The Incorporation of Standard Terms in Electronic Communications under the CISG

Diplomarbeit
zur Erlangung des akademischen Grades
Magistra der Rechtswissenschaften
im Diplomstudium
Rechtswissenschaften
EIDESSTATTLICHE ERKLÄRUNG

Ich erkläre an Eides statt, dass ich die vorliegende Diplomarbeit selbstständig und ohne fremde Hilfe verfasst, andere als die angegebenen Quellen und Hilfsmittel nicht benutzt bzw. die wörtlich oder sinngemäß entnommenen Stellen als solche kenntlich gemacht habe.

Die vorliegende Diplomarbeit ist mit dem elektronisch übermittelten Texdokument identisch.

Linz, 12.6.2018

Christina Geißler
Table of Contents

Table of Abbreviations .................................................................................................................. 5
I. Introduction .................................................................................................................................. 6
II. Statutory Provision within the CISG ......................................................................................... 6
III. Incorporation to the Contract .................................................................................................. 7
   A. Offeror’s Clear Intent ............................................................................................................... 8
      1. Assessment of Intent acc to Art 8 CISG ............................................................................... 8
      2. Language of Submitted Standard Terms .............................................................................. 8
         a) General Rule .................................................................................................................... 8
         b) Third Language ................................................................................................................ 9
         c) World Language ................................................................................................................. 9
   B. Sufficient Availability .............................................................................................................. 9
      1. Sending of Standard Terms ................................................................................................. 10
      2. Making Terms Otherwise Available .................................................................................... 10
         a) At Conclusion of the Contract among Present Parties ...................................................... 11
         b) Provision of Standard Terms on the Internet ................................................................... 11
            (1) Contract Concluded on the Internet ........................................................................... 11
            (2) Conclusion of Contract Offline .................................................................................... 12
   C. Time of Notice ......................................................................................................................... 13
   D. Acceptance of the Offer .......................................................................................................... 14
      1. Express Acceptance .............................................................................................................. 14
      2. Acceptance by Conduct ........................................................................................................ 14
      3. Acceptance by Silence or Inactivity .................................................................................... 15
   E. Effectiveness of the Acceptance ............................................................................................... 15
      1. Declaration of Assent Reaching the Offeror ........................................................................ 16
      2. Declaration of Assent Not Reaching the Offeror ................................................................. 16
      3. Time of Assent ..................................................................................................................... 16
   F. Burden of Proof ......................................................................................................................... 17
   G. Battle of Forms ......................................................................................................................... 18
      1. Resolving the Battle of Forms ............................................................................................... 18
      2. Non-Material Change ........................................................................................................... 18
      3. Material Change .................................................................................................................. 19
      4. Last Shot Rule ...................................................................................................................... 19
         a) Requirement for Application ............................................................................................ 20
         b) Support .............................................................................................................................. 20
5. Knock Out Rule ................................................................. 21
   a) Requirements for Application ............................................. 21
      (1) Deviation from Art 19 CISG ........................................... 21
      (2) Conclusion of a Contract ............................................... 21
      (3) Content of the Contract ................................................. 22
      (4) Determination of Common Terms .................................... 22
   b) Support ............................................................................. 22
   c) Criticism ........................................................................... 23

6. Recourse to National Law and First Shot Rule .................................. 23

IV. Content of Standard Terms .......................................................... 24

V. Conclusion .................................................................................... 24

Bibliography ......................................................................................... 26
Table of Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>ABGB</td>
<td>Allgemeines Bürgerliches Gesetzbuch (Austrian Civil Code)</td>
</tr>
<tr>
<td>AC</td>
<td>CISG Advisory Council</td>
</tr>
<tr>
<td>acc</td>
<td>according</td>
</tr>
<tr>
<td>Art</td>
<td>Article</td>
</tr>
<tr>
<td>BGB</td>
<td>Bürgerliches Gesetzbuch (German Civil Code)</td>
</tr>
<tr>
<td>BGBl</td>
<td>Bundesgesetzblatt (Austrian Federal Law Gazette)</td>
</tr>
<tr>
<td>BGH</td>
<td>Bundesgerichtshof (German Supreme Court)</td>
</tr>
<tr>
<td>cf</td>
<td>compare with</td>
</tr>
<tr>
<td>ea</td>
<td>and others</td>
</tr>
<tr>
<td>et seq/seqq</td>
<td>and the following</td>
</tr>
<tr>
<td>FS</td>
<td>Festschrift (commemorative book)</td>
</tr>
<tr>
<td>GmbH</td>
<td>Gesellschaft mit beschränkter Haftung (limited liability company)</td>
</tr>
<tr>
<td>HG</td>
<td>Handelsgericht (Commercial Court)</td>
</tr>
<tr>
<td>HGB</td>
<td>Handelsgesetzbuch (German Commercial Code)</td>
</tr>
<tr>
<td>IHR</td>
<td>Internationales Handelsrecht</td>
</tr>
<tr>
<td>Inc</td>
<td>incorporation</td>
</tr>
<tr>
<td>JBI</td>
<td>Juristische Blätter</td>
</tr>
<tr>
<td>LG</td>
<td>Landesgericht (Circuit Court)</td>
</tr>
<tr>
<td>mn</td>
<td>margin number</td>
</tr>
<tr>
<td>NIPR</td>
<td>Nederlands Internationaal Privaatrecht</td>
</tr>
<tr>
<td>NJW</td>
<td>Neue Juristische Wochenschrift</td>
</tr>
<tr>
<td>No</td>
<td>number</td>
</tr>
<tr>
<td>OGH</td>
<td>Oberster Gerichtshof (Austrian Supreme Court)</td>
</tr>
<tr>
<td>OLG</td>
<td>Oberlandesgericht (Intermediate Court of Appeals)</td>
</tr>
<tr>
<td>para</td>
<td>paragraph</td>
</tr>
<tr>
<td>PECL</td>
<td>Principles of European Contract Law</td>
</tr>
<tr>
<td>RIW</td>
<td>Recht der Internationalen Wirtschaft</td>
</tr>
<tr>
<td>UN</td>
<td>United Nations</td>
</tr>
<tr>
<td>UNCITRAL</td>
<td>United Nations Commission on International Trade Law</td>
</tr>
<tr>
<td>UNIDROIT</td>
<td>International Institute for the Unification of Private Law</td>
</tr>
<tr>
<td>US</td>
<td>United States</td>
</tr>
<tr>
<td>v</td>
<td>versus</td>
</tr>
<tr>
<td>VJ</td>
<td>Vindobona Journal</td>
</tr>
<tr>
<td>wbl</td>
<td>Wirtschaftsrechtliche Blätter</td>
</tr>
<tr>
<td>ZfRV</td>
<td>Zeitschrift für Europarecht, Int Privatrecht und Rechtsvergleichung</td>
</tr>
</tbody>
</table>
I. Introduction

International trade and globalization have created a demand for a legal framework that governs international business-to-business contracts on the sale of goods. This led to the introduction of the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG) of 11 April 1980, BGBl 96/1988 which provides such framework. By the end of 2015 the CISG had been adopted by 84 states.¹

In application of the CISG, the incorporation of standard terms to a contract is a significant aspect that often leads to dispute. The present thesis deals with the incorporation of standard terms under the CISG. It particularly focusses on the incorporation of terms by means of electronic communications. Starting with the provisions on incorporation found within the CISG, the thesis will then deal with the respective requirements to incorporate standard terms successfully. With regard to this, there will be an emphasis on the relevant prerequisites in use of electronic communications. Since offer and acceptance do not always correspond with regard to the standard terms, the practically relevant “battle of forms” will be addressed in the last part of this thesis.

