order confirmations did not incorporate its standard conditions. However, CSN did include within its counteroffer a term relating to payment if CSN's insurer refused to cover the transaction. Thereafter, CSN affirmatively invoked that term. After its invocation by CSN, RTI breached its contractual obligations by repudiating the contract. Therefore, RTI's Motion for Judgment on the Pleadings (doc. no. 40) will be DENIED and CSN's Cross-Motion for Judgment on the Pleadings (doc. no. 44) will be GRANTED.

(*omissis*)

Exclusion of CISG, Battle of Forms and Incorporation of Standard Terms according to a recent decision by the U.S. District Court, Western District of Pennsylvania.

SUMMARY: I. Introduction. — II. Summary of the facts. — III. The governing law. — IV. UCC and CISG compared. — 1. Additional terms. — 2. Battle of forms. — 3. Incorporation of standard terms. — V. Contract formation under the CISG. — VI. Conclusions.

I. *Introduction.*

During the negotiation phase of an international sales contract the parties involved frequently exchange a series of documents — order forms, acknowledgements of order forms, etc. — the content of which is often in conflict. In a large number of cases, this conflict is determined by the fact that reference is made to standard terms of contract that one or both parties want to be applicable to the agreement being attempted (1). However, parties will not usually become aware that their standard terms clash until a controversy arises between them. At this point, the competent court or arbitral tribunal will normally have to establish whether a contract had been formed at all and, if so, on what terms the parties had agreed.

The decision taken by the U.S. District Court, Western District of Pennsylvania, in the case *Roser Technologies v. Carl Schreiber GmbH d/b/a CSN Metals* is particularly interesting in that it is a typical example of the practical problems that may arise when offer and acceptance do not match — especially when one or both parties make use of standard terms of contract. Likewise, it provides an opportunity to examine how such problems are resolved within the system of a universally accepted legal instrument such as the 1980 United Nations Convention on Contracts for the International Sale of Goods (hereinafter "CISG" or "Convention") (2).

After a brief presentation of the facts of the case (II), an analysis of the decision will follow in an attempt to illustrate, first, the Court's reasoning as to the law governing the merits of the dispute (III); second, the comparison made by the

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(1) Standard terms can be defined as those contract provisions that are drafted in advance by one party for a general and repeated use and which are actually used in a given case without being negotiated with the other party. For such a definition, see, among others, Art. 2.1.19 of the UNIDROIT Principles of International Commercial Contracts - hereinafter "UNIDROIT Principles").

(2) Since its entry into force on 1 January 1988, the current number of Contracting States of the Convention has grown to 83.

Court between the domestic law and the Convention on the main substantive issues involved — that is, the effect of additional terms (IV.1), the so-called battle of forms (IV.2), and the incorporation of standard terms (IV.3); third, the Court's ruling on whether a contract was concluded between the seller and the buyer in accordance with the CISG's provisions (V). In the last paragraph (VI), some concluding remarks will be drawn.

II. *Summary of the facts.*

The dispute brought before the U.S. District Court, Western District of Pennsylvania, concerned an agreement entered into between Roser Technologies, a US-based company ("the buyer"), and Carl Schreiber GmbH d/b/a CSN Metals, a German manufacturer ("the seller"), for the supply of copper mold plates.

The seller provided the buyer with two price quotes. After receiving these quotes, the buyer issued two separate purchase orders that the seller subsequently confirmed via order confirmations. Both price quotes provided that, had a payment target been offered, it would be subject to a sufficient coverage by the seller's insurance company; if this were not the case, equivalent guarantees or payment in advance would be required. Additionally, the price quotes included the following clause: "According to our standard conditions of sale to be found under www.c-snmetals.de, we have pleasure in quoting without engagement as follows (...)." Likewise, the order confirmations expressly stated that they were subject to the seller's standard terms available at the German company's website. Those terms provided, inter alia, that "supplies and benefits shall exclusively be governed by German law", and that "the application of laws on international sales of moveable objects and on international purchase contracts on (*rectius*: of) moveable objects" was excluded.

When the seller, after being notified that its credit line had been cut, emailed the buyer requesting payment in advance or a L/C — and also proposed, by a further email, a third option to ship the goods in installments, the second installment being sent upon receipt of payment for the first one — the buyer notified the seller of its intention to obtain the goods from another supplier. Subsequently, the buyer commenced proceedings before the District Court of Pennsylvania contending that the seller's requests revealed that it was unwilling to perform the contract; the seller counterclaimed that the buyer had unlawfully cancelled the contract with it.

The main issues for the Court to decide were whether the CISG was applicable to the merits of the dispute; and whether a contract was concluded between the parties on the basis of the exchanged documents and, if so, on what terms.

