Incorporation of standard terms according to the CISG and the CESL: Will these Competing Instruments Enhance Legal Certainty in Cross-Border Sales Transactions?

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Abstract

This article compares the regulation of standard terms in the UN Convention on Contracts for the International Sale of Goods (CISG) and the Draft Regulation on a Common European Sales Law (CESL). Even though the CISG does not contain any express provisions concerning standard terms, this issue is governed by the Convention. The CESL contains an express provision concerning the incorporation of standard terms, but one may wonder what to conclude from this provision concerning B2B transactions. Concerning the battle of the forms, there is legal uncertainty in the application of the CISG as it is not clear from the text of the CISG and from the legal literature which approach should be followed. The provision in the CESL on this topic is rather clear as it provides which theory should be followed. However how, in practice, cases should be solved is not yet fully clear.

1. Introduction

Contracts lie at the heart of the business community. They play a vital role in the functioning of the internal market of the European Union. Thus, it can be expected that the European Union will carefully foster the system of contract law. So far however, the European legislator has not provided a comprehensive legal regime for commercial sales contracts.[1] This may change in the near future as, on 11 October 2011, the European Commission published a Proposal for a Regulation on a Common European Sales Law (hereafter referred to as the Regulation on CESL).[2] In this proposal, the European Commission explicitly stated that it is its position that divergences between national contract laws constitute an obstacle to cross-border transactions and impede the functioning of the internal market. Therefore, the objective of this proposal is to 'improve the conditions for the establish-

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[1] The exception, which proves the rule, is Directive 2000/35/EC on combating late payment in commercial transactions [2000] OJ L200/35, in which the Union has regulated the area of combating late payments in respect of relations between traders by setting up rules on minimum interest rates.

[2] Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, Brussels 11 October 2011 COM(2011) 635 final.

ment and the functioning of the internal market by making available a uniform set of contract law rules' (Art. 1 of the Regulation on CESL).

For the international sale of goods, however, a comparable instrument is already in force; namely, the UN Convention on Contracts for the International Sale of Goods (hereafter: the CISG). This Convention applies to contracts for the sale of goods between parties whose places of business are in different states, when both these states are Contracting States or when the rules of private international law lead to the application of the law of a Contracting State (Art. 1 CISG). The contracting parties may agree to (partly) exclude the application of the CISG (Art. 6 CISG). This means that, after the entry into force of the Regulation on CESL, cross-border contracts for the sale of goods concluded between businesses within Europe can be governed by the CISG, the CESL and/or national law. Thus, these different systems of law may become each other's competitors. Therefore, it is interesting to compare the CESL with the CISG in order to ascertain which provisions are most suitable for commercial transactions. It would, however, go beyond the scope of this contribution to make a complete comparison of the two instruments.

In commercial contracts, standard terms and conditions are very often used. The purpose of this contribution is to illustrate the application of the provisions concerning standard terms in international sales contracts. As it is the idea of the European Commission to apply the CESL to cross-border sales transactions within the European Union, the question may arise whether this will lead to better law in comparison with the CISG. After an introduction to the background of the Regulation on CESL (section 2), this paper will introduce the provisions on the formation of contracts in both the CISG and the CESL which are of relevance for the incorporation of standard terms (section 3). Thereafter, it will discuss the incorporation of standard terms (section 4). This paper will concentrate on contracts concluded between businesses in order to make a proper comparison between the CISG and the CESL. In principle, the CISG only applies to commercial sales contracts.[3] Thus, when making a comparison between CISG and CESL, the particular provisions for consumer sales in CESL will not be discussed at length. From time to time, however, some remarks will be made concerning B2C contracts in CESL as an illustration.

2. The Background of the Regulation on CESL

The publication of the Proposal for a Regulation on a Common European Sales Law marks the end of decades of comparative research in the field of contract law. In 1994, the first version of the UNIDROIT Principles of International Commercial Contracts (hereafter the UNIDROIT Principles) was published by the UNIDROIT International Institute for the Unification of Private Law and in 1995 the Principles of European Contract Law (hereafter the PECL) were published by the Commission

[3] Compare Art. 2(a) CISG.

on European Contract Law.[4] At that time, the harmonisation of contract law seemed only an academic exercise. In 2001, the European Commission expressed its clear interest in European contract law and published a Communication on European Contract Law.[5] This was the start of a process of extensive public consultation on the (potential) problems arising from the differences between the Member States' contract laws.

Between 2005 and 2009, a network of European contract law experts developed a Draft Common Frame of Reference (hereafter the DCFR) on the basis of comparative law research.[6] The European Commission examined several options as to how to ease cross-border transactions by making contract law more coherent within the European Union.[7] In 2010, the European Commission decided to set up an Expert Group in the area of European contract law. The task of this group was to assist the Commission by means of a feasibility study and in making further progress in the development of a possible future European contract law instrument.[8] The Commission requested the Expert Group to select those parts of the DCFR which are of direct relevance to contract law and to restructure and supplement the selected content. In 2011, the Expert Group published its Feasibility Study on a future initiative on European contract law (hereafter FSOI).[9] On the basis of this study, the European Commission published its Proposal for the Regulation on CESL.

The proposed Regulation itself merely provides for the scope of application of the instrument. The provisions of the proposed instrument of European contract law (hereafter referred to as the Common European Sales Law or CESL) are to be found in Annex I. The rules in the CESL can apply to cross-border transactions for the sale of goods, for the supply of digital content and for related services.[10] Thus, the material scope of application of the CESL is in line with the material scope of application

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[4] The UNIDROIT Principles of International Commercial Contracts (Rome 1994; the newest version is from 2004) can be consulted at: http://www.unidroit.org/english/principles/contracts/principles2004/blackletter2004.pdf. The text of the Principles of European Contract Law can be found on the internet, see for example http://frontpage.cbs.dk/law/commission_on_european_contract_law/PECL%20engelsk/engelsk_partI_og_II.htm.

[5] Communication from the Commission to the Council and the European Parliament on European Contract Law, COM (2001) 398 final, 11 July 2001.

[6] Parts of the DCFR are clearly based on the CISG. On non-conformity and the buyer's remedies, Huber concludes that the DCFR rules are very similar to, and are probably modelled on, the respective CISG provisions. See P. Huber, *On the Beaten Track – The European DCFR and the CISG*, in: A. Büchler and M. Müller-Chen, *Private Law National – Global – Comparative*, *Festschrift für Ingeborg Schwenzer zum 60*, 807–826 (Geburtstag, Bern: Stämpfle Verlag/Intersentia 2011).

[7] Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses, COM(2010)348 final.

[8] Commission Decision of 26 April 2010 setting up the Expert Group on a Common Frame of Reference in the area of European contract law, (2010/233/EU); 27.4.2010 Official Journal of the European Union L 105/109.

[9] In the version of 19 August 2011, to be found at: http://ec.europa.eu/justice/contract/files/feasibility-study_en.pdf.

[10] The term 'digital content' is defined in Art. 2(j) of the Regulation on CESL. Also see the term 'digital content' M. Loos, N. Helberger, L. Guibault and C. Mak, *The Regulation of Digital Content*

of the CISG. Therefore, it does not come as a surprise that, in some respects, provisions in CESL clearly seem to be derived from the CISG.[11] Art. 1 of the Regulation on CESL states that the rules in CESL can be used 'where the parties to a contract agree to do so'. Thus, the CESL has the form of an optional instrument and can be chosen by businesses and consumers to serve as a basis for their transactions.

