Incorporation of Standard Terms under the CISG and Electronic Communication

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1 Introduction

International trade has always played an important role in the Netherlands. The Dutch East India Company (*Vereenigde Oostindische Compagnie*, or *VOC*), which was established in the 17th century, was the first multinational corporation in the world and the first company to issue stocks and shares.[1] For a long time, the East India Company was the largest trading company that did business with Asia, buying tea, porcelain and silk in China. However, the importance of international trade for the Netherlands is not matched by attention to the CISG.[2] In the same year as the CISG entered into force in the Netherlands, 1992, the new Civil Code for the Netherlands (*Burgerlijk Wetboek*) was enacted.[3] The entry into force of the CISG was, unfortunately, overshadowed by the introduction of the new Civil Code.

The increased use of electronic communication worldwide has altered the position of international trade. This has given rise to new legal questions. This paper will focus on one of these new issues and will discuss the incorporation of standard terms in a contract that is governed by the CISG and the use of electronic communication. When discussing the issue of general terms and conditions, one can distinguish between different questions. First of all, it needs to be determined whether any general terms and conditions have become part of the contract. If the general terms and conditions are in a language other than the language in which the contract is drafted, one may wonder whether such general terms and conditions can become part of the contract at all. If the contracting parties both

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1 P. van Schilfgaarde & J. Winter, *Van de BV en de NV*, at 31 (2009).

2 United Nations Convention on Contracts for the International Sale of Goods (CISG), Vienna, 11 April 1980, available at <http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html>.

3 Enactment of the Netherlands Civil Code: 'besluit van 17 April 1991, Staatsblad 200'. Since its enactment in 1992, the Netherlands Civil Code has been amended frequently.

use their own, and thus differing, general terms and conditions, a situation arises which is termed the 'battle of the forms' and the pertinent question is which conditions the parties have agreed upon. If contracting parties have a long-term business relationship, one of the parties may have assumed that they had established a general usage between them of applying one set of general terms and conditions. Finally, there are usually special requirements for the treatment of jurisdiction and arbitration clauses, and for choice of law clauses.

This paper will focus on only the first point, that is, the position of the offeror which is concluding an international sales contract for the first time with its counterparty, and which would like to incorporate its own standard terms in the contract. What would such a party need to do in order to ensure that its general terms and conditions become a binding part of the international sales contract that is about to be concluded? This question will be discussed in Part 2 of this article. In particular, this article will address the use of electronic communication in this respect, including attention to the question whether a reference in the offer to the company's website – which contains the general terms and conditions – is sufficient to incorporate these terms in an international sales contract which is governed by the CISG (Part 3). In this respect, a short comparison will be made with Dutch national contract law. An amendment to the Dutch Civil Code recently agreed by the Dutch legislator has given rise to similar questions as those arising under the CISG (Part 4).

2 Standard Terms and the CISG

2.1 No Special Provisions Concerning Standard Terms

The CISG does not contain any special rules regarding the inclusion of standard terms and conditions in a contract. At the time when the CISG was drafted, a proposal was made to expressly regulate the incorporation of general terms and conditions in the Convention. This proposal was rejected, however, on the ground that the Convention already contained rules for interpretation of the content of the contract.[4] Thus, even though the CISG does not contain any special rules regarding the inclusion of standard terms in a contract, the CISG is applicable to this issue. This has also been confirmed in case law and literature.[5]

4 U. Schroeter, in I. Schwenzer (Ed.), Schlechtriem & Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, Art. 14 para. 33 (2010), with further references.

5 *Id.*; German Federal Supreme Court, 31 October 2001, CISG-online 617, 2002 *Internationales Handelsrecht* 14, translation available at <http://cisgw3.law.pace.edu/cases/011031g1.html>; French Supreme Court, 16 July 1998, CISG-online 344, translation available at <http://cisgw3.law.pace.edu/cases/980716f1.html>.