III. *The governing law.*

The District Court, after confirming its jurisdiction over the case, had to then determine the applicable law. Since the parties argued that either the Uniform Commercial Code (UCC) or the CISG would apply, the Court, pursuant to the conflicts of law rules of the forum, had to preliminarily analyze the provisions of both the UCC and the Convention dealing with the issues at stake in order to verify

whether they diverged or not (3). Having reached the conclusion that relevant divergences existed between the two instruments — and that a true conflict of laws existed as a result (for a discussion on this point, see *infra* § IV) — the Court had hence to decide what was the governing law in the case at hand, and being Germany and United States both parties to the Convention (Art. 1(1)(a) CISG), it opted for the CISG. The Court observed that even if the seller's standard terms had been proven to be included into the contract, this would not lead to an exclusion of the Convention. Indeed, according to the Court, in order for such an exclusion to be effective, the contract must contain clear language stating that the Convention doesn't apply. This condition was not fulfilled in the case at hand, because there was no express mention of the CISG in the clause. Moreover, the seller's standard terms referred to international sales law concerning "moveable objects", whereas not only does this expression not appear in the Convention, but within the same Convention the term "objects" stands for "protests", not for "goods". In addition, the parties' reference to either the CISG or the UCC as the governing law (with the exclusion of German law) confirmed that they did not intend to opt out of the Convention.

Several observations can be made in relation to the Court's conclusion on the applicable law. To begin with, it comes as no surprise that the Court raised as its first argument that there was no express exclusion of the Convention in the choice-of-law clause contained in the seller's standard terms. As recently confirmed by the CISG Advisory Council in its Opinion No. 16 (4), Art. 6 CISG allows parties to contract out even only implicitly from the Convention in cases where the requirements for its application are fulfilled (5); and the same opinion is shared by most courts in various countries (which have, however, generally been very cautious in this field, consistent with the drafters' intent (6)) (7). Yet U.S. courts

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(3) Indeed, according to the conflicts-of-law rules of the State of Pennsylvania, a court is required to determine, as a threshold issue, whether a conflict exists between the potentially applicable laws; if no conflict exists, the Court will apply the lex fori (see, among others, Maniscalco v. Bro. Int'l (USA) Corp., 709 F.3d 202, 206 (3d Cir.2013).

(4) CISG-AC Opinion No. 16, Exclusion of the CISG under Article 6, Rapporteur: Doctor Lisa Spagnolo, Monash University, Australia. Adopted by the CISG Advisory Council following its 19th meeting in Pretoria, South Africa on 30 May 2014.

(5) For this conclusion, see, among others, M.J. Bonell, Art. 6, in M.C. Bianca - M.J. Bonell (eds.), *Commentary on the International Sales Law*, Milan, 1987, 51 *et seq.*; J. Schwenzer/P. Hachem, *Art. 6*, in J. Schwenzer (ed.), *Schlechtriem&Schwenzer: Commentary on the UN Convention on the International Sale of Goods*, 3rd ed., New York, 2010, at 103.

(6) As pointed out by M.J. Bonell, *Art. 6*, in M.C. Bianca - M.J. Bonell (eds.), *Commentary*, supra note n.13, para. 2.3, the fact that said provision does not expressly mention (in contrast to its antecedent, Art. 3 of the 1964 The Hague Convention relating to a Uniform Law on the International Sale of Goods, ULIS) the possibility to implicitly derogate from the entire Convention is not to be intended in the sense "to exclude such a possibility altogether, but rather to discourage courts from too easily inferring an *implied* [emphasis added] exclusion or derogation".

(7) See, for example, Tribunale di Vigevano, 12.7.2000 (abstract in English and full text available at *http://www.unilex.info/case.cfm?id=387*) and Tribunale di Padova - Sez. Este, 25.2.2004, *SO.M.AGRI s.a.s. vs. Erzeugerorganisation Marchfeldgemuese Gmbh & Co. KG* (abstract in English and full text available at *http://www.unilex.info/case.cfm?id=972*), which both concluded that, since the pleadings revealed that parties were unaware of the CISG's applicability, choosing to make an exclusive reference to the Italian law could not amount to an implied exclusion of the Convention; for a similar statement, see, among others,

have constantly maintained that, in order for the Convention's exclusion to be effective, the contract must include language affirmatively stating that the CISG doesn't apply ([8]).

While the parties themselves, during proceedings, urged for the application of either the UCC or the Convention (thereby demonstrating that they regarded the CISG's purported exclusion in the seller's standard terms as ineffective), what is still questionable here is the interpretation by the Court of the choice-of-law clause, insomuch as it provided for the exclusion of the application of "laws on international sales of moveable objects and on international purchase contracts on moveable objects".

First of all, the Court's statement that the expression "moveable objects" does not appear in the Convention sounds too formalistic. Admittedly, the Convention does use the terms "goods"; however, had the Court not applied such a narrow interpretation, but instead looked at the whole statement in which said expression appeared as well as at the general context, it may well have concluded that, in the clause concerned, "moveable objects" stood for "goods".

Equally unconvincing is the Court's argument that the word "objects" is only used within the Convention as a synonym for "protests", that is to mean that the offeror is not bound by an offer containing *immaterial* additional terms, if it has opposed to the discrepancy orally (see Art. 19(2) CISG; for further considerations on this point, see *infra* § IV.1). It is, indeed, somewhat surprising that the Court apparently neglected the fact that the term "objects" was placed next to the adjective "moveable", and therefore was not used as a verb (like it is in Art. 19(2) CISG) but rather as a *noun.*

Had the Court reasoned otherwise, it might perhaps have come to the conclusion that the clause in question, albeit imprecisely drafted, aimed at avoiding the application of all international instruments dealing with the international sale of *goods*, of which the CISG is — as is well known — the most outstanding example. All the more so because, as the same clause also provided for the application of the law of the seller (that is, the law of Germany), a Contracting State to the

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Oberlandesgericht Stuttgart, 31.1.2008 (abstract in English and full text available at *http://www.unilex.info/case.cfm?id=1317*).

