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1 Introduction

It is a common feature of the modern mass production economy that contracts for the manufacturing, distribution and delivery of products and services are governed by the standard terms and conditions of one of the parties.[1] It is usually the standard contract of the party who is in a stronger bargaining position that will govern the situation.[2] One of the perennial problems in respect of standard terms in most legal systems is whether the terms which are usually not the object of specific bargaining has been included in the agreement between the parties or not.[3] It is unsurprisingly also a problem which has been encountered in the interpretation and application of the United Nations Convention on Contracts for the International Sale of Goods, Vienna 1980 (CISG).[4]

The CISG is generally recognised as one of the most successful instruments for the harmonisation and unification of international trade law. It has been adopted in 76 countries worldwide, representing about 80% of world trade.[5] It therefore potentially applies to a very great number of international transactions. One of the main problems of legal unification instruments, irrespective of how successful they are, is that the apparent unification achieved by uniform law, is endangered by divergent interpretations and application in the various jurisdictions where the uniform law

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1 Raiser *Allgemeinen Geschäftsbedingungen* 26 ff; Wolf, Horn and Lindacher *AGB-Gesetz* Einl par 1; Eiselen *Standaardbedinge* 1; Hondius *Standaardvoorwaarden* 123; Kötz "Allgemeine Geschäftsbedingungen" A23-24; Heinrichs *Palandt* par 1-3; Slawson 1971 *Harv LR* 529.

2 Raiser *Allgemeinen Geschäftsbedingungen* 21-23, 93; Llewellyn 1939 *Harv LR* 701; Kötz "Allgemeine Geschäftsbedingungen" A26-27; Wolf, Horn and Lindacher *AGB-Gesetz* Einl par 3-4; Harker 1981 *SALJ* 16; Eiselen *Standaardbedinge* 25, 30-34, 103-104; Wolf, Horn and Lindacher *AGB-Gesetz* Einl par 2; Mroch *Geschäftsbedingungen* 4.

3 Magnus U "Standard Contract Terms" 323; Schmidt-Kessel "Comments" Art 8 § 52-53.

4 Schmidt-Kessel "Comments" Art 8 § 52; Magnus "Wiener UN Kaufrecht" Art 14 §§ 40 ff.

5 Schmidt-Kessel "Comments" Introduction 1; Eiselen and Kritzer *International Contract Manual* § 80:1 (80-5); Lookofsky "1980 United Nations Convention on Contracts" 18; New Zealand Law Commission 1992 http://www.cisg.law.pace.edu/cisg/wais/db/articles/newz2.html 10; Magnus "Wiener UN Kaufrecht" Einl § 1.

applies.[6] Although it is also fairly generally recognised that the uniformity of the CISG has been preserved in its interpretation and application,[7] there are a few areas where court's have interpreted and applied the convention in divergent manners.[8] The inclusion of standard terms is one such area.

Where the incorporation of standard terms have been expressly agreed upon by the parties no problem arises, but quite often the incorporation of the standard terms takes place by a mere reference in an oral communication or written communication to the inclusion of such terms. Sometimes the text of the standard terms will accompany the main agreement, for instance being printed on the back of an order form, but quite often the contract merely contains an incorporation clause without any accompanying text. The question then arises whether there has been a valid incorporation or not.

The CISG does not expressly deal with requirements for the inclusion of standard terms and court's must therefore rely on the interpretation of the articles dealing with the formation of the contract in general,[9] as well as the provisions of article 7.[10] Based on an interpretation of these articles and the general principles underlying the CISG, court's have developed three distinct but divergent approaches:

- a strict approach which has been developed mainly in the German court's which requires that the standard terms be made available to the other party at the time of contracting;[11]
- a moderate approach which only requires a clear reference to the inclusion of the standard terms;[12] and

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6 Rosett 1984 *Ohio St LJ* 297–298, 265; Rosett 1988 *Cornell International Law Journal* 587; Kötz 1986 *Rabels Zeitschrift für ausländisches und internationals Privatrecht* 9-10; Ferrari 1994 *Georgia Journal of International and Comparative Law* 183 ff; Ferrari "Homeward trend" 185 ff.

7 Magnus "Standard Contract Terms" 338.

8 Ferrari "Homeward trend" 185 ff.

9 Schmidt-Kessel "Comments" Art 8 § 52-53; Magnus "Wiener UN Kaufrecht" Art 14 § 40.

10 Magnus "Homeward trend" 320.

11 Germany Supreme Court 2001 http://cisgw3.law.pace.edu/cases/011031g1.html; Germany Appellate Court Celle 2009 http://cisgw3.law.pace.edu/cases/090724g1.html; Germany Supreme Court 2007 http://cisgw3.law.pace.edu/cases/071127g1.html; France Appellate Court Paris 1995 http://cisgw3.law.pace.edu/cases/951213f1.html; Netherlands District Court Utrecht 2009 http://cisgw3.law.pace.edu/cases/090121n1.html.

