

CISG ADVISORY COUNCIL¹ OPINION NO 13

INCLUSION OF STANDARD TERMS UNDER THE CISG

To be cited as: CISG-AC Opinion No. 13 Inclusion of Standard Terms under the CISG, Rapporteur: Professor Sieg Eiselen, College of Law, University of South Africa, Pretoria, South Africa. Adopted by the CISG Advisory Council following its 17th meeting, in Villanova, Pennsylvania, USA, on 20 January 2013.²

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INGEBORG SCHWENZER, *Chair*

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¹ *The CISG-AC is a private initiative supported by the Institute of International Commercial Law at Pace University School of Law and the Centre for Commercial Law Studies, Queen Mary, University of London. The International Sales Convention Advisory Council (CISG-AC) is in place to support understanding of the United Nations Convention on Contracts for the International Sale of Goods (CISG) and the promotion and assistance in the uniform interpretation of the CISG.*

At its formative meeting in Paris in June 2001, Prof. Peter Schlechtriem of Freiburg University, Germany, was elected Chair of the CISG-AC for a three-year term. Dr. Loukas A. Mistelis of the Centre for Commercial Law Studies, Queen Mary, University of London, was elected Secretary. The founding members of the CISG-AC were Prof. Emeritus Eric E. Bergsten, Pace University School of Law; Prof. Michael Joachim Bonell, University of Rome La Sapienza; Prof. E. Allan Farnsworth, Columbia University School of Law; Prof. Alejandro M. Garro, Columbia University School of Law; Prof. Sir Roy M. Goode, Oxford, Prof. Sergei N. Lebedev, Maritime Arbitration Commission of the Chamber of Commerce and Industry of the Russian Federation; Prof. Jan Ramberg, University of Stockholm, Faculty of Law; Prof. Peter Schlechtriem, Freiburg University; Prof. Hiroo Sono, Faculty of Law, Hokkaido University; Prof. Claude Witz, Universität des Saarlandes and Strasbourg University. Members of the Council are elected by the Council.

At subsequent meetings, the CISG-AC elected as additional members Prof. Pilar Perales Viscasillas, Universidad Carlos III, Madrid; Professor Ingeborg Schwenzler, University of Basel; Prof. John Y. Gotanda, Villanova University; and Prof. Michael G. Bridge, London School of Economics; Prof. Jan Ramberg served for a three-year term as the second Chair of the CISG-AC.

At its 11th meeting in Wuhan, People's Republic of China, Prof. Eric E. Bergsten of Pace University School of Law was elected Chair of the CISG-AC and Prof. Sieg Eiselen of the Department of Private Law of the University of South Africa was elected Secretary. At its 14th meeting in Belgrade, Serbia, Prof. Ingeborg Schwenzler of the University of Basel was elected Chair of the CISG-AC.

² Rules 1-9 were adopted unanimously. Rule 10 was adopted with one dissenting vote.

BLACK LETTER RULES

- 1. The inclusion of standard terms under the CISG is determined according to the rules for the formation and interpretation of contracts under the CISG.**
- 2. Standard terms are included in the contract where the parties have expressly or impliedly agreed to their inclusion at the time of the formation of the contract and the other party had a reasonable opportunity to take notice of the terms.**
- 3. Amongst others, a party is deemed to have had a reasonable opportunity to take notice of the standard terms:**
 - 3.1. Where the terms are attached to a document used in connection with the formation of the contract or printed on the reverse side of that document;**
 - 3.2. Where the terms are available to the parties in the presence of each other at the time of negotiating the contract;**
 - 3.3. Where, in electronic communications, the terms are made available to and retrievable electronically by that party and are accessible to that party at the time of negotiating the contract;**
 - 3.4. Where the parties have had prior agreements subject to the same standard terms.**
- 4. Standard terms cannot be incorporated after the formation of the contract, unless the contract is modified by agreement.**
- 5. A reference to the inclusion of standard terms and the standard terms themselves must be clear to a reasonable person of the same kind as the other party and in the same circumstances.**
- 6. A reference to the inclusion and the standard terms will be regarded to be clear where:**
 - 6.1. They are readable and understandable by a reasonable person; and**

- 6.2. They are available in a language that the other party could reasonably be expected to understand. Such a language includes the language of the negotiated part of the contract, the negotiations or the language ordinarily used by that party.
 7. Standard terms that are so surprising or unusual that a reasonable person of the same kind as the relevant party could not reasonably have expected such a term in the agreement, do not form part of the agreement.
 8. Where there is a conflict between negotiated terms and standard terms in the contract, the negotiated terms override the standard terms.
 9. If the meaning of a standard term provided by one party remains ambiguous despite interpretation the meaning more favourable to the other party shall prevail.
 10. Where both parties seek to incorporate standard terms and reach agreement except on those terms, a contract is concluded on the basis of the negotiated terms and of any standard terms which are common in substance unless one party clearly indicates in advance, or later on but without undue delay objects to the conclusion of the contract on that basis.
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COMMENTS

A General

1. It is a common feature of the modern mass production economy that contracts for the manufacturing, distribution and delivery of products and services are governed by the standard terms and conditions of one of the parties.³ Standard terms are provisions

³ Raiser L *Das Recht der Allgemeine Geschäftsbedingungen* (Hamburg 1935) 26 ff; Wolf M, Horn N & Lindacher WF *AGB-Gesetz, Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen* 4th ed (Frankfurt 1999) Einl para 1; Hondius EH *Standaardvoorwaarden* (Deventer 1978) 123; Kötz H "Welche gesetzgeberischen Maßnahmen empfehlen sich zum Schutze des Endverbrauchers gegenüber Allgemeinen Geschäftsbedingungen und Formularverträgen?" in *Verhandlungen des fünfzigsten Deutschen Juristentages (Band I) Gutachten* (Munich 1974) A23-24; Heinrichs H in Bassenge P et al (eds) *Palandt Bürgerliches*

which are prepared in advance for general and repeated use by one party and which are actually used without negotiation with the other party.⁴ The contents of the contract may be contained not only in the part specifically negotiated and agreed on by the parties but also by reference to standard terms used by one of the parties, framework contracts, standard industry contracts or a combination of the above.⁵

2. One of the perennial problems in respect of standard terms in most legal systems is whether the terms which are usually not the object of specific bargaining have been included in the agreement between the parties or not.⁶
3. The UNCITRAL Working Group discussed the issue of the incorporation of standard terms, but decided that the provisions dealing with the interpretation of the contents of the contract were sufficient.⁷ Most commentators and courts agree that the incorporation of standard terms must therefore be dealt with in accordance with the provisions dealing with the formation of the contract.⁸ Domestic provisions and rules regulating standard terms may only be applied to standard terms if they deal with questions of validity.⁹

Gesetzbuch 71st ed (Munich 2012) AGB Gesetz par 1-3; Slawson WD "Standard form contracts and the democratic control of lawmaking power" 1971 *Harv LR* 529; Llewellyn K "The standardization of commercial contracts in English and continental law" 1939 *Harv LR* 701; Basedow J in Kruger (ed) *Münchener Kommentar zum Bürgerlichen Gesetzbuch Band 2 Schuldrecht Allgemeiner Teil* 5th ed (Beck München 2007).

4 This definition is similar to the definition in the UNIDROIT Principles of International Commercial Contracts 2010 ("UNIDROIT Principles") Article 2.1.19(2).

5 Schroeter U in Schwenger I (ed) *Schlechtriem & Schwenger Commentary on the UN Convention on the International Sale of Goods (CISG)* 3rd ed (2010 OUP) Art 14 para 32.

6 Magnus U "Incorporation of Standard Contract Terms under the CISG" in Andersen CM & Schroeter UG (eds), *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday* (London 2008) 323; Schmidt-Kessel M in Schwenger I (ed) *Schlechtriem & Schwenger Commentary on the UN Convention on the International Sale of Goods (CISG)* 3rd ed (2010 OUP) Art 8 paras 55-58.

7 A proposal in the Working Group that the CISG should specifically deal with the incorporation of standard terms was rejected by the Ninth session of UNCITRAL – see Yearbook IX (1978) p 81. See also Schroeter in *Schlechtriem/Schwenger Commentary* Art 14 para 32; Magnus U *J von Staudinger's Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetze Wiener UN-Kaufrecht (CISG)* (2005 Sellier) Art 14 para 41; Ferrari F in Kröll S, Mistelis L & Perales Viscasillas P *UN Convention on Contracts for the Sale of Goods (CISG)* (2011 Beck) Art 14 para 38.