([8]) On many occasions, U.S. courts have therefore stated that, absent a clear indication that the Convention doesn't apply, choice of the law of a Contracting State could not exclude the CISG's application: see, among others, U.S. District Court, Middle District of Pennsylvania, 31.7.2013, *It's Intoxicating, Inc., v. Maritim Hotelgesellschaft mbH and D. Zimmer* (abstract in English and full text available at *http://www.unilex.info/case.cfm?id=1815*); U.S. District Court, Eastern District of Michigan, 28.9.2007, *Easom Automation Systems, Inc. v. Thyssenkrupp Fabco, Corp.* (abstract in English and full text available at *http://www.unilex-.info/case.cfm?id=1224*); U.S. District Court, Minnesota, 31.1.2007, *The Travelers Property Casualty Company of America and Hellmuth Obata & Kassabaum, Inc. v. Saint-Gobain Technical Fabrics Canada Ltd* (reported in IHR 6/2007, 240 *et seq.*; abstract in English and full text available at *http://www.unilex.info/case.cfm?id=1166*); U.S. District Court, Northern District of Illinois, Eastern Division, 29.1.2003, *Ajax Tool Works, Inc. v. Can-Eng Manufacturing Ltd* (abstract in English and full text available at *http://www.unilex.info/case.cfm?id=834*). For further details on the approach developed by U.S. courts, see F. Ferrari, *Homeward Trend: What, Why and Why Not*, in A. Janssen - O. Meyer, CISG Methodology, Munich, 2009, 171 *et seq.* (at 185 *et seq.*).

Convention, its purpose was ostensibly to have the contract subject to not-unified domestic law.

This conclusion is reinforced by the fact that, in their original German version (dated 1st September 2014), the standard terms as retrievable at the company's website provide in Art. 11, lit. c, that "*Alle Verträge, einschließlich aller daraus oder in diesem Zusammenhang entstehender Rechtsstreitigkeiten unterliegen ausschließlich deutschem Recht. Die Anwendbarkeit des Internationalen Privatrechts und des U¨bereinkommens der Vereinten Nationen über Verträge über den internationalen Warenkauf* (*UN-Kaufrecht*) *wird ausgeschlossen*". Thus, there is no room here for uncertainty as to the exclusion of the Convention. Yet, unfortunately, no English translation of the seller's standard terms is available at the company website, and it can't be known otherwise what the origin of the text as it appeared in the clause was. At any rate, this is a clear demonstration of the numerous language problems involved in international contracting, even when language as widespread as English is used.

IV. *UCC and CISG compared.*

For the reasons indicated above, the U.S. District Court, before solving the issue of what the controlling law was in the case at hand, devoted itself to a comparison between the UCC and the Convention with respect to the main substantive issues involved — that is, the effect of additional terms (IV.1), the battle of forms (IV.2), and the incorporation of standard terms into the contract (IV.3).

1. *Additional terms.*

Important differences emerged between the UCC and the CISG as to the effect of additional terms.

With respect to the former, the Court observed that, according to § 2-207(2) UCC, additional terms — to be considered as proposals for addition to the contract — become part of the contract unless they materially alter it (9) —, that is, they result in surprise or hardship to the other party (10).

As regards the Convention, the Court noted that the provision dealing with the effect of additional terms is Art. 19 CISG. Citing both U.S. and foreign court decisions, as well as scholarly writings, the Court observed that such provision essentially embraces the mirror-image rule, that is, the rule requiring a perfect resemblance between offer and acceptance.

The Court's analysis calls for some remarks. To begin with, there is no doubt that Art. 19 CISG reflects a stricter approach to formation of contract than that embraced by § 2-207 UCC. Whereas, in fact, under the CISG an acceptance containing terms additional or different from those offered amounts, as a rule, to a

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(9) Under § 2-207(2) UCC (which, relevantly, only applies to contracts between merchants), incorporation of additional terms that do not materially alter the terms in the offer may nonetheless be excluded where the offer expressly limits acceptance to the terms of the offer (lit. (a)); or where notification of objection to them has already been given or is given within a reasonable time after notice of them is received (lit. (b)).

(10) See Comment 4 to § 2-207 UCC.

new offer and a rejection of the original offer (11), in the system of the UCC a discrepancy between offer and acceptance does not prevent a contract from coming into being, unless the offeree "takes pains expressly to say that it does" (12). According to § 2-207(1) UCC, in fact, "a definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms".

It must however be recalled that — as acknowledged by the Court (13) — the Convention's drafters made an effort to overcome the rigidity of the widely recognized *mirror-image rule*, by providing — in the second paragraph of Art. 19 — that additional or different terms in the acceptance not materially altering the content of the initial offer do become part of the contract, unless the offeror objects forthwith to the discrepancies (14).

Yet a significant difference still remains between the two sets of rules with regard to the test of *materiality*. Under the UCC, as the Court noted, it is to be treated as material such terms that result in surprise or hardship to the other party. Determining if, according to said standard, a term gains the status of *a material term* is, of course, not an easy task for adjudicators. Fundamental guidance is still offered by the Official Comment, which provides examples of terms materially altering the offer (e.g., a warranty disclaimer and a clause which imposes that complaints be made within an unreasonably short period of time), as well as examples of non-material alterations (e.g., a force majeure clause, a reasonable interest charge on overdue accounts, and a limitation of remedies in a reasonable manner) (15).