II. Statutory Provision within the CISG

The CISG lacks explicit wording on several topics concerning the conclusion of contracts. Among those are the incorporation of standard terms and the battle of forms if each party attempts to include its very own set of standard terms.² Due to this situation, there is consent that the incorporation follows the regime of Art 14 et seqq of the CISG. A recourse to the applicable national law by following the rules on conflict of laws is rejected by the vast majority of scholars³ as there is no gap within the scope of the CISG present.⁴ Thus, the application of the UNIDROIT Principles⁵ and the Principles of European Contract Law⁶ (PECL) has to be denied.⁷ Scholars and courts agree that the inclusion of standard terms follows the rules for the formation and the interpretation of contracts under the CISG.⁸ Art 14 CISG reads as follows:

“(1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods

¹ Kritzer, CISG: Table of Contracting States.
² Cf Schlechtriem/Schroeter, Internationales UN-Kaufrecht⁶ mn 239.
³ Cf Magnus in Staudinger von, BGB Art 14 CISG mn 40.
⁴ Cf Dornis in Honsell, UN-Kaufrecht² Art 14 CISG mn 36.
⁷ Cf Ferrari in MüKo HGB⁴ Art 14 CISG mn 38.
and expressly or implicitly fixes or makes provision for determining the quantity and the price.

(2) A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal."

The formation of a contract and the inclusion of standard terms is therefore successful if there are an offer and a full and corresponding acceptance in the sense of Art 14 CISG.⁹

III. Incorporation to the Contract

Art 14 CISG stipulates that an offer needs to be sufficiently definite concerning the respective good. It also requires the intention of the offeror to be bound to the contract in case of acceptance by the other party. If such intention is not present, it constitutes merely an *invitatio ad offerendum*, an invitation to make an offer. This is the case if an offer is not addressed to a specific offeree but to a larger number of possible business partners.¹⁰

Any party concluding a contract will usually seek to incorporate its own set of standard terms to the respective contract. The party therefore needs to make the terms a valid part of the offer. The standard terms often do not form part of the offer where the contract has been concluded via telephone, fax or e-mail. In these situations the standard terms have usually not been handed over to the offeree. As a consequence incorporation to the contract fails.¹¹

Unless there is a trade usage or an agreement on the basis of contractual negotiations with regard to the standard terms, the offeror needs to submit the offer with reference to the standard terms and the offeree needs to be aware of the content.¹² If the parties have agreed to deviate from the procedure in Art 14 CISG by an agreement acc to Art 6 CISG, or have established any trade usage or practice acc to Art 9 CISG, the approach may deviate.¹³

A leading case to decide whether the incorporation to the offer has been successful is the German Machinery case. In accordance with this decision, there are three requirements that need to be met. The first requirement is that the intention to include the standard terms into the offer must be clear. Furthermore, the standard terms have to be made sufficiently available to the other party. Lastly, the incorporation of standard terms must be accepted by the other party.¹⁴

---

⁹ Cf Magnus in Staudinger von, BGB Introduction to Art 14 CISG et seqq mn 2.
¹⁰ Cf Schlechtriem/Butler, UN Law on International Sales mn 73.
¹² Cf Schroeter in Schlechtriem/Schwenzer, UN-Kaufrecht Art 14 CISG mn 36.
¹⁴ BGH VIII ZR 60/01 = NJW 2002, 370 = CISG-online 617.
A. Offeror’s Clear Intent

The first requirement to successfully incorporate standard terms to a contract is the offeror’s clear intent to do so.\textsuperscript{15} Whether a party has the intent to include a specific set of standard terms to a contract has to be interpreted in line with Art 8 CISG.

1. Assessment of Intent acc to Art 8 CISG

Art 8 CISG on the interpretation of statements and conduct needs to be considered to determine the scope of the offer. In accordance with Art 8(1) CISG primarily the statements and other conduct of parties need to be interpreted according to the parties’ intent if the other party “knew or could not have been unaware what that intent was”.

If Art 8(1) CISG cannot be applied, the relevant threshold is the understanding of a reasonable third party. Following the Machinery case, intent requires that the intention of one party to include their terms and conditions into the contract needs to be apparent to one’s counterpart.\textsuperscript{16} In these situations Art 8(2) CISG needs to be considered. Art 8(2) CISG stipulates that the decisive factor is the understanding of a reasonable party in the same circumstances. Thus, the other party needs to be aware of the offeror’s intention to include a specific set of terms if any reasonable third person would have been aware of this intended inclusion. If the other party did not have to be aware of the proposed standard terms because the intention by the offeror was not clear, the terms do not form part of the offer. This understanding of a reasonable person is defined in Art 8(3) CISG. According to this provision all relevant circumstances, including negotiations or usages, have to be considered.\textsuperscript{17} Hence, intent is given if a reasonable third party was allowed to assume the standard terms to form part of the offer as conveyed to the offeree.\textsuperscript{18}

2. Language of Submitted Standard Terms

The case law with regard to the language used in the provided standard terms is to some extent inconsistent.

a) General Rule

Generally, the text has to be provided in the language(s) used during the contractual negotiations or comprehensible to the offeree.\textsuperscript{19} This does not apply if any agreement between the parties, trade usage acc to Art 9 CISG or practice allows for a different language to be used.\textsuperscript{20}

\textsuperscript{15} BGH VIII ZR 60/01 = NJW 2002, 370 = CISG-online 617.
\textsuperscript{16} BGH VIII ZR 60/01 = NJW 2002, 370 = CISG-online 617.
\textsuperscript{17} Cf Ferrari in Kröll/Mistelis/Perales Viscasillas, CISG\textsuperscript{2} Art 14 CISG mn 38 et seq.
\textsuperscript{18} OGH 7 Ob 175/05v IHR 2006, 31 = CISG-online 1093.
\textsuperscript{19} Cf Magnus in Staudinger von, BGB Art 14 CISG mn 41b.
\textsuperscript{20} Cf Piltz, VJ 2004, 233.
b) Third Language
Where terms are drafted in a third language, the incorporation is also not hindered if the terms have been referred to in the language used in negotiations or the language of the contract unless the offeree did not declare unreserved acceptance.\(^{21}\) If the reference to the standard terms is already in a third language, an incorporation has to be denied. This avoids any infringement of the offeree’s rights as the offeree did not have the opportunity to take notice of the proposed inclusion.\(^{22}\) It has been held by a German court that incorporation of standard terms provided in a third language is only given if an employee of the offeree who is involved in the contract negotiations is familiar with the respective language.\(^{23}\)

c) World Language
The Austrian Supreme Court has decided that the incorporation of standard terms in a language other than the language of the contract is appropriate if the text of the standard terms is written in a “world language” such as German. The court found that standard terms drafted in a language other than the one of the contract or the offeree may be incorporated. Whether the terms form part of the offer depends on whether the desired incorporation was recognisable and reasonable. Recognisability and reasonableness need to be assessed on a case-by-case basis. The reasonableness of using a language other than the one used in the contract or one familiar to the offeree needs to be decided upon duration, intensity and significance of the business relationship as well as the spread of the language within a cultural sphere. The Austrian Supreme Court found that the price paid, the earlier business connection and the use of a German speaking intermediary were sufficient to allow the use of the “world language” German.\(^{24}\) This view was not shared by a German court, which denied inclusion of standard terms in such language.\(^{25}\) Furthermore, the standard of a “world language” is also criticized because there is no guidance on how to classify such a language. Even the eligibility of English to obtain the status of a “world language” is doubted. It is the intelligibility for the individual addressee which is decisive. Hence, any classification of language, such as awarding English or German the status of a “world language”, should not be taken into account under the CISG.\(^{26}\)

B. Sufficient Availability

There is a difference of opinion among scholars and courts to what extent the standard terms have to be provided to the other party. It is argued that for successful incorporation it is necessary that the other party has the possibility to take notice of the terms. Thus, the standard

\(^{21}\) OGH 7 Ob 176/98b = ecolex 1999/329.
\(^{23}\) OLG Düsseldorf I-15 U 88/03 = IHR 2005, 24 = CISG-online 915.
\(^{24}\) OGH 7 Ob 275/03x = JBI 2004, 449 = CISG-online 828.
\(^{25}\) OLG Düsseldorf I 23 U 70/03 = IHR 2004, 108 = CISG-online 821.
\(^{26}\) Cf Schroeter in Schlechtriem/Schwenzer, UN-Kaufrecht\(^{6}\) Art 14 CISG mn 66.
terms have to be forwarded to the offeree or the offeror has to make the standard terms otherwise accessible. Contrary to this, it is deemed sufficient that a mere reference is provided.  

