

The Incorporation of Standard Terms into International Sales Contracts under the CISG

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In this article, the author deals with the specific question of standard terms in international sales and in which manner they should be incorporated in contracts. Furthermore, she examines the situation where two parties to a contract rely on their standard terms and the different theories trying to solve this matter: “the battle of forms”. The author supports the knock-out theory which favours the common standard terms and excludes the rest from the contract.

Abstract provided by the Editorial Board

Introduction

Standard terms are provisions that are prepared in advance and elaborated unilaterally by one party, without negotiations with the other party¹. It is frequent in international sales contracts that parties to a contract try to incorporate their respective standard terms². The United Nations Convention on Contracts for the International Sale of Goods (CISG) which is the law governing international sales contracts, does not specifically regulate the incorporation of standard terms³. Specific rules were deemed unnecessary as the CISG already provided rules for the interpretation of the contract⁴. Therefore, the incorporation of standard terms must be analysed pursuant to the general rules of the CISG on formation and interpretation of contracts, namely Art. 14 *et seq* and Art. 8 CISG⁵. Firstly, this study will analyse the conditions for the

incorporation of standard terms (*infra* I). Secondly, the questions in relation with the “battle of forms” will be covered (*infra* II).

I. The Conditions for the Incorporation of Standard Terms

The doctrine and the case-law developed conditions for the incorporation of standard terms. According to them, a reasonable person in the same circumstances according to Art. 8 CISG must understand that the person sought to incorporate her standard terms. In order to achieve this, two conditions must be fulfilled. First, she must show her intent to incorporate her standard terms (*infra* A) and second, she must make them available to the offeree in a reasonable manner (*infra* B)⁶.

A. The Intent of the Offeror to Incorporate his or her Standard Terms

The offeror must refer to his or her standard terms and emphasize that these form part of the contract⁷. The decisive criteria is that the reference to the standard terms must be clear so that a reasonable person according to Art. 8(2) CISG would understand that the person sought to incorporate her standard terms⁸. The CISG does not set out specific requirements in relation with the form of the reference, *e.g.* that the reference must be in bold⁹. Rather, authors consider that the reference should not be hidden¹⁰.

Furthermore, the reference to the incorporation of standard terms must not necessarily figure in the offer. Indeed, it can also be made at an earlier stage, such as during the negotiations according to Art. 8(3) CISG¹¹.

¹ CISG ADVISORY COUNCIL, Opinion no 13, *Inclusion of standard terms under the CISG*, Villanova 2013, n° 1 ; SCHROETER U., in Schlechtriem / Schwenzler (eds), *Commentary on the UN Convention on the International Sale of Goods*, Oxford 2016, Art. 14 n° 39; SCHWENZLER I. / HACHEM P. / KEE C., *Global Sales and Contract Law*, Oxford 2012, n° 12.01.

² CISG-AC Op. 13 (n 1), n° 1; SCHROETER (n 1), Art. 19, n° 31.

³ HUBER P., *Standard Terms under the CISG* (2009) *Vindobona Journal of International Commercial Law & Arbitration* 13, p. 123.

⁴ KRUISINGA S., *Incorporation of Standard Terms under the CISG and Electronic Communication*, in Schwenzler / Spagnolo (eds), *Towards Uniformity The Hague* 2011, p. 70.

⁵ CISG-AC Op. 13 (n 1), n° 1.1-1.2; FERRARI F., in Kröll / Mistelis / Perales Viscasillas (eds), *Commentary on the UN Convention on Contracts for the International Sale of Goods (CISG)*, Munich 2011, Art. 14, n°s 38-39; KRUISINGA (n 4), p. 71; SCHROETER (n 1), Art. 14, n° 40.

⁶ SCHMIDT-KESSEL M./ MEYER L., *Allgemeine Geschäftsbedingungen und UN-Kaufrecht* (2008) *Internationales Handelsrecht* 5, p. 178; SCHROETER (n 1), Art. 14 n° 43.

⁷ MAGNUS U., *Incorporation of Standard Contract Terms under the CISG*, in Andersen / Schroeter (eds), *Sharing International Commercial Law across National Boundaries*, London 2008, p. 315; SCHROETER (n 1), Art. 14 n° 43.

⁸ CISG-AC Op. 13 (n 1), n° 5.1; SCHROETER (n 1), Art. 14 n° 44.

⁹ SCHROETER (n 1), Art. 14 n° 44.

¹⁰ CISG-AC Op. 13 (n 1), n° 5.1.

¹¹ Machinery Case, Germany, Bundesgerichtshof, 31 October 2001, VIII ZR 60/01.