8 Schroeter in *Schlechtriem/Schwenger Commentary* Art 14 paras 32-33; Magnus *Kommentar* Art 14 para 41; Ferrari in *Kröll/Mistelis/Perales Viscasillas CISG* Art 14 para 38; **Austria** 31 August 2005 Supreme Court (Tantalum powder case) <http://cisgw3.law.pace.edu/cases/050831a3.html>; **Austria** 31 August 2005 Supreme Court (Tantalum case) <http://cisgw3.law.pace.edu/cases/050831a3.html>; **Austria** 17 December 2003 Supreme Court (Tantalum powder case) <http://cisgw3.law.pace.edu/cases/031217a3.html>; **Germany** 31 October 2001 Supreme Court (Machinery case) <http://cisgw3.law.pace.edu/cases/011031g1.html>; **Germany** 26 June 2006 Appellate Court Frankfurt (Printed goods case) <http://cisgw3.law.pace.edu/cases/060626g1.html>; **Italy** 21 November 2007 Tribunale [District Court] Rovereto (*Takap B.V. v. Europlay S.r.l.*) <http://cisgw3.law.pace.edu/cases/071121i3.html>; **Netherlands** 29 May 2007 Gerechtshof [Appellate Court] 's-Hertogenbosch (Machine case) <http://cisgw3.law.pace.edu/cases/070529n1.html>; **Switzerland** 11 December 2003 District Court Zug (Plastic granulate case) <http://cisgw3.law.pace.edu/cases/031211s1.html>; **United States** *Travelers Property Casualty Company of America et al v Saint-Gobain Technical Fabrics Canada Ltd*, US Dist Ct (D Minn), 31 January 2007 <http://cisgw3.law.pace.edu/cases/070131u1.html>.

9 Art 4(2)(a). See Schroeter in *Schlechtriem/Schwenger Commentary* Art 14 para 34; Ferrari in *Kröll/Mistelis/Perales Viscasillas CISG* Art 14 para 42; **Germany** 21 April 2004 Appellate Court Düsseldorf [15 U 30/03] (Yarn case) <http://cisgw3.law.pace.edu/cases/040421g1.html>; **Austria** 23 March 2005 Oberlandesgericht [Appellate Court] Linz (Conveyor band case) <http://cisgw3.law.pace.edu/cases/050323a3.html>; **Germany** 12

4. Where the parties have expressly agreed to the incorporation of standard terms no problem arises, but quite often the incorporation of the standard terms takes place by a mere reference in an oral or written communication to the inclusion of such terms without any clear and express agreement on the incorporation.¹⁰ Sometimes the text of the standard terms will accompany the main agreement, for instance being printed on the back of an order form,¹¹ but quite often the contract merely contains an incorporation clause without any accompanying text.¹² The question then arises whether there has been a valid incorporation or not.
5. The essential characteristic of standard terms is that they have not been individually negotiated between the parties. It does not matter how the standard terms are presented, who drafted them or whether they are brief or extensive. Standard terms may be specially drafted for one of the parties or may be drafted by an industry organisation for general use in the trade.¹³
6. Although there are many different definitions of standard or non-negotiated terms,¹⁴ the definition contained in Article 2.1.19 of the UNIDROIT Principles of International Commercial Contracts ("UNIDROIT Principles") provides a good example of such a definition.¹⁵ The key characteristic of these clauses are the fact that they are not

June 2008 District Court Landshut (Metalic slabs case) <http://cisgw3.law.pace.edu/cases/080612g2.html>.

10 Schroeter in *Schlechtriem/Schwenzer Commentary* Art 14 para 37.

11 See for instance **France** 13 December 1995 *Cour d'appel* [Appellate Court] Paris (*ISEA Industrie v. Lu*) <http://cisgw3.law.pace.edu/cases/951213f1.html>.

12 Magnus, *Festschrift Kritzer* 315; Schroeter in *Schlechtriem/Schwenzer Commentary* Art 14 para 37. See for instance **Austria** 31 August 2005 Supreme Court (Tantalum case) <http://cisgw3.law.pace.edu/cases/050831a3.html>; **Spain** 27 December 2007 Appellate Court Navarra (Case involving machine for repair of bricks) <http://cisgw3.law.pace.edu/cases/071227s4.html>; **Germany** 11 June 2007 Appellate Court Dresden (Airbag parts case) <http://cisgw3.law.pace.edu/cases/070611g1.html>; **Belgium** 4 November 1998 Appellate Court Antwerp (*I.S. Trading v. Vadotex*) <http://cisgw3.law.pace.edu/cases/981104b1.html>; **Belgium** 25 April 2001 District Court Veurne (BV BA G-2 v. AS C.B.) <http://cisgw3.law.pace.edu/cases/010425b1.html>.

13 Schroeter in *Schlechtriem/Schwenzer Commentary* Art 14 para 32; Naudé *Commentary on PICC* Art 2.1.19 paras 3-4.

14 See for instance § 305(1) of the German BGB; Article 2.1.19 of the UNIDROIT Principles; Art 2:209(3) of the Principles of European Contract Law. See Naudé T in Vogenauer S & Kleinheisterkamp J *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (OUP Oxford 2009) Art 2.1.19 paras 1-5. The UNIDROIT Working Group found it extremely difficult to agree to a definition – see Documents Issued in connection with UNIDROIT's Working Group for the Preparation of Principles of International Commercial Contracts p 94. See also Basedow *Münchener Kommentar* § 305 paras 5-8.

15 Comment 2 to Art 2.1.19 of the UNIDROIT Principles aptly describes standard terms as follows:

“Standard terms” are to be understood as those contract provisions which are prepared in advance for general and repeated use by one party and which are actually used without negotiation with the other party (para. (2)). What is decisive is not their formal presentation (e.g. whether they are contained in a separate document or in the contract document itself; whether they have been issued on pre-printed forms or are only contained in an electronic file, etc.), nor who prepared them (the party itself, a trade or professional association, etc.), nor their volume (whether they consist of a comprehensive set of provisions covering almost all the relevant aspects of the contract, or of only one or two provisions regarding, for instance, exclusion of liability and arbitration). What is decisive is the fact that they are drafted in advance for general and repeated use and that they are actually used in a given case by one of the parties without negotiation with the other party. This latter requirement obviously relates only to the standard terms as such, which the other party must accept

negotiated between the parties.

B Specific comments

1. Rule 1. The inclusion of standard terms under the CISG is determined according to the rules for the formation and interpretation of contracts.

Basic principles of contract formation

- 1.1. The CISG does not expressly deal with requirements for the inclusion of standard terms and courts must therefore rely on the interpretation of the articles dealing with the formation and interpretation of the contract in general.¹⁶ The issue is governed mainly by Article 8(2) which stipulates that where a party is not aware of the intent that the other party had with a specific statement, that statement must 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.¹⁷
- 1.2. The CISG deals with the formation of the contract in Part II, and more specifically for our purposes in Articles 14, 18, 19 and 23.¹⁸
- 1.3. However, it is also necessary to consider Articles 8 and 9 that deal with the interpretation of any statements made by the parties, as the statements and conduct of the parties form the basis for the offer and acceptance and usages established between the parties.¹⁹
- 1.4. The question on whether terms are included in the contract or not, is an issue which falls squarely within the scope of the CISG.²⁰

as a whole, while the other terms of the same contract may well be the subject of negotiation between the parties.”

16 Schmidt-Kessel in *Schlechtriem/Schwenzer Commentary* Art 8 para 55-56; *Magnus Kommentar* Art 14 para 40.

17 Schroeter in *Schlechtriem/Schwenzer Commentary* Art 14 para 36; Ferrari in *Kröll/Mistelis/Perales Viscasillas CISG* Art 14 para .

18 Schroeter in *Schlechtriem/Schwenzer Commentary* Intro Art 14-24 para 1-4; Ferrari in *Kröll/Mistelis/Perales Viscasillas CISG* Intro Art 14-24 para 4.

19 Schroeter in *Schlechtriem/Schwenzer Commentary* Art 14 para 346.

20 Schroeter in *Schlechtriem/Schwenzer Commentary* Art 14 paras 32-33; *Magnus Kommentar* Art 14 para 41; Ferrari in *Kröll/Mistelis/Perales Viscasillas CISG* Art 14 para 38; **Austria** 31 August 2005 Supreme Court (Tantalum case) <http://cisgw3.law.pace.edu/cases/050831a3.html>; **Austria** 31 August 2005 Supreme Court (Tantalum case) <http://cisgw3.law.pace.edu/cases/050831a3.html>; **Austria** 17 December 2003 Supreme Court (Tantalum powder case) <http://cisgw3.law.pace.edu/cases/031217a3.html>]; **Germany** 31 October 2001 Supreme Court (Machinery case) <http://cisgw3.law.pace.edu/cases/011031g1.html>]; **Germany** 26 June 2006 Appellate Court Frankfurt (Printed goods case) <http://cisgw3.law.pace.edu/cases/060626g1.html>; **Italy** 21 November 2007 Tribunale [District Court] Rovereto (*Takap B.V. v. Europlay S.r.l.*) <http://cisgw3.law.pace.edu/cases/071121i3.html>; **Netherlands** 29 May 2007 Appellate Court 's-Hertogenbosch (Machine case) <http://cisgw3.law.pace.edu/cases/070529n1.html>; **Switzerland** 11 December 2003 District Court Zug (Plastic granulate case) <http://cisgw3.law.pace.edu/cases/031211s1.html>; **United States** *Travelers Property Casualty Company of America et al v Saint-Gobain Technical Fabrics Canada Ltd*, US Dist Ct (D Minn), 31 January 2007 <http://cisgw3.law.pace.edu/cases/070131u1.html>. **Netherlands** 17 March 2004