The question whether any general terms and conditions have been agreed upon by the parties will therefore have to be determined on the basis of the provisions of the CISG dealing with contract formation and contract interpretation. Articles 14 to 24 CISG concern the formation of contracts. The starting point of these provisions is that an international sales contract comes into being by an offer and acceptance.[6] Regarding the content of an offer, Article 8 CISG is of importance.[7]

When determining whether a party's standard terms are incorporated in a sales contract, it must first of all be ascertained whether the standard terms were part of the offer, which was the basis of the contract and which was accepted by the offeree. According to Article 8(2) CISG, it has to be determined whether, according to the understanding of a reasonable person of the same kind as the offeree, it was clear that the offeror intended to include its general terms and conditions in the contract. An effective inclusion of general terms and conditions first requires that the intention of the offeror to incorporate its general terms and conditions in the contract is apparent to the recipient of the offer. In addition, the question arises whether a reference to standard terms suffices to incorporate these terms in an international sales contract, or whether it is necessary to transmit the text of the standard terms to the offeree.

Whether general terms and conditions are part of the offer can follow from the negotiations between the parties, the existing practices between the parties, or international custom. Very interesting issues may arise in this respect. However, these will not be discussed in this paper which concentrates on the situation in which a seller is negotiating a new international sales contract with a prospective buyer. If a seller is about to conclude an export contract which will be governed by the CISG, the question arises what such a seller needs to do in order to validly insert its standard terms in the contract. Literature and case law show that different approaches exist with regard to this issue.

See also *Château des Charmes Wines Ltd. v. Sabaté USA, Sabaté S.A.*, 328 F.3d 528 (9th Cir. 2003), CISG-online 767, 2003 *Internationales Handelsrecht* 295, available at <http://cisgw3.law.pace.edu/cases/030505u1.html>. The Supreme Court of the Netherlands, 28 January 2005, CISG-online 1002, translation available at <http://cisgw3.law.pace.edu/cases/050128n1.html>, held that if a contract is governed by the CISG, questions concerning matters governed by this Convention, which are not expressly settled therein, are to be settled in conformity with the general provisions on which the Convention is based, on the basis of Art. 7(2) CISG. The court therefore held that the question whether a party has consented to the formation of a contract and the general terms and conditions which are part of that contract, belongs to the matters which are governed by the CISG.

6 Arts. 14 to 24 CISG.

7 P. Mankowski, in F. Ferrari, *et al.* (Eds.), *Internationales Vertragsrecht, EGBGB – CMR – CISG – FactÜ, Kommentar*, Vor Art. 14 CISG para. 21 *et seq*. (2007).

2.2 Divergent Approaches in Case Law

There have been some divergent approaches in case law on the question whether a seller can suffice by inserting a reference to standard terms in the contract. For example, in a case decided by the Belgian *Tribunal Commercial de Nivelles* on 19 September 1995, it was held that a reference to standard terms is sufficient to incorporate these terms in an international sales contract governed by the CISG.[8] A French decision from the same year took a somewhat more stringent approach, holding that the standard terms that were printed on a standard form were not applicable because they were printed on the back of the offer and the offeror failed to point this out to the offeree.[9]

In a case decided by the German Federal Supreme Court, the *Bundesgerichtshof* (BGH), on 31 October 2001, it was held that it must be possible in a reasonable manner for the recipient of a contractual offer to become aware of the standard terms.[10] The BGH explicitly held that, according to the CISG, the offeror intending to rely on standard terms must transmit the text of the conditions to the offeree or make the text of the conditions available in another way. The court, very clearly, explained the rationale of its decision.

First, it placed the burden of making general terms and conditions available on the party using the general terms, since the recipient can often not foresee which clauses he is agreeing to in a specific case as significant differences exist between the standard terms used in different countries due to the different national legal systems and customs. Secondly, the court held that it is readily possible for the party using standard terms to attach these terms to its offer. The court held that imposing an obligation on the other party to inquire about clauses that have not been transmitted and burdening him with the risks and disadvantages of unknown standard terms of the counterparty would contradict the principle of good faith in international trade (Art. 7(1) CISG) as well as the general obligations of cooperation and information provision by the parties.

As will be illustrated in Part 2.4, the literature has both agreed with and rejected this decision. In the case law, however, the decision by the *Bundesgerichtshof* was followed, for

8 Nivelles Commercial Court, 19 September 1995, not published, Case No. R.G. 1707/93, available at <www.law.kuleuven.be/ipr/eng/cases/1995-09-19.html>.