If both contracting parties are traders, the CESL may only be used when at least one of them is a small or medium-sized enterprise.[12] A Member State may decide to make the CESL available for contracts where all parties are traders but none of them is a small or medium-sized enterprise.[13] It is important to note that the definition of a consumer in CESL is very strict; a consumer only means a natural person who is acting for purposes which are (completely) outside that person's trade, business, craft, or profession.[14] This means that any natural person who buys a product for both business and private purposes will not be regarded as a consumer but as a trader. This means that the suggested consumer protection offered by the CESL will in practice be more limited than expected. Thus, it will be even more important to be aware of the provisions on standard terms in the CESL concerning a contract between two traders. The entry into force of the CESL may also give rise to questions of conflict of laws; these questions will not be addressed in this paper.[15]

One may wonder why, alongside the CISG, an additional instrument of contract law would be needed. The European Commission gave three reasons why the CISG

Contracts in the Optional Instrument of Contract Law 6 ERPL 729–758 (2011). The term related services is defined in Art. 2(m) of the Regulation on CESL.

[11] For example, Art. 88(1) CESL on exemption in case of an impediment which may excuse the non-performance of an obligation by a party clearly resembles Art. 79(1) CISG. Concerning (non-)conformity, Art. 100 (a) CESL is almost identical to Art. 35(2)(b) CISG and so are Art. 100(b) CESL vs. Art. 35(2)(a) CISG, Art. 100(c) CESL vs. Art. 35(2)(c) CISG and Art. 100(d) CESL vs. Art. 35(2)(d) CISG. The same is true for the possibility of a buyer who may avoid (CISG) or terminate (CESL) the contract if the seller's failure to perform its contractual obligations amounts to a fundamental breach on the basis of Arts 49(1)(a) and 25 CISG as well as Arts 114(1) and 87(2)(a) CESL or if the seller still fails to deliver after the lapse of an additional period of time for performance on the basis of Arts 49(1)(b) and 47 CISG and on the basis of Art. 115 CESL. Also see E.M. Kieninger, *Allgemeines Leistungsstörungsrecht im Vorschlag für ein Gemeinsames Europäisches Kaufrecht*, in: H. Schulte-Nölke e.a. (eds), *Der Entwurf für ein optionales europäisches Kaufrecht*, 206 (Munich: Sellier European Law Publishers 2012).

[12] A small or medium-sized enterprise has been defined in Art. 7 of the Regulation as 'a trader which (a) employs fewer than 250 persons; and (b) has an annual turnover not exceeding EUR 50 million or an annual balance sheet total not exceeding EUR 43 million (…)'.

[13] See Art. 13(b) of the Regulation on CESL.

[14] Art. 2(f) of the Regulation on CESL; also see M.B.M. Loos, *De algemene voorwaarden-regeling in het voorstel voor een Gemeenschappelijk Europees kooprecht: een vergelijking met het Nederlandse recht*, NTBR 2012/24.

[15] See, in that regard, for example: M. Hesselink, *How to Opt into the Common European Sales Law? Brief Comments on the Commission's Proposal for a Regulation* 1 ERPL 195–212 (2012); S. Whittaker, *The Proposed 'Common European Sales Law: Legal Framework and the Agreement of the Parties* 75(4) Modern Law Review 578–605 (2012) and M. Fornasier, *28. versus 2. Regime – Kollisionsrechtliche Aspekte eines optionalen europäischen Vertragsrecht* 76 RabelsZ Bd 401–422(2012).

would not suffice.[16] First of all, the CISG regulates certain aspects of contracts for the sale of goods but also leaves matters outside its scope, such as unfair contract terms and prescription. While this is true, it should also be mentioned that the CESL does not regulate all legal aspects of a contract for the sale of goods either; for example, it does not regulate illegality and the passing of title. Secondly, not all Member States have ratified the CISG.[17] However, the majority of the EU Member States have ratified the CISG.[18] Thirdly, there is no mechanism which could ensure a uniform interpretation of the CISG. Even though there is no supranational court which can safeguard its uniform interpretation, this does not mean that there is no uniformity in the application of the convention.[19] There are a number of initiatives which promote the uniform interpretation of the convention; for example, the CISG Advisory Council plays an important role in this respect as it issues opinions relating to the interpretation and application of the CISG.[20]

In general, one can say that the publication of the proposed Regulation has led to different responses; some authors discuss the CESL with scepticism.[21] Other authors promote a revision of the text of the Proposal.[22] The German Federal Bar[23] recommends for B2B contracts to include the CISG into CESL without any change and to include additional provisions on questions which are not regulated by the CISG; this

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[16] Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, Brussels 11 October 2011 COM(2011) 635 final, p 5. Also see on this issue: N. Kornet, *The Common European Sales Law and the CISG – Complicating or Simplifying the Legal Environment?* 19 Maastricht Journal 171–175 (2012).

[17] At the Conference 'The Proposed Common European Sales Law: Have the Right Choices Been Made?' in Brussels, Belgium, 9 December 2011, W. Bull, Conference Report, ERPL 2012/2, pp 649–654, Ms Carpus-Carcea, policy officer at DG Justice, noted that not all EU Member States that apply the CISG apply it in its entirety. This, however, is no longer relevant. It is true that Sweden, Finland and Denmark used the reservation within the meaning of Art. 92 CISG and declared that they would not be bound by Part II of the convention. However, in May, June and July 2012 respectively, these states have completed the process to become a party to Part II of the CISG, see http://www.unis.unvienna.org/unis/pressrels/2012/unisl168.html.

[18] A recent overview of the Contracting States can be found at: www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html. The EU Member States that have not (yet) ratified the CISG are the United Kingdom, Ireland, Portugal and Malta.

[19] E.M. Kieninger, *Allgemeines Leistungsstörungsrecht im Vorschlag für ein Gemeinsames Europäisches Kaufrecht* in: H. Schulte-Nölke e.a. (eds), *Der Entwurf für ein optionales europäisches Kaufrecht*, 227 (Munich: Sellier European Law Publishers 2012).

[20] I. Schwenzer and P. Hachem, in: I. Schwenzer (ed.), *Schlechtriem and Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG)*, Art. 7, para. 10–15, pp 124–127 (Oxford: Oxford University Press 2010).

[21] See for example, P. Mankowski, *CESL – Who Needs It?* IHR (2012) at 45.

[22] See for example, B. Piltz, *The Proposal for a Regulation on a Common European Sales Law and More Particular its Provisions on Remedies* IHR (2012/4) at 133.

[23] See *Stellungnahme der Bundesrechtsanwaltskammer* IHR (2012/3) at 53 and B. Piltz, *The Proposal for a Regulation on a Common European Sales Law and More Particular its Provisions on Remedies* IHR (2012/4) at 133. A similar comment was made by O. Lando, *Comments and Questions Relating to the European Commission's Proposal for a Regulation on a Common European Sales Law* 6 ERPL 722 (2011).

would mean that any case law decided on the basis of the CISG and all literature on the CISG can be used in the application of parts of the CESL, this could promote legal certainty. Both the UK Law Commission and the European Law Institute (hereafter ELI) have reviewed the text of the Proposal in a critical and constructive manner and have suggested a number of revisions.[24]

3. Formation of Contracts According to the CISG and the CESL

The provisions on the formation of contracts form a vital part of the CESL. They determine not only whether a contract has been concluded, but also whether the parties to such a contract have validly chosen to apply the provisions of the CESL to their contract. The Draft Regulation provides in Art. 8(1) that the use of the CESL requires an agreement between the parties to that effect. The existence and validity of such an agreement shall be determined by the relevant provisions of the CESL. In contrast to the requirements for consumer contracts, the Draft Regulation does not require any formalities between commercial parties in how they choose to apply the CESL. This would even allow businesses to refer to the CESL as a choice of law in their standard terms. This may give rise to numerous questions which cannot be discussed here due to the limits of this contribution.