The Convention's drafters followed a more restrictive approach. In fact, Art. 19, paragraph 3 CISG does not provide the interpreter with any loose criterion to distinguish between material and immaterial terms; it rather sets forth a non-exhaustive list of terms that are presumed to materially alter the initial offer, and that virtually cover all the most relevant aspects in practice (16). Indeed, according

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(11) Cf. Art. 19(1) CISG.

(12) For this statement, cf. E.A. Farnsworth, *Contracts*, 4th ed., New York, 2004, at 164.

(13) See footnote n. 4 of the decision.

(14) The adoption of this paragraph gave rise to prolonged discussions during the *travaux préparatoires*: see, for all, F. Vergne, *The "Battle of the Forms" Under the 1980 United Nations Convention on Contracts for the International Sale of Goods*, 33 Am. J. Comp. L., 1985, 233 *et seq.*

(15) See Official Comment to § 2-207 UCC.

(16) This provision is the result of a compromise amongst the different views that emerged during the Vienna Conference: for a synthesis of those views, see F. Vergne, *The "Battle of the Forms"*, *supra* note n. 22, 235 *et seq.*

An analogous provision can now be found in Art. 38 of the proposed European Common Sales Law ("CESL"), as published on 11 October 2011 (see Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law (PR CESL), COM(2011) 635 final). As is as well known, said proposal was withdrawn by the EU Commission in December 2014, in view (presumably) of adopting a new text capable of "fully unleash the potential of e- commerce in the Digital Single Market" (see EU Commission Work Programme 2015 - A New Start; Annex 2 - Item 60) (COM(2014) 910 final). For a comparison between the CISG and the CESL's provisions relating to B2B contracts, see,

to said provision, clauses that are presumed to materially alter the content of the original offer are those pertaining to payment and price, delivery conditions, quantity and quality of the goods, settlement of disputes, and extent of one party's liability. Hence, despite its innovative momentum, the scope of the provision appears to be quite narrow (17), and cases where it has served to establish that a contract was concluded in spite of a conflict between offer and acceptance are very limited in number (18).

This decision is no exception: whilst the Court did not ignore the fact that an acceptance containing additional or different terms — if the modifications are not material — does not prevent a contract from coming into existence, it proceeded on the premise that the rule in Art. 19(2) CISG was inapplicable to the case at hand (19), since the additional term proposed by the seller pertained to payment conditions, thereby falling among the terms that are presumed to be material in accordance with Art. 19(3) CISG (for further considerations on this point, see *infra* § V).

2. *Battle of forms.*

The analysis conducted by the U.S. District Court also revealed that the UCC and the CISG diverge as to the so-called battle of forms: the situation where each party uses standard terms of contract, and insists that its own terms apply.

For that which concerns domestic law, the Court noted that in all cases (as in the one before it) where writings exchanged between the parties do not coincide, but performance demonstrates that a contract has nevertheless comes to life, terms of contract are those on which the writings agree, as well as any other term

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among others, U. Magnus, *CESL v. CISG*, in U. Magnus (ed.), *CISG vs. and Regional Sales Law Unification, with a Focus on the New Common European Sales Law*, Munich, 2012, 97 *et seq.;* J. Schwenzer, *The Proposed Common European Sales Law and the Convention on the International Sales of Goods*, 44 Unif. Comm. Code Law Journal (UCCLJ), 2012, 457 *et seq.*

(17) However, many authors convincingly maintain that Art. 19(3) contains only a rebuttable presumption that terms listed therein have a "material" character, and that such provision shouldn't be construed narrowly, but rather considered in the light of all relevant circumstances of the individual case (see, among others, U. Schroeter, *Art. 19*, in J. Schwenzer (ed.), Schlechtriem&Schwenzer: Commentary, *supra* note n.13, para 15.

Relevantly, a solution closer to the one adopted by the UCC's drafters can be found in the Unidroit Principles, since, even though Art. 2.1.11(2) contains a rule literally inspired by Art. 19(2) CISG, no list of terms comparable to the one to be found therein is provided. Furthermore, the Official Comment expressly states that "[w]hat amount to a 'material' modification cannot be determined in the abstract to but will depend on the circumstances of each case". In such an assessment, due consideration should be given as to whether the additional or different terms are commonly used in the trade sector concerned and therefore may not represent a surprise to the offeree.

(18) See, for example, Oberlandesgericht Naumburg, 27. 4.1999 (abstract in English and full-text available at *http://www.unilex.info/case.cfm?id=510*), where the Court considered as being not material a modification pertaining to delivery date ("April 1997" instead of "mid March 1997"); Oberster Gerichtshof, 20.3.1997 (abstract in English and full text available at *http://www.unilex.info/case.cfm?id=254*), concerning a modification to the quantity of the goods to be purchased that was only favorable to the offeror; Landgericht Baden-Baden, 14.8.1991 (abstract in English and full text available at *http://www.unilex-.info/case.cfm?id=13*), where the Court did not consider as being material a contractual term in the purported acceptance establishing a 30-day time limit for notice of non-conformity.