1. Sending of Standard Terms

In any case, the offeree has been made aware of the relevant terms if they have been forwarded to the offeree. The offeree has been made aware of the standard terms if the full text is included in the forwarded offer itself. If the offer is submitted via e-mail, the standard terms have to be attached as a file. The text may also be sent separately from the offer. This, however, needs to take place before conclusion of the contract. If the sending fails due to technical issues, the legal consequences are determined by Art 24 CISG. The addressee bears the risk if the error occurs in the addressee's sphere. According to Art 24 CISG the text has been delivered if the written statement has entered the addressee's sphere of influence in a manner that he could take note of the text given an ordinary run of events. However, actual knowledge is not required.

2. Making Terms Otherwise Available

The legal concept of “made otherwise accessible” was introduced by the German Supreme Court in the Machinery case. In this case, the standard terms had not been attached to the offer. Here the court held that this way of proceeding was not sufficient in international trade. As the offeree only had the mere possibility of finding the text of the standard terms by himself, the terms did not form an integral part of the offer. To achieve a valid incorporation, it would have been required of the offeror to submit the text of the standard terms or to make them available in a different way. In accordance with Art 7 CISG a party has to provide all relevant information in an easily accessible way. Any party not complying with this standard violates the duty to disclose and to cooperate. This also follows from the principle of good faith acc to Art 7(1) CISG and the fact that it is a conceivably easy task for the offeror to attach a set of standard terms to the offer. As both parties will usually try to avoid delays with regard to the conclusion of the contract, the offeree should not have to find information on the standard terms by himself. The offeree can also not be expected to sign to a contract that contains an unknown set of standard terms. It is not considered sufficient if the standard terms are deposited at a chamber or court and the offeree has to call the respective institution for information on the standard terms.

27 Cf Magnus in Staudinger von, BGB Art 14 CISG mn 41.
28 Cf Schroeter in Schlechtriem/Schwenzer, UN-Kaufrecht Art 14 CISG mn 44 et seqq.
29 Cf Magnus in Staudinger von, BGB Art 24 CISG mn 15.
30 BGH VIII ZR 60/01 = NJW 2002, 370 = CISG-online 617.
31 Cf Magnus in Staudinger von, BGB Art 7 CISG mn 48.
32 BGH VIII ZR 60/01 = NJW 2002, 370 = CISG-online 617.
a) At Conclusion of the Contract among Present Parties

The demands of availability are met if the standard terms are handed over to the party present at the time when the contract is concluded. Ample opportunity has to be given to the party to read through the standard terms on the business premises where the contract is concluded. A production of the text without giving the contracting partner time to read through the standard terms is therefore not valid for means of incorporation.\(^{34}\) If the standard terms are printed on the back page of an offer, a reference on the front page is necessary to make the addressee aware of the terms and to successfully incorporate the terms.\(^{35}\) Despite the fact that information can easily be found and retrieved on the internet by anyone, the offeror should not be relieved from his burden to provide the standard terms in a sufficient manner. The argument for smooth and quick transactions between business partners does not serve as adequate justification to contravene with the fundamental principles of the CISG.\(^{36}\)

b) Provision of Standard Terms on the Internet

It is disputable under which circumstances it is sufficient to provide standard terms on the internet. A distinction needs to be drawn between contracts concluded on the internet and those contracts that are concluded offline by means of other communications, such as fax or electronic data interchange.\(^{37}\)

(1) Contract Concluded on the Internet

In case the contract is concluded on the internet on the offeror’s homepage, a hyperlink allowing to access and download the standard terms is regarded to meet the requirements. This only applies if the parties consented to the use of a medium of communication by joint usage.\(^{38}\) A reasonable party in the sense of Art 8(2) CISG has to be capable of finding the standard terms provided in such a manner.\(^{39}\) Regardless the applied procedure by the offeror, it is essential that the standard terms can be printed on paper.\(^{40}\) It needs to be mentioned that the costs of a printout have to be borne by the addressee.\(^{41}\)

Where the contract is concluded via e-mail, an attachment or a link provided in an e-mail that leads the addressee to the standard terms is also deemed eligible. However, it is crucial that the offeree does not have to search for any standard terms proposed by the offeror.\(^{42}\)

The effort of a download imposed on the addressee in these situations can be accepted, as a simple download avoids delays compared to a different method of forwarding. Hence, it does not

---

\(^{34}\) Cf Magnus in Staudinger von, BGB Art 14 CISG mn 41b.

\(^{35}\) Cf Saenger in BeckOK BGB\(^{45}\) Art 14 CISG mn 7 [1 November 2017] (beck).

\(^{36}\) Cf Piltz, VJ 2004, 233.

\(^{37}\) Cf Schroeter in Schlechtriem/Schwenzer, UN-Kaufrecht\(^{46}\) Art 14 CISG mn 49 et seq.

\(^{38}\) Cf Schroeter in Schlechtriem/Schwenzer, UN-Kaufrecht\(^{46}\) Art 14 CISG mn 50.

\(^{39}\) Cf Schroeter in Schlechtriem/Schwenzer, UN-Kaufrecht\(^{46}\) Art 14 CISG mn 49.

\(^{40}\) Cf Ventsch/Kluth, IHR 2003, 224.

\(^{41}\) Cf Gruber in MüKo BGB/III\(^{7}\) Art 14 CISG mn 30.

\(^{42}\) Cf Schwenzer/Mohs, IHR 2006, 239.
violate the offeror’s duty to inform or cooperate and to provide the standard terms prior to conclusion of the contract in a sufficient way. Since the retrieval of a link is a very simple act, it is allowed to demand such action from the offeree.43

If, however, the hyperlink leads to a different webpage where the addressee has to find the standard terms among various versions of these terms, this might not suffice. The same applies to cases in which the landing page also provides content other than a link to access the standard terms.44

According to a dissenting opinion, the addressee can be expected to look for the standard terms on the homepage, given that the homepage is clearly structured.45

(2) Conclusion of Contract Offline

A reference to standard terms that can be found on the internet is not valid if the contract is not being concluded on the internet.46 This also applies if the offeree disclosed an e-mail address to the offeror or if the offeror provided the exact link in non-electronic means of communication. Under these circumstances incorporation should be negated, as retrieval of the standard terms via the internet by providing reference in an e-mail does not meet the requirement of making the standard terms available. This opinion rests on the argument that special technical equipment is needed to gain access to standard terms which are provided online. The addressee has to use special software to open the standard terms as well as the hardware to print it. In addition to that, the retrieval of standard terms is linked to costs as the internet has to be paid for and access to the internet has to exist in the first place. Given the global ambit of the CISG, one cannot assume comprehensive access to the internet for all geographical areas.47

On the contrary it is argued, that the need of extra equipment of costs for printing should not be considered. Software, such as an Acrobat Reader, only needs to be installed once, not separately for every concluded contract. Furthermore, the hurdles to install and operate the program are very low and can be expected from an employee working in any office. It is argued that the digital availability of a text makes it easier to search for key words. The effort to open a link or file is deemed comparable to the turning of a page. There is also no delay in conclusion of the contract as the terms can be retrieved and printed immediately, anytime and anywhere. This depicts an advantage compared to conveyance via ordinary mail. In case an offeree does not have access to the internet and therefore cannot retrieve the standard terms, they still have the possibility to point this circumstance out in their answer to the proposed offer and deny incorporation.48