- 1.5. The statements and conduct of the parties leading up to and including the conclusion of the contract must be interpreted in the light of Article 8 and Article 9. Article 8 must also be applied to the interpretation of the offer made by the offeror in terms of Article 14 and the acceptance of the offer by the offeree in terms of Articles 18 and 19 as the statements and conduct of the parties underlie the offer and the acceptance.²¹
- 1.6. Where the offeror has clearly communicated to the offeree that it wanted the agreement to be subject to its standard terms then the standard terms should be applicable where the offeree accepts the offer, unless the offeree clearly indicates that it does not agree to such incorporation, provided that the offeree has a reasonable opportunity to take notice of the contents of the standard terms.²²
- 1.7. Where there is a clear and conspicuous reference to the incorporation of the standard terms, there should in principle be no problem about the incorporation of the terms as acceptance by the offeree of the offer based on such document, creates the reasonable impression in the mind of the offeror that the offer has been accepted without any modification.²³
- 1.8. If the offeree failed to read the incorporation clause, it would not have the subjective intent to accept the standard terms but this is a fact that the offeror cannot be held to be aware of. The conduct of the offeree creates the objective impression that the offer was accepted. Article 8(2) should then be applied.²⁴
- 1.9. In the circumstances where the written offer contains a clear incorporation clause and is accepted without any further statement or qualification by the offeree, it would be objectively reasonable conduct on the part of the offeror to rely on such unqualified acceptance and to accept that its standard terms will apply,²⁵ provided that the standard terms were reasonably available to the other party at the time of the negotiations or conclusion of the contract.²⁶ It is the same deduction that a reasonable person of the

District Court Arnhem (*Soil for plants case*) <http://cisgw3.law.pace.edu/cases/040317n1.html>. For an earlier ruling that seems similar, **Netherlands** 1 March 1995 District Court Zwolle (*Textiles case*)

<http://cisgw3.law.pace.edu/cases/950301n2.html>. However, see **Netherlands** 28 January 2005 Hoge Raad (*Gran Canaria tomatoes case*) <http://cisgw3.law.pace.edu/cases/050128n1.html>. See however Magnus *Kommentar* Art 14 para 42; Schwenger & Hachem in *Schlechtriem/Schwenger Commentary* Art 4 para 12.

21 Magnus *Kommentar* Art 14 para 41; Schmidt-Kessel in *Schlechtriem/Schwenger Commentary* Art 8 para 55; Ferrari in *Kröll/Mistelis/Perales Viscasillas CISG Art 14 para 39*.

22 Schmidt-Kessel in *Schlechtriem/Schwenger Commentary* Art 8 para 55; Schmidt-Kessel Case Commentary at <http://cisgw3.law.pace.edu/cases/011031g1.html>.

23 Schmidt-Kessel in *Schlechtriem/Schwenger Commentary* Art 8 para 55; Schmidt-Kessel Case Commentary at <http://cisgw3.law.pace.edu/cases/011031g1.html>; Schroeter in *Schlechtriem/Schwenger Commentary* Art 14 para 37; **Austria** 17 December 2003 Supreme Court (*Tantalum powder case*) [<http://cisgw3.law.pace.edu/cases/031217a3.html>]; **United States** Filanto SpA v. Chilewich Intern Corp 789 F Supp 1229, 1240 (SD NY 1992). Contra Magnus *Kommentar* Art 14 para 41 **Germany** 31 October 2001 Supreme Court (*Machinery case*) <http://cisgw3.law.pace.edu/cases/011031g1.html> .; **Netherlands** 10 February 2005 Netherlands Arbitration Institute (interim award) <http://cisgw3.law.pace.edu/cases/050210n1.html>; Magnus *Festschrift Kritzer* 314.

24 Ferrari in *Kröll/Mistelis/Perales Viscasillas CISG Art 14 para 39*; Schroeter in *Schlechtriem/Schwenger Commentary* Art 14 para .

25 Schroeter in *Schlechtriem/Schwenger Commentary* Art 14 para 37; Ferrari in *Kröll/Mistelis/Perales Viscasillas CISG Art 14 para 39*.

26 See the discussion under Rule 3 below. **Germany** 31 October 2001 Supreme Court (*Machinery case*)

same kind as the offeror would make in similar circumstances.

2. **Rule 2. Standard terms are included in the contract where the parties have expressly or impliedly agreed to their inclusion at the time of the formation of the contract and the other party had a reasonable opportunity to take notice of the terms.**

Divergent approaches in the case law

- 2.1. In the case law there have been a number of cases with divergent approaches to the inclusion of standard terms under the CISG as set out above.

(a) *Making the terms available prerequisite*

- 2.2. There are a number of cases where it has been held that standard terms will not be regarded as having been validly incorporated into the contract unless the offeror has made the standard terms available to the offeree in order that the offeree has a reasonable opportunity to become aware of them in a reasonable manner.²⁷ The leading case is the German *Machinery* case²⁸ where the German Supreme Court held as follows:

2. Thus, through an interpretation according to Art. 8 CISG, it must be determined whether the general terms and conditions are part of the offer, which can already follow from the negotiations between the parties, the existing practices between the parties, or international customs (Art. 8(3) CISG). As for the rest, it must be analyzed how a "reasonable person of the same kind as the other party" would have understood the offer (Art. 8(2) CISG).

It is generally required that the recipient of a contract offer that is supposed to be based on general terms and conditions have the possibility to become aware of them in a reasonable manner (Staudinger/Magnus, Art. 14 &p;41; Schlechtriem/Schlechtriem, supra; Soergel/Lüderitz/Fenge, supra; Reithmann/Martiny, International Sales Law, 5th ed., ¶ 651). An effective inclusion of general terms and conditions thus first requires that the intention of the offeror that he wants to include his terms and conditions into the contract be apparent to the recipient of the offer. In addition, as the Court of Appeals correctly assumed, the Uniform Sales Law requires the user of general terms and conditions to transmit the text or make it available in another way (see also Piltz, Sales Law, §3 &pp;77 et seq.; Piltz, NJW, supra; Teklote, The Uniform Sales Law and the German Law on General Terms and Conditions, 1994, pp. 112 et seq.; Hennemann, General Terms and Conditions Control and the CISG from the German and French Viewpoints, Ph.D. Thesis 2001, pp. 72 et seq.; similarly, Staudinger/Magnus, supra, with

[<http://cisgw3.law.pace.edu/cases/011031g1.html>; Ferrari in *Kröll/Mistelis/Perales Viscasillas CISG Art 14 para 39*; Schroeter in *Schlechtriem/Schwenzer Commentary Art 14 para 40*.

27 Schroeter in *Schlechtriem/Schwenzer Commentary Art 14 para 40*; Ferrari in *Kröll/Mistelis/Perales Viscasillas CISG Art 14 para 39*.

28 **Germany** 31 October 2001 Supreme Court (*Machinery case*)

[<http://cisgw3.law.pace.edu/cases/011031g1.html>. See also **Netherlands** 10 February 2005 Netherlands Arbitration Institute (interim award) <http://cisgw3.law.pace.edu/cases/050210n1.html>. See Schmidt-Kessel Case Commentary at <http://cisgw3.law.pace.edu/cases/011031g1.html>. See also **Germany** 24 July 2009 Appellate Court Celle (*Broadcasters case*), **Germany** 15 October 2009 District Court Stuttgart (Printing machine case) <http://cisgw3.law.pace.edu/cases/091015g1.html>; **Netherlands** 21 January 2009 District Court Utrecht (*Sesame seed case*) <http://cisgw3.law.pace.edu/cases/090121n1.html>; Magnus *Festschrift Kritzer* 319-320.

reference to the Supreme Court of Austria, RdW 1996, 203, 204, with an annotation by Karollus RdW 1996, 197 et seq.; different view, Holthausen, RIW 1989, 513, 517).

[My emphasis]

The court in its analysis and interpretation of Article 8(2) CISG comes to a conclusion that sets a stricter requirement than that encountered in domestic German law.²⁹ The CISG's approach is accordingly closer to the position taken by other national sales laws, which similarly impose stricter requirements than German and most common law domestic legal systems.³⁰

- 2.3. Although the approach in the German *Machinery* case is somewhat controversial,³¹ it would seem that the majority opinion is however that it is desirable that a party should make the standard terms available at the time of the contracting.³²
- 2.4. This **approach** should be favoured over the other approaches discussed below as more in keeping with the principles underlying the CISG and the requirements of international trade.
- 2.5. The decision in the German *Machinery* case has been interpreted by some lower courts in Germany³³ and courts in the Netherlands³⁴ to mean that the terms themselves should

29 Schroeter in *Schlechtriem/Schwenzer Commentary* Art 14 para 41; Ferrari in *Kröll/Mistelis/Perales Viscasillas CISG* Art 14 para 40. See also **Germany** 24 July 2009 Appellate Court Celle (*Broadcasters case*) [<http://cisgw3.law.pace.edu/cases/090724g1.html>]. This is a case in which the court stated:

"Therefore the effective incorporation of standard terms and conditions into a contract, which -- as in the case at hand -- is governed by the CISG, is subject to the provisions regarding the formation of the contract (Art. 14 and Art. 18 CISG). According to Art. 8 CISG, the recipient of a contract offer, which is supposed to be based on standard terms and conditions, must have the possibility to become aware of them in a reasonable manner (decision of the German Federal Supreme Court (Bundesgerichtshof; BGH) in: BGHZ vol. 149 113, 116 et seq.). Within the scope of the Convention, the effective inclusion of standard terms and conditions requires not only that the offeror's intention that he wants to include his standard terms and conditions into the contract be apparent to the recipient. In addition, the CISG requires the user of standard terms and conditions to transmit the text or make it available in another way (see decision of the German Federal Supreme Court (Bundesgerichtshof; BGH) in: BGHZ, supra, with further references)".