- a lenient approach which allows the standard terms to be included even after the conclusion of the contract.[13]

The object of this article is firstly to critically examine the different approaches found in the case law against the back-drop of the provisions of the CISG in order to establish the most appropriate approach to the inclusion of standard terms under the CISG. The solution to this problem is of practical importance for international traders who make use of standard terms in their everyday dealings.

2 Basic principles of the CISG

The CISG deals with the formation of the contract in Part II, and more specifically for our purposes in articles 14, 18, 19 and 23.[14] However, it is also necessary to consider article 8 which deals with the interpretation of any statements made by the parties, as the statements and conduct of the parties form the basis for the offer and acceptance.[15] Although some earlier decisions held that whether standard terms have been validly incorporated or not fell outside the scope of the CISG in terms of article 4, it is now generally accepted that the issue falls squarely within the ambit of the Convention and need to be decided according to its provisions and not the provisions of the applicable domestic contract law.[16] It is only the substantive validity

12 Germany District Court Coburg 2006 http://cisgw3.law.pace.edu/cases/061212g1.html; Germany Appellate Court Köln 2005 http://cisgw3.law.pace.edu/cases/051221g1.html; Austria Appellate Court Linz 2005 http://cisgw3.law.pace.edu/cases/050808a3.html. See also Austria Supreme Court 2003 http://cisgw3.law.pace.edu/cases/031217a3.html; *Filanto SpA v Chilewich Intern Corp* 789 F Supp 1229, 1240 (SD NY 1992); Austria Supreme Court 2005 http://cisgw3.law.pace.edu/cases/050831a3.html; Austria Appellate Court Linz 2005 http://cisgw3.law.pace.edu/cases/050808a3.html. See also Netherlands District Court Breda 2008 http://cisgw3.law.pace.edu/cases/080227n1.html; Netherlands Court 's-Hertogenbosch 2007 http://cisgw3.law.pace.edu/cases/070529n1.html; Austria Supreme Court 1998 http://cisgw3.law.pace.edu/cases/981015a3.html. See also Belgium Commercial Court Brussels 2004 http://cisgw3.law.pace.edu/cases/040324b2.html.

13 *Berry v Ken M Spooner Farms Inc* 59 UCC Rep Serv 2d 443 (WD Wash 2006).

14 Magnus "Wiener UN Kaufrecht" Vorbem Zu Art 14 ff § 1; Schlechtriem and Schwenzer *Commentary* intro to Arts 14-24 § 1.

15 Magnus "Wiener UN Kaufrecht" Art 8 § 18.

16 For ease of reference the term 'domestic law' is used restricted to denote non-unified domestic law. Strictly speaking the CISG also constitutes domestic law in all of the jurisdictions where it has been adopted. See Netherlands District Court Arnhem 2004 http://cisgw3.law.pace.edu/cases/040317n1.html. For an earlier ruling that seems similar, see Netherlands District Court Zwolle 1995 http://cisgw3.law.pace.edu/cases/950301n2.html.

of standard terms, for example, whether their provisions are unconscionable or unfair in terms of domestic legislation that falls outside the scope of the CISG in terms of article 4.[17]

The statements and conduct of the parties leading up to and including the conclusion of the contract must be interpreted in the light of article 8. Article 8 therefore must also be applied to the interpretation of the offer made by the offeror in terms of article 14 and the acceptance of the offer by the offeree in terms of articles 18 and 19 as the statements and conduct of the parties underlie the offer and the acceptance.[18] Also relevant is article 23 which deals with the time that the contract is deemed to have come into existence.

The CISG uses the usual approach found in most legal systems to the analysis of the conclusion of the contract, namely distinguishing between an offer and an acceptance bringing the contract into existence. Article 14 states:

> (1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.

Article 14 states the minimum requirements for a valid offer, namely identification of the goods and a definite price and made with the intention of being bound if the other party accepts that offer. As is clear from this article there is no provision dealing specifically with the incorporation of standard terms.

However, then there is Netherlands Supreme Court 2005 http://cisgw3.law.pace.edu/cases/050128n1.html.

17 Magnus "Wiener UN Kaufrecht" Art 14 § 42; Schlechtriem and Schwenzer *Commentary* Art 4 § 12; Germany District Court Landshut 2008 http://cisgw3.law.pace.edu/cases/080612g2.html. In this case the court stated that: *"The test in respect to the inclusion of standard terms has to be generally assessed according to Article 14 et seq. The test as to the content of standard terms has to be assessed according to national law."* Austria Appellate Court Linz 2005 http://cisgw3.law.pace.edu/cases/050323a3.html where the court stated: "*The CISG applies in respect to the assessment whether [Seller]'s standard terms … have become part of the contract." But "[t]he CISG does not contain provisions for the test of the substantive validity of standard terms. The test according to the law applicable according to conflict rules applies, here: German law. However, the standard of appropriateness needs to be adjusted to unified law and internationally accepted usages.*" (citations omitted)

18 Magnus "Wiener UN Kaufrecht" Art 14 § 41; Schmidt-Kessel "Comments" Art 8 § 52.

Article 18 deals with the requirements for an acceptance:

> (1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.
> (2) An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror.