43 Cf Stiegele/Halter, IHR 2003, 169.
44 Cf Schroeter in Schlechtriem/Schwenzer, UN-Kaufrecht 6 Art 14 CISG mn 49.
45 Cf Gruber in MüKo GGB/III 7 Art 14 CISG mn 30.
46 Cf Ferrari in Kröll/Mistelis/Perales Viscasillas, CISG 2 Art 14 CISG mn 40.
47 Cf Ventsch/Kluth, IHR 2003, 224.
48 Cf Lautenschlager, Auslegung 23 et seq.
Another cornerstone to this approach is a violation of the offeror’s duty to inform the contracting partner. In this situation, it would be up to the offeree’s initiative to gather information in order to be able to assess the risks connected with an offer, which cannot be accepted in light of the offeror’s duties. 49

This view is in line with decisions that deny incorporation under these circumstances such as in the US district court case Roser Technologies, Inc v Carl Schreiber GmbH60. In this decision the seller wanted to incorporate its standard terms by referring to their availability on its website. However, the court clearly denied such incorporation, since the website needed to be navigated in order for the standard terms to be found. In addition, no evidence was provided that the inclusion of the seller’s standard terms had been discussed in previous negotiations, nor had the buyer received a copy of them. Consequently, the incorporation of the seller’s standard terms was denied.51

The incorporation to the offer is successful if a set of standard terms has been applied in previous business relationships, because in this case, the terms are known to the offeree. In these cases a repeated forwarding to the offeree is not deemed necessary.52 A necessary condition for incorporation on this basis is that the standard terms have been validly incorporated to a previous contract. If the standard terms have not been incorporated to a previous contract the incorporation without forwarding is not possible.53

C. Time of Notice

It is necessary that the respective standard terms have been made available to the contracting partner prior to any acceptance of the offer. Only in this situation the offeree can be aware of the offer’s content.54

Standard terms may only be incorporated to the contract after conclusion if the addressee expresses a clear assent to the subsequent inclusion.55 The mere longer lasting performance of a contract does not mount to acceptance of the later submission of standard terms.56

An attempt to incorporate standard terms is in any case not timely and successful if the standard terms are submitted via invoice57 or delivery note58 after conclusion of the contract. The inclusion by reference on the invoice is accepted if there is a constant business relationship still ongoing

49 Cf Ferrari in Kröll/Mistelis/Perales Viscasillas, CISG2 Art 14 CISG mn 40.
50 US District Court, Western District of Pennsylvania 11cv302 ERIE = CISG-online 2490.
51 Also: US Federal District Court Maryland CCB-09-2008 = CISG-online 2177; US District Court, for the Western District of Pennsylvania Civ. A 04-1626 = CISG-online 1363.
52 Cf Ferrari in Kröll/Mistelis/Perales Viscasillas, CISG2 Art 14 CISG mn 40.
53 Cf Schroeter in Schlechtriem/Schwenzer, UN-Kaufrecht6 Art 14 CISG mn 51.
54 Cf Schlechtriem/Schroeter, Internationales UN-Kaufrecht9 mn 255.
55 Cf Magnus in Staudinger von, BGB Art 14 CISG mn 42.
56 US District Court, Delaware 7-140-JJf = CISG-online 1769.
57 Ontario Superior Court of Justice 03-CV-261424CM 3 = CISG-online 1139; LG Neubrandenburg 10 O 74/04 = CISG-online 1190.
58 Cf Schmidt-Kessel/Meyer, IHR 2008, 177 (179).
between the parties and if the reference is discernible to the average reader. The signing of a delivery note, however, is not eligible for inclusion of standard terms. This conclusion needs to be drawn because by signing the delivery note only the receipt of the goods is confirmed. A signature on a delivery note does therefore not constitute assent to the incorporation of standard terms.\(^59\)

**D. Acceptance of the Offer**

The acceptance of an offer including the standard terms follows the general provisions of Art 18 et seqq CISG.\(^60\) If a clear intention and sufficient availability of the terms in an eligible language are given prior to a declaration of assent, an acceptance of the offer also entails a valid incorporation of the standard terms. Incorporation of the standard terms has to be denied where acc to Art 8 CISG acceptance of the offer has to be understood as rejection of the proposed standard terms.\(^61\)

An offer does not necessarily have to be accepted by express means.\(^62\) An acceptance by conduct is also possible. Silence or inactivity itself, however, do not amount to acceptance of an offer.\(^63\)

**1. Express Acceptance**

The corresponding acceptance to an offer, which entails conclusion of the contract, can be submitted by express declaration acc to Art 18(1) CISG. Whether a declaration to accept was effective has to be assessed by application of the competent domestic law. Unless something is subject to a trade usage or other consuetude, the offeror may set out a specific standard with regard to the form of the acceptance. This instrument allows the offeror to only agree to acceptances that meet these requirements.\(^64\)

**2. Acceptance by Conduct**

For the incorporation by conduct from which the intention may be implied, it is necessary that the offeror refers to the standard terms as already discussed. Furthermore, it is crucial that the offeree does not dissent with regard to the validity of the offer.\(^65\) A contract may be concluded by a conduct, which signifies a serious and unambiguous consent to be bound to an offer.\(^66\)

---

\(^{59}\) Cf Schroeter in Schlechtriem/Schwenzer, UN-Kaufrecht\(^6\) Art 14 CISG mn 60.
\(^{60}\) Tribunale di Rovereto 25 August 2006 = CISG-online 1374.
\(^{61}\) Cf Pitz, IHR 2004, 133.
\(^{62}\) OGH 4 Ob 205/05h = CISG-online 1227; OGH 1 Ob 215/12t = IHR 2013, 114 = CISG-online 2438.
\(^{63}\) Cf Ferrari in Kröll/Mistelis/Perales Viscasillas, CISG\(^2\) Art 18 CISG mn 7.
\(^{64}\) Cf Saenger in BeckOK BGB\(^45\) Art 18 CISG mn 2.
\(^{65}\) LG Coburg 22 O 38/06 = IHR 2007, 117 = CISG-online 1447.
\(^{66}\) Cf Saenger in BeckOK BGB\(^45\) Art 18 CISG mn 2.
Eligible conduct is either the shipment of goods or the full or partial payment of the purchase price. According to Ferrari, further examples for conduct indicating assent are the opening of a letter of credit for the purchase price, the dispatch of an invoice or the signature thereof by the buyer, the cashing of a cheque sent with the offer, the processing of the goods by the buyer, the entering into transactions to make the production of the goods possible and the commencing of production.

3. Acceptance by Silence or Inactivity

It is stipulated in Art 18(1) CISG that silence or inactivity can amount to acceptance but it has to be taken into account, that silence or inactivity itself does not suffice. Therefore, other circumstances indicating assent have to be present. These circumstances may be set by practices and trade usages acc to Art 9 CISG or agreements between the parties. Also in cases where business transactions happen continuously on basis of unilaterally proposed standard terms, silence suffices. If, however, parties have their place of business in countries where silence followed by a commercial letter of confirmation does mount to acceptance, or regularly conduct their business in such countries, the offeree’s silence suffices to incorporate a set of standard terms to the contract. In any case, a statement of the offeror that the recipient’s silence mounts to acceptance is without any effect.

The Austrian Supreme Court held that standard terms may be incorporated where a party to a long lasting business relationship repeatedly refers to the application of its standard terms on official business paper and no complaints are made about this reference.