30 Schroeter in *Schlechtriem/Schwenzer Commentary* Art 14 para 41.

31 The fact that this view is the generally accepted view under German scholars, as maintained by Magnus *Festschrift Kritzer* 320 and the German Supreme Court, is by no means an indication that the issue is not controversial. See Magnus *Festschrift Kritzer* 320; Huber, "Standard Terms under the CISG," 13 (2009) *Vindobona Journal of International Commercial Law & Arbitration* 126-127; Eiselen S "The Requirements for the Inclusion of Standard Terms in International Sales Contracts" 2011 *Potchefstroom Electronic Law Review* available at <http://dspace.nwu.ac.za/handle/10394/4494>; Schmidt-Kessel, M (2002), 'Einbeziehung von Allgemeinen Geschäftsbedingungen unter UN-Kaufrecht' 2002 *Neue Juristische Wochenschrift* 3444; Schmidt-Kessel in *Schlechtriem/Schwenzer Commentary* Art 8 § 55.

32 Magnus *Festschrift Kritzer* 320; Schroeter in *Schlechtriem/Schwenzer Commentary* Art 14 para 41; Ferrari in *Kröll/Mistelis/Perales Viscasillas CISG* Art 14 para 340. See Schmidt-Kessel in *Schlechtriem/Schwenzer Commentary* Art 8 par 57-58.

33 See for instance **Germany** 20 December 2007 Appellate Court Oldenburg (*Industrial tools case*) [<http://cisgw3.law.pace.edu/cases/071220g1.html>] where the court states:

As a conclusion to this, the Court assumes that [Buyer] may not rely on the choice of forum clause contained in its standard terms because these terms have not been actually presented to [Seller] at the time of the conclusion of the contract. A mere reference or possibility of the other party to obtain the standard terms does not suffice to fulfill the requirements for a valid choice of forum agreement under Art. 23(1) Brussels I Regulation.

be handed over or sent to the offeree at the time of contracting. This sets too strict a standard.³⁵ The *Bundesgerichtshof's* decision leaves room for making the standard terms available to the other party in another manner which provides the other party with a reasonable opportunity to take notice of them.³⁶ It would, for instance, suffice where the reference to the inclusion of the standard terms refers to the offeror's website where the terms are available.³⁷

- 2.6. The offeror need not make the standard terms available to the other party where the **parties** have had prior dealings subject to the same standard terms or where the offeree has prior knowledge of the contents of the standard terms.³⁸

(b) Mere reference sufficient

- 2.7. In the **Austrian Propane case**³⁹ the court sets out the more traditional approach commensurate with domestic law in most legal systems:

The CISG does not contain specific requirements for the incorporation of standard business conditions, such as the [sellers'] general conditions of sale, into a contract. Therefore, the necessary requirements for such an inclusion are to be developed from Art. 14 et seq. CISG, which contain the exclusive requirements for the conclusion of a contract (cf. Piltz, Internationales Kaufrecht, Art. 5 n. 75). Consequently, the general conditions of sale have to be part of the offer according to the offeror's intent, where the offeree could not have been unaware of that intent, in order to become a part of the contract (Art. 8(1) and (2) CISG). This inclusion into the offer can also be done implicitly or can be inferred from the negotiations between the parties or a practice which has developed between them.

- 2.8. As indicated by Magnus this approach makes an unfair risk allocation in the case of international transactions.⁴⁰ It should not be incumbent on the offeree to request a copy of the standard terms from the other party where the latter seeks to incorporate the standard terms.⁴¹

(c) Clear incorporation reference where terms are attached

- 2.9. The French *Isea case*⁴² presents a more problematic scenario. In that case the buyer

See also **Germany** 3 August 2005 District Court Neubrandenburg (Pitted sour cherries case) <http://cisgw3.law.pace.edu/cases/050803g1.html>; **Germany** 12 June 2008 District Court Landshut (Metalic slabs case) <http://cisgw3.law.pace.edu/cases/080612g2.html>.

34 See for instance **Netherlands** 21 January 2009 District Court Utrecht (Sesame seed case) <http://cisgw3.law.pace.edu/cases/090121n1.html>; **Netherlands** 25 February 2009 District Court Rotterdam (*Fresh-Life International B.V. v. Cobana Fruchtring GmbH & Co., KG*) <http://cisgw3.law.pace.edu/cases/090225n1.html>]

35 See however, Ferrari in *Kröll/Mistelis/Perales Viscasillas* CISG Art 14 para 40.

36 Schroeter in *Schlechtriem/Schwenzer Commentary* Art 14 para 47.

37 See the discussion below.

38 See Rule 5.4 below. See also Schmidt-Kessel in *Schlechtriem/Schwenzer Commentary* Art 8 par 56-57; Ferrari in *Kröll/Mistelis/Perales Viscasillas* CISG Art 14 para 40; .

39 Austria 6 February 1996 Supreme Court (Propane case) <http://cisgw3.law.pace.edu/cases/960206a3.html>.

40 Magnus *Festschrift Kritzer* 320.

41 Magnus *Festschrift Kritzer* 320-321.

42 **France** 13 December 1995 *Cour d'appel* [Appellate Court] Paris (*ISEA Industrie v. Lu*)

sent order forms to the seller. The order forms contained standard terms printed on the back, but contained no incorporation clause on the front of the document. The court held as follows:

The disputed sale was formed, by application of Article 18(2) of the [CISG], at the moment when [Buyer] received the order form returned by [Seller] with the signature of its representative, that is, on 5 April 1991.

Bearing in mind the absence, on the reverse side of that form, of an express reference to the general terms of sale appearing on the back, the [Seller] cannot be considered to have accepted the latter. The confirmation of the order on 23 April 1991, which contains the general terms of sale, being subsequent to the date of contract formation, cannot be analyzed as a counter-offer within the meaning of Article 19(1) of the [CISG]; consequently, [Buyer]'s silence is stripped of its import.

2.10. There is no indication or analysis by the court whether the writing on the back of the order form was conspicuous or not or whether a reasonable person in the position of the seller would have noticed such terms on the back of this document. The court, taking a strict approach, simply decided that the lack of an incorporation clause on the front part of the document was enough to deny the standard terms on the reverse side any legal relevance.

2.11. This case must be contrasted with the *American Golden Valley Grape Juice* case⁴³ where the offer was sent as an attachment to an email. The email also included an attachment setting out a warranty and one containing standard terms. The offer did not specifically refer to the incorporation of the standard terms, but the court held that it was the clear intention of the offeror that all of the attachments were relevant for the agreement being negotiated. The buyer could not simply pick and choose between the documents. The court states:

Here, however, the General Conditions accompanied the sales quote. The General Conditions were attached, contemporaneously, with the sales quote and with other sale information, such as warranty information and banking information, which were included in the e-mail. Unlike Chateau and Solae, the General Conditions were not sought to be imposed after the contract had been formed. The General Conditions were part of the offer. Indeed, it is without dispute that Centrisys reviewed at least one other attachment in the same e-mail -- the warranty.

...

The evidence establishes that at the time STS sent its sales quote to Centrisys, it contemporaneously sent its General Conditions as part of the attachments. By adopting the terms of the sales quote, Centrisys accepted the terms upon which the centrifuge had been offered, including the General Conditions. Thus, Centrisys accepted the General Conditions.

2.12. The use of standard terms in all sales, domestic and international is a well known and widespread phenomenon. The decision in the *Golden Valley Grape juice* case provides a commercially reasonable approach to cases where the written offer does not refer to the incorporation of the standard terms, but where they are attached or printed on the

<http://cisgw3.law.pace.edu/cases/951213f1.html> [. See also **Spain** 27 December 2007 Appellate Court Navarra (Case involving machine for repair of bricks) <http://cisgw3.law.pace.edu/cases/071227s4.html>]

43 **United States** *Golden Valley Grape Juice and Wine, LLC v. Centriys Corporation / Centriys Corporation v. Separator Technology Solutions Pty Ltd United States* 21 January 2010 Federal District Court [California] <http://cisgw3.law.pace.edu/cases/100121u1.html>].

reverse side. If the attached terms are conspicuous, the other party cannot simply ignore such terms, whether they have been sent as a separate document or printed on the reverse side of the document.