The offer can be accepted by a statement, ie orally or in writing, or by any other conduct which unequivocally indicates the fact that the offeree wants to accept the offer and that it will be bound by the contract.[19] The acceptance may not contain any additional material terms but must be an unconditional acceptance of the offer in terms of article 19.[20] If any additional material terms are added the statement is regarded as a rejection and counter-offer open to acceptance by the original offeror.[21]

The statements of the parties must be interpreted in accordance with the provision of article 8. Article 8(1) first of all states a subjective test to be applied to all statements and conduct made by a contracting party and reads as follows:

> For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

Where a party makes an offer, the offer must be interpreted according to the subjective intention of that party provided that the other party knew what that intention was or the objective circumstances show that it must have known what that intention was.[22]

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19 Schlechtriem and Schwenzer *Commentary* Art 18 §§ 3-7; Magnus "Wiener UN Kaufrecht" Art 18 § 6-12.

20 Magnus "Wiener UN Kaufrecht" Art 19 § 1; Schlechtriem and Schwenzer *Commentary* Art 19 §§ 1-4.

21 Magnus "Wiener UN Kaufrecht" Art 19 § 7; Schlechtriem and Schwenzer *Commentary* Art 19 §§ 10-12.

22 Magnus "Wiener UN Kaufrecht" Art 8 § 17-18; Schmidt-Kessel "Comments" Art 8 §§ 19-20.

Applied to the incorporation of standard terms this would mean that where the offeror has clearly communicated to the offeree that it wanted the agreement to be subject to its standard terms then the standard terms should be applicable where the offeree accepts the offer, unless the offeree clearly indicates that it does not agree to such incorporation.[23] Where the contract is concluded orally and the incorporation of the standard terms specifically mentioned, there should theoretically and in principal be no problem about the applicability of the terms, although a party may have problems in proving such communication.

Most problems about incorporation however arise in the context of written communications where a party relies merely on an incorporation clause in the offer, but where the text of the standard terms are not attached or provided to the offeree simultaneously. Where there is a clear and conspicuous reference to the incorporation of the standard terms in the document provided to the offeree, there should in theory and in principle also be no problem about the incorporation of the terms as acceptance by the offeree of the offer based on such document, creates the reasonable impression in the mind of the offeror that the offer has been accepted without any modification.[24] If the offeree failed to read the incorporation clause, it would not have the subjective intent to accept the standard terms but this is a fact that the offeror cannot be held to be aware of. The conduct of the offeree creates the objective impression that the offer was accepted. In such circumstances the provisions of article 8(2) and (3) become relevant, where a more objective test is applied: Article 8 reads:

> (2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.

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23 Schmidt-Kessel "Comments" Art 8 § 36, 53; Schmidt-Kessel Case Commentary at http://cisgw3.law.pace.edu/cases/011031g1.html [date of use 13 October 2010].

24 Schmidt-Kessel in *Schlechtriem/Schwenzer Commentary* Art 8 § 52; Schmidt-Kessel Case Commentary at Germany Supreme Court 2001 http://cisgw3.law.pace.edu/cases/011031g1.html; Austria Supreme Court 2003 http://cisgw3.law.pace.edu/cases/031217a3.html; *Filanto SpA v Chilewich Intern Corp* 789 F Supp 1229, 1240 (SD NY 1992). *Contra* Magnus "Wiener UN Kaufrecht" Art 14 § 41 Germany Supreme Court 2001 http://cisgw3.law.pace.edu/cases/011031g1.html; Netherlands Arbitration Institute 2005 http://cisgw3.law.pace.edu/cases/050210n1.html; Magnus "Standard Contract Terms" 314.

> (3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

In the circumstances where the written offer contains a clear incorporation clause and is accepted without any further statement or qualification by the offeree, it would be objectively reasonable conduct on the part of the offeror to rely on such unqualified acceptance and to accept that its standard terms will apply. It is the same deduction that a reasonable person of the same kind as the offeror would make in similar circumstances.