(19) See footnote n.4 of the decision.

established according to supplementary rules. This rule is sets forth by § 2-207(3) UCC, which enshrined the so-called *knockout doctrine.*

On the contrary, within the system of the Convention a writing reproducing one party's standard terms of contract — or merely referring to them — will be normally regarded as a material alteration calling for an express or implied acceptance by the other party. On this premise, a contract will be normally considered as having been concluded on the basis of those terms that were the last to be sent, or referred to (the so-called *last shot principle).* Conclusively, the Court observed that whereas under UCC standard terms in an acceptance that materially alter the terms of the agreement are disregarded, under the CISG, an acceptance with different standard terms is not actually an acceptance, but rather is a rejection and counteroffer.

The judgment here in comment is openly in accord with that part of legal doctrine and case law that leans towards the recourse to Art. 19 CISG to solve the conflict that almost unavoidably will arises between the forms exchanged between the parties (20). It shouldn't be overlooked, however, that this is not the sole solution held to be compatible with the Convention's provisions and the general principles on which it is based. Indeed, many commentators (21), as well as courts (especially in Germany) (22), are in favor of the application of the *knockout rule*, which has also been adopted by the UNIDROIT Principles of International Commercial Contracts (23). Furthermore, such an approach has been recently approved by the CISG Advisory Council in its Opinion No. 13 (24), for it is more in accord with expectations and intent of the parties, and has the potential to enhance predictability and certainty by avoiding an arbitrary prevalence of one of the competing sets of standard terms referred to by the parties (25).

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(20) See, for example, E.A. Farnsworth, *Art. 19*, in C.M. Bianca - M.J. Bonell, *Commentary*, supra note n.13, para.2.5; J.E. Murray, *The Definitive "Battle of the Forms": Chaos Revisited*, J. Law Commerce, 2000, *1 et seq.*; M.d.P. 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, Pace Int'l L. Rev., 1998, 97 *et seq.* (at 101 *et seq.).*

As to case law, see, among others, U.S. DC, Minnesota, 31.1.2007 (abstract in English and full text available at http://www.unilex.info/case.cfm?id=1166); Hof's-Hertogenbosch, 19.11.1996 (abstract in English and full text available at http://www.unilex.info/case.cfm?id=329).

(21) See U. Schoeter, in J. Schwenzer (ed.), *Schlechtriem&Schwenzer: Commentary*, supra note n.13, at 350; B. Audit, *La vente internationale de marchandises*, Paris, 1990, para. 71; J.O. Honnold, *Uniform Law for International Sales Under the 1980 United Nations Convention,* 3rd ed., Deventer, 1999, Art. 19, para. 170.4; J. Lookofsky, *Understanding the CISG in the USA*, 2nd ed., The Hague, 2004, para. 3.8, at 57.

(22) Cfr., among others, OLG Köln, 24.5.2006 (abstract in English and full text available at http://www.unilex.info/case.cfm?id=1132); BGH, 9.01.2002 (abstract in English and full text available at *http://www.unilex.info/case.cfm?id=766*).

(23) See Art. 2.1.22. The same approach has also been adopted in the CESL (see Art. 39).

(24) CISG-AC Opinion No. 13, Inclusion of Standard Terms under the CISG, Rapporteur: Professor Sieg Eiselen, College of Law, University of South Africa, Pretoria, South Africa. Adopted by the CISG Advisory Council following its 17th meeting, in Villanova, Pennsylvania, USA, on 20 January 2013 (published in IHR 1/2014, 34 et seq.)

(25) Thus, as is stated in Black Letter Rule No.10 of the CISG-AC Opinion No. 13, in cases where a battle of forms arises under the CISG, a contract should be deemed concluded

Against this background, it is regrettable that the Court failed to consider that the UCC's approach in favor of the knockout rule is far from unknown in the framework of the Convention, and irreconcilable with the general principles underlying it.

3. *Incorporation of standard terms.*

The District Court recognized a further significant divergence between the UCC and the Convention in relation to whether a reference to standard terms of contract may suffice in order for those terms to be validly incorporated into a contract. This made it crucial to decide what body of law would control in the case at hand.

As regards domestic law, the Court observed that under the UCC, "a provision will not be incorporated by reference if it would result in surprise or hardship to the party against whom enforcement is sought". It follows that whether the standard conditions are incorporated into the contract depends upon whether incorporation would result in surprise or hardship to the other party.

For that which concerns the Convention, the Court, after considering both U.S. and foreign precedents, came to the conclusion that, on the strength of Arts. 8 and 14 CISG, standard conditions are only incorporated in a contract "if one party attempts to incorporate the standard conditions and the other party had reasonable notice of this attempted incorporation."

Before examining that part of the judgment that addressed the issue of whether a contract was concluded between the parties and on what terms they were bound, it is interesting to note that the Court was correct in deciding to derive general rules on incorporation of standard terms from the CISG's provisions regarding contract interpretation and formation. Even though the Convention does not contain any special rules on inclusion of standard terms, according to both prevailing scholarly opinion ([26]) and case law ([27]) this is a matter to be considered

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"on the basis of the negotiated terms and of any standard terms which are common in substance unless one party clearly indicates in advance, or later on but without undue delay objects to the conclusion of the contract on that basis".