(d) Implied acceptance of the standard terms

2.13. Acceptance of the standard terms will often result from some conduct of the offeree objectively indicating that it has accepted the standard terms. This will be the case where there is a clear reference to the incorporation of standard terms in the offer and where they were reasonably available at the time of the negotiations or conclusion of the contract and the other party starts performing without objecting to the inclusion of the standard terms. The fact that the party impliedly accepted the standard terms together with the negotiated terms at the time of its conduct.⁴⁴

3. Rule 3: Amongst others, a party is deemed to have had a reasonable opportunity to take notice of the standard terms:

3.1 Where the terms are attached to a document used in connection with the formation of the contract or printed on the reverse side of that document;

3.2 Where the terms are available to the parties in the presence of each other at the time of negotiating the contract;

3.3 Where, in electronic communications, the terms are made available to and retrievable electronically by that party and are accessible to that party at the time of negotiating the contract;

3.4 Where the parties have had prior agreements subject to the same standard terms.

(a) General

3.1. The examples of when it should be regarded that a party has had a reasonable opportunity to take notice of the standard terms result from examples found in the case law and mentioned by the various authors favouring this approach. This list deals with the most commonly encountered situations but is not intended to be a conclusive list. Each factual situation needs to be assessed against the general principle of reasonable availability.

(b) Terms attached to a document used in connection with the formation of the contract or printed on the reverse side

⁴⁴ See **United States** *Golden Valley Grape Juice and Wine, LLC v. Centriys Corporation / Centriys Corporation v. Separator Technology Solutions Pty Ltd* 21 January 2010 Federal District Court [California] <http://cisgw3.law.pace.edu/cases/100121u1.html>]; **Netherlands** 10 February 2005 Netherlands Arbitration Institute (interim award) <http://cisgw3.law.pace.edu/cases/050210n1.html>] Schmidt-Kessel in *Schlechtriem/Schwenzer Commentary* Art 8 par 55-57.

3.2. In most instances where the standard terms are attached to the offer or other document used in connection with the formation of the contract or printed on the reverse side of such document it should be deemed that the other party had a reasonable opportunity to take notice of them.⁴⁵ The approach adopted in the French *Isea case*⁴⁶ should be the exception rather than the rule depending on the particular facts. The approach adopted in the American *Golden Valley Grape Juice case*⁴⁷ where there was no incorporation clause in the offer, but other clearly contractual attachments to an email discussed above, provides an example of a commercially sound approach.

(c) Terms available to parties in the presence of each other

3.3. Where parties are negotiating face to face and the terms are referred to during the negotiations or by an incorporation clause and the terms are available at the place of negotiation, that party has a reasonable opportunity to take notice of the standard terms should it wish to do so.⁴⁸

(d) Terms available and retrievable electronically

3.4. It is today commonplace for commercial parties to have websites containing information about that party and very often containing the standard terms on which that party contracts. Where a party during negotiations refers to the inclusion of standard terms or where there is an incorporation clause in the offer referring to the website, 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. This is particularly true if the contract is being concluded via the website. Where the contract has been concluded by other means such as email or in person, a reference to the document on a website will also suffice if access to the website was reasonably available to the other party at that time. Where there are several sets of standard terms and it is not clear which set will apply, the terms cannot be regarded as reasonably available. It should not be up to the other party to guess or inquire which set of terms are applicable to the specific transaction. The terms should also be downloadable and storable for future reference.⁴⁹

3.5. Where the parties are negotiating by email or other electronic means, it would generally suffice if the standard terms are contained in an attachment to the email or can be accessed by clicking on a hyperlink leading to the applicable terms.⁵⁰ However, it is

45 Schroeter in *Schlechtriem/Schwenzer Commentary* Art 14 para 44. See **United States** *Golden Valley Grape Juice and Wine, LLC v. Centriys Corporation / Centriys Corporation v. Separator Technology Solutions Pty Ltd* 21 January 2010 Federal District Court [California] <http://cisgw3.law.pace.edu/cases/100121u1.html>.

46 **France** 13 December 1995 *Cour d'appel* [Appellate Court] Paris (*ISEA Industrie v. Lu*) <http://cisgw3.law.pace.edu/cases/951213f1.html>.

47 **United States** *Golden Valley Grape Juice and Wine, LLC v. Centriys Corporation / Centriys Corporation v. Separator Technology Solutions Pty Ltd* 21 January 2010 Federal District Court [California] <http://cisgw3.law.pace.edu/cases/100121u1.html>].

48 Schroeter in *Schlechtriem/Schwenzer Commentary* Art 14 para 48; Staudinger/Magnus Art 14 para 41b.

49 Schroeter in *Schlechtriem/Schwenzer Commentary* Art 14 para 49. See however, Ferrari in *Kröll/Mistelis/Perales Viscasillas CISG Art 14 para 40; Staudinger/Magnus Kommentar Art 14 para 41*.

50 Schroeter in *Schlechtriem/Schwenzer Commentary* Art 14 para 50.

more problematic where the negotiations are taking place face to face or over the telephone for instance. The question then becomes a factual issue on whether the terms were reasonably available to the other at the time of contracting.⁵¹

(e) Terms used in prior agreements

3.6. It is reasonable to assume that where the standard terms have been used in previous dealings between the parties that they were available to the other party at the time of the negotiations or of contracting.⁵² This can only be assumed where the standard terms were previously validly incorporated into contracts between the parties. Where the terms were included in documents such as invoices after the fact and therefore not validly incorporated, they cannot be assumed to be incorporated in future contracts.⁵³

4. Rule 4. Standard terms cannot be incorporated after the formation of the contract, unless the contract is modified by agreement.

4.1. The approach in two leading American cases in regard to the inclusion of standard terms after the conclusion of the contract is generally accepted⁵⁴ - the reference to and availability of standard terms must occur before or at the same time as the conclusion of the contract.⁵⁵ A reference to or the inclusion of standard terms afterwards on an invoice or similar document cannot in itself modify the terms of the already existing contract.⁵⁶

4.2. In stark contrast to these two case where the courts have followed a strict but reasonable approach in regard to the incorporation of standard terms, there is one case where a court has followed an approach which is unacceptably lax. In the American *Barbara Berry* case the court held as follows:⁵⁷

Finally, the exclusionary clause was printed in bright red on top of all 63 boxes of raspberry planting stock, and there is no dispute that Plaintiff Berry received and opened these boxes. Even if this were the only notice of the exclusionary clause, similar to the case in Mortenson, the clause is conscionable and enforceable.

Even if the CISG did apply, the exclusionary clause is still enforceable because Plaintiff paid the price for the goods and opened the package where the exclusionary clause was prominently

51 Schroeter in *Schlechtriem/Schwenzer Commentary* Art 14 para 50.

52 Netherlands 10 February 2005 Netherlands Arbitration Institute (interim award) <http://cisgw3.law.pace.edu/cases/050210n1.html>; Schroeter in *Schlechtriem/Schwenzer Commentary* Art 14 para 51

53 Schroeter in *Schlechtriem/Schwenzer Commentary* Art 14 para 51; **Germany** 3 August 2005 District Court Neubrandenburg (Pitted sour cherries case) <http://cisgw3.law.pace.edu/cases/050803g1.html>

54 **United States** *Berry v Ken M Spooner Farms Inc* 59 UCC Rep Serv 2d 443 (WD Wash 2006); **United States** *Golden Valley Grape Juice and Wine, LLC v Centriys Corporation / Centriys Corporation v. Separator Technology Solutions Pty Ltd* United States 21 January 2010 Federal District Court [California] <http://cisgw3.law.pace.edu/cases/100121u1.html>; Magnus *Festschrift Kritzer* 32. See also **United States** *Solae, LLC v. Hershey Canada, Inc.*, 557 F. Supp. 2d 452 (D. Del. 2008).

55 On timing generally see Schroeter in *Schlechtriem/Schwenzer Commentary* Art 14 para 59.

56 **United States** *Berry v Ken M Spooner Farms Inc* 59 UCC Rep Serv 2d 443 (WD Wash 2006); Magnus *Festschrift Kritzer* 320.

57 **United States** *Berry v Ken M Spooner Farms Inc* 59 UCC Rep Serv 2d 443 (WD Wash 2006); Magnus *Festschrift Kritzer* 320.

displayed on top in red. (Article 18(3): "assent by performing an act, such as one relating to the dispatch of the goods or payment of the price ..."; Article 18(1): an additional term can be accepted by "conduct by the offeree indicating assent.") Also, under Article 9(2), "the parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of 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." It appears that the placement of oral orders for goods followed by invoices with sales terms is commonplace, and while every term of the contract is not usually part of the oral discussion, subsequent written confirmation containing additional terms are binding unless timely objected to. See, e.g., *W.T. GmbH v. P. AG*, No. P4 1991/238 (ZG Basel, Switz. Dec. 21, 1992).