Also, the onward sale of goods to a third person mounts to acceptance of the original offer including the standard terms proposed by the first seller without any additional conduct or declaration.

Whether silence can actually mount to an acceptance has to be interpreted and decided on a case-to-case basis and cannot be generalized.

E. Effectiveness of the Acceptance

The acceptance acc to Art 18 CISG needs to fulfil several requirements in order to take its full effect. Unless Art 18(3) CISG is applicable the declaration of acceptance, be it express or by

---

67 LG Bielefeld 15 O 201/90 = CISG-online 174.
69 Ferrari in Kröll/Mistelis/Perales Viscasillas, CISG² Art 18 CISG mn 8.
70 Cf Magnus in Staudinger von, BGB Art 18 CISG mn 12.
72 Cf Ferrari in Kröll/Mistelis/Perales Viscasillas, CISG² Art 18 CISG mn 10 et seqq.
73 OGH 6 Ob 73/01f = IHR 2002, 74 = CISG-online 644.
74 US District Court, Eastern District of California CV F 09-1424 LJO GSA = CISG-online 2089.
75 Cf Schlechtriem/Butler, UN Law on International Sales mn 87.
conduct, has to reach the offeror. As a general rule the acceptance also has to take place timely within a set or an appropriate period of time, depending on the circumstances.\footnote{Cf Brunner, CISG Art 18 CISG mn 1 et seqq.}  

1. Declaration of Assent Reaching the Offeror  

In accordance with Art 24 and 18(2) CISG, the indication of assent has to reach the offeror to conclude a contract. In addition, receipt of acceptance serves to assess timeliness of the acceptance. Revocation is possible unless the declaration of acceptance has reached the offeror, regardless the tool of communication.\footnote{Cf Saenger in BeckOK BGB\textsuperscript{45} Art 18 CISG mn 3.}  

Similar to an express acceptance, it is also necessary that a notice of the assenting conduct reaches the offeror. This notice can also be conveyed to the offeror by use of a third person.\footnote{Cf Magnus in Staudinger von, BGB Art 18 CISG mn 14.}  

It needs to be noted, that the necessity of arrival acc to Art 18(2) CISG stands in contrast to the mailbox-rule.\footnote{Cf Lüderitz/Fenge in Soergel, BGB/XIII\textsuperscript{13} Art 18 CISG mn 4.} The declaration of assent only becomes effective once it has reached the offeror. The submission of the statement itself does not entail effectiveness of the acceptance unless Art 18(3) CISG applies.\footnote{Cf Magnus in Staudinger von, BGB Art 18 CISG mn 5.}  

2. Declaration of Assent Not Reaching the Offeror  

Acc to Art 18(3) CISG, there are also situations where a notification of the offeror is not needed to conclude a contract. Here, the contract is concluded the moment the act of acceptance is performed. Not only conduct but also verbal declarations are regarded to be eligible for this kind of acceptance, given that the acceptance is declared within the required time period.\footnote{Cf Magnus in Staudinger von, BGB Art 18 CISG mn 14.}  

Since the contract is concluded acc to Art 23 CISG already at the time of performance or declaration, any revocation of the acceptance is not possible. It is under dispute whether the offeror should be notified after acceptance.\footnote{Cf Gruber in MüKo BGB/III\textsuperscript{7} Art 18 CISG mn 19 et seq.}  

Receipt of the acceptance is only dispensable if this follows from the offer, practices between the business partners or international trade usages. In addition to this, parties may, in line with Art 18(3) CISG, also agree that a notification of the offeror is not necessary. Any statement made by parties in this regard needs to be interpreted acc to Art 8 CISG. A clear wording is therefore of utmost importance.\footnote{Cf Magnus in Staudinger von, BGB Art 18 CISG mn 25 et seq.}  

3. Time of Assent  

Acceptance of the offer needs to take place timely. Usually the appropriate period of time, which depends on the object of the contract, results from time for deliberation and time for transmission.
of the acceptance. If a contract, however, is concluded by electronic means of communication, the time for transmission is not granted which follows from Art 20 CISG.\textsuperscript{84}

Unlike an offer submitted via telephone, where immediate acceptance is needed, the situation is different if fax, e-mail or the internet are being used as means of communication. These do not require immediate acceptance, as presence of both parties is not necessarily given. The acceptance, however, needs to take place within an appropriate or specified period of time.\textsuperscript{85}

In pursuance of Art 10(2) of the UNCITRAL Convention on the Use of Electronic Communications in International Contracts\textsuperscript{86}, the time of receipt of an electronic communication is the time when it becomes capable of being retrieved by the addressee at an electronic address designated by the addressee. Electronic communication is presumed to be capable of being retrieved by the addressee when it reaches the addressee’s electronic address.\textsuperscript{87}

If the use of electronic communication creates a face-to-face situation, e.g. a conversation via Skype, the rules for a verbal offer have to be applied and immediate acceptance is needed. This comparability to a phone call is also given if a voice radio is used.\textsuperscript{88}

F. Burden of Proof

The burden of proof that the standard terms have been made sufficiently available to the other party lies on the offeror.\textsuperscript{89} It is therefore recommended that the offeror requires a confirmation from the addressee that the standard terms have been provided prior to acceptance of the offer. Such confirmation can be obtained by having to click a confirmation field before submitting any acceptance.\textsuperscript{90} Where a party claims the existence of special circumstances, such as a trade usage that alters the ordinary rules for availability of the standard terms, the burden of proof with regard to the existence of these asserted facts lies on the providing party.\textsuperscript{91}

Furthermore, the offeror needs to prove the eligibility of the language used for the standard terms.\textsuperscript{92}

Ultimately, the party providing the standard terms generally also has to prove that they have been accepted by the other party alongside the substantive offer.\textsuperscript{93} Whichever party claims the receipt of acceptance on the part of the offeror has to proof this assertion. Contrary to this, it is

\begin{itemize}
  \item \textsuperscript{84} Cf Magnus in Staudinger von, BGB Art 18 CISG mn 18 et seq.
  \item \textsuperscript{85} Cf Saenger in BeckOK BGB\textsuperscript{45} Art 18 CISG mn 3.
  \item \textsuperscript{86} General Assembly, Resolution A/60/21, UNCITRAL Convention on the Use of Electronic Communications in International Contracts, 23 November 2005.
  \item \textsuperscript{87} Art 10(2) of the UNCITRAL Convention on the Use of Electronic Communications in International Contracts.
  \item \textsuperscript{88} Cf Posch in Schwimann/Kodek, ABGB-IV\textsuperscript{4} Art 18 CISG mn 6.
  \item \textsuperscript{89} Cf Ventsch/Kluth, IHR 2003, 224.
  \item \textsuperscript{90} Cf Schroeter in Schlechtriem/Schwenger, UN-Kaufrecht\textsuperscript{6} Art 14 CISG mn 49.
  \item \textsuperscript{91} Piltz, IHR 2004, 133.
  \item \textsuperscript{92} Cf Schmidt-Kessel/Meyer, 2008, 177.
  \item \textsuperscript{93} OLG Düsseldorf I-17 U 22/03 = CISG-online 919.
\end{itemize}
always the acceptant who has to provide evidence for the asserted point in time when the assent by a performed act acc to Art 18(3) CISG has taken place.\footnote{Cf Magnus in Staudinger von, BGB Art 18 CISG mn 30.}

**G. Battle of Forms**

The response to an offer issued by one party is not necessarily always an unconditional acceptance of the proposal. There is a deviation, where acc to Art 19(1) CISG “additions, limitations or other modifications” are being made. Situations arise where the offeror receives an “acceptance” to a set of standard terms they did not submit, or receives a counter offer to incorporate a different set of terms. A so-called “battle of forms” arises, where each party seeks to incorporate its own set of standard terms.