([26]) As far as scholarly opinion is concerned, see, among others, S. Kruisinga, *Incorporation of Standard Terms under the CISG and the Electronic Communication*, in J. Schwenzer/L. Spagnolo (eds.), *Towards Uniformity - The 2nd Annual MAA Schlechtriem CISG Conference*, 2011, 69 *et seq.*; U.G. Schroeter, *Art. 14*, in *Schlechtriem&Schwenzer: Commentary*, supra note n., para. 33, 275 *et seq.*; *Schmidt-Kessel/Meyer, Allgemeine Geschäftsbedingungen und UN-Kaufrecht*, Internationales Handelsrecht (IHR), 2008, 177 *et seq.;* J. Hellner, *The Vienna Convention and Standard Form Contracts*, in P. Sarcevic/P. Volken (eds.), *International Sale of Goods*, New York-Oceana, 1986, 335 *et seq.*

([27]) For that which concerns case law, see, among others, Oberlandesgericht, 13.2.2013, (abstract in English and full text available at http://www.unilex.info/case.cfm?id=1697); U.S. District Court, District of Maryland, 08.2.2011, *CSS Antenna, Inc. v. Amphenol-Tuchel Electronics, GMBH* (abstract in English and full text available at http://www.unilex.info/case.cfm?id=1593); Rechtbank Utrecht, 21.1.2009, (abstract in English and full text available at *http://www.unilex.info/case.cfm?id=1594*); Tribunale di Rovereto, 21.11.2007, *Takap B.V. v. Europlay S.r.l.* (abstract in English and full text available at http://www.unilex.info/case.cfm?id=1219); Oberster Gerichtshof, 31.8.2005 (abstract in English and ful text available at *http://www.unilex.info/case.cfm?id=1096*). For the opposite approach, followed by a minority of the courts in the past, according to which domestic law should apply to solve questions regarding the effective incorporation of standard terms, see,

as falling within its scope. This means that, as recently reaffirmed by the CISG Advisory Council (Opinion No. 13), interpreters are asked, on the basis of Art. 7(2) CISG ([28]), to answer the question of incorporation of standard terms by resorting to other provisions of the Convention (to be applied analogously) as well as the general principles underlying it, rather than to the otherwise applicable domestic law.

V. *Contract formation under the CISG.*

Having established that the CISG was the controlling law (see § III, *supra*), the Court moved on to decide whether a contract had been formed between the parties, and on the basis of what terms.

The seller contended that the purchase orders issued by the buyer amounted to offers and that its order confirmations were rejections and counteroffers under Art. 19 CISG. If the Court had instead treated its order confirmations as acceptance, the purchase orders (offers) would have to be considered as embodying the standard terms of sale via reference to the seller's price quotes.

For its part, the buyer argued that its purchase orders were offers which did not include the seller's standard terms, and that the seller's confirmation of orders amounted to acceptance.

In order to settle the dispute, the Court found it crucial first to establish whether the buyer's purchase orders had incorporated the seller's standard terms by reference ([29]). In this respect, the Court noted at the outset that neither the parties nor the Court itself had knowledge of U.S. precedents relating to the CISG addressing the question of whether an offer that refers to a document, which in turn makes reference to standard terms, had to be considered as incorporating such terms. However, the Court, drawing on a judgment by the Austrian Supreme Court ([30]), maintained that in order for standard terms to be opposable to the recipient, it is first of all necessary that, in compliance with the criteria set forth by Art. 8 CISG, the intention of the party that wants them governing the contract is apparent — that is, that such party acts in such a way that the other party is aware (or may not reasonably be unaware) of such intent ([31]).

This requirement was not fulfilled in the case at hand, as the purchase orders embodied contractual terms that diverged from those in the seller's standard terms. For instance, while the purchase orders provided that the orders were FOB destination, the seller's standard terms stated that those were FOB origin. Again, in the seller's standard terms, time of payment was fixed at 90 days, whereas in the purchase orders a period of 60 days was indicated.

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for example, Landgericht München, 29.5.1995 (abstract in English and full text available at http://www.unilex.info/case.cfm?id=161).

([28]) For an analysis of Art. 7, and the problem of gap filling within the system of the CISG, see for all M.J. Bonell, Art. 7, in C.M. Bianca/M.J. Bonell (eds.), *Commentary*, supra note n.13, 65 *et seq.*

([29]) The buyer's purchase orders were, in fact, "per seller's quote", followed by the respective quotes numbers.

([30]) Oberster Gerichtshof, 17.12.2003, 7 Ob 275/03x (reported in IHR 4/2004, 148 *et seq.*; abstract in English and full text available at http://www.unilex.info/case.cfm?id=1884); in agreement, among others, Oberster Gerichtshof, 31.8.2005 (*supra* note 25).

([31]) For this statement, see CISG Advisory Council Opinion No. 13, § 5.

Having determined that the seller's standard terms were not incorporated in the purchase orders via reference to the price quotes, the Court turned to consider whether, under the Convention, the seller's order confirmations amounted to acceptances, or to rejections and counteroffers. In order to answer this question, it was central to establish whether the order confirmations had properly incorporated the general conditions of sale.