These general statements must be qualified in regard to the substantive validity of the standard terms being incorporated. Although the issue on the substantive validity of standard terms is generally regarded as an issue that falls outside the scope of the CISG, this does not hold true in the case of standard terms that are unusual or surprising.[25] In the case of clauses that are unusual or surprising, it cannot be said that the other party could reasonably have expected to find such clauses in the standard terms and a party should therefore not be held bound to such clauses. What qualifies as an unusual or surprising term will depend on the particular circumstances of the parties, the type of trade involved and the dispositive law displaced.[26] Terms that are generally encountered in standard terms in a particular trade cannot qualify as unusual or surprising, even if they are very harsh or one-sided. Surprising or unusual terms can be said to fall outside the consensus or the agreement of the parties, having regard to the principles underlying articles 14, 18 and 8.[27] One could further argue that good faith in terms of article 7 also requires a party to make the other party specifically aware of any unusual or surprising clauses.

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25 Schlechtriem and Schwenzer *Commentary* Art 8 § 63; Magnus "Wiener UN Kaufrecht" Art 4 par 25; Germany Appellate Court Düsseldorf 2004 http://cisgw3.law.pace.edu/cases/040421g3.html; Germany District Court Landshut 2008 http://cisgw3.law.pace.edu/cases/080612g2.html.

26 Germany Appellate Court Düsseldorf 2004 http://cisgw3.law.pace.edu/cases/040421g3.html. See also Naudé "Standard Terms" 332 ff.

27 Schmidt-Kessel "Comments" Art 8 § 63.

This last conclusion is also in line with the solution found in the UNIDROIT Principles of International Commercial Contracts 2004.[28] The commentary to article 2.1.19 states that the general rules to formation should usually also apply to standard terms. Where the standard terms do not form part of the document accepted or signed by a party, such a document must refer to the inclusion of the standard terms.[29] Of particular importance is article 2.1.20 dealing with surprising terms which states:

> (1) No term contained in standard terms which is of such a character that the other party could not reasonably have expected it, is effective unless it has been expressly accepted by that party.
> (2) In determining whether a term is of such a character regard shall be had to its content, language and presentation.

The Commentary to article 2.1.20 goes on to state that a party who accepts the other party's standard terms will be bound to those terms "irrespective of whether or not it actually knows their content in detail or fully understands their implications". However, a party will not be bound to terms that can be qualified as surprising terms as defined in article 2.1.20. This provision reflects the principle of good faith and fair dealing required by article 1.7 of the Principles.[30]

The relevant case law will now be analysed against the background of the general provisions as set out above.

3 Analysis of the case law

The problems in regard to the incorporation of standard terms manifest in four different typical scenarios:

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28 See International Institute for the Unification of Private Law 2004 http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-3.pdf; Naudé "Standard Terms" 330-331.

29 Commentary to Art 2.1.19 par 3.

30 Naudé "Standard Terms" 330-331.

- where the contract document contains an incorporation clause or reference to the standard terms, but without actually attaching or providing the standard terms at the same time;[31]
- where the contract document contains standard terms printed on the back but without a clear incorporation clause on the front side;[32]
- where the standard terms are set out in a language that is different from the language of the contract or the negotiations between the parties;[33] and
- where the standard terms are added after the actual conclusion of the contract, for instance in a confirmation letter or printed on the products.[34]

3.1 Incorporation clause without the provision of the standard terms

There are a number of cases, mainly of German origin, where it has been held that standard terms will not be regarded as having been validly incorporated into the contract unless the offeror has provided the offeree with a copy of the standard terms. This represents the very strict approach to the incorporation of standard clauses. The leading case is the German *Machinery case*[35] where the *Bundesgerichtshof* held as follows:

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

31 See for instance Germany Supreme Court 2001 http://cisgw3.law.pace.edu/cases/011031g1.html.

32 See for instance France Appellate Court Paris 1995 http://cisgw3.law.pace.edu/cases/951213f1.html.

33 See for instance Germany District Court Kassel 1996 http://cisgw3.law.pace.edu/cases/960215g2.html.

34 See for instance *Berry v Ken M Spooner Farms Inc* 59 UCC Rep Serv 2d 443 (WD Wash 2006).

35 Germany Supreme Court 2001 http://cisgw3.law.pace.edu/cases/011031g1.html; Netherlands Arbitration Institute 2005 http://cisgw3.law.pace.edu/cases/050210n1.html. See Schmidt-Kessel Case Commentary at Germany Supreme Court 2001 http://cisgw3.law.pace.edu/cases/011031g1.html. See also Germany Appellate Court Celle 2009 http://cisgw3.law.pace.edu/cases/090724g1.html; Netherlands District Court Utrecht 2009 http://cisgw3.law.pace.edu/cases/090121n1.html; Magnus "Standard Contract Terms" 319-320.