- 4.3. A party cannot unilaterally add additional terms to the contract after the fact. It would be a breach of the contract if one of the parties refused to perform under the terms originally agreed to. The buyer in this instance was quite entitled under the provisions of the CISG to ignore the terms that the seller wanted to impose unilaterally afterwards. The inclusion of standard terms on invoice after the conclusion of the contract cannot in itself be sufficient to modify the original contract if the recipient remains silent or even performs its part of the contract.⁵⁸
 - 4.4. This type of situation might be distinguished from the cases where one of the parties sends a confirmatory letter immediately after the formation of the contract including its standard terms.⁵⁹ This opinion does not deal with the issue of commercial letters of confirmation as this is regarded as a distinct issue which might be addressed in a separate future opinion.
- 5. Rule 5. A reference to the inclusion of standard terms and the standard terms themselves must be clear to a reasonable person of the same kind as the other party and in the same circumstances.**
- 5.1. The reference to the incorporation of standard terms should not be hidden away or printed in such a manner that it is easy to overlook. Article 8(2) requires for deemed assent that the one party could not have been unaware of the intention of the other party. The requirement for a clear inclusion is in line with this provision. There should be a reasonable attempt to make the other party aware of the incorporation.⁶⁰ Although standard terms are very frequently used in international trade, there should be no obligation on a party to go hunting for a reference on their inclusion. The obligation should be on the party relying on them to ensure that they are set out in a manner and at a place where a reasonable contractual party would have noticed them.
 - 5.2. It is also necessary that the terms themselves should be clear to a reasonable person of the same kind as the other party under the same circumstances. An example of terms that would not be regarded as clear, is where the standard terms are in another language and it could not reasonably be expected of that recipient to understand the

58 Schroeter in *Schlechtriem/Schwenzer Commentary* Art 14 para 60.

59 See Schmidt-Kessel *Schlechtriem/Schwenzer* Art 9 para 22-24; Schroeter in *Schlechtriem/Schwenzer Commentary* Art 14-24 para 17-37.

60 Schroeter in *Schlechtriem/Schwenzer Commentary* Art 14 paras 56-57; Ferrari in *Kröll/Mistelis/Perales Viscasillas CISG* Art 14 para 39.

foreign language.⁶¹

6. Rule 6. A reference to the inclusion and the standard terms will be regarded to be clear where:

6.1 They are readable and understandable by a reasonable person; and

6.2 They are available in a language that the other party could reasonably be expected to understand. Such a language includes the language of the negotiated part of the contract, the negotiations or the language ordinarily used by that party.

6.1. Under the CISG there are no particular form requirements in regard to lay-out, design, format or size of the text of standard or any other terms. It is merely necessary in terms of Article 8(2) that a reasonable person of the same kind should be able to understand the content of the standard terms as presented. Where the text is unreadable for instance the terms should not be regarded as incorporated.⁶² Terms that should for instance be regarded as not readable where the print is so small that it cannot be read without a reading glass, or the printing on the front page makes the printing on the reverse page impossible to read.

6.2. It sometimes happens that a contract will refer to the inclusion of standard terms where the standard terms have been drafted in a language other than the language of the contract or in a language that is not understood by the other contract party. The question then arises whether such an inclusion should be held to be valid and binding.

6.3. In the German *Knitware case* the court dealt with this problem as follows:⁶³

If the [seller] did send its General Conditions to the [buyer], it still cannot be assumed that the [buyer]'s Terms for Purchasing became part of the contract. On the one hand, the [seller] denies having received the [buyer]'s General Terms of Business; on the other hand, the [buyer] did not state that it had included an Italian translation of its Terms for Purchasing. Since the language of the contract in the present case was not German, the General Terms of Business written in German did not become part of the contract (v. Caemmerer/Schlechtriem, Article 14 n.16)

6.4. In the American *MCC-Marble Ceramic case*⁶⁴, the court also dealt with language risks, but taking a different point of view, placing the risk on the party accepting a

61 See paragraph 6 below. See also Schroeter in *Schlechtriem/Schwenzer Commentary Art 14 para 56-57*.

62 Schroeter in *Schlechtriem/Schwenzer Commentary Art 14 para 56-57*. See also **Belgium** 18 January 2002 District Court Mechelen (Tomatoes case) <http://cisgw3.law.pace.edu/cases/020118b1.html>; **France** 24 October 2000 Appellate Court Colmar (*Pelliculest v. Morton International*) <http://cisgw3.law.pace.edu/cases/001024f1.html>

63 **Germany** 6 October 1995 Lower Court Kehl (*Knitware case*) <http://cisgw3.law.pace.edu/cases/951006g1.html>. See also **Germany** 21 April 2004 Appellate Court Düsseldorf [15 U 88/03] (Mobile car phones case) <http://cisgw3.law.pace.edu/cases/040421g3.html>; **Germany** 6 December 2005 Appellate Court Hamm (Used motorcar parts case) <http://cisgw3.law.pace.edu/cases/051206g1.html>.

64 **United States** *MCC-Marble Ceramic Center Inc v Ceramica Nuova d'Agostino SpA*, 144 F3d 1384, 1389 (11th Cir 1998).

communication in a foreign language without any further inquiry:

We find it nothing short of astounding that an individual, purportedly experienced in commercial matters, would sign a contract in a foreign language and expect not to be bound simply because he could not comprehend its terms. We find nothing in the CISG that might counsel this type of reckless behavior and nothing that signals any retreat from the proposition that parties who sign contracts will be bound by them regardless of whether they have read them or understood them.

6.5. In keeping with the general principle accepted above that the standard terms should be made available to the other party, it is necessary that the standard terms must be in a language that the recipient could reasonably be expected to understand.⁶⁵ Standard terms that are in a different language will not be accessible to the other party at the time of contracting if it is not in a language that it could reasonably be expected to understand such as the language of the contract, the language of the negotiations or the language used by the other party in communications between the parties.⁶⁶ The language commonly used in the place where the other party has its usual place of business can also be regarded as an acceptable language. If the standard terms are not in a language that the other party could reasonably be expected to understand, the standard terms must be disregarded.⁶⁷

6.6. No preference should be given to so-called 'world languages' as some Austrian courts have done.⁶⁸ There is no need for the special treatment of these languages outside of the general principles contained in this rule. There is also no clarity on what constitutes a world language. The context of a particular transaction should determine what languages could be regarded as sufficiently well known to the parties concerned.⁶⁹

7. Rule 7. Standard terms that are so surprising or unusual that a reasonable person of the same kind as the relevant party could not reasonably have expected such a term in the agreement, do not form part of the agreement.

7.1. Where the standard terms of a party have been successfully incorporated into a contract according to the rules set out above, the other party is bound by those terms whether it has read them or not, or is aware of their contents or not. The standard terms usually cover familiar terrain and that is one of the reasons why many parties simply do not bother to read them at the time of the negotiations even where they are subjectively aware of the inclusion of those terms.

7.2. However, where the terms are of such a nature that the other party could not reasonably have expected them, such surprising terms should not form part of the consensus between the parties. This is not a validity issue but a contract formation issue and

65 Magnus *Festschrift Kritzer* 320-321; Schmidt-Kessel in Schlechtriem/Schwenzer Art 8 par 60; Schroeter in *Slechtriem/Schwenzer Commentary* Art 14 para 61; **Germany** 21 April 2004 Appellate Court Düsseldorf [15 U 88/03] (Mobile car phones case) <http://cisgw3.law.pace.edu/cases/040421g3.html>.

66 Magnus *Festschrift Kritzer* 320-321.

67 Schroeter in *Slechtriem/Schwenzer Commentary* Art 14 paras 62-64.

68 **Austria** 17 December 2003 Supreme Court (Tantalum powder case) <http://cisgw3.law.pace.edu/cases/031217a3.html>; **Austria** 1 February 2005 Appellate Court Innsbruck (Powdered tantulum case) <http://cisgw3.law.pace.edu/cases/050201a3.html>.

69 Schroeter in *Slechtriem/Schwenzer Commentary* Art 14 para 66.

therefore falls within the scope of the CISG.⁷⁰ It is simply not a risk that can be ascribed to the party in such circumstances. If the party using the standard terms wishes to include such terms, it needs to specifically inform the other party of their existence and inclusion. In the UNIDROIT principles it is stated that a party is not bound to a term that the party by virtue of their content, language or presentation are of such a character that it could not reasonably have expected them to be included in the standard terms.⁷¹

8. Rule 8. Where there is a conflict between negotiated terms and standard terms in the contract, the negotiated terms override the standard terms.

- 8.1. This is a familiar rule of contractual interpretation found in many legal systems. It is based on the premise that the actual intentions of the parties should take precedence over presumed intentions.⁷²
- 8.2. Standard terms are by definition prepared in advance by one party or a third person and incorporated in an individual contract without their content being discussed by the parties. It is therefore logical that whenever the parties specifically negotiate and agree on particular provisions of their contract, such provisions will prevail over conflicting provisions contained in the standard terms since they are more likely to reflect the intention of the parties in the given case.⁷³

9. Rule 9. If the meaning of a standard term provided by one party remains ambiguous despite interpretation the meaning more favourable to the other party shall prevail.