9 Paris Court of Appeal, 13 December 1995, CISG-online 312, translation available at <http://cisgw3.law.pace.edu/cases/951213f1.html>. The same was held by the Düsseldorf Court of Appeal, 30 January 2004, CISG-online 821, 2004 *Internationales Handelsrecht* 108, translation available at <http://cisgw3.law.pace.edu/cases/040130g1.html>. But see Amsterdam Court of Appeal, 24 April 1997, *NIPR* 1999 no 169, which held that for the application of standard terms, it is sufficient that the full text of such terms is printed on the back of the order form.

10 German Federal Supreme Court, 31 October 2001, *supra* note 5.

example, by the German Courts of Appeal of Düsseldorf and Munich.[11] The reasoning of the German Federal Supreme Court in its aforementioned decision was also explicitly followed by a number of judicial decisions in the Netherlands.[12] From the perspective of a uniform interpretation of the CISG, it is interesting to note that in some of these decisions, the courts explicitly referred to the German Federal Supreme Court's findings. It was one of the first occasions on which courts in the Netherlands explicitly referred to foreign case law when applying the CISG. A somewhat different approach may have been taken by the Austrian Supreme Court (*Oberster Gerichtshof*) which, in its decision of 17 December 2003, seemed to accept that standard terms may be validly incorporated in a contract even if they are not made part of the offer, provided that there is a clause referring to these terms which is so clear that a reasonable party in the same position as the recipient would have understood it.[13] The court held that the addressee must be referred to the standard terms in such a way that it could not reasonably be unaware of those standard terms. The decision by the court was, however, based on a different issue: the court held that the standard terms were not applicable because they were drafted in another language than that of the contract itself. Whether or not the standard terms were handed over was therefore no longer a crucial issue in this decision.

2.3 The Influence of the Principles and the DCFR

In some cases it has been held that in the interpretation of the CISG it is important to take notice of the UNIDROIT Principles of International Commercial Contracts (UNIDROIT Principles)[14] and the Principles of European Contract Law (PECL).[15] These cases all con-

11 Düsseldorf Court of Appeal, 21 April 2004, CISG-online 915, 2005 *Internationales Handelsrecht* 24, translation available at <http://cisgw3.law.pace.edu/cases/ 040421g3.html>; München Court of Appeal, 14 January 2009, CISG-online 2011, 2009 *Internationales Handelsrecht* 201, translation available at <http://cisgw3.law.pace.edu/cases/090114g1.html>.

12 Utrecht District Court, 21 January 2009, CISG-online 1814, translation available at <http://cisgw3.law.pace.edu/cases/090121n1.html>; Rotterdam District Court, 25 February 2009, CISG-online 1812, translation available at <http://cisgw3.law.pace.edu/cases/090225n1.html>; Zutphen District Court, 14 January 2009, *Nederlandse Jurisprudentie Feitenrechtspraak* 2009 No. 244; Amsterdam District Court, 3 June 2009, *Landelijk Jurisprudentie Nummer* BK0976, which all explicitly refer to the decision of the German Federal Supreme Court, 31 October 2001, *supra* note 5. See also Arnhem District Court, 16 December 2009; *Landelijk Jurisprudentie Nummer* BK8904.

13 Austrian Federal Supreme Court, 17 December 2003, CISG-online 828, 2004 *Internationales Handelsrecht* 148, translation available at <http://cisgw3.law.pace.edu/cases/031217a3.html>.

14 UNIDROIT International Institute for the Unification of Private Law, UNIDROIT Principles of International Commercial Contracts (2004), Rome, April 2004, available at <http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf>.

15 Principles of European Contract Law, 1999, available at <http://frontpage.cbs.dk/law/commission_on_european_contract_law/PECL%20engelsk/engelsk_partI_og_II.htm>. See also 's-Hertogenbosch District Court, 16 October 2002, CISG-online 816, translation available at <http://cisgw3.law.pace.edu/cases/021016n1.html>;

cerned contracts for the international sale of goods between parties having their places of business in different European states. The courts, and the arbitral institution, held that it is a matter of interpretation of the CISG to determine whether, and to what extent, a party has to be informed about the general conditions of its counterparty. It was considered that the aforementioned UNIDROIT Principles give some guidance in this respect.