B. The Offeree's Awareness of the Standard Terms

In order to make the offeree aware of the standard terms, the offeror must fulfill the "making available" test¹². This test was elaborated by the German Supreme Court in the *Machinery Case*. In its decision, the Court held that the CISG "requires the user of general terms and conditions to transmit the text or make it available in another way"¹³. Therefore, it is the offeror's duty to make the terms available to the offeree and not the offeree's obligation to investigate in order to find the standard terms¹⁴. In addition, it is accepted by the doctrine that the terms must not necessarily be transmitted¹⁵. Rather, a mere reference to the standard terms can suffice¹⁶.

With the development of the internet and commercial contracting via electronic communications, a recent and controversial question arising is how standard terms can be made available in electronic communications. It is generally admitted that standard terms attached to an e-mail suffice for their incorporation¹⁷.

The majority of authors considers that a link to a general website is not sufficient to raise the awareness of the other party of the standard terms¹⁸. The burden is on the party trying to rely on its standard terms¹⁹; problems that may arise are the possibility that there are several sets of standard terms on the website or that the company decides to change the standard terms in the meanwhile²⁰. However, some authors have recently supported another stance, namely by supporting that a reference on a general website can be enough for the incorporation²¹. The internet has become in-

creasingly important over the past years. Thus, it can be assumed that businesses have access to it²². In addition, the CISG Advisory Council considered that "the other party has a reasonable opportunity to take notice of those terms if they are generally accessible over the internet at the time of contracting"²³. This position is easier to admit where the contract is concluded via the website or when the negotiations and conclusion of the contract occurred over the internet²⁴. We consider that, in the future, as contracts will increasingly be concluded via electronic communications, a clear theory should be developed as to what extent a reference can be enough. It is our opinion that a specific link to the standard terms should be deemed sufficient. In relation with a general link, many problems may arise. Therefore, if the party wants to be certain that the "making available" test is fulfilled, it should attach a pdf version of its standard terms to its e-mail or include a specific link to the standard terms.

II. The "Battle of Forms"

A "battle of forms" occurs when both parties to the contract seek to impose their respective standard terms²⁵. As each party's attempt to incorporate its own standard terms amounts to a counter-offer according to Art. 19 CISG, the formation of the contract is prevented²⁶. In order to redress this issue, scholars and courts have developed different theories²⁷. In the following, the two prevailing theories will be analysed, namely the last-shot theory (*infra* A) and the knock-out theory (*infra* B).

A. The Last-Shot Theory

The last-shot theory provides that the standard terms that will govern the contract are the last ones not ob-

¹² CISG-AC Op. 13 (n 1), n° 2.2.

¹³ *Machinery Case* (n 11).

¹⁴ HUBER (n 3), p. 127 ; KRUISINGA (n 4), p. 72.

¹⁵ HUBER (n 3), p. 128.

¹⁶ *Id.*, p. 127.

¹⁷ CISG-AC Op. 13 (n 1), n° 3.4; KRUISINGA (n 4), p. 76; MAGNUS, *Incorporation* (n 7), p. 323.

¹⁸ FERRARI (n 5), Art. 14, n° 40 ; HUBER (n 3), p. 133 ; KRUISINGA (n 4), pp. 76-77; MAGNUS, *Incorporation* (n 7), p. 323; SCHROETER (n 1), Art. 14, n° 57.

¹⁹ HUBER (n 3), p. 127 ; KRUISINGA (n 4), pp. 76-77 ; MAGNUS, *Incorporation* (n 7), p. 320 ; SCHROETER (n 1), Art. 14, n° 57.

²⁰ KRUISINGA (n 4), p. 77.

²¹ LAUTENSCHLAGER F., *Current Problems regarding the Interpretation of Statements and Party Conduct under the CISG – The Reasonable Third Person, Language Problems and Standard Terms and Conditions* (2007) *Vindobona Journal of International Commercial Law & Arbitration* 11, p. 282; STIEGELE A./ HALTER R., *Nochmals : Ein-beziehung von Allgemeinen Geschäftsbedingungen im Rahmen des UN-Kaufrechts – Zugänglichmachung im Internet* (2003) *IHR* 4, p. 169.

²² *Ibid.*

²³ CISG-AC Op. 13 (n 1), n° 3.4.

²⁴ *Ibid.*

²⁵ CISG-AC Op. 13 (n 1), n° 10.1; MAGNUS U., *Last Shot vs. Knock Out – Still Battle over the Battle of Forms Under the CISG*, in Cranston / Ramberg / Ziegele (eds) *Commercial Law Challenges in the 21st Century*, Stockholm 2007, p. 185; PERALES VISCASILLAS M., *Battle of the Forms, Modification of Contract, Commercial Letter of Confirmation : Comparison of the United Nations Convention on Contracts for the International Sale of Goods (CISG) with the Principles of European Contract Law (PECL)* (2002) *Pace International Law Review* 14, p. 156; PILTZ B., *AGB in UN-Kaufverträgen* (2004) *IHR* 4, p. 136; SCHROETER (n 1), Art. 19, n° 31.