In addition, it is important to note that the CESL contains a number of duties to provide information, also for contracts for the sale of goods between two traders.[25]

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[24] Statement of the European Law Institute on the Proposal for a Regulation on a Common European Sales Law COM(2011) 635 final, approved by the ELI Council as an official Statement of the ELI on 7 September 2012, to be found at: http://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/S-2–2012_Statement_on_the_Proposal_for_a_Regulation_on__a_Common_European_Sales_Law.pdf. The report by the UK Law Commission, An Optional Common European Sales Law: Advantages and Problems, Advice to the UK Government, November 2011 can be consulted at: http://lawcommission.justice.gov.uk/docs/Common_European_Sales_Law_Advice.pdf. The conclusion of the report by the UK Law Commission, An Optional Common European Sales Law: Advantages and Problems, Advice to the UK Government, November 2011, which can be consulted at: http://lawcommission.justice.gov.uk/docs/Common_European_Sales_Law_Advice.pdf does not leave any non-clarity. Para. 7.99 states: '(e)ven if we are right to be pessimistic, and the CESL is hardly ever used, no harm would be done. On the other hand, we are not convinced that developing a CESL for commercial parties should be seen as a priority for the European Commission's scarce resources. We think efforts would be better spent on developing a European code for consumer sales over the internet, where there is stronger evidence that the current variety of contract laws inhibits the single market.'

[25] In a contract for the sale of goods between two traders, there is a duty to provide information. Art. 23 CESL provides that before the conclusion of a contract for the sale of goods by a trader to another trader, the supplier has a duty to disclose to the other trader any information concerning the main characteristics of the goods to be supplied which the supplier has or can be expected to have and which it would be contrary to good faith and fair dealing not to disclose to the other party. Art. 24 CESL contains some additional duties to provide information in distance contracts concluded by electronic means. This provision only applies where a trader provides the means for concluding a contract and where those means are electronic and do not involve the exclusive exchange of electronic mail or other individual communication. Art. 25 contains a similar provision for distance contracts. For contracts between traders, these provisions are of a non-mandatory nature. This follows – indirectly – from Art. 27 CESL[,]

The provisions on this issue are of no relevance, however, to the formation of contracts. The sanction on not complying with these requirements does not lie in the field of the formation of contracts; a party which has failed to comply with any of these duties is liable for any loss caused to the other party by such failure (Art. 29 CESL). The CESL contains a number of general duties to provide information which may also seem to deal with standard terms. For example, Art. 24(3)(e) CESL provides that the trader must provide information about the contract terms before the other party makes or accepts an offer. This provision only applies where a trader provides the electronic means for concluding a contract which do not involve the exclusive exchange of electronic mail or other individual communication (Art. 24(1) CESL). Again, the failure to comply with this duty only leads to liability in damages (Art. 29 CESL).[26] In addition, the CESL also contains a provision concerning unfair contract terms in contracts between traders (Art. 86 CESL). Due to the limits of this contribution, this provision cannot be addressed.

Both the CISG and the CESL accept the principle of freedom from requirements as to form in commercial transactions as a general rule (Art. 6 CESL and Art. 11 CISG). The CISG takes, as a starting point for the formation of contracts in Arts 14 to 24 CISG, a ruling on offer and acceptance and contains the so-called mirror image rule. Art. 19(1) CISG after all provides that a purported acceptance of an offer to conclude a sales contract, which contains additions, limitations or other modifications, should be regarded as a rejection of the offer and will constitute a counter-offer. If, however, such additions or modifications do not materially alter the terms of the offer, it is presumed that the contract is concluded as was suggested in the offer and as has been modified in the acceptance. Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, the place and time of delivery, the extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially (Art. 19(3) CISG). A reply which states or implies additional or different contract terms will always be a rejection of the offer if the offeror objects to the additional or different terms without undue delay (Art. 19(2) CISG). Art. 38 CESL contains a very similar provision which is also based on the mirror image rule. In addition, and different from the CISG, Art. 38 CESL also provides that a reply which states or implies additional or different contract terms will always be a rejection of the offer if the offer expressly limits acceptance to the terms of the offer or if the offeree makes the acceptance conditional upon the offeror's assent to the additional or different terms and the assent does not reach the offeree within a reasonable time. It seems to me that any court will reach a similar conclusion on the basis of these facts if the CISG were applicable. In such case, Art. 8 CISG will apply to the interpretation of the statements by the parties. Any analysis of cases will however also depend on the circumstances of a particular case.

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which provides that in relations between a trader and a consumer, the parties may not, to the detriment of the consumer, exclude the application of these provisions or derogate from or vary their effects.

[26] See also J.H.M. Spanjaard and T.H.M. van Wechem, *Algemene voorwaarden in het GEKR in vergelijking met het Nederlandse BW*, MvV (2012), no. 7/8, p 228.

Art. 14 CISG and Art. 31 CESL contain the requirements for a valid offer. These requirements are very similar; an offer is a proposal for concluding a contract, which – in principle – should be addressed to only one or more specific persons. It has to be sufficiently definite (CISG) or it has to have sufficient content (CESL) and it must be intended to result in a contract if it is accepted (CESL) or it has to indicate the intention of the offeror to be bound in the case of acceptance (CISG).[27] An offer becomes effective when it reaches the offeree (Art. 15 CISG and Art. 10(3) CESL).[28] An offer may be withdrawn (according to the CISG) or revoked (according to the CESL) if the withdrawal or revocation reaches the offeree before or at the same time as the offer (Art. 15(2) CISG and Art. 10(5) CESL). A statement made by or other conduct of the offeree indicating assent to an offer constitutes an acceptance; silence or inactivity does not in itself constitute acceptance (Art. 34 CESL and Art. 18(1) CISG). An acceptance of an offer becomes effective when it reaches the offeror (Art. 18(2) CISG and Art. 35(1) CESL). Art. 35(2) CESL adds that where an offer is accepted by conduct, the contract is concluded when notice of the conduct reaches the offeror. Art. 18(3) CISG and Art. 35(3) CESL provide that where, by virtue of the offer, by virtue of practices which the parties have established between themselves or by virtue of a usage, the offeree may accept the offer by conduct without notice to the offeror, the contract is concluded when the offeree begins to act. An acceptance may also be withdrawn or revoked if the withdrawal or revocation reaches the offeror before or at the same time as the acceptance would have become effective (Art. 22 CISG and Art. 10(5) CESL).

Thus, the requirements for the formation of contracts in CISG and CESL are very similar. The question whether any standard terms and conditions have become part of the contract may, however, be answered differently according to the CISG and the CESL.

4. Incorporation of Standard Terms according to CISG and CESL

4.1 Introduction

In commercial sales transactions, contracting parties often use standard terms and conditions. A business which routinely sells goods to other businesses will draft a set of standard terms and will (try to) use them for all sales. Two important issues which may arise in this context deal with the incorporation of standard terms. First of all, the question may arise whether a mere reference to standard terms is suffi-

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[27] Different from Art. 14(1) CISG, Art. 31 CESL does not require an offer to fix or make a provision for determining the price. It is unclear, however, whether this requirement in Art. 14(1) CISG will always apply. See U.G. Schroeter in: I. Schwenzer (ed.), *Schlechtriem and Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG)*, Art. 14, para. 17–22, pp 266–269 (Oxford: Oxford University Press 2010).