In this respect, it must be recalled that opinions are divided as to whether a reference to standard terms is sufficient in order for such terms to become part of the contract. Whereas in some instances it has been stated that a mere reference is sufficient (32), in other cases it has been held as necessary that the adhering party have had a reasonable opportunity to become aware of such terms (33). Despite the fact that this latter approach provides for stricter requirements than those set forth in a number of legal systems (34), it has increasingly gained support (35), and has recently been endorsed by the CISG Advisory Council (36) as being more in line with the spirit of the Convention and the requirements of international trade. Thus, standard terms are to be regarded as being included in the contract not only when the parties have expressly agreed on it, but also (quoting the CISG-AC's Opinion) when they have "impliedly agreed to their inclusion at the time of the formation of the contract and the other party had a reasonable opportunity to take notice of the terms" (37).

This is not to say, however, that standard terms need in all cases to be handed over or transmitted to the adhering party, because this would set too stringent a requirement (38). Instead, in some cases, as pointed out in Opinion No. 13 of the CISG-AC Opinion "it would, for instance, suffice where the reference to the inclusion of the standard terms refers to the offeror's website where the terms are available". This is especially true with regard to contracts concluded over the

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(32) See, for example, Oberster Gerichtshof, 06.2.1996 (abstract in English and full text available at *http://www.unilex.info/case.cfm?id=202*); Tribunal Commercial de Nivelles, 19.9.1995, *S.A. Gantry v. Research Consulting Marketing* (abstract in English and full text available at *http://www.unilex.info/case.cfm?id=231*). Interestingly, this is the solution that seems to be considered preferable within the system of the CESL: cf. Art. 70 and the proposed amendments contained in the European Parliament Draft Report on the PCESL published on 18 February 2013.

(33) The leading case is represented by the decision of the Bundesgerichtshof, 31.10.2001, known as the "Machinery Case" (reported in IHR 1/2002, 14 *et seq.*; abstract in English and full text available at http://www.unilex.info/case.cfm?id=736).

(34) See, for all, U.G. Schroeter, Art. 14, in J. Schwenzer (ed.), Schlechtriem&Schwenzer: Commentary, supra note n.13, para. 41, 280 *et seq.*

(35) See, among others, Oberlandesgericht Naumburg, 13.2.2013, 12 U 153/12 (Hs) (reported in IHR 4/2013, 158 *et seq.*; abstract in English and full text available at *http://www.unilex.info/case.cfm?id=1697*); Rechtbank Rotterdam, 25.2.2009, *Fresh-Life International B.V. v. Cobana Fruchtring GmbH & Co., KG* (abstract in English and full text available at *http://www.unilex.info/case.cfm?id=1573*); Tribunale di Rovereto, 21.11.2007 (*supra* note no. 25).

(36) See CISG-AC, Opinion No. 13, para. 2.4.

(37) For a recent reference to the Opinion No. 3 CISG-AC by the Court of Appeal, the Hague, as a basis for solving the dispute before it, see the decision taken in the case *Feinbäckerei Otten GmbH & Co. Kg v HDI-Gerling Industrie Versicherung AG*, 22.04.2014 (abstract in English and full text available at http://www.unilex.info/case.cfm?id=1900).

(38) See, however, Rechtbank Utrecht, 21.9.2009 (abstract in English and full text available at *http://www.unilex.info/case.cfm?id=1594*).

website, provided that access to the website is available at the time of contract conclusion, and that in cases where several sets of rules are retrievable, no ambiguity exists as to what standard terms apply (39). In other cases, for example where the parties have negotiated by email or other electronic means, it may be necessary that standard terms are attached to the email, or made easily available to the adhering party by way of a hyperlink (40).

The annotated decision falls within the group of precedents that have set stringent requirements in order to solve the question of the incorporation of standard terms by reference. Moving from the premise that the adhering party must have a reasonable opportunity to easily take note of the standard terms of the counterparty, the U.S. District Court observed at the outset that the language of the order confirmations was ambiguous, as they merely directed the buyer to the seller's homepage, thus requiring a laborious search in order to locate the standard terms in the website. Furthermore, the Court added that no evidence was provided to show that the parties had discussed the standard terms' inclusion during contract negotiation, nor that the buyer had received a copy of them. In this scenario, the Court excluded that the seller's reference to its standard terms was sufficient to incorporate them in the order confirmations.

However, the Court held that, even though the seller's standard terms had not become part of the contract (as they were neither included in the buyer's purchase orders nor in the order confirmations), the buyer was nevertheless bound by the clause concerning target payment in the order confirmations. This was, in fact, a separate independent clause, which, even while being material within the meaning of Art. 19(3) CISG, the buyer had accepted in compliance with Art. 18(1) CISG.

The buyer had argued that such term, rather than imposing a duty on it, would merely give the seller the ability to ask for equivalent guarantees or advance payment; but this argument was rejected by the Court, which argued that any reasonable businessman would have interpreted such term as imposing a requirement in the event that the seller had not obtained sufficient coverage from its insurance company.

The Court then observed, as to the first purchase order, that the buyer's acceptance descended from the fact that it had sent the seller the original drawings of the plates, as expressly required by the German company in order to start production; and also from the fact that it did not object to the additional terms that were included in the order confirmation (counteroffer).

Similarly, as to the second purchase order, the Court found that the buyer's acceptance was to be inferred from the fact that, after reviewing the order confirmation, this latter communicated the seller to start manufacturing the goods, and did not raise any objection.

In conclusion, the Court stated that the buyer had unlawfully refused to comply with the payment conditions legitimately requested by the seller, and cancelled the contract, thereby breaching its contractual obligations.