The UNIDROIT Principles do not provide whether the text of the standard terms has to be transmitted to the other party. The Official Comments state that standard terms contained in a contract document itself are binding upon the mere signature of the counterparty, unless they appear on the reverse side and not referred to in the contract document itself. There must be express references to standard terms in a separate document.[16] Article 2:104(1) PECL, however, states that standard terms may only be invoked against a party which did not know of them if the party using the conditions 'took reasonable steps to bring them to the other party's attention before or when the contract was concluded'. Terms are not appropriately brought to a party's attention by a mere reference to them in a contract document, according to Article 2:104(2) PECL.

In the aforementioned case law, it was held that according to this provision in the PECL, a mere reference to general conditions does not suffice to incorporate these conditions in an international sales contract which is governed by the CISG.[17] Thus, the general conditions must be attached to the contract, or must be made available to the offeree in another way. In this respect, it is interesting to note that a very similar provision is contained in the Draft Common Frame of Reference (DCFR).[18] These provisions are thus in accord with the position that was taken by the *Bundesgerichtshof* in its aforementioned decision of 2001.

Amsterdam District Court, 3 June 2009, CISG-online 2065, available at <http://cisgw3.law.pace.edu/cases/090603n1.html>; Netherlands Arbitration Institute, 10 February 2005, CISG-online 1621, available at <http://www.globalsaleslaw.org/content/api/cisg/urteile/1621.pdf>.

16 See Official Comments to Art. 2.1.19 UNIDROIT Principles, available at <http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=13637&x=1>, para. 3.

17 *Supra* note 15.

18 C. von Bar, *et al.* (Eds.), *Principles, Definitions, and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR)* (2009). A full online version of the DCFR is available at <http://ec.europa.eu/justice_home/fsj/civil/docs/dcfr_outline_edition_en.pdf>. Art. II. – 9:103(1) DCFR provides that standard terms may only be invoked against a party who was not aware of these terms if the party supplying the terms took reasonable steps to draw the other party's attention to these terms, before or when the contract was concluded. Art. II. – 9:103(3)(b) states that terms are not sufficiently brought to the other party's attention by a mere reference to them in a contract document.

2.4 Divergent Perspectives in the Literature

Some authors have agreed with the approach taken by the *Bundesgerichtshof*.[19] Other authors, however, disagree while stating that a general duty to transmit the text of standard terms should be rejected.[20] According to these scholars, a mere reference to the standard terms can suffice. What should be decisive, in their view, is whether the other party could reasonably be expected to be aware that its contracting party would like to include its standard terms in the contract. To achieve this, it would be sufficient that the required reference to the standard terms is clear and understandable for a reasonable person within the meaning of Article 8(2) CISG. Moreover, upon inquiry, it must be possible to become aware of the terms in a reasonable manner. Such an inquiry is not in all cases unreasonable for the other party. If the contracting parties have established a long-standing business relationship, it would indeed be useless to require that the text of the standard terms be transmitted for every new contract.

However, if parties are concluding an international sales contract for the first time, I would submit that the offeror is then required to transmit the text of its standard terms if it wishes to include these terms in the contract that is about to be concluded. Thus, I tend to agree with the ruling of the German Federal Supreme Court of 2001, especially because of its rationale, that in international transactions the content of standard terms can vary extensively due to the different legal systems of the countries where the contracting parties have their places of business. More importantly, standard terms usually contain provisions which are in the interest of the party using them and may include a choice of law clause, a dispute settlement clause, a retention of title clause or clauses excluding or limiting liability. As the CISG is a non-mandatory convention, these clauses may be essential for the outcome of a dispute that arises out of an international sales contract. For the party intending to use its standard terms it is easily possible, especially if electronic communication is used, to attach its standard terms to its offer. As the provisions therein generally favour the party using the standard terms, it is, in my view, for that party to carry the burden of transmitting the text of the standard terms to the other party.

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19 U. Magnus, 'Incorporation of Standard Contract Terms Under the CISG', in C. Andersen & U. Schroeter (Eds.), *Sharing International Commercial Law across National Boundaries, Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday*, 303, at 318 *et seq.* (2008); Schroeter, *supra* note 44, Art. 14 para. 36 *et seq.*; Mankowski, *supra* note 7, Vor Art. 14 CISG para. 28 *et seq.*; B. Piltz, 'AGB in UN-Kaufverträgen', 2004 *Internationales Handelsrecht* 133.