[28] Art. 24 CISG and Art. 10(4) CESL define what the term 'reach' implies in this respect.

cient to incorporate such terms in the contract or whether a contracting party will have to make the text of the conditions available to the other party. This issue will be addressed in what follows and a comparison between the CISG (section 4.2) and the CESL (section 4.3) will be made in this respect. Secondly, in case of a so-called battle of the forms, which is the situation in which both contracting parties use their own standard terms, the question may arise as to whether any of the standard terms used by both contracting parties can become a part of the contract (sections 4.4 and 4.5). That a battle of forms can give rise to complex questions which may not easily be answered was also clearly illustrated in the report by the UK Law Commission[29] in response to the CESL:

Resolving the battle of the forms can be complex, especially if the parties send a long series of emails and forms to each other. It also causes difficulties where the standard forms include different choice of law clauses, because then the dispute is not only about who wins the battle, but also about which rules should govern the battle.

4.2 Incorporation of Standard Terms according to the CISG

The CISG does not contain any express provisions on the use of standard terms and conditions. Indeed, the wording of the convention does not mention this concept at all. Thus, 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 the interpretation of the content of the contract.[30] 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 the case law and the literature.[31] Thus, the question whether any general terms and conditions were included in the contract needs to be answered on the basis of the provisions in the CISG dealing with the conclusion of contracts (Art. 14 CISG ff.) and by applying the provision on the interpretation of contracts (Art. 8 CISG). When determining whether a party's

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[29] The report by the UK Law Commission, An Optional Common European Sales Law: Advantages and Problems, Advice to the UK Government, November 2011 can be consulted at: http://lawcommission.justice.gov.uk/docs/Common_European_Sales_Law_Advice.pdf, see para. 7.40.

[30] See YB IX (1978) at 81, No. 278 and U.G.Schroeter in: I. Schwenzer (ed.), *Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG)*, Art. 14, para. 33, pp 275–276 (Oxford: Oxford University Press 2010).

[31] U.G.Schroeter in: I. Schwenzer (ed.), *Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG)*, Art. 14, para. 33, pp 275–276 (Oxford: Oxford University Press 2010) and the decision by the German Supreme Court (*Bundesgerichtshof*) of 31 October 2001, IHR (2002/1) at 14–16, the French Supreme Court (*Cour de Cassation*) of 16 July 1998, CLOUT No. 242, the Dutch Supreme Court (*Hoge Raad)* of 28 January 2005, NJ (2006) at 517 and, for example, the decision by the U.S. Court of Appeals for the Ninth Circuit 5 May 2003, 328 F.3d 528, 6 IHR 295–296 (2003).

standard terms are validly incorporated in a sales contract, it needs to be ascertained, first of all, whether the standard terms were part of the offer which was the basis of the contract and which was accepted by the offeree (Art. 14 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 incorporate its general terms and conditions in the contract (Art. 8(2) CISG). 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 already follow from the negotiations between the parties, the existing practices between the parties or international custom. Very interesting questions may arise in this respect; these questions will not, however, be discussed in this paper, which will concentrate 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, a question arises as to what such a seller needs to do in order to validly insert its standard terms into the contract. The literature and case law show that different approaches exist with regard to this issue. 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.[32] 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.[33]

In a case decided by the German Supreme Court, the *Bundesgerichtshof*, on 31 October 2001, it was held that it is required that the recipient of a contract offer that is intended to be based on standard terms has the possibility to become aware of them in a reasonable manner.[34] The *Bundesgerichtshof* explicitly held that, according to the CISG, the offeror is required to transmit the text of the conditions to the offeree or to make the text of the conditions available in another way. The court explained, very clearly, the rationale of its decision. Firstly, it placed the burden of making the general terms and conditions available on the party using the standard terms because the recipient often cannot foresee which clauses he is agreeing to in a specific case due to the significant differences which exist between the standard terms used in different countries arising out of different national legal systems and customs. Secondly, the court held, for the party using standard terms, it is easily possible to attach these terms to its offer. The decision by the *Bundesgerichtshof* was followed, for example,

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[32] *Tribunal Commercial de Nivelles* 19 September 1995, not published, Case No. R.G. 1707/93.

[33] *Cour d'Appel de Paris* 13 December 1995, CLOUT No. 203. The same was held by the German *Oberlandesgericht Düsseldorf* 30 January 2004, IHR (2004/3) at 108–113. Differently: *Gerechtshof Amsterdam* 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.

[34] *Bundesgerichtshof* 31 October 2001, IHR (2002/1) at 14–16.

by the German Courts of Appeal of Düsseldorf and Munich.[35] The reasoning of the German Supreme Court in its aforementioned decision was also explicitly followed by a number of judicial decisions in the Netherlands.[36]

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.[37] 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 could not be applicable as they were drafted in another language than the contract itself. Whether or not the standard terms were handed over was therefore no longer a crucial issue in this decision.

Some authors have agreed with the approach taken by the *Bundesgerichtshof*.[38] Other authors, however, disagree while stating that a general duty to transmit the text of standard terms should be rejected.[39] According to these scholars, a mere reference to the standard terms can suffice. What should be decisive, in their view, is whether

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[35] *Oberlandesgericht Düsseldorf* 21 April 2004, IHR (2005/1) at 24 ff. and *Oberlandesgericht München* 14 January 2009, IHR (2009/5) at 201 ff.

[36] Compare *Rechtbank Utrecht* 21 January 2009, NIPR (2010) at 189; *Rechtbank Rotterdam* 25 February 2009, JOR (2009) at 175; *Rechtbank Zutphen* 14 January 2009, NJF (2009) No. 244; *Rechtbank Amsterdam* 3 June 2009; LJN: BK0976, NIPR (2009) at 301, which all explicitly refer to the BGH decision. Compare also *Rechtbank Arnhem* 16 December 2009; LJN: BK8904, *Rechtbank. 's-Hertogenbosch* 26 January 2011, NIPR (2011) at 244; *Rechtbank Breda* 29 June 2011, *LJN*: BQ9897, *Rechtbank 's-Hertogenbosch* 7 September 2011, LJN: BR6948, *Rechtbank. Arnhem* 23 May 2012; LJN:BW7459 and *Rechtbank. 's-Hertogenbosch* 1 August 2012, LJN: BX3380.

[37] *Oberster Gerichtshof* 17 December 2003; IHR (2004/4) at 148–156.

[38] Compare for example, U. Magnus, *Incorporation of Standard Contract Terms under the CISG* in: C.B. Andersen & U.G. Schroeter (eds), *Sharing International Commercial Law across National Boundaries, Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday* at 318 ff (2008); U.G.Schroeter in: I. Schwenzer (ed.), *Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG)*, Art. 14, para. 36–43 (Oxford: Oxford University Press 2010); B. Piltz, *AGB in UN-Kaufverträgen*, 4 IHR (2004) at 133 ff. and P. Mankowski in F. Ferrari et al. (eds), *Internationales Vertragsrecht* 276–277 (C.H. Beck: Munich 2007); S.A. Kruisinga, *Reactie op T.H.M. van Wechem and J.H.M. Spanjaard, De toepasselijkheid van algemene voorwaarden onder het Weens Koopverdrag: nieuwe trend in de Nederlandse (lagere) rechtspraak?* 1 *Contracteren* 34–38 (2010), 3 *Contracteren* 107–111 (2010).