²⁶ SCHWENZER / HACHEM / KEE (n 1), n° 12.28; VENTSCH V. / KLUTH P., *Die Einbeziehung von Allgemeinen Geschäftsbedingungen im Rahmen des UN-Kaufrechts* (2003) *IHR* 3, p. 64.

²⁷ HUBER (n 3), p. 129 ; *Milk Powder Case*, Germany, Bundesgerichtshof, 9 January 2002, VIII ZR 304/00.

jected to by the other party²⁸. This embodies a strict application of Art. 19 CISG, which states that a reply to an offer containing modifications constitutes a rejection of the offer and a counter-offer²⁹.

This approach has the advantage that it is in accordance with the rules of the CISG³⁰, which provides legal certainty³¹. However, it is rejected by the majority of authors. Indeed, it leads to arbitrary results, because the result can be random, unfair and unforeseeable for the parties³². In addition, it neither complies with the parties' intent nor with commercial reality³³.

B. The Knock-Out Theory

As the last-shot theory is not satisfactory, scholars and courts have developed the knock-out theory, prevailing on an international level³⁴. According to this theory, the contract will be composed of the essential terms of the contract and all the standard terms that are common in substance. Accordingly, the conflicting standard terms will be knocked out, *i.e.* excluded from the contract³⁵. In regard with the rules of the CISG, it is considered that the parties agreed to depart from Art. 19 CISG, which they are allowed to according to Art. 6 CISG, that provides for the party's autonomy³⁶.

The reasoning behind this theory is that, in general, the parties' intent to enter into a contract despite the use of conflicting standard terms is more important than the prevalence of their standard terms³⁷. This intent can particularly be deduced from the performance of the contract by the parties³⁸.

Criticism to the knock-out theory have equally been developed by the doctrine. The fact that the parties decided to derogate from the CISG rules is a mere fiction and is based on the hypothetical intent of the parties, rather than the real intent³⁹.

Conclusion

As the CISG does not specifically rule the question of the incorporation of standard terms, it is a subject that is mainly discussed by scholars and case-law. On the one hand, many questions are unresolved or uncertain. In relation with the conditions for the incorporation, it still remains arguable to what extent a person must make her standard terms reasonably available to the offeree. In particular, the question of the internet, that has significant importance nowadays, has not been solved. In relation to the question of the "battle of forms", the two main theories that have been developed, the last-shot theory and the knock-out theory, contain imperfections. We would favour the knock-out theory, as it seems to be the closest option to the parties' intent, which is crucial to interpret a contract in accordance with Art. 8 CISG.

On the other hand, this question is open for argumentation. In particular, the incorporation of the standard terms must be analysed on a case-by-case basis by considering the circumstances and the facts. This leaves room for interpretation and solutions that particularly fit to a particular case.

³⁹ LAUTENSCHLAGER (n 21), p. 288.

²⁸ CISG-AC Op. 13 (n 1), n° 10.5 ; HUBER (n 3), p. 129 ; SCHROETER (n 1), Art. 19, n° 35.

²⁹ HUBER (n 3), p. 129.

³⁰ *Id.*, p. 130.

³¹ LAUTENSCHLAGER (n 21), p. 285.

³² CISG-AC Op. 13 (n 1), n° 10.6.

³³ CISG-AC Op. 13 (n 1), n° 10.6; LAUTENSCHLAGER (n 21), p. 285; PILTZ (n 25), p. 137; SCHROETER (n 1), Art. 19, n° 35; VENTSCH / KLUTH (n 26), p. 64.

³⁴ CISG-AC Op. 13 (n 1), n° 10.6; LAUTENSCHLAGER (n 21), p. 285; MAGNUS, *Battle of Forms* (n 25), p. 194; PERALES VISCASILLAS (n 25), p. 157; SCHROETER (n 1), Art. 19, n° 36 *et seq.*; VENTSCH / KLUTH (n 26), p. 64.

³⁵ *Ibid.*

³⁶ HUBER (n 3), p. 130.

³⁷ HUBER (n 3), p. 130 ; SCHROETER (n 1), Art. 19, n° 41 ; SCHWENZER / HACHEM / KEE (n 1), n° 12.33.

³⁸ LAUTENSCHLAGER (n 21), p. 287; MAGNUS, *Battle of Forms* (n 25), pp. 195-196 ; SCHROETER (n 1), Art. 19, n° 44 ; VENTSCH / KLUTH (n 26), p. 63 ; Milk Powder Case (n 27).