> It is *generally required that the recipient of a contract offer that is supposed to be based on general terms and conditions have the possibility to become aware of them in a reasonable manner* (Staudinger/Magnus, Art. 14 &p;41; Schlechtriem/Schlechtriem, supra; Soergel/Lüderitz/Fenge, supra; Reithmann/Martiny, International Sales Law, 5th ed., 651). An effective inclusion of general terms and conditions thus first requires that the intention of the offeror that he wants to include his terms and conditions into the contract be apparent to the recipient of the offer. *In addition, as the Court of Appeals correctly assumed, the Uniform Sales Law requires the user of general terms and conditions to transmit the text or make it available in another way* (see also Piltz, Sales Law, §3 &pp;77 et seq.; Piltz, NJW, supra; Teklote, The Uniform Sales Law and the German Law on General Terms and Conditions, 1994, pp. 112 et seq.; Hennemann, General Terms and Conditions Control and the CISG from the German and French Viewpoints, Ph.D. Thesis 2001, pp. 72 et seq.; similarly, Staudinger/Magnus, supra, with reference to the Supreme Court of Austria, RdW 1996, 203, 204, with an annotation by Karollus RdW 1996, 197 et seq.; different view, Holthausen, RIW 1989, 513, 517).
>
> 3. Insofar as the general terms and conditions at issue become a part of the contract under German non-CISG law and/or in commercial relations between merchants where the customer does not know them but has the possibility of reasonable notice - e.g., by requesting them from the user (compare BGHZ 117, 190, 198; Panel Decision of June 30, 1976 - VIII ZR 267/75, NJW 1976, 1886 under II 1, each with further citations), this does not lead to a different result. In the national legal system, the clauses within one industry sector are often similar and usually known to the participating merchants. To the extent that this does not apply to a commercially-active contract party, it can be expected of him, in good faith, that he make the clauses available to the other party, if he wants to close the deal - as offered by the user based on the general terms and conditions. *These requirements do not, however, apply to the same extent to international commercial relations, so that, under the principles of good faith of the other party, a duty to inquire cannot be expected of him.*[36]

It is most surprising that the court in its analysis and interpretation of article 8(2) CISG comes to a conclusion that sets a stricter requirement than that encountered in domestic German law.[37] Its conclusions are based firstly on the statement that it is generally accepted that the offeree must be in a position to reasonably take notice of

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[36] Translation of the original text as presented on the Pace CISG website at Germany Supreme Court 2001 http://cisgw3.law.pace.edu/cases/011031g1.html. Emphasis added.

[37] See Germany Appellate Court Celle 2009 http://cisgw3.law.pace.edu/cases/090724g1.html. This is a case in which the court stated: "*Therefore the effective incorporation of standard terms and conditions into a contract, which -- as in the case at hand -- is governed by the CISG, is subject to the provisions regarding the formation of the contract (Art. 14 and Art. 18 CISG). According to Art. 8 CISG, the recipient of a contract offer, which is supposed to be based on standard terms and conditions, must have the possibility to become aware of them in a reasonable manner (decision of the German Federal Supreme Court (Bundesgerichtshof; BGH) in: BGHZ vol. 149 113, 116 et seq.). Within the scope of the Convention, the effective inclusion of standard terms and conditions requires not only that the offeror's intention that he wants to include his standard terms and conditions into the contract be apparent to the recipient. In addition, the CISG requires the user of standard terms and conditions to transmit the text or make it available in another way (see decision of the German Federal Supreme Court (Bundesgerichtshof; BGH) in: BGHZ, supra, with further references)*".

the content of the standard terms. The court relies mainly on a number of German authors for this conclusion. It is submitted that it is neither generally the case in domestic German commercial practice as conceded by the court, nor in international commercial practice that it is *generally accepted* that the text of standard terms will or should be available at the time of contracting.[38] Magnus concedes that the approach is controversial.[39] Schmidt-Kessel states very strongly that this view is not tenable stating that the decision of the Bundesgerichtshof should be rejected and should not even be regarded as persuasive authority.[40] Magnus, however, argues that:

> it would be a wrong and unfair risk allocation -- even in commercial transactions -- if a mere reference would suffice and if the other party had an obligation to search the contents of the standard terms before the conclusion of the contract at the peril that they become binding.

Although it could be said that it is desirable that a party should make the standard terms available at the time of the contracting, it goes beyond the clear rules contained in articles 8, 14 and 18 and their underlying principles to require contractual conduct which is not even required in domestic law, especially as these contracts are commercial and not consumer contracts. Proponents of this approach also rely on the principle of good faith contained in article 7 to argue that good faith requires a party to make its standard terms available.[41] However, good faith also requires a party not to create false impressions about its own intentions as embodied in article 8(2). This would entail that the other party should not create an impression that it has accepted the inclusion of the standard terms where there is clear reference to their inclusion.

At least in the common law world, the principle of *caveat subscriptor* is widely accepted and applied. Especially in commercial transactions English law attaches great importance to the signing of a document. The general rule derived from *Parker*

38 The fact that this view is the generally accepted view under German scholars, as maintained by Magnus "Standard Contract Terms" 320 and the German Supreme Court, is by no means an indication that the issue is not controversial.