- 9.1. Rule 9 embodies the *contra proferentem* rule. This is an internationally well known rule of interpretation and it is generally regarded by commentators to apply under the CISG as well.⁷⁴ Honnold explains that "Article 8(2) places the burden on one who prepares a communication or who drafts a contract to communicate clearly to a reasonable person in the same position as the other party."⁷⁵ This is particularly important in international transactions where parties originate from different cultural, language and business backgrounds. Article 8(2) places the burden on the party drafting the agreement or making a statement.⁷⁶

70 See Schroeter in *Schlechtriem/Schwenzer Commentary* Art 14 para 35 for examples of such clauses in the case law.

71 Comment 1 to Art 2.1.20. See also Schmidt-Kessel *Schlechtriem/Schwenzer Commentary* Art 8 par 63; **Germany** 21 April 2004 Appellate Court Düsseldorf [15 U 88/03] (Mobile car phones case) <http://cisgw3.law.pace.edu/cases/040421g3.html>.

72 Schmidt-Kessel in *Schlechtriem/Schwenzer* Art 8 par 64. See also the UNIDROIT Principles Art 2.1.21

73 Comment 1 to Art 2.1.21 of PICC.

74 Honnold *Uniform Law for International Sales under the 1980 United Nations Convention* (3rd ed 1999) para 107.1; Staudinger/Magnus Art 8 para 18; Schmidt-Kessel in *Schlechtriem/Schwenzer Commentary* Art 14 para 49.

75 Honnold *Uniform Law* para 107.1; Staudinger/Magnus Art 8 para. 18; Schmidt-Kessel in *Schlechtriem/Schwenzer Commentary* Art 8 para 49.

76 Honnold *Uniform Law* para 107.1.

9.2. The *contra proferentem* rule was applied in the Chinese *Cysteine* arbitration case where the arbitration tribunal held:⁷⁷

Both parties' interpretations of Clause 5 of the Contract make sense to a certain extent. The Tribunal cannot locate a guide from the CISG -- which both parties agreed to have as the governing law -- to solve the problem. However, the Tribunal notes that Clause 5 is from the standard contract drafted by the [Seller]. According to the basic principle of contract interpretation -- contra proferentem -- if contract terms supplied by one party are unclear, an interpretation against that party shall be adopted.

9.3. All the terms of the contract must be interpreted according to the general rules of interpretation of the CISG contained in article 8.⁷⁸ In this context the provisions of Art 8(3) which requires interpretation in the light of all the relevant circumstances of the case including the negotiations between the parties is particularly important. Where for instance the parties did have negotiations on the issue covered by the ambiguous standard term, such negotiations must be taken into account.⁷⁹

10. Rule 10. Where both parties seek to incorporate standard terms and reach agreement except on those terms, a contract is concluded on the basis of the negotiated terms and of any standard terms which are common in substance unless one party clearly indicates in advance, or later on but without undue delay objects to the conclusion of the contract on that basis.

10.1. This Rule deals with the so-called battle of forms. Differences between the offer and acceptance may arise where both parties insist on the use of their standard terms prior to the conclusion of the contract and it is unclear from the facts which set of standard terms should prevail. In most cases the parties are in agreement on the negotiated part of their agreement, but the two sets of standard terms will invariably be in conflict as the standard terms on issues such as jurisdiction, applicable law, time limits, notifications, and limitation of liability will favour the party relying on its own terms.⁸⁰

10.2. The issue has given rise to a substantial body of literature,⁸¹ far outstripping the relative

77 **China** 7 January 2000 CIETAC Arbitration proceeding (*Cysteine case*) <http://cisgw3.law.pace.edu/cases/000107c1.html> See also **Germany** 31 March 2008 Appellate Court Stuttgart (*Automobile case*) <http://cisgw3.law.pace.edu/cases/080331g1.html>; .

78 See Schmidt-Kessel in *Schlechtriem/Schwenzer Commentary* Art 8 paras 1-2; Zuppi in *Kröll/Mistelis/Perales Viscasillas CISG* Art 8 para 1-2; Staudinger/Magnus Art 8 para 1-2.

79 Schmidt-Kessel in *Schlechtriem/Schwenzer Commentary* Art 8 para 49.

80 Schroeter in *Schlechtriem/Schwenzer Commentary* Art 19 par 31; *Staudinger/Magnus* Art 19 para 20; Ferrari in *Kröll/Mistelis/Perales Viscasillas CISG* Art 19 para 14.

81 See for instance Blodgett PC "The U.N. Convention on the Sale of Goods and the 'Battle of the Forms' 18 Colorado Lawyer (1989) 423-430; Fejös A *Formation of Contracts in International Transactions: The Issue of Battle of the Forms under the CISG and the UCC* (Thesis, Central European University, Budapest 2006); Magnus U "Last Shot vs. Knock Out -- Still Battle over the Battle of Forms Under the CISG" in Cranston R, Ramberg J & Ziegel J (eds) *Commercial Law Challenges in the 21st Century: Jan Hellner in memoriam* (Stockholm Centre for Commercial Law: Juridiska institutionen 2007) 185-200; Murray JE "The Definitive 'Battle of the Forms': Chaos Revisited" 20 *Journal of Law and Commerce* (Fall 2000) 1-48; Perales Viscasillas P "The 'Battle of the Forms' Under the 1980 United Nations Convention on Contracts for the International Sale of Goods and the UNIDROIT] Principles of International Commercial Contracts" 10 *Pace International Law Review* (1998)

importance of this issue discussing the problem.⁸² The vast amount literature probably obscures the practical importance of the problem⁸³ which has only rarely reared its head in the reported case law.⁸⁴

- 10.3. The German *Milk powder* case⁸⁵ provides a classic example of this type of problem where both the parties referred to their standard forms during the negotiations phase of the contract. It was clear that a contract had been formed, but it was not possible to determine which set of standard terms was actually agreed on. The court was faced with a dilemma that is difficult to resolve on the basis of general principles of the CISG.
- 10.4. The battle of forms issue falls squarely within the scope of the CISG and should not be resolved with reference to domestic law as it deals with the contract formation process covered in Articles 14-24.⁸⁶
- 10.5. The battle of forms problem was discussed during the drafting process of the CISG, but could not be resolved.⁸⁷ A number of different solutions have been offered to resolve the problem.⁸⁸ The two main approaches are:

97-155; Perales Viscasillas P "Battle of the Forms and the Burden of Proof: An Analysis of BGH 9 January 2002" 6 *Vindobona Journal of International Commercial Law and Arbitration* (2002) 217-228; Schlechtriem P "Kollidierende Geschäftsbedingungen im internationalen Vertragsrecht", in: Thume (ed), *Festschrift für Rolf Herber zum 70. Geburtstag*, (Neuwied Luchterhand 1999) 36-49; Eiselen S & Bergenthal S "The Battle of Forms: A Comparative Analysis" 2006 *CILSA* 214-240.

82 See Schroeter in Schlechtriem/Schwenzer Art 19 paras 31 ff; Honnold JO *Uniform Law for International Sales under the 1980 United Nations Convention* (2nd ed) para 170.4. See however, Ferrari in *Kröll/Mistelis/Perales Viscasillas CISG* Art 19 para 14. The issue has cropped up in the following cases: **United States** 25 July 2008 Federal District Court [Pennsylvania] (*Norfolk Southern Railway Company v. Power Source Supply, Inc.*) <http://cisgw3.law.pace.edu/cases/080725u1.html>; **Germany** 4 October 2002 Appellate Court Koblenz (Concrete slabs case) [<http://cisgw3.law.pace.edu/cases/021004g1.html>]; **Germany** 11 March 1998 Appellate Court München (Cashmere sweaters case) <http://cisgw3.law.pace.edu/cases/980311g1.html>; **Germany** 24 May 2006 Appellate Court Köln (Shock-cushioning seat case) <http://cisgw3.law.pace.edu/cases/060524g1.html>; **Germany** 6 October 1995 Lower Court Kehl (Knitware case) <http://cisgw3.law.pace.edu/cases/951006g1.html>; **France** 16 July 1998 Supreme Court (*Les Verreries de Saint Gobain v. Martinswerk*) <http://cisgw3.law.pace.edu/cases/980716f1.html>; **Germany** 9 January 2002 Supreme Court (Powdered milk case) <http://cisgw3.law.pace.edu/cases/020109g1.html>; **Germany** 25 July 2003 Appellate Court Düsseldorf (Rubber sealing parts case) <http://cisgw3.law.pace.edu/cases/030725g1.html>; **Germany** 26 June 2006 Appellate Court Frankfurt (Printed goods case) <http://cisgw3.law.pace.edu/cases/060626g1.html>;

83 See Honnold Uniform Law for International Sales under the 1980 United Nations Convention 2nd ed 1999 par 170.4; Schroeter in in Schlechtriem/Schwenzer Art 19 para 34.