Under the CISG, a battle of forms typically merely unfolds consequences to the content of a contract but not the very existence of such. This is due to the freedom of form under the CISG, codified in Art 11 and 29 CISG. An agreement on the essentialia negotii prior to any reference to standard terms is sufficient to conclude a contract and a written statement is not needed.\footnote{Cf Schlechtriem/Schwenzer, UN-Kaufrecht\textsuperscript{6} Art 19 CISG mn 20.}

1. **Resolving the Battle of Forms**

This battle of forms has to be resolved within the scope of the CISG. Any opinion stating that a recourse to national law is necessary should not be followed.\footnote{Cf Steensgaard, IHR 2015, 89.} It is not entirely clear which approach should be favoured when resolving the battle of forms. The allocation of an approach based on whether any alteration is material or non-material does not solve the controversy on the various approaches.\footnote{Cf Schroeter in Schlechtriem/Schwenzer, UN-Kaufrecht\textsuperscript{6} Art 19 CISG mn 20.}

Resolving the battle of forms is a difficult task for practitioners because the CISG cannot be categorized as belonging to a specific legal system. Additionally, it has not developed from any tradition or customs. As a result, lawyers and judges are unlikely to consider this issue from an objective point of view but rather in the same way it would be dealt with within their national jurisdictions.\footnote{Cf Posch in Schwimann/Kodek, ABGB/IV\textsuperscript{4} Art 19 CISG mn 7.}

A battle of forms cannot arise in the first place where the parties use standardized contractual conditions, Incoterms\textsuperscript{®} or where a trade usage acc to Art 9 CISG exists.\footnote{Cf Kröll/Hennecke, RIW 2001,736 (740).}

2. **Non-Material Change**

Given a non-material alteration to an offer, sufficient solution can be found within Art 19(2) CISG. If the change cannot be regarded material as stipulated in Art 19(2) CISG, an acceptance of the...
offer as altered by the offeree constitutes incorporation of the altered standard terms. The offeror may avoid this by immediate objection or the use of a protective clause. A change of the term for complaints in standard terms for instance has been qualified as not material. Where an altered clause is less advantageous to the party that initially proposed the standard terms, a change is more likely to be considered material. If the parties, however, perform a contract despite a battle of forms, the change is in any case deemed not to be of material nature. Given the circumstances under which a change is of material nature acc to Art 19(3) CISG, the solution provided in Art 19(2) CISG only finds application to a very limited extent, as most changes are material.

3. Material Change

The mere existence of a material change in the sense of Art 19(3) CISG does not terminate the contractual negotiations between the parties. The “acceptance” constitutes a counter offer that again needs to be accepted by the other party following the rules set in Art 18 CISG. The refusal to a counter offer means that any offer has terminated acc to Art 17 CISG. In this situation, it is not possible for the offeror to still conclude a contract even if they are willing to abandon their own standard terms and contract in accordance with the initially made offer. As a consequence, the set of standard terms which the parties finally discussed about finds incorporation. Thus, the wording of Art 19 CISG is affirming the last shot rule. In case the standard terms as proposed by the offeree contain material and non-material changes, no contract would be concluded.

4. Last Shot Rule

The CISG deals with the situation of dismissal and counter offer in Art 19 CISG, which therefore also has to be considered when dealing with a battle of forms. Art 19 CISG incorporates the so-called mirror image-principle, simply indicating that both offer and acceptance must be congruent. This means that the acceptance needs to assent to all points of the offer, including the proposed standard terms, without any alteration. Acc to Art 19(1) and (3) CISG, any material deviation from the original offer renders an acceptance a counter-offer, which again

---

100 Cf Gruber in MüKo BGB/III Art 19 CISG mn 19.
102 LG Baden-Baden 4 O 113/90 = CISG-online 24.
104 BGH VIII ZR 304/00 = IHR 2002, 16 = CISG-online 651.
106 Cf Kröll/Hennecke, RIW 2001, 736.
107 Cf Ferrari in MüKo HGB Art 19 CISG mn 15.
108 Cf Neumayer in FS Giger 521 et seq.
109 Cf Magnus in FS Hellner 188.
110 Cf Steensgaard, IHR 2015, 89 (90).
111 Cf Ferrari in Kröll/Mistelis/Perales Viscasillas, CISG2 Art 19 CISG mn 1.
needs to be accepted to conclude a contract. This indicates that the party that “fires the last shot” in terms of an offer is successful in incorporating its own standard terms.

a) Requirement for Application

Within the theory of the last shot, there are two approaches dealing with the acceptance of the last shot by the offeree. The first one strictly adheres to the mirror image-principle. This approach regards the final offer as accepted by the offeree. Acceptance is given through implied acceptance by conduct, such as shipment of goods. This conduct is interpreted to accept the counter offer in the last shot. The second alternative is of very limited scope, because the offeree is obliged to object to the counter offer, otherwise he is bound to it. In this case, silence would mount to acceptance, which is generally not accepted. Silence may only result in a consequence where a jurisdiction allows for such effect, something only found in very few jurisdictions.  

b) Support

The last shot doctrine is deemed suitable where parties have not commenced with performance of the contract but are still in the stage of negotiating. Also in situations where the standard terms are of indispensable importance to one party, even the UNIDROIT Principles and PECL give credit to the last shot. A party finding itself in such circumstances is, however, obliged to expressly communicate the importance of its own standard terms for the conclusion of the contract. It has to inform the other party that conclusion of a contract is not possible where its own standard terms cannot be included. Notwithstanding the justified criticism with regard to the last shot rule, there is still support for the last shot rule among scholars who stick to a strict application of Art 19 CISG to resolve the battle of forms. Once the contract has been performed, one must assume that the offeror accepted the altered standard terms of the final offer through assenting conduct also if the changes were of material nature.

c) Criticism

The last shot rule has been criticized because it neglects previous negotiations between the parties and chooses the prevailing standard terms purely by chance of who referred to them last. Any conduct of the offeree would be interpreted as an acceptance of the terms. This interpretation is not comprehensible because it is very unlikely that a party would at first propose a set of terms and then tacitly accept a different set, which is usually less favourable to him.

---

112 Cf Steensgaard, IHR 2015, 89.
113 Cf Schwenzer/Mohs, IHR 2006, 239.
114 UNIDROIT Principles 2016 Art 2.1.22 Comment 3.
115 Cf Kühl/Hingst in FS Herber 56.
116 Cf Ferrari in Kröll/Mistelis/Perales Viscasillas, CISG2 Art 19 CISG mn 15.
117 Cf Honnold, Uniform Law for International Sales para 170.3; Ventsch/Kluth, IHR 2003, 61.
118 Cf Ferrari in Kröll/Mistelis/Perales Viscasillas, CISG2 Art 19 CISG mn 15.
119 Cf Kramer in FS Welser 554.
Such interpretation is incompatible with the view of any reasonable party in the sense of Art 8(2) CISG.\textsuperscript{120} Although the last shot rule used to be applied by courts, its practicability is of limited scope because the result when applying the last shot rule shot is rarely predictable for the parties.\textsuperscript{121}

The last shot rule cannot find application in the first place where a contract has been concluded by two crossing offers. The fact that the last shot rule neglects the aspect that no party wants to submit to someone else’s standard terms depicts a further point of criticism.\textsuperscript{122}

5. **Knock Out Rule**

While the CISG is considered to fully cover the battle of forms within Art 19 CISG, thus leading to application of the last shot rule, there is an opposing view, which argues that the CISG itself does not provide adequate indications to resolve this issue.