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(39) See CISG-AC, Opinion No. 13, para. 3.4. For further remarks on why a mere reference to one party's website where standard terms are retrievable may not suffice, see S. Kruisinga, Incorporation of Standard Terms, supra note n. 34, 76 *et seq.*

(40) See CISG-AC, Opinion No. 13, para. 3.5. In agreement, see U.G. Schroeter, in J. Schwenzer (ed.), *Schlechtriem&Schwenzer: Commentary*, para 49, at 283.

VI. *Conclusions.*

The first issue dealt with by the U.S. District Court, Western District of Pennsylvania, concerns the debated question of what the necessary requirements are for the parties to a contract governed by the CISG to exclude the application of the Convention entirely. This decision is a further addition to the series of judgments by which U.S. courts have refuted that the Convention can be implicitly derogated. However, the way the Court interpreted the choice-of-law clause can hardly be considered convincing here.

The other issues addressed by the Court regard some of the typical problems that may arise in the context of contract formation, which however do not find an express solution in the CISG.

With respect to the so-called battle of forms, the Court adhered to the view that the resulting conflict should be resolved, as required by Art. 19(2) CISG, according to the *last shot doctrine.* In the opinion of the Court, this would mark a difference with the approach followed by the UCC's drafters, who instead favored the *knockout rule.* It shouldn't be overlooked, however, that such a rule is far from unknown within the system of the Convention, as demonstrated by the large support received both among legal scholars and on the part of case law.

As to the requirements for standard terms to be incorporated into a contract governed by the CISG, the judgment is interesting particularly because, as it involved parties that communicated with one another via email, the Court reached the conclusion that a mere reference to the company's homepage from where the standard conditions could be retrieved did not suffice. The rationale for this outcome appears to be that the burden of providing information about such terms rests on the party insisting on their application, and no duty can be imposed on the adhering party to actively search for them. It however remains unclear whether, had the standard terms not only been attached to the relevant emails, but also made accessible by a hyperlink directly leading to the applicable rules, the Court would have reached a different conclusion.

Last but not least, the decision of the District Court deserves attention for its consideration, when dealing with all issues involved, of not only U.S. but also foreign precedents. In this respect, it is noteworthy that reference was made more often to precedents by courts in civil law jurisdictions (that the Court accessed in an English translation) than those by courts in common law countries (as it may have been reasonably expected (41)). This demonstrates a particular openness and effort on the part of the U.S. District Court in attaining the goal of a uniform interpretation and application of the Convention, as required by Art. 7(1) CISG. Likewise, it is a further recognition of the invaluable role in attaining such a goal of not only "official" initiatives (42), but also "private" ones, such as the numerous

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(41) In this respect, it should however be recalled that England has not, so far, ratified the Convention.

(42) By "official" initiatives, those sponsored by the UNCITRAL are meant, such as the CLOUT System and the UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods (first published in 2004, and subsequently in 2012). For an overview of such initiatives, see *Sekolek*, Digest of case law on the UN Sales Convention: The combined wisdom of judges and arbitrators promoting uniform interpretation of the Convention, in F. Ferrari/H. Flechtner/R.A. Brand (eds.), *The Draft UNCITRAL*

databases run by scholars and researchers all over the world that contribute to the dissemination of knowledge of the decisions relating to the CISG, and to the reduction of linguistic barriers (43).

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Digest and Beyond: Cases, Analysis and Unresolved Issues in the U.N. Sales Convention, Munich, 2004, 1 *et seq.*; for some critical remarks on the CLOUT System and on the UNCITRAL Digest, see F. DE LY, *Uniform Interpretation: What is Being Done? Official Efforts*, in F. FERRARI, *The 1980 Uniform Sales Law: Old issues revisited in the Light of Recent Experiences*, Munich, 2003, 335 *et seq.*

(43) As clearly illustrated by A. VENEZIANO, U*niform Interpretation: What is Being Done? Unofficial Efforts and their Impact*, in F. FERRARI, *The 1980 Uniform Sales Law*, supra note n.50, 325 *et seq.*, the numerous "private" existing databases differ as to their purpose (and their structure and content are affected accordingly). While a number of them have as their main purpose that of making national case law available in the original language (for example, CISG-France, *www.cisg.fr*; CISG-Australia, *http://www.business.vu.edu.au/cisg/cases.asp*; CISG-China, *http://aff.whu.edu.cn/cisgchina/en/news_more.asp?lm2=67*), others also provide abstracts or comments in English (e.g., CISG-Spain and Latin America database, http://www.cisgspanish.com). More ambitiously, other databases contain a collection of international case law. Among them, the well-known site of the Pace University Law School (to which the same District Court resorted to) provides, among others, the opportunity to search for cases by articles of the CISG and by word descriptors; the most interesting decisions are usually translated into English. As to the UNILEX database (*www.unilex.info*), which is also the unique collection of national and arbitral decisions relating to the UNIDROIT Principles, its key strengths are that all decisions are provided with keywords and abstracts in English, and that all case law can be retrieved not only chronologically and by country and arbitral award, but also through access to (an extremely user-friendly) analytical index composed of about 800 issues and sub-issues. As concerns the database run by a team of scholars from the University of Basel under the direction of prof. I. Schwenzer (*www.globalsaleslaw.org*), it features many search facilities, including the opportunity to search cases also by seller's and/or buyer's country, the goods involved and the (key) provisions cited in the decision/award.