[39] Compare for example K.P. Berger, *Die Einbeziehung von AGB in internationale Kaufverträge* in: K.P. Berger et al. (eds), *Private and Commercial Law in a European and Global Context, Festschrift für Norbert Horn zum 70*, 3–20 (Geburtstag 2006).; T.H.M. van Wechem, *Toepasselijkheid van algemene voorwaarden*, 111–123 (Deventer: Kluwer 2007); M. Schmidt-Kessel & L. Meyer, *Allgemeine Geschäftsbedingungen und UN-Kaufrecht*, 5 IHR (2008) at 177 ff and M. Schmidt-Kessel in: I. Schwenzer (ed.), *Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG)*, Art. 8, para. 57 (Oxford: Oxford University Press 2010); T.H.M. van Wechem & J.H.M. Spanjaard, *De toepasselijkheid van algemene voorwaarden onder het Weens Koopverdrag: nieuwe trend in de Nederlandse (lagere) rechtspraak?* 1 *Contracteren* 34–38 (2010).

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 Art. 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 an unfair burden to require that the text of the standard terms would have to 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 Supreme Court of 2001, especially because of its rationale, as in international transactions the content of the 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 appear to 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 bear the burden of transmitting the text of the standard terms to the other party. It should be emphasized that the *Bundesgerichtshof* held that the party using standard terms should transmit the text of the conditions or make the text of the conditions available in another way. Thus, the text may also be made available in another way.[40]

Because of the divergent approaches in both the literature and the case law, there is some legal uncertainty in this field at the moment. Therefore, it is all the more important to note that the CISG Advisory Council is at this moment preparing an opinion on the inclusion of standard terms.[41]

4.3 Incorporation of Standard Terms according to the CESL

Unlike the CISG, the CESL contains a number of provisions concerning standard terms. This is an important advantage of the CESL. Unfortunately however, it does not explicitly answer the question whether in B2B relations a mere reference to

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[40] Also see: H. Schelhaas, *Algemene voorwaarden in handelstransacties*, 37 (Deventer: Kluwer 2011).

[41] http://cisgac.com/default.php?ipkCat=133&sid=133.

standard terms is sufficient to incorporate such terms in a contract.[42] Art. 70 CESL contains a duty to raise awareness concerning not individually negotiated contract terms. According to the CESL, 'not individually negotiated contract terms' are terms which have been supplied by one party, while the other party has not been able to influence its content (Art. 7 CESL). It is important to note that this provision applies to contract terms which were not individually negotiated. There may be cases in which the standard terms are the result of a prior individual negotiation between a trader and 'several' other traders, one of these being the other party in question. Willett stated on the basis of the DCFR that it may well be that in such a case a term, although it has been formulated in advance for several transactions, has been individually negotiated between the contracting parties.[43]

In order to introduce the background of the relevant provision in the CESL concerning the incorporation of standard terms, it is worthwhile to compare the CESL with the instruments of uniform private law that were drafted earlier. 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 signing such contract, unless they are on the reverse side and are not referred to in the contract document itself. Standard terms in a separate document have to be expressly referred to.[44] On the other hand, Naudé clearly illustrates that a party will not be bound by the other party's standard terms because it ought to have known of their existence.[45] Differently, the PECL, the DCFR, the FSOI as well as the CESL all contain a duty to raise awareness concerning contract terms which were not individually negotiated. It goes without saying that any reference to such terms needs to be made before or when the contract was concluded. A clear distinction can be made between the PECL and the DCFR on the one hand, and the FSOI and the CESL on the other.

The PECL provide that terms that were not individually negotiated may only be invoked against a party who did not know thereof if the party invoking them took 'reasonable steps' to bring them to the other party's attention (Article 2:104 PECL).[46] In addition, the PECL explicitly provide, for all types of contracts, that a mere refer-

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[42] Also see J.H.M. Spanjaard and T.H.M. van Wechem, *Algemene voorwaarden in het GEKR in vergelijking met het Nederlandse BW*, MvV (2012), no. 7/8, p 229.

[43] C. Willett, *Unfair Terms*, in L. Antoniolli/F. Fiorentini (eds), *A Factual Assessment of the Draft Common Frame of Reference*, 57 (Munich: Sellier European Law Publishers 2011).

[44] See The Official Comments to Art. 2.1.19 UNIDROIT Principles of International Commercial Contracts at www.unidroit.org and T. Naudé, in: S. Vogenauer and J. Kleinheisterkamp, *Commentary on the UNIDROIT Principles of International Commercial Contracts*, Art. 2.1.19, para. 10–27, pp 321–327 (Oxford: Oxford University Press 2009).

[45] T. Naudé, in: S. Vogenauer and J. Kleinheisterkamp, *Commentary on the UNIDROIT Principles of International Commercial Contracts*, Art. 2.1.19, para. 8, p 320 (Oxford: Oxford University Press 2009).

[46] Article 2:104 PECL provides: '(1) Contract terms which have not been individually negotiated may be invoked against a party who did not know of them only if the party invoking them took reasonable steps to bring them to the other party's attention before or when the contract was concluded. (2) Terms are not brought appropriately to a party's attention by mere reference to them in a contract document, even if that party signs the document.'

ence to such terms in a contract document is not sufficient to comply with this requirement.[47] Quite similarly, the DCFR also states that such terms supplied by one party can be invoked against the other party only if this other party was aware of them, or if the party supplying the terms took 'reasonable steps' to draw these terms to the other party's attention. Again, a mere reference to the standard terms in a contract document will not be sufficient to bring the terms to the other party's attention (Article II.-9:103(1) and (3)(b) DCFR).[48]

The FSOI introduced a different approach to this topic, which was followed in the CESL (Art. 71 FSOI and Art. 70 CESL).[49] They both provide that not individually negotiated contract terms supplied by one party may be invoked against the other party only if that other party was aware thereof or if the party supplying them took 'reasonable steps' to draw the other party's attention to them. This part of the provisions is clearly based on Art. 2:104 PECL. The distinction can be found in the second subsection of Art. 70 CESL and Art. 71 FSOI which provide that contract terms are not sufficiently brought to the other party's attention by a mere reference to them in

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[47] It is interesting to note that in some cases (for example, *Gerechtshof 's-Hertogenbosch* 16 October 2002, NIPR (2003) at 192; *Rechtbank Amsterdam* 3 June 2009, NIPR (2009) at 301 and the Netherlands Arbitration Institute 10 February 2005, TvA (2006) at 31) it has been held that, in the interpretation of the CISG, it is important to take note of the aforementioned provisions on standard terms in the UNIDROIT Principles and the PECL. These cases have all concerned contracts for the international sale of goods between parties having their places of business in different European states. In these cases, 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. Thus, the general conditions must be attached to the contract or must be made available to the offeree in another way.

[48] Article II.-9:103 DCFR reads: '(1) terms supplied by one party and not individually negotiated may be invoked against a party only if the other party was aware of them, or if the party supplying the terms took reasonable steps to draw the other party's attention to them, before or when the contract was concluded. (...) (3) For the purposes of this Article (...) (b) terms are not brought sufficiently to the other party's attention by mere reference to them in a contract document, even if that party signs the document.' Also see: C. Willett, *Unfair Terms*, in L. Antoniolli/F. Fiorentini (eds), *A Factual Assessment of the Draft Common Frame of Reference*, 54 (Munich: Sellier European Law Publishers 2011).