a) **Requirements for Application**

(1) **Deviation from Art 19 CISG**

The knock-out rule concludes that in case the parties agree on the main terms, all standard terms not in conflict with these will form part of the agreement. For this reason, the knock out rule constitutes a deviation from the mirror image-principle. The mirror image-principle, which is stipulated in Art 19 CISG, however, is something the drafters of the CISG explicitly agreed upon.\textsuperscript{123} A derogation from Art 19 CISG is not precluded due to the fact that Art 19 CISG is only valid unless there is a trade usage acc to Art 9 CISG or an agreement between the parties acc to Art 6 CISG. It is therefore possible to deviate from the mirror image-principle and Art 19 CISG.\textsuperscript{124} Where the CISG lacks approach of the battle of forms, the UNIDROIT Principles and the PECL provide solutions for this matter.\textsuperscript{125}

(2) **Conclusion of a Contract**

In a first step, it needs to be assessed whether a contract has been concluded either by expressed rule, such as Art 2.1.22 UNIDROIT Principles or Art 2:209 PECL, or alternative contract formation. Alternative contract formation allows conclusion of a contract where offer and acceptance are not congruent, for instance just because the parties consider the contract to exist.\textsuperscript{126} Agreement to consider a contract as concluded can be deduced from the declaration at concluding the contract and any later conduct. Such conduct is interpreted in line with Art 8(3) CISG. Eligible are preparatory acts or unconditional acceptance of a performance. In

\textsuperscript{120} Cf Schlechtriem/Schroeter, Internationales UN-Kaufrecht\textsuperscript{5} mn 287.

\textsuperscript{121} Cf Schroeter in Schlechtriem/Schwenzer, UN-Kaufrecht\textsuperscript{6} Art 19 CISG mn 22.

\textsuperscript{122} Cf Gruber in MüKo BGB/III\textsuperscript{7} Art 19 CISG mn 24.

\textsuperscript{123} Cf UNCITRAL Yearbook 82 para 107.

\textsuperscript{124} Cf Kröll/Hennecke, RIW 2001, 736 (741 et seq).

\textsuperscript{125} Cf Ferrari in Kröll/Mistelis/Perales Viscasillas, CISG\textsuperscript{2} Introduction to Art 14–24 CISG mn 5 et seq.

\textsuperscript{126} Cf Steensgaard, IHR 2015, 89 (91).
this way the parties show that a contract has been concluded notwithstanding any outstanding points, such as the standard terms.\footnote{Cf Schlechtriem/Schroeter, Internationales UN-Kaufrecht\textsuperscript{6} mn 290.}

(3) Content of the Contract

Once the parties have concluded a contract, the content needs to be determined and only common terms form part of the contract. Conflicting terms are excluded and replaced by the dispositive or residual law applicable.\footnote{Cf CISG-AC No 13, IHR 2014, 34.; Huber/Mullis, The CISG 94; BGH VIII ZR 304/00 = CISG-online 651.} Each party’s reference to their standard terms is to be considered an \textit{invitatio ad offerendum} to include their set of terms. This invitation does, however, not implicate that no contract at all shall be included in case the invitation is not successful because the parties have already agreed on the \textit{essentialia negotii} and are also willing to be bound to the contract irrespective of the applicable standard terms.\footnote{Cf Kramer in FS Welser 557 et seq.}

(4) Determination of Common Terms

The parts of the standard terms which are not contradictory or only covered by one set of terms form part of a contract.\footnote{Cf Gruber in MüKo GGB/III\textsuperscript{7} Art 19 CISG mn 20.} To determine whether a specific provision is a common term in both sets of standard terms, the court has to look at the framework as a whole, not at the privileging factor of each clause.\footnote{Cf Schroeter in Schlechtriem/Schwenzer, UN-Kaufrecht\textsuperscript{6} Art 19 CISG mn 35.} Any provisions that are more favourably in one set of terms than in the other do not find isolated incorporation. The favourable terms shall only become effective if the whole set of standard terms which they form part of is adopted.\footnote{Cf Ventsch/Kluth IHR 2003, 61 (64).} Exceptions from this principle exist where one party submits to the counterpart’s standard terms. A further example is where conclusion of the whole contract fails due to the conflict on the standard terms. Such situations regularly occur where a party indicates that no contract shall be concluded at all if a set of standard terms is not going to be applied.\footnote{Cf Kramer in FS Welser 557 et seq.}

b) Support

Although not mentioned in the CISG, recently the knock out approach has been preferred over the last shot rule. Both, UNIDROIT Principles (Art 2.22) and the PECL (Art 2:209), favour application of the knock out rule to resolve a battle of forms.

The knock out approach is highly supported if the parties have already performed the contract. This follows from the rationale that the parties obviously did not consider the divergences within their opposing standard terms as a circumstance that would prevent them from executing the contract. One can draw the conclusion that the parties did not question the very existence of a
contract but merely that the exact content was still indefinite.\textsuperscript{134} Thus, it is much more convincing to exclude conflicting terms altogether than to accept those that were brought in last.\textsuperscript{135}

The German Federal Court rendered a landmark decision in the \textit{Powdered milk case}\textsuperscript{136} favouring the knock out solution. This decision rests on the argument that

\begin{quote}
"the parties have indicated by performing the contract that they did not consider the lack of agreement between the mutual conditions of the contract as essential within the meaning of Art 19 CISG".\textsuperscript{137}
\end{quote}

\begin{c}
\textbf{Criticism}
\end{c}

As briefly mentioned\textsuperscript{138}, any gaps followed by application of the knock out approach are to be filled by the CISG, which leaves space for criticism since partial dissent is not explicitly governed by the CISG and therefore this topic can again only be dealt with under Art 19 CISG. It is therefore criticized that application of the knock out approach is difficult to construe given the wording of Art 19 CISG.\textsuperscript{139} Critics with regard to the knock out rule also refer to the drafting process of the CISG. During this procedure, the incorporation of a provision including the knock out approach was proposed by a Belgian delegation but the proposal was denied and thus not incorporated.\textsuperscript{140} Thus, it may be argued that it was never the intention of the drafters of the CISG to include such approach and that therefore the last shot rule is to be applied. There is, however, argumentation that the denial during the drafting process does not equal a converse solution to be present within the CISG.\textsuperscript{141}

A further point of criticism is linked to Art 7 CISG, which stipulates the goal of a uniform application of the CISG. Searching for a solution to the battle of forms outside the CISG would contravene this goal and also create legal uncertainty in practice.\textsuperscript{142}

\begin{c}
\textbf{6. Recourse to National Law and First Shot Rule}
\end{c}

It is considered wrong to argue that a battle of forms is not covered by the CISG and that therefore parties have to apply national law to resolve this issue.\textsuperscript{143} It is thus incorrect to apply any national provision, such as the first shot rule to resolve the battle of forms. In contrast to the last shot rule, here the first shot is preferred. It is therefore the standard terms referred to by the offeror that prevail. The offeree receives these terms and is able to voice an objection with regard to the standard terms or terminate the contractual negotiations. If there is no such

\begin{footnotes}
\footnote{134} Cf Magnus in FS Hellner 195.
\footnote{135} Cf Kröll/Hennecke, RIW 2001, 736.
\footnote{136} BGH VIII ZR 304/00 = IHR 2002, 16 = CISG-online 651.
\footnote{137} BGH VIII ZR 304/00 = IHR 2002, 16 = CISG-online 651.
\footnote{138} See point III on p 7.
\footnote{139} Cf Schroeter in Schlechtriem/Schwenzer, UN-Kaufrecht\textsuperscript{6} Art 19 CISG mn 23.
\footnote{140} Cf Moccia, Battle of Forms 661.
\footnote{141} Cf Kühl/Hingst in FS Herber 57.
\footnote{142} Cf Piltz, VJ 2004, 233.
\end{footnotes}
behaviour, the standard terms of the offeror will bind the offeree.\textsuperscript{144} This approach corresponds to the respective solution that can be found in Dutch law. The first shot rule does not find much support in literature and courts outside the Netherlands.\textsuperscript{145}

**IV. Content of Standard Terms**

It is stipulated in Art 4 CISG that the validity of any provision of the concluded contract does not fall within the factual scope of application of the CISG. As a result, the question whether the content of the respective standard terms is appropriate is no matter of the CISG. This issue needs to be resolved by application of the competent domestic law.\textsuperscript{146} Control of the content is, however, not provided for in every legal framework.