20 K. Berger, 'Die Einbeziehung von AGB in internationale Kaufverträge', in K. Berger, *et al.* (Eds.), *Zivil- und Wirtschaftsrecht im Europäischen und Globalen Kontext, Private and Commercial Law in a European and Global Context, Festschrift für Norbert Horn zum 70. Geburtstag*, 3 (2006); T. van Wechem, *Toepasselijkheid van algemene voorwaarden*, at 111 *et seq.* (2007); M. Schmidt-Kessel & L. Meyer, 'Allgemeine Geschäftsbedingungen und UN-Kaufrecht', 2008 *Internationales Handelsrecht* 177; M. Schmidt-Kessel, in I. Schwenzer (Ed.), *supra* note 4, Art. 8 para. 57.

3 Standard Terms and Electronic Communication in the CISG

The increased use of electronic communication gives rise to some new questions. It is generally acknowledged that international sales contracts can be concluded by electronic means.[21] When discussing the use of electronic communication with respect to standard terms, a distinction needs to be made. Standard terms can be contained in an attachment to an e-mail, or they can be retrieved from a website, either via a link from the website on which the offer is available, or via a link in the e-mail that constitutes the offer. The user of the standard terms may also, in its offer, refer to its website where the standard terms are to be found.

If a seller is doing business for the first time with its counterparty, I would be inclined to follow the stringent requirements that were set by the *Bundesgerichtshof*. This means that the offeror has to make the text of the standard terms available to the offeree. The aim is to ensure that the offeree is not obliged to search for the standard terms of the offeror. If the parties have used electronic communication for the formation of their contract, it would suffice for the offeror to include its standard terms in an attachment to the e-mail or in the e-mail itself.[22] By doing so, the offeror has clearly transmitted the text of the standard terms to the offeree and the offeree will be able, even at a later stage, to consult the text of the standard terms.

In my view, a mere reference to the company's website, where the standard terms are to be found, does not suffice for the incorporation of such standard terms in an international sales contract governed by the CISG.[23] The rationale of the stringent requirement that was set by the German Federal Supreme Court is that the burden of informing the other party rests, as the court explicitly held, on the offeror.

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21 CISG-AC Opinion No. 1, Electronic Communications under CISG, 15 August 2003, Rapporteur: Professor Christina Ramberg, Gothenburg, Sweden, available at <http://www.cisgac.com/default.php?ipkCat=128&ifkCat=143&sid=143>.

22 Mankowski, *supra* note 7, Vor Art. 14 CISG para. 33 *et seq*.; Schroeter, *supra* note 4, Art. 14 para. 44; I. Schwenzer & F. Mohs, 'Old Habits Die Hard: Traditional Contract Formation in a Modern World', 2006 *Internationales Handelsrecht* 239.

23 P. Huber, 'Standard Terms under the CISG', 13 *Vindobona Journal of International Commercial Law & Arbitration* 123, at 133 (2009), stating that it is doubtful whether it is sufficient for the user of standard terms to simply send a link to a website where its standard terms can be downloaded. See also Piltz, *supra* note 19, at 134 *et seq*.; Magnus, *supra* note 19, 303, at 323; Mankowski, *supra* note 7, Vor Art. 14 CISG para. 33 *et seq*. But see A. Stiegele & R. Halter, 'Nochmals: Einbeziehung von Allgemeinen Geschäftsbedingungen im Rahmen des UN-Kaufrechts – Zugänglichmachung im Internet', 2004 *Internationales Handelsrecht* 169; Berger, *supra* note 20, 3, at 17 *et seq*.

First of all, it is not reasonable for the offeree to have to search for standard terms, to be found somewhere on the company's website, on which there may even be a number of different standard terms for different transactions.

Secondly, if a company changes its standard terms, an offeree could never be sure which general terms and conditions it agreed to by returning to the website at a later stage. Moreover, the risk that the standard terms can be unilaterally modified by the user subsequent to the formation of the contract should not be borne by the offeree, for whom such conditions are usually disadvantageous. The argument that this can be counteracted by printing the standard terms at the time of the conclusion of the contract should fail, as it is not for the offeree to print the standard terms, but for the offeror to make sure that the offeree has free access to the standard terms which are applicable to their contract. Had the offeror included the standard terms in the offer, such confusion could have been prevented.