39 Magnus "Standard Contract Terms" 320.

40 Schmidt-Kessel "Comments" Art 8 § 53.

41 Magnus "Standard Contract Terms" 320.

v South Eastern Railway[42] is that a person is bound by the contents of a contractual document he has signed whether or not he has read it or understood it.[43] If a party therefore signs a document containing a clear and unambiguous incorporation clause, it will be held bound to the standard terms incorporated whether it has read the standard terms or not and whether they were available to it at the time or not. A reasonable common law trader in the position of the offeror would be most surprised if told that the mere incorporation clause as accepted would be insufficient to make its standard terms applicable. It would seem that a German trader would be equally surprised, given the provisions of the domestic German law. One cannot therefore agree with the basic assumption made by the court here.

It would seem that the real reason for the stricter standard set by the *Bundesgerichtshof* is based on the assumption that there exists a big difference between domestic sales where it is easy to obtain reasonable access to standard terms from the other party by merely requesting them, and international sales where it is allegedly not so easy and therefore not reasonable.

The court goes on to state that under the principle of good faith there is no duty on the offeree to make inquiries about the standard terms. This is an astonishing statement in the light of the impression that the statement or conduct of the offeree must make on the offeror by accepting the reference to the standard terms without question, query or protest. Indeed, one would expect the principle of good faith to prompt the offeree to make enquiry about the standard terms or protest their inclusion at the time of contracting. In the era of modern communications including cellphones, fax and the internet, it is no more difficult for a participant in international trade to make enquiry about or require a copy of the standard terms than it is for participants in domestic transactions. The reasons for setting a stricter standard in

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42 *Parker v South Eastern Railway* (1877) 2 CPD 416. See also *L'Estrange v F Graucob Ltd* ([1934] 2 KB 403 where the court said: "*When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not*."

43 *Harris v Great Western Railway Co* (1876) 1 QBD 515 at 530; *McCutcheon v David MacBrayne Ltd* [1964] 1 All ER 430 at 436.

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respect of international transactions than for those in domestic transactions is neither convincing nor warranted on a proper interpretation of the relevant CISG provisions.

This sets requirements that are more stringent than those set in the decision of the Austrian Supreme Court as it requires the inclusion of the standard terms themselves, whereas the Austrian court merely requires incorporation by a clear reference. The Austrian Supreme Court states:[44]

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

The approach taken by the Austrian court is a commercially more realistic approach and in line with the general requirements of the CISG. This more moderate approach is to be preferred above that of the German Supreme Court.

3.2 Contract terms on the back but no clear reference on the front

The facts in the French *Isea case*[45] present a more problematic scenario. In that case the buyer sent order forms to the seller. The order forms contained standard terms printed on the back, but contained no incorporation clause on the front of the document. The court held as follows:

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

44 Austria Supreme Court 1996 http://cisgw3.law.pace.edu/cases/960206a3.html. See also Austria Supreme Court 2003 http://cisgw3.law.pace.edu/cases/031217a3.html; Austria Appellate Court Linz 2005 http://cisgw3.law.pace.edu/cases/050808a3.html.

45 France Appellate Court Paris 1995 http://cisgw3.law.pace.edu/cases/951213f1.html.

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

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

Once again this is in a commercial sense a rather startling conclusion without properly analysing the appearance of the document. The use of standard terms in all sales, domestic and international is a well known and widespread phenomenon. Indeed, in this case both parties regularly made use of standard terms. The buyer's terms were printed on the back of the order form, the seller consistently sent his standard terms to the buyer, albeit after the conclusion of the contract. One may well ask whether the conduct of the seller in this case who probably would have seen the writing on the back of the document, acted in good faith by studiously ignoring the writing on a document which was clearly a contractual document and in which a reasonable commercial party would have expected to find standard terms. It is submitted that in this case the French court displayed too strict an approach to the incorporation of standard terms.

3.3 Where the standard terms are in a different language

In international transactions the contracting parties very often conclude their agreement in a neutral language such as English, or in the language of one of the contracting parties. In these cases it quite often happens that the agreement refers to the incorporation of the standard terms of either the buyer or seller and that those

standard terms then exist only in a different language. The issue is whether the incorporation in these circumstances should be regarded as effective. On the one hand one may argue that where there is a clear incorporation term, the party should be bound by the terms incorporated unless it objects to such incorporation. The fact that the terms are in another language theoretically makes it difficult for that party to take subjective notice of the contents of such terms, but practically speaking it is well known that such terms are very often not read by the other party. The failure of the latter to object to the inclusion should have the same effect as if the terms had been in the same language as the rest of the contract.