Where the standard terms have to undergo such control, an interpretation of the provisions needs to take place first. This step does not fall under the content control but merely serves to define the aim of a clause more precisely.\textsuperscript{147} The relevant standard for interpretation is once more Art 8 CISG. In case of an ambiguous wording, the understanding of a reasonable party prevails. Thereby the \textit{contra proferentem} rule found its way into the CISG.\textsuperscript{148}

Whenever an assessment needs to be made on the basis of a domestic law, the standards of the CISG, not national standards, have to be applied.\textsuperscript{149} In the opinion of the majority of scholars, the values stipulated in the CISG have to be respected and applied when assessing the conformity of any content.\textsuperscript{150}

**V. Conclusion**

The incorporation of standard terms into contracts follows the pattern of Art 14 et seqq CISG. There has to be an offer as well as a fully congruent acceptance. Any statement made by parties has to be interpreted in line with Art 8 CISG. The incorporation of standard terms in electronic communications follows the incorporation by other means of communications to a great extent. The offeror needs to incorporate terms by indicating a clear intent and has to make the terms available to the offeree. Scholars and courts are not in complete agreement with regard to the making available of standard terms on a homepage. A line needs to be drawn between contracts concluded on the internet and such not concluded on the internet. As a third requirement, the offer needs to be accepted timely acc to Art 18 CISG. Any acceptance deviating from the original

\textsuperscript{144} Cf Neumayer in FS Giger 506.
\textsuperscript{145} Cf Piltz, IHR 2004, 133.
\textsuperscript{146} Cf Saenger in BeckOK BGB\textsuperscript{45} Art 14 CISG mn 7.
\textsuperscript{147} Cf Piltz, Internationales Kaufrecht\textsuperscript{2} para 3-90.
\textsuperscript{148} Cf Magnus in Staudinger von, BGB Art 8 CISG mn 18.
\textsuperscript{149} Cf Karollus, JBI 1993, 23 (30).
\textsuperscript{150} Cf Ferrari in Schlechtriem/Schwenzer, UN-Kaufrecht\textsuperscript{6} Art 4 CISG mn 20.
offer needs to be assessed acc to Art 19 CISG on whether a change is material or not. Where each party seeks to incorporate a set of standard terms, a battle of forms arises. With regard to the battle of forms, the two main approaches, which need to be considered, are the knock out rule and the last shot rule. The last shot rule has been preferred up to the beginning of the 21st century. Starting with a landmark decision by the German Supreme Court in 2002, the knock out approach has been favoured in the recent past, although there are still decisions and voices in favour of the last shot rule. The CISG does not provide a clear solution on the battle of forms and therefore in each case the arguments for and against the different approaches have to be considered.
Bibliography

Sources retrieved via <https://www.cisg.law.pace.edu/> have been cited with the respective page numbers as found on the website.

*Bamberger/Roth/Hau/Poseck* (Eds), *BeckOK BGB* [1 November 2017] (beck)
cited as: BeckOK BGB

cited as: Brunner, UN-Kaufrecht

cited as: CISG-AC No 13, IHR 2014, 34

*Grunewald ea* (Eds), Münchner Kommentar zum HGB (2018)
cited as: MüKo HGB

cited as: Honnold, Uniform Law for International Sales

*Honsell* (Ed), Kommentar zum UN-Kaufrecht (2009)
cited as: Honsell, UN-Kaufrecht

*Huber/Mullis*, The CISG (2007)
cited as: Huber/Mullis, The CISG

cited as: Janssen, wbl 2002, 453

*Karollus*, UN-Kaufrecht: Hinweise für die Vertragspraxis, JBl 1993, 23
cited as: Karollus, JBl 1993, 23

cited as: Kramer in FS Welser

*Kritzer*, CISG: Table of Contracting States <cisg.law.pace.edu/cisg/countries/cntries.html>
cited as: Kritzer, CISG: Table of Contracting States

*Kröll/Hennecke*, Kollektierende Allgemeine Geschäftsbedingungen in internationalen Kaufverträgen, RIW 2001, 736
cited as: Kröll/Hennecke, RIW 2001, 736

*Kröll/Mistelis/Perales Viscasillas* (Eds), CISG² (2018)
cited as: Kröll/Mistelis/Perales Viscasillas, CISG²

cited as: Kühl/Hingst in FS Herber

cited as: Lautenschlager, Auslegung

cited as: Magnus in FS Hellner
<https://cisg.law.pace.edu/>
cited as: Moccia, Battle of Forms

Neumayer, Das Wiener Kaufrechtsübereinkommen und die sogenannte „battle of forms“, in Habscheid/Hoffmann-Nowotny/Linder/Meier-Hayoz (Eds), Freiheit und Zwang - FS Giger (1989)
cited as: Neumayer in FS Giger

Piltz, Internationales Kaufrecht - Das UN-Kaufrecht in praxisorientierter Darstellung² (2008)
cited as: Piltz, Internationales Kaufrecht²

Piltz, AGB in UN-Kaufverträgen, IHR 2004, 133
cited as: Piltz, IHR 2004, 133

<25.cisg.info/content/publikation.php?id=10#fulltext>
cited as: Piltz, VJ 2004, 233

Säcker/Rixecker/Oetker/Limperg (Eds), Münchner Kommentar zum BGB/III² (2016)
cited as: MükBGB/III²

Sauthoff, Lieferverzugs als wesentliche Vertragsverletzung bei Vereinbarung sofortiger Lieferung und wirksame Einbeziehung fremdsprachiger AGB, IHR 2005, 21
cited as: Sauthoff, IHR 2005, 21

cited as: Schlechtriem/Butler, UN Law on International Sales

Schlechtriem/Schroeter, Internationales UN-Kaufrecht⁵ (2013)
cited as: Schlechtriem/Schroeter, Internationales UN-Kaufrecht⁵

Schlechtriem/Schwenzer (Ed), Kommentar zum Einheitlichen UN-Kaufrecht⁶ (2013)
cited as: Schlechtriem/Schwenzer, UN-Kaufrecht⁶

Schmidt-Kessel/Meyer, Allgemeine Geschäftsbedingungen und UN-Kaufrecht, IHR 2008, 177
cited as: Schmidt-Kessel/Meyer, IHR 2008, 177

Schwenzer/Mohs, Old Habits Die Hard: Traditional Contract Formation in a Modern World, IHR 2006, 239
cited as: Schwenzer/Mohs, 2006, 239

Schwimann/Kodek (Eds), ABGB Praxiskommentar/IV⁴ (2014)
cited as: Schwimann/Kodek, ABGB/IV⁴

cited as: Soergel, BGB/ XII¹³

Staudinger von, BGB (2018)
cited as: Staudinger von, BGB

Stiegele/Halter, Nochmals: Einbeziehung von Allgemeinen Geschäftsbedingungen im Rahmen des UN-Kaufrechts - Zugänglichmachung im Internet, IHR 2003, 169
cited as: Stiegele/Halter, IHR 2003, 169

Ventsch/Kluth, Die Einbeziehung von Allgemeinen Geschäftsbedingungen im Rahmen des UN-Kaufrechts, IHR 2003, 61
cited as: Ventsch/Kluth, IHR 2003, 61

Ventsch/Kluth, UN-Kaufrecht: Keine Einbeziehung von AGB durch Abrufmöglichkeit im Internet, IHR 2003, 224
cited as: Ventsch/Kluth, IHR 2003, 224
cited as: UNCITRAL Yearbook