84 See for instance **Germany** 6 October 1995 Lower Court Kehl (Knitware case) <http://cisgw3.law.pace.edu/cases/951006g1.html>; **France** 16 July 1998 Supreme Court (*Les Verreries de Saint Gobain v. Martinswerk*) <http://cisgw3.law.pace.edu/cases/980716f1.html>; **Germany** 9 January 2002 Supreme Court (Powdered milk case) <http://cisgw3.law.pace.edu/cases/020109g1.html>; **Germany** 25 July 2003 Appellate Court Düsseldorf (Rubber sealing parts case) <http://cisgw3.law.pace.edu/cases/030725g1.html>; **Germany** 26 June 2006 Appellate Court Frankfurt (Printed goods case) <http://cisgw3.law.pace.edu/cases/060626g1.html>.

85 **Germany** 9 January 2002 Supreme Court (Powdered milk case) <http://cisgw3.law.pace.edu/cases/020109g1.html>; Austria 13 September 2001 Supreme Court (Toiletory kits and attaché cases case) <http://cisgw3.law.pace.edu/cases/010913a3.html>.

86 Schroeter in *Slechtriem/Schwenzer Commentary* Art 19 par 31; Eiselen & Bergenthal 2006 *CILSA* 219-220; Staudinger/Magnus Art 19 para 20.

87 Ferrari in *Kröll/Mistelis/Perales Viscasillas CISG* Art 19 para 14; Schroeter in *Slechtriem/Schwenzer Commentary* Art 19 par 33; Staudinger/Magnus Art 19 paras 5 & 20; Eiselen & Bergenthal 2006 *CILSA* .

88 Eiselen & Bergenthal 2006 *CILSA* 216.

- (a) Last shot approach. This approach simply concludes that the party who succeeds in getting the last word in without the other party objecting, will be successful in getting its standard terms included.⁸⁹ It is based on the mirror image rule requiring the acceptance to exactly mirror the offer.⁹⁰
- (b) Knock-out approach. This approach concludes that the parties are in agreement on the main terms and that all standard terms which are not in conflict, will form part of the agreement. Conflicting terms are excluded and replaced by the dispositive or residual law applicable.⁹¹

10.6. It would seem that the knock-out rule is favoured by the majority of commentators⁹² and the case law,⁹³ although there is also support for the last shot rule.⁹⁴ The knock-out approach is also the approach adopted in the UNIDROIT Principles.⁹⁵ The knock-out rule has the advantage that it is in conformity with the intention of typical parties in international commercial relations and leads to acceptable results in cross-border trade situations.⁹⁶ The rule avoids an arbitrary choice between the two sets of competing standard terms, instead using only those elements which are common to both sets. This accords with the actual intention of both parties. Although the last shot rule seems to be in accordance with a strictly literal interpretation of Article 19, it often leads to results

89 Kelso JC 'The United Nations Convention on Contracts for the International Sale of Goods: contract formation and the battle of forms' 21 (1982/83) *Columbia Journal of Transnational Law* 529–556 at IV, available online at: <http://www.cisg.law.pace.edu/cisg/biblio/kelso.html>; Herber R & Czerwenka GB *Internationales Kaufrecht* (1991) art 19 para 18; Perales Viscasillas "'Battle of the Forms" under the 1980 United Nations Convention on Contracts for the International Sale of Goods: a comparison with section 2–207 UCC and the UNIDROIT Principles' 10 (1998) *Pace International Law Review* Heading II.

90 Eiselen & Bergenthal 2006 *CILSA* 217-218.

91 Schroeter in *Schlechtriem/Schwenzer Commentary* Art 19 para 35 and the authorities quoted in fn 118.

92 Schroeter in *Schlechtriem/Schwenzer Commentary* Art 19 para 36-38 and the authorities quoted in fn 121. See however, Ferrari in *Kröll/Mistelis/Perales Viscasillas CISG Art 19 para 15*.

93 **Germany** 9 January 2002 Supreme Court (Powdered milk case) <http://cisgw3.law.pace.edu/cases/020109g1.html>; **Germany** 6 October 1995 Lower Court Kehl (Knitware case) <http://cisgw3.law.pace.edu/cases/951006g1.html>; **France** 16 July 1998 Supreme Court (*Les Verreries de Saint Gobain v. Martinswerk*) <http://cisgw3.law.pace.edu/cases/980716f1.html>; **Germany** 25 July 2003 Appellate Court Düsseldorf (Rubber sealing parts case) <http://cisgw3.law.pace.edu/cases/030725g1.html>; **Germany** 26 June 2006 Appellate Court Frankfurt (Printed goods case) <http://cisgw3.law.pace.edu/cases/060626g1.html>; .

94 See Perales Viscasillas 10 (1998) *Pace International Law Review* VI(3); Farnsworth in Bianca & Bonell *Commentary on the International Sales Law* (Giuffrè Milan 1987); Kelso JC 'The United Nations Convention on Contracts for the International Sale of Goods: contract formation and the battle of forms' 21 (1982/83) *Columbia Journal of Transnational Law* 529–556 at IV, available online at: <http://www.cisg.law.pace.edu/cisg/biblio/kelso.html>; Herber R & Czerwenka GB *Internationales Kaufrecht* (1991) art 19 para 18; Piltz B *Internationales Kaufrecht. Das UN-Kaufrecht in praxisorientierter Darstellung* 2nd ed (Beck München 2008) para 3-108 ff. See also **United States** 25 July 2008 Federal District Court [Pennsylvania] (*Norfolk Southern Railway Company v. Power Source Supply, Inc.*) <http://cisgw3.law.pace.edu/cases/080725u1.html>; **Germany** 4 October 2002 Appellate Court Koblenz (Concrete slabs case) [<http://cisgw3.law.pace.edu/cases/021004g1.html>]; **Germany** 11 March 1998 Appellate Court München (Cashmere sweaters case) <http://cisgw3.law.pace.edu/cases/980311g1.html>; **Germany** 24 May 2006 Appellate Court Köln (Shock-cushioning seat case) <http://cisgw3.law.pace.edu/cases/060524g1.html>]

95 See Art 2.1.22. it is also the approach adopted in the American Uniform Commercial Code – see § 2–207(3).

96 Schroeter in *Schlechtriem/Schwenzer Commentary* Art 19 para 38.

which are random, casuistic, unfair and very difficult to foresee for the parties.⁹⁷

10.7. In the German *Powdered milk* case the court justified the choice for the knock-out rule as follows:⁹⁸

The Court of Appeals correctly assumed that the partial contradiction of the referenced general terms and conditions of [buyer 1] and [seller 1] did not lead to the failure of the contract within the meaning of Art. 19(1) and (3) CISG because of the lack of a consensus (dissent). Its judicial appraisal, that the parties have indicated by the execution of the contract that they did not consider the lack of an agreement between the mutual conditions of contract as essential within the meaning of Art. 19 CISG, cannot be legally challenged and is expressly accepted by the appeal.

*The question to what extent colliding general terms and conditions become an integral part of a contract where the CISG applies, is answered in different ways in the legal literature. According to the (probably) prevailing opinion, partially diverging general terms and conditions become an integral part of a contract (only) insofar as they do not contradict each other; the statutory provisions apply to the rest (so-called "rest validity theory"; e.g., Achilles, *Komm. zum UN-Kaufrechtsübereinkommen [Commentary to the CISG]*, Art. 19 ¶ 5; Schlechtriem/Slechtriem, *CISG (3d ed.)*, Art. 19 ¶ 20, esp. p. 226; Staudinger/Magnus, *CISG (1999)*, Art. 19 ¶ 23). Whether there is such a contradiction that impedes the integration, cannot be determined only by an interpretation of the wording of individual clauses, but only upon the full appraisal of all relevant provisions.*

10.8. The knock-out approach will apply to a battle of forms situation unless a party has explicitly excluded the operation of the rule by explicitly indicating in advance that it will not be bound by other standard terms than its own. The mere inclusion of such a clause in the standard terms should not be sufficient.⁹⁹

10.9. The CISG fulfils a gap filling role in the sense that it only applies in so far as the parties have not reached agreement on particular issues. The agreement of the parties takes precedence over the CISG in terms of Article 6.¹⁰⁰ Accordingly, where the parties have common elements in their standard terms and both parties have indicated that they wish to incorporate those standard terms, those common elements should take precedence over custom and the provisions of the CISG. In determining which parts are common and which parts are conflicting, a court should consider the standard terms as a whole and should not consider clauses in isolation.¹⁰¹ For instance, where a contract contains an arbitration clause that is common to both sets of standard terms (ie arbitration under the auspices of the International Chamber of Commerce, Paris and its rules) the arbitration clause will apply and exclude litigation in the ordinary courts.

97 Honnold *Uniform Law* §170.3 Schroeter in *Slechtriem/Schwenzer Commentary* Art 19 para 35.

98 **Germany** 9 January 2002 Supreme Court (*Powdered milk case*)
<http://cisgw3.law.pace.edu/cases/020109g1.html>.

99 See Comment 3 to Art 2.1.22 of the UNIDROIT Principles.

100 See Schwenzer Hachem *Slechtriem/Schwenzer Commentary* Art 6 paras 2-6; Mistelis in *Kröll/Mistelis/Perales Viscasillas CISG* Art 6 paras 8-10.

101 Schroeter in *Slechtriem/Schwenzer Commentary* Art 19 para 50.