Magnus however takes a different view. He states:[46]

> Generally, only if formulated in the language of the contract is the necessary reference to standard terms effective. The language of the contract is the language in which the parties negotiated and concluded the contract. However, if the reference is made in a language which the addressee (or its representative) in fact understands this constitutes a valid reference. A reference in another language has, however, no effect.
>
> In principle, the same considerations apply to the language of the standard terms themselves. But if in a longstanding commercial relationship a party has always accepted standard terms in a language which is neither the contract language nor understood by this party then such conduct and the principle of good faith disallows this party to object to the terms.

Magnus' point of view is supported by the decision in the German *Knitware case* where the court states:[47]

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

It is submitted that this line of reasoning does not hold water when regard is had to the general principles. Where the addressee does not read or require a copy of the

[46] Magnus "Standard Contract Terms" 323-324.
[47] Germany Lower Court Kehl 1995 http://cisgw3.law.pace.edu/cases/951006g1.html.

standard terms, the language in which they are couched becomes wholly immaterial. Whether it is in a language that the addressee understands or not, makes no practical difference – the addressee has taken no interest in obtaining the standard terms and has also not objected to their inclusion. The addressee has therefore created the objective impression that it has assented to the inclusion of the standard terms and the other party should be able to rely on that impression if regard is had to the principles laid down in article 8.[48] The reasoning of the court in the German *Clothes* case[49] is to be preferred:

> The [Seller] may not invoke comprehension difficulties, which were not even recited correctly and are hardly understandable in view of the letter of 10 June 1994, which was written in German. A party that accepts a foreign language for negotiations or accepts foreign language offers has to let the intricacies of meaning of the foreign language be held against them because, in case of doubt, the offeree is held to make objections to get sufficient certainty, to make further inquiries or use a professional translation (v. Caemmerer-Schlechtriem, aa. Art. 8, para. 4a). Should it neglect to do so, any unwanted consequences are to be borne by it pursuant to CISG Art. 8(1).

In the American *MCC-Marble Ceramic* case,[50] the court also dealt with language risks, quite correctly placing the risk on the party accepting a communication in a foreign language without any further inquiry:

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

The approach taken in the German *Knitware* case and expounded by Magnus again evidences an approach that is too strict and not in step with commercial realities or with the basic principles of the CISG and should therefore be rejected.

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48 Zeller 2003 *CILSA*; Germany District Court Kassel 1996 http://cisgw3.law.pace.edu/cases/960215g2.html.

49 Germany District Court Kassel 1996 http://cisgw3.law.pace.edu/cases/960215g2.html.

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

3.4 Where the standard terms are added ex post facto

In stark contrast to these cases where the court's have followed an approach that is far too strict in regard to the incorporation of standard terms, there is one case where a court has followed an approach which is unacceptably lax. In the American *Berry* case the court held as follows:[51]

> Finally, the exclusionary clause was printed in bright red on top of all 63 boxes of raspberry planting stock, and there is no dispute that Plaintiff Berry received and opened these boxes. Even if this were the only notice of the exclusionary clause, similar to the case in Mortenson, the clause is conscionable and enforceable.
>
> *Even if the CISG did apply, the exclusionary clause is still enforceable because Plaintiff paid the price for the goods and opened the package where the exclusionary clause was prominently displayed on top in red*. (Article 18(3): "assent by performing an act, such as one relating to the dispatch of the goods or payment of the price ..."; Article 18(1): an additional term can be accepted by "conduct by the offeree indicating assent.") Also, under Article 9(2), "the parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned." It appears that the placement of oral orders for goods followed by invoices with sales terms is commonplace, and while every term of the contract is not usually part of the oral discussion, subsequent written confirmation containing additional terms are binding unless timely objected to. See, e.g., W.T. GmbH v. P. AG, No. P4 1991/238 (ZG Basel, Switz. Dec. 21, 1992).[52]

Magnus[53] quite correctly observes that the reference to and availability of standard terms must occur before or at the same time as the conclusion of the contract. A reference to or the inclusion of standard terms afterwards on an invoice or similar document cannot in itself modify the terms of the already existing contract.[54] The court's reference here to the existence of a usage as the justification of the inclusion of the standard terms cannot be accepted as there was no clear evidence of such a usage either between the parties or in the industry at large. Furthermore a party cannot unilaterally add additional terms to the contract after the fact. It would be a breach of the contract if one of the parties insisted, even if it is only by its conduct, to insist on additional terms after the conclusion of the contract. The buyer in this

51 *Berry v Ken M Spooner Farms Inc* 59 UCC Rep Serv 2d 443 (WD Wash 2006).
52 Emphasis added.
53 Magnus "Standard Contract Terms" 323-324
54 *Berry v Ken M Spooner Farms Inc* 59 UCC Rep Serv 2d 443 (WD Wash 2006).

instance was quite entitled under the provisions of the CISG to ignore the terms that the seller wanted to impose unilaterally afterwards.