The same is true, from my perspective, with regard to standard terms which can be retrieved from a website, either via a link from the website where the offer is available, or via a link in the e-mail that constitutes the offer.[24] First of all, the offeree must be able to easily examine the standard terms if a dispute arises about the performance of the contract and, secondly, it has to be clear to which standard terms a party has agreed. A website may be temporarily inaccessible, a risk which should not be borne by the offeree. Finally, the offeror would be able to change its standard terms in the meantime. It is, in any event, advisable for a party that intends to insert its standard terms in an international sales contract to insert the text of the standard terms in an email, as this will allow it – at a later stage – to prove that it sent the text of the terms. The burden of proof in this respect will be addressed in more detail in Part 5 of this article.

The aforementioned reasoning seems to be consistent with Article II. – 9:103(2) DCFR, which provides that if a contract is to be concluded by electronic means, the party supplying standard terms may only invoke these terms against the other party if they are made available to the other party in textual form. This provision seems to imply that the text of the conditions as such, contained in a document, must be transmitted to the other party.[25] This is also in accordance with a recent amendment to the Netherlands Civil Code.

24 But see Schwenzer & Mohs, *supra* note 22, at 241; Schroeter, *supra* note 4, Art. 14 para. 49 *et seq*.
25 See also Huber, *supra* note 23, at 133, note 42.

4 Standard Terms and Electronic Communication in the Netherlands Civil Code

The aforementioned questions have also been considered by the legislator in the Netherlands. For contracts concluded by electronic means, the Netherlands Civil Code already allowed standard terms to be made available to the other party by electronic means, before or at the time of the conclusion of the contract. This has to occur in such a way that the text of the standard terms can be saved, or otherwise stored, by the other party and that they are accessible for later perusal.[26] In 2008, the Dutch Minister of Justice proposed an amendment to the Dutch Civil Code.[27] The suggested amendment makes it possible to make standard terms available by electronic means even if the contract itself has not been concluded by electronic means. If the contract is not concluded by electronic means, explicit consent of the other party will be required.[28] It is not clear, however, what amounts to *explicit* consent.[29]

The Minister of Justice has stated that as to the requirement of making the general terms and conditions available, the complete text of the standard terms could be inserted in an attachment to an e-mail or inserted as a hyper link in an e-mail through which the other party can consult the text of the applicable standard terms with one click.[30] The first option mentioned by the Minister is, in my view, undisputed. The second option, however, fails

26 See Art. 6:233(b) and Art. 6:234(1)(c) Netherlands Civil Code. For a translation, see H. Warendorf, *et al.*, *The Civil Code of the Netherlands* (2009). It has to be noted, however, that some of these provisions have a limited scope of application. These provisions cannot be invoked by a party that has validly inserted the identical (or almost identical) standard terms repeatedly in its contracts, as provided by Art. 6:235(3) Netherlands Civil Code. Moreover, and even more importantly, legal entities (*rechtspersonen*) can generally not rely on Arts. 6:233 and 6:234 Netherlands Civil Code. The same is true, generally, for companies having 50 workers or more at the time of the conclusion of the contract, according to Art. 6:235(1) Netherlands Civil Code.

27 The title of the proposed amendment is: 'Wetsvoorstel Wijziging van enige bepalingen van het Wetboek van Burgerlijke Rechtsvordering en het Burgerlijk Wetboek teneinde naast het in deze bepalingen gestelde vereiste van schriftelijkheid ook ruimte te bieden aan de ontwikkelingen op het gebied van het elektronisch verkeer', proposing amendments to some of the provisions of the Netherlands Civil Code and the Netherlands Code of Civil Procedure in order to provide for the developments in the area of electronic commerce. See *Kamerstukken II* 2007/08 31 358, available at <www.officielebekendmakingen.nl>.

28 Such consent is not required if the contract is concluded by electronic means: in such cases, the other party chose itself to contract by electronic means. See *Kamerstukken II* 2007/08 31 358 no 3 at. 9-10, available at <www.officielebekendmakingen.nl>.