[49] Art. 71 FSOI (in the version of 19 August 2011 (to be found at: http://ec.europa.eu/justice/contract/files/feasibility-study_en.pdf) provides: '1. Contract terms supplied by one party and not individually negotiated may be invoked against the other party only if the other party was aware of them, or if the party supplying them took reasonable steps to draw the other party's attention to them, before or when the contract was concluded. 2. For the purposes of this Article, *in relations between a* trader *and a consumer* contract terms are not sufficiently brought to the other party's attention by a mere reference to them in a contract document, even if that party signs the document. 3. The parties may not exclude the application of this Article or derogate from or vary its effects.'

Article 70 CESL reads: '1. Contract terms supplied by one party and not individually negotiated within the meaning of Article 7 may be invoked against the other party only if the other party was aware of them, or if the party supplying them took reasonable steps to draw the other party's attention to them, before or when the contract was concluded. 2. For the purposes of this Article, in relations between a trader and a consumer contract terms are not sufficiently brought to the consumer's attention by a mere reference to them in a contract document, even if the consumer signs the document. 3. The parties may not exclude the application of this Article or derogate from or vary its effects.'

a contract document. The distinction is that this part of the provisions in the FSOI and the CESL will only apply in relations between a trader and a consumer.

This distinction between the PECL and the DCFR on the one hand, and the FSOI and the CESL on the other, is very important. If using an *a contrario* reasoning, it would follow from the FSOI and the CESL that in a commercial sales contract, the party using standard terms does not have to make the text of the conditions available to the other party.[50] It may, however, confine itself to a mere reference to its standard terms in a contract document. Thus, even though Art. 70 CESL contains a duty to raise awareness of contract terms which were not individually negotiated, it seems that Art. 70 CESL in B2B transactions does not require that such terms be handed over to the other party.[51] It is slightly disappointing that the Community legislator did not take this opportunity to clearly provide what is required for the insertion of standard terms and conditions in a cross-border sales transaction between traders. Moreover, even if one were to conclude that a trader does not have to transmit the text of the conditions, it may still be unclear what precisely is required; when has a trader taken reasonable steps to draw the other party's attention to the standard terms? This is a very important point as the provision in Art. 70 CESL has a mandatory nature. Thus, if CESL is applicable, the contracting parties may not exclude the application of this provision or derogate therefrom both in B2B contracts and in B2C contracts (Art. 70(3) CESL).

The aforementioned points may be the reasons why the European Law Institute has criticized the provision in Art. 70 CESL in its aforementioned ELI Statement. It states that it is not 'apposite' to apply Art. 70 CESL to both B2B and B2C transactions as '(i)t is an issue of consumer protection, and one which cannot properly be extended to traders … It is not apposite as traders are to be expected to read agreements, including small print.' Thus, the ELI suggests that Art. 70 CESL should only apply to contracts between a trader and a consumer. It would be my position however that both subsection 1 and subsection 2 of Art. 70 CESL should apply to cross-border contracts between traders. First of all, in international transactions the content of the standard terms can vary extensively due to the different legal systems of the countries where the contracting parties have their places of business. Secondly, for the party intending to use its standard terms it is easily possible 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 bear the burden of transmitting the text of the standard terms to the other party. This would also be in line with the position of the *Bundesgerichtshof* in its aforementioned decision and it would provide a very clear ruling. It goes without saying that traders are expected to read agreements, including small print. However, it would be an unfair burden to expect from the other party to request

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[50] Also see M.B.M. Loos, *Standard Contract Terms Regulation in the Proposal for a Common European Sales Law*, Amsterdam Law School Legal Studies Research Paper No. 2012–65, Centre for the Study of European Contract Law Working Paper No. 2012-04, electronic copy available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2081857.

[51] Also see Advocate General M. Wissink in *Van Vliet/Dealkent* HR 11 May 2012, NJ (2012) at 318.

the party using standard terms to send the conditions, which generally favour the latter.

4.4 Battle of the Forms Solved According to the CISG

In case of a so-called battle of the forms, which is the situation in which both contracting parties use their own standard terms, the question may arise as to whether any of the standard terms used by both contracting parties can become a part of the contract. Since the CISG does not contain any particular provisions concerning standard terms at all, a solution for such cases needs to be found in the provisions in the CISG on offer and acceptance. A distinction needs to be made between the conclusion of the contract and determining the content of the contract. It is possible that a contract is formed even though both contracting parties have used their own contradictory standard terms.[52]

It has been held in the legal literature that questions which arise in case of a battle of the forms need to be answered by applying Art. 19 CISG. A strict application of this provision would lead one to conclude that the so-called *last shot rule* will apply.[53] Art. 19 CISG – see also section 3 – provides that a reply to an offer which intends to be an acceptance but which contains additions, limitations or other modifications, is a rejection of the offer and constitutes a counter-offer. If, however such a reply does not materially alter the terms of the offer, it is not a rejection of the offer but it constitutes an acceptance unless the offeror immediately objects to the differences. Which terms may be said to materially alter the terms of the offer? Art. 19(3) CISG provides some examples of such terms; it refers to terms which relate to the price, payment, quality and quantity of the goods, the place and time of delivery, the extent of one party's liability towards the other or the settlement of disputes. This presumption can be rebutted in an individual situation. General conditions usually contain provisions on either of these subjects; a seller will, for example, generally insert a clause which limits its liability in its standard terms. This means that an offer that contains the general conditions of the seller will nearly always be different from a reply by the buyer that contains its general conditions if only because the sets of general conditions will differ from each other. This means that an offer will be answered by a counter-offer and this will finally imply that the contract is concluded at the time of performance (Art. 18 CISG). From this, most scholars conclude that the *last shot rule* is applicable; the counter-offer that is sent last is decisive. In other words, the general conditions that were sent last become part of the contract.[54]

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[52] Also see U.G. Schroeter in I. Schwenzer (ed.), *Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG)*, Art. 19, para. 38–40, pp 350–351 (Oxford: Oxford University Press 2010).

[53] U.G. Schroeter in I. Schwenzer (ed.), *Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG)*, Art. 19, para. 35, pp 348–349 (Oxford: Oxford University Press 2010).

