IV.3.1 - Scope of application; definition

(a) Where one party or both parties use standard terms in concluding a contract, the general rules on formation apply, subject to the following Principles.

(b) Standard terms are provisions which are prepared in advance for general and repeated use by the party supplying the term or by a third party and which are actually used without negotiation with the other party.

Commentary:

1 This Principle takes account of the fact that businessmen tend to conclude contracts by reference to their standard terms in order to save time and costs of long lasting contract negotiations and in order to shape the contract to their benefit.

2 Subsection (a) clarifies that if the parties conclude their contract on the basis of standard terms, the general rules of contract conclusion apply. These rules are merely supplemented or modified by the following rules because of the special nature of standard terms which is defined in Subsection (b). Special rules may apply, however, for the incorporation of an arbitration clause contained in a separate set of standard terms. Such a rule is contained in Art. 7 (2) 3rd sentence of the UNCITRAL Model Law on International Commercial Arbitration.

3 It follows from Subsection (b) that the qualification of a contract term as a standard term is determined solely by the user's intention to use that term generally and repeatedly for its contracts to be concluded with other parties and not by the fact that the terms were actually drafted by the party which uses it, or by the nature of the terms as a separate set of standard terms or a standard form or model contract. Therefore, a contract can be a mix of standard and non-standard terms, or can consist only of standard terms.

4 It follows from the last words of Subsection (b) that contract clauses do not qualify as standard terms if they were individually negotiated between the parties to the contract. This does not require that the wording of a clause proposed by one side must have been amended during the contract negotiations as long as that clause was the subject of negotiations between the parties. Very often, the parties consider certain terms in the contract as "package deals", i.e. one party requires a change in the wording of one clause because it has accepted another clause which is less favorable to its interests. In such a scenario, both clauses must be considered as individually negotiated. Often, parties have concluded previous contracts with identical terms. In that case, contract terms which were the subject of the first contract negotiations must be considered individually negotiated in the second negotiations, even if the parties have not discussed that clause again then.