29 D. Beenders, 'Informatieplicht bij algemene voorwaarden; verdeeldheid in de praktijk', 6777 *Weekblad voor Privaatrecht Notariaat en Registratie* 903, at 903-905 (2008), C.B.F.M. Westerhuis, 'Algemene voorwaarden; elektronisch gebruik en toepasselijkheid anno 2008', 21 *Juridisch up to Date* 21, at 21-24 (2008) and T.H.M. van Wechem, 'Wetsvoorstel 31 358: een hamerstuk met losse eindjes', 1 *Contracteren* 4 (2010).

30 *Kamerstukken II* 2007/08 31 358, no 3, at 9-10, available at <www.officielebekendmakingen.nl>.

to ensure that the offeree is allowed access to the text of the standard terms at all times, as was argued in Part 3 above.

The Minister of Justice has explicitly pointed out that a mere reference to the address of a website is insufficient, because the other party would then have to search on that website for the standard terms which are applicable to its contract.[31] If a buyer has to actively search for the text of the standard terms, this is not to be regarded as offering a reasonable opportunity to become aware of the standard terms, as is required.[32] This amendment was agreed upon by the Dutch legislator as at 16 February 2010 and entered into force on 1 July 2010.[33]

It is clear that lawyers are struggling with the aforementioned questions and there is still some legal uncertainty in this respect. For example, the Court of Appeal of 's-Hertogenbosch, in a decision on 13 October 2009 in which the Netherlands Civil Code was applied, held that a mere statement that the standard terms can be viewed on the website of the company was sufficient to incorporate the standard terms into the contract without handing over the standard terms as such.[34] This case concerned a contract that was concluded by electronic means; it did not concern a contract for the sale of goods, but a storage contract. The claim concerned the costs for storage of groundnut kernels. At the bottom of an e-mail, the party using the standard terms stated:

> Storage activities are subject to the Warehouse Conditions Amsterdam-Rotterdam […]. A copy of these conditions will be sent to you free of charge immediately upon your request or they can be viewed on [website].

The standard terms were posted on the named website and could be downloaded there. According to the court, this had to be regarded as providing the other party with a reasonable opportunity to become aware of the standard terms used. This clearly differs from the approach taken by the Minister of Justice. A number of other cases that were decided by courts of first instance, however, show that a mere reference to the fact that the standard terms can be viewed on a website is not sufficient to warrant the conclusion that the standard terms have been made available to the other party.[35]

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31 *Id.*

32 *Kamerstukken I* 2008/09 31 358, C at 3-6, available at <www.officielebekendmakingen.nl>.

33 *Staatsblad* 2010, at 222, available at www.officielebekendmakingen.nl.

34 's-Hertogenbosch Court of Appeal, 13 October 2009, *Landelijk Jurisprudentie Nummer* BL1921. A similar line of reasoning was adopted by the Haarlem District Court, 29 August 2007, *Landelijk Jurisprudentie Nummer* BB2576.

35 In some of these cases, the contract was concluded by electronic means, and in some it was not, Maastricht District Court, 20 January 2010, *Landelijk Jurisprudentie Nummer* BL1980; Zwolle District Court, 14 January

Even though the aforementioned provisions in the Dutch Civil Code do not apply to international contracts and do not even apply to all national commercial contracts, the rationale of these provisions can be used as a source of inspiration for international commercial contracts that are governed by the CISG. I would submit that in order to incorporate standard terms in an international sales contract governed by the CISG, it does not suffice only to refer to a website which contains the company's standard terms.

According to the Dutch Civil Code, a party using standard terms which does not take the aforementioned provisions into account, will not be able to rely on these standard terms. The sanction that the Dutch Civil Code uses in this respect is that the offeree may annul the standard terms.[36] These provisions in the Dutch Civil Code thus relate to content control. However, if the CISG is applicable to a particular contract, the Dutch provisions do not play any role. Although control over the validity of standard terms is, in principle, a matter of domestic law, in my view this is not so in relation to the matters of content discussed in this chapter. While it may not yet be fully certain whether, according to the CISG, a party using standard terms is required to transmit the text of these conditions to the other party, it is certain that this question is governed by the CISG.