[54] See for example J. Meeusen, *Totstandkoming van de overeenkomst* in H. Van Houtte et al. (eds), *Het Weens Koopverdrag*, 93 (Antwerp: Intersentia 1997); F. Ferrari, in: S. Kröll et al. (eds), *UN Conven-*

This interpretation of the CISG that leads to the application of the *last shot rule* has often been criticized in the legal literature.[55] The critique aimed at this approach has been that the choice for the application of the terms that were sent last seems to be coincidental. Moreover, one may question whether the other party, the offeree, has indeed implicitly agreed to the standard terms of the offeror merely by performing the contract. Different solutions have been put forward in the legal literature.[56] It can be said that the battle of the forms amounts to a *lacuna* in the CISG which must be supplemented by the application of the general principles on which the convention is based (Art. 7(1) CISG). Good faith in international trade leads to the conclusion that conditions in standard terms which are contradictory will not apply. These topics will then be governed by the otherwise applicable law – which will probably be either the CISG or national law. A variant of this theory is that this situation implies an exclusion by the contracting parties of the application of Art. 19 CISG as is permitted on the basis of Art. 6 CISG.[57] According to Meeusen[58] this cannot be in compliance with the text of the CISG. If the contracting parties have reached an agreement on the *essentialia negotii*, for example following from the performance of the contract, it may also be construed that they have waived the right to rely on the contradictory standard terms.[59]

These latter approaches have been referred to as the *knock-out rule* or the *rest validity theory*. Schroeter[60] has stated that in the application of the CISG the latter should apply. He concludes that "the terms that the parties agreed upon (…) in the standard forms which do not contradict each other become part of the contract". The contract has then been concluded, according to the provisions of the CISG, and contains the provisions of both sets of standard terms except the provisions which con-

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tion on Contracts for the International Sale of Goods (CISG), Art. 19, para 15, pp 289–290 (Munich: Beck 2011), and U.G. Schroeter in I. Schwenzer (ed.), *Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG)*, Art. 19, para. 35, pp 348–349 (Oxford: Oxford University Press 2010). This approach was also followed in a decision by the German *Oberlandesgericht München* 11 March 1998, TranspR-IHR (1999), pp 20–22 in which it was held that the buyer had agreed to the seller's standard terms which deviated from the buyer's standard terms by the performance of the contract.

[55] Compare, for example, V. Ventsch and P. Kluth, *Die Einbeziehung van Allgemeinen Geschäftsbedingungen im Rahmen des UN-Kaufrechts*, IHR (2003/2), pp 63–64 and J. Meeusen, *Totstandkoming van de overeenkomst* in H. Van Houtte et al. (eds), *Het Weens Koopverdrag*, 94 (Antwerp: Intersentia 1997).

[56] Compare, for example, M. del Pilar Perales Viscasillas, *"Battle of the forms" Under the 1980 United Nations Convention on Contracts for the International Sale of Goods: A Comparison with Section 2-207 UCC and the UNIDROIT Principles* 10 Pace International Law Review 97–155 (1998).

[57] Compare U.G. Schroeter in I. Schwenzer (ed.), *Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG)*, Art. 19, para. 41, pp 351–352 (Oxford: Oxford University Press 2010).

[58] J. Meeusen, *Totstandkoming van de overeenkomst* in H. Van Houtte et al. (eds), *Het Weens Koopverdrag*, 94 (Antwerp: Intersentia 1997).

[59] See for example *Amtsgericht* Kehl 6 October 1995, RIW (1996), pp 957–958.

[60] U.G. Schroeter in I. Schwenzer (ed.), *Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG)*, Art. 19, para. 49, pp 354–355 (Oxford: Oxford University Press 2010).

tradict each other. In reply to the question when such contradiction arises, Schroeter[61] states that "a contradiction even exists where one party's terms deal with matters on which the other party's terms are silent, since the other party's declaration must then be supplemented by the – typically different – rules of the Convention". Along similar lines, the German *Bundesgerichtshof*[62] held that the fact that the standard terms of both contracting parties are partly contradictory does not necessarily prevent the formation of the contract as the contracting parties have not regarded this contradiction as a barrier for the performance of the contract. The court held that according to the (probably) prevailing opinion, partially diverging general terms and conditions become an integral part of a contract (only) insofar as they do not contradict each other. Whether there is such a contradiction that impedes the integration of such terms cannot be determined by an interpretation of the wording of individual clauses but only upon the full appraisal of all relevant provisions. It is interesting to note that, most likely for the sake of certainty, the court also held that the outcome of the case would not have been different if the *last shot rule* was applied in the case at hand.

In the legal literature, it has also been defended that both sets of standard terms cannot be applied unless the provisions therein are common (the so-called *knock-out rule*).[63] It is my position that the application of this *knock-out rule* fits better within the system in the CISG. A meeting of the minds is after all the starting point in this convention for the formation of contracts. The application of the *knock-out rule* is exactly based upon this concept.

4.5 The Battle of Forms Solved According to the CESL

The aforementioned *knock-out rule* can also be found in Art. 39 of the CESL which provides that, where the parties have reached agreement except that the offer and acceptance refer to conflicting standard contract terms, a contract is nonetheless concluded.[64] The standard contract terms are part of the contract to the extent that they are 'common in substance'. No contract is concluded, however, if one party has indicated in advance – and not by way of standard terms – an intention not to be bound by such a contract or, without undue delay, informs the other party of such an intention. It is important to note that this provision applies to 'standard

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[61] U.G. Schroeter in I. Schwenzer (ed.), *Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG)*, Art. 19, para. 50, p 355 (Oxford: Oxford University Press 2010).

[62] *Bundesgerichtshof* 9 January 2002, IHR (1/2002), pp 16–21, NJW (2002), pp 1651–1655, RIW (2002), pp 396–400; Zeitschrift für Wirtschaftsrecht (2002), pp 672–676.

[63] V. Ventsch and P. Kluth, *Die Einbeziehung van Allgemeinen Geschäftsbedingungen im Rahmen des UN-Kaufrechts*, IHR (2003/2), pp 63–64.

[64] Article 39 CESL reads: '1. Where the parties have reached agreement except that the offer and acceptance refer to conflicting standard contract terms, a contract is nonetheless concluded. The standard contract terms are part of the contract to the extent that they are common in substance. 2. Notwithstanding paragraph 1, no contract is concluded if one party: (a) has indicated in advance, explicitly, and not by way of standard contract terms, an intention not to be bound by a contract on the basis of paragraph 1; or (b) without undue delay, informs the other party of such an intention.'

contract terms', which are contract terms which have been drafted in advance for several transactions involving different parties, and which have not been individually negotiated by the parties (Art. 2 (d) of the Regulation on CESL).[65]

The provision in the CESL is clearly inspired by Art. 2.1.22 of the UNIDROIT Principles, Art. 2:209 PECL, Art. II. – 4:209 DCFR and Art. 40 FSOI which all provide that if the contracting parties have reached agreement, except that they have used different standard terms, a contract is nonetheless formed.[66] The contract contains all standard terms which are 'common in substance'. All other general conditions do not form part of the contract. The conditions that are not common in substance are being replaced or substituted by the provisions in the national law or in the CISG, whichever is applicable. The exception to this rule is the case in which a party clearly indicates that it does not intend to be bound by such a contract. In order to comply with this exception, it will not be sufficient if the other party uses its own standard terms which provide that the conditions of the first party will not apply. An explicit declaration by the other party is required in its purported acceptance.[67]

As the provisions in the UNIDROIT Principles, the PECL, the DCFR and the FSOI all contain the same concept, one may find inspiration in the comments to these provisions when answering the question whether any standard terms are 'common in

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[65] Art. 7 CESL defines when a contract term is not individually negotiated; this means that the term has been supplied by one party and the other party has not been able to influence its content.

[66] Art. 2.1.22 UNIDROIT Principles provides: 'Where both parties use standard terms and reach agreement except on those terms, a contract is concluded on the basis of the agreed terms and of any standard terms which are common in substance unless one party clearly indicates in advance, or later and without undue delay informs the other party, that it does not intend to be bound by such a contract.'

Art. 2.209 of the Principles of European Contract Law provides: '(1) If the parties have reached agreement except that the offer and acceptance refer to conflicting general conditions of contract, a contract is nonetheless formed. The general conditions form part of the contract to the extent that they are common in substance. (2) However, no contract is formed if one party: *(a) has indicated in advance, explicitly, and not by way of general conditions, that it does not intend to be bound by a contract on the basis of paragraph (1); or* (b) without delay, informs the other party that it does not intend to be bound by such contract.'