The court also refers to the decision in a Swiss case[55] as support for its provisions that a party is entitled to send a subsequent written confirmation of the terms of the contract. However, that case dealt with an entirely different situation. In German and Swiss law this type of confirmation is known as a "kaufmännisches Bestätigungsschreiben".[56] In this type of situation one of the parties will send a confirmatory writing setting out the terms of the agreement immediately after the conclusion of an oral agreement. If the other party does not agree with the confirmatory writing, it must register an immediate protest otherwise the confirmation is deemed to be in accordance with their agreement. However, in the *Berry* case the court was not dealing with this kind of confirmatory writing, but with entirely new terms that were being forced onto the other party after the conclusion of the contract. The Swiss case therefore does not support the American court's conclusion in any way. This case provides an example of an approach which is far too lax in respect to the inclusion of standard terms and goes against the clear provisions of the CISG.

Although most of the statements of the court in the *Berry case* may be considered correct, the application to facts and the result must be questioned. Once a contract has been concluded, the parties are bound by the terms of their agreement and cannot after the event be unilaterally modified by one of the parties, which seems to be what happened in this case. Unless the parties had established between themselves a practice where the inclusion of the standard terms became part of their agreements, sending invoices and packaging with terms prominently displayed cannot change the original agreement. The buyer was entitled to receive the goods in terms of the original contract without any additional conditions or terms being imposed on it. To require, as the court does here, that the buyer should refuse to open the packages if it wanted to object to the inclusion of these terms, runs against the grain of the provisions of article 18 and 19. Furthermore, the nursery is not as vulnerable or exposed in this situation as suggested by the court. There is no reason

55 Switzerland Civil Court Basel 1992 http://cisgw3.law.pace.edu/cases/921221s1.html.
56 A tradesman's written confirmation.

why the nursery could not refer the buyer to the inclusion of its standard terms at the time of contracting.

4 Conclusion

It is regrettable that at present there does not seem to be any harmony in the interpretation and application of the CISG in regard to the inclusion of standard terms. Although the CISG does not contain any specific provisions dealing with standard terms, the general principles found in articles 8, 14 and 18 should be sufficient to deal with this issue. It is clear that where a contract incorporates standard terms by reference and the standard terms are made available to the other party, that such terms are validly incorporated into the contract. However, the case law as well as academic opinion is divided on the question where the terms are not made available to the other party at the same time. There are three distinct approaches that can be observed in the case law and academic writings, a strict approach, moderate approach and a lax approach.

The German Supreme Court,[57] applying the strict approach, has held that unless the terms are supplied or made available to the other party at the time of the conclusion, they will not be regarded as validly incorporated. This strict approach has been applied consistently in Germany since and has even found favour with some Dutch court's.[58] This approach is too strict in respect of international commercial transactions and runs against a proper interpretation of the CISG. It should be rejected.

57 Germany Supreme Court 2001 [http://cisgw3.law.pace.edu/cases/011031g1.html.

58 Germany District Court Coburg 2006 http://cisgw3.law.pace.edu/cases/061212g1.html; Germany Appellate Court Köln 2005 http://cisgw3.law.pace.edu/cases/051221g1.html; Netherlands District Court Breda 2008 http://cisgw3.law.pace.edu/cases/080227n1.html; Netherlands Court 's-Hertogenbosch 2007 http://cisgw3.law.pace.edu/cases/070529n1.html.

At the other end of the scale, the lax approach applied by an American court in the *Berry* case[59] should equally be rejected. Allowing standard terms to be included *ex post facto* without allowing for a modification of the contract is totally unacceptable.

The fact that the standard terms to be incorporated into a contract is couched in a language different to that of the contract, should not affect the validity of their incorporation unless the other party has objected to their inclusion at the time of the contract.

It is submitted that the moderate approach used by the Austrian Supreme Court[60] is based on a proper interpretation of the CISG and is also more closely aligned to commercial practice and the expectations of international traders. It is hoped that this approach will eventually find favour with the majority of court's and represent the harmonised approach that should emerge.

The only exception to these rules should be in respect of those provisions which can be assessed as surprising or unusual in the particular circumstances. A party should not be held bound to such clauses unless it has been specifically made aware of such terms.

59 *Berry v Ken M Spooner Farms Inc* 59 UCC Rep Serv 2d 443 (WD Wash 2006).
60 Austria Supreme Court 2003 [http://cisgw3.law.pace.edu/cases/031217a3.html.

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CSIG	United Nations Convention on Contracts for the International Sale of Goods, Vienna 1980
Harv LJ	Harvard Law Journal
Ohio St LJ	Ohio State Law Journal
PICC	Principles of International Commercial Contracts
SALJ	South African Law Journal
UN	United Nations
UNIDROIT	International Institute for the Unification of Private Law