5 Burden of Proof

It is possible that the aforementioned issues are solved in practice through the division of the burden of proof. It is well established nowadays that the CISG governs the division of the burden of proof. First of all, for the interpretation under Article 8(2) CISG, the general rule applies that the party that stands to benefit bears the burden of proof.[37] Moreover, if a party claims that its declaration has reached the other party, then it bears the burden of proving its claim.[38] Thus, the burden of proving whether any standard terms are incorporated in a contract rests with the party relying on the standard terms.[39]

If this party has included the standard terms in an attachment to an e-mail or in the e-mail itself, it has not only clearly transmitted the text of the standard terms to the other party, but it will generally also be able to prove which standard terms it inserted in the contract at hand. If the offeror has used a hyperlink in its e-mail which contains the offer, or if it

2009, *Landelijk Jurisprudentie Nummer* BI3429; Roermond District Court, 11 August 2009, *Landelijk Jurisprudentie Nummer* BJ5160; Utrecht District Court, 23 July 2008; *Landelijk Jurisprudentie Nummer* BF0016; Zutphen District Court, 19 August 2009, *Landelijk Jurisprudentie Nummer* BJ5577.

36 Art. 6:233 (b) Netherlands Civil Code.

37 Schmidt-Kessel, *supra* note 20, Art. 8 para. 67.

38 Schroeter, *supra* note 4, Art. 24 para. 43.

39 *Id.*, Art. 14 para. 76.

has used such a link on the website where the offer was to be found, the offeror will have to prove that it had made the text of the conditions available. It may, however, be difficult to prove the exact contents of the standard terms if the website had meanwhile been altered.

The question whether or not a hyperlink is sufficient for the incorporation of standard terms will, in my view, have to be answered through the division of the burden of proof.[40] This, again, was also confirmed in the recent amendment to the Dutch Civil Code. Concerning the amendment, the Minister of Justice stated that if a dispute arises concerning the question whether the party using standard terms has provided the other party with a reasonable opportunity to take note of these standard terms, the burden of proof rests with the party using the standard terms. The Minister states that the way in which the offeror does this, is up to him. He further adds that a confirmation of receipt by the other party will surely help, but that there are also other possibilities.[41]

6 Conclusion

Standard terms are often used by companies in international trade. Such terms are drafted in advance and are meant to be incorporated into a contract without negotiating them with the other party. As the CISG is a non-mandatory convention, these clauses may turn out to be essential for the outcome of a dispute that arises out of an international sales contract. There is, however, still some legal uncertainty with respect to the insertion of standard terms by using electronic communication.

First of all, the provisions and case law discussed show that contracting parties which are doing business abroad would be well advised to always add their general terms and conditions to their offers. For contracts that are concluded by the use of electronic communication, it is suggested that the standard terms should always be sent as an attachment to an e-mail message, or the text of the standard terms be placed in full in the e-mail message itself. This will allow the party seeking to rely on the standard terms, later on, to prove which standard terms were transmitted to the offeree. Transmission of the text of the standard terms is, in my view, required under the CISG if a party concludes an international sales contract with a counterparty with which it has not previously done business.

40 See also E.C. Kraan-Beekman, 'Leerstukken – Elektronisch contracteren, maar toch de pen (moeten) hanteren?', 3 *Contracteren* 80, at 81 (2009).

41 *Kamerstukken I* 2009/10 31 358, E at 7. See also T.H.M. van Wechem, 'Twee arresten over bewijslast en algemene voorwaarden (HR 21 september 2007, NJ 2007, 565 en HR 11 juli 2008, LJN: BD1394, C07/012HR)', 3 *Contracteren* 68, at 68-70 (2008).

It is in my view neither sufficient to merely refer to the company's website where the standard terms can be found, nor to place a hyperlink in an e-mail message that gives direct access to the website. First of all, the offeree must be able to easily examine the standard terms if a dispute arises about the performance of the contract and, secondly, it has to be clear to which standard terms a party agreed. A website can be temporarily inaccessible, a risk which should not be borne by the offeree, and the offeror could change its standard terms in the meantime. Moreover, in such cases, it will also be rather complex for the offeror to prove that it made the standard terms available to the other party.

As e-mail and internet are increasingly used for the conclusion of international sales contracts, the questions discussed in this paper will inevitably attract further attention in the next decade. It is to be hoped that this will lead to a uniform approach in this respect.