Art. II. – 4:209 DCFR provides: '(1) If the parties have reached agreement except that the offer and acceptance

refer to conflicting standard terms, a contract is nonetheless formed. The standard terms form part of the contract to the extent that they are common in substance. (2) However, no contract is formed if one party: (a) has indicated in advance, explicitly, and not by way of standard terms, an intention not to be bound by a contract on the basis of paragraph (1); or (b) without undue delay, informs the other party of such an intention.'

Art. 40 FSOI (in the version of 19 August 2011 (to be found at: http://ec.europa.eu/justice/contract/files/feasibility-study_en.pdf) provides: '1. Where the parties have reached agreement except that the offer and acceptance refer to conflicting standard contract terms, a contract is nonetheless concluded. The standard contract terms are part of the contract to the extent that they are common in substance. 2. No contract is concluded if one party: (1) has indicated in advance, explicitly, and not by way of standard contract terms, an intention not to be bound by a contract on the basis of paragraph (1); or (2) without undue delay, informs the other party of such an intention.'

[67] O. Lando and H. Beale (eds), *Principles of European Contract Law*, Part I and II, 182 (The Hague/London/Boston: Kluwer Law International 2000).

substance' within the meaning of Art. 39 CESL. One may wonder what this terminology 'common in substance' really implies. It seems to me that these provisions do not require the relevant parts of the different sets of standard terms to be identical. It is required that the content of the particular provisions has the same purpose. However, it will not always be simple to decide whether particular terms are common in substance. Lando and Beale provide the following example concerning the relevant provision in the PECL; the standard terms of one party provide that any disputes between the parties will be brought before an arbitral tribunal in London, whereas the standard terms of the other party point towards an arbitral tribunal in Stockholm. It is possible that a court in such case concludes that both contracting parties preferred arbitration. However, if the court were to conclude that the parties, or only one of them, would only have agreed to arbitration if this was to take place in a particular city, the court may disregard the arbitration clause as, in these circumstances, there was no agreement between the parties.[68]

The more difficult question will be how to apply this *knock-out rule* if standard terms of one party have no counter-part in the standard terms of the other party. DiMatteo[69] wonders how to deal with such additional terms. He distinguishes two possible solutions; (1) this is not a case of conflict and the term becomes part of the contract as long as it does not materially alter the terms of the offer within the meaning of Art. 38 CESL or (2) this is a conflicting term and thus the additional terms will not become part of the contract. I agree to his appropriate remark that this issue should be clarified before the entry into force of the CESL. Loos[70] has advocated the first approach; it is his position that if the standard terms of one party regulate a particular issue and the other party's terms remain silent on this topic, the relevant terms have become part of the contract.[71] To me, the term 'common in substance' would mean that both parties must have a similar provision in their standard terms concerning the particular issue. It is only in these cases that the parties in fact reached agreement on this subject. This position seems to be confirmed by the approach that Lando and Beale have taken in the interpretation of the PECL.[72]

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[68] O. Lando and H. Beale (eds), *Principles of European Contract Law*, Part I and II, 183 (The Hague/London/Boston: Kluwer Law International 2000).

[69] L.A. DiMatteo, *The Curious Case of Transborder Sales Law: A Comparative Analysis of CESL, CISG and the UCC* in U. Magnus, *CISG vs. Regional Sales Law Unification*, 48 (Munich: Sellier European Law Publishers 2012).

[70] M.B.M. Loos, *Standard Contract Terms Regulation in the Proposal for a Common European Sales Law*, Amsterdam Law School Legal Studies Research Paper No. 2012-65, Centre for the Study of European Contract Law Working Paper No. 2012–04, electronic copy available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2081857.

[71] A different approach has been advocated for the application of Art. 2.1.22 of the UNIDROIT Principles: T. Naudé, in S. Vogenauer and J. Kleinheisterkamp, *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC),* Art. 2.1.22 para. 4 (Oxford: Oxford University Press 2009) states that "[w]hen only one party's standard terms contain terms on particular issues which deviate from the default rules, the point of departure should be that there is a conflict with the other party's standard terms, as silence on such issues tacitly assumes that the default rules are effective".

[72] See *supra* fn. 68.

5. 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 reference. One of the reasons therefor is that the CISG does not contain any provisions concerning standard terms. Even though the CESL contains an express provision concerning the incorporation of standard terms, one may wonder what to conclude from this provision concerning B2B transactions. The provisions and case law discussed show that contracting parties which are doing business abroad are well advised to always add their general terms and conditions to their offers. Transmitting the text of the standard terms is, in my view, required at least under the CISG if a party concludes an international sales contract with a counterparty with which it has not previously done business.

Concerning the battle of the forms, there is legal uncertainty in the application of the CISG as it is not clear from the text of the CISG and from the legal literature which approach should be followed. The fact that the CESL contains a provision on this issue is a clear advantage of this new instrument. The provision in the CESL on this topic is rather clear as it provides which theory should be followed. However how, in practice, cases should be solved is not yet fully clear. It is to be hoped that the combination of these provisions will allow courts, at least in the application of the CISG, to abandon the *last shot rule* in contracts governed by the CISG and to apply the *knock-out rule* or the *rest validity theory* instead.

Will the introduction of the CESL enhance legal certainty? One may wonder. First of all, the fact that there will be three different legal systems – CESL, CISG and/or national law – that can be applicable to cross-border contracts certainly does not simplify the questions concerning the applicable law. This is even more so in the field of standard terms. It is already difficult to decide whether the CISG will apply at all if both contracting parties – having their places of business in different, Contracting States – have used standard terms which explicitly exclude the application of the CISG.[73] This will only become more complex after the entry into force of the CESL if contracting parties refer to the application of the CESL in their standard terms. This is allowed as the Draft Regulation does not require any formalities between commer-

[73] For example, the *Rechtbank Leeuwarden* 3 September 2008, LJN: BF0362 concluded that in such a case there was no reason to apply the CISG, whereas the *Gerechtshof 's-Hertogenbosch* 22 June 2010, LJN: BM9531 and the *Rechtbank 's-Hertogenbosch* 1 August 2012, LJN: BX3380 held, correctly I would think, that the fact that both contracting parties had excluded the CISG in their standard terms does not alter the fact that the first question which has to be answered is whether the standard terms have become part of the contract. According to these last two cases, this question had to be answered on the basis of the CISG.

cial parties in how they choose to apply the CESL. Thus, when combining choice of law questions and the battle of the forms, it becomes clear that the entry into force of the CESL will certainly not simplify this field of the law.[74]

[74] Para. 7.42 of the report by the UK Law Commission, *An Optional Common European Sales Law: Advantages and Problems, Advice to the UK Government*, November 2011 can be consulted at: http://lawcommission.justice.gov.uk/docs/Common_European_Sales_Law_Advice.pdf. This position was very clearly illustrated by the report of the UK Law Commission on CESL.

Where one set of terms is governed by English or Scots law, and one set by the CESL, this could lead to surprising results. Take a case in which an English buyer ordered goods on standard terms written under English law. A Portuguese supplier acknowledged the order, with terms written under the CESL. Under English law, the buyer's form is ineffective. Instead, the contract is written on the supplier's terms, which was the "last shot fired". The English courts would consider the choice of the CESL to be valid. Yet under the CESL, the term incorporating the CESL would be ineffective. Only terms which were common between the parties form part of the contract, and the adoption of the CESL was not one of them.