 1979 draft. No changes.