Opting out of Merger and Form Clauses under the CISG – Second thoughts on *TeeVee Toons, Inc. & Steve Gottlieb, Inc. v. Gerhard Schubert GmbH*

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Years ago, I had to testify as an expert on German Law in the same court that decided *TeeVee Toons*.[1] Al Kritzer, having heard about my being in New York, invited me to dinner. He came to my hotel two hours earlier and spread out some of his recent ideas, how to make American institutions and lawyers more familiar with the CISG – literally spread them out, for soon the floor of my room was covered with files and papers. One plan was to form a group of scholars and other experts of the CISG, who would issue opinions – on request of institutions and free of charge – in order to explain and/or clarify certain provisions of the CISG and their influence on domestic law. No. 3 of these opinions of the Advisory Council on the CISG, as this group came to be known, which was requested by the Association of the Bar of the City of New York Committee on Foreign and Comparative Law, has influenced the decision in *TeeVee Toons* to a considerable extent, and thereby proves how far sighted Al's ideas have been.

The court in *TeeVee Toons* had to deal with – among other issues – the question, whether the parties had clearly[2] deviated by an oral exchange from the Standard Conditions 'attached' to their contract, in particular in dropping – allegedly – a disclaimer of warranties in these standard 'Terms and Conditions'. The boilerplate disclaimer released the German seller from his contractual liability (for the non-conformity of the goods sold, here: improp-

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1 U.S. District Court (S.D.N.Y.), 23 August 2006 (*TeeVee Toons, Inc. & Steve Gottlieb, Inc. v. Gerhard Schubert GmbH*), available at: http://cisgw3.law.pace.edu/cases/060823u1.html.

2 So as leaving no genuine question of material facts and allowing a summary judgement.

erly manufacture and malfunction of a packaging system) under the applicable warranty provision of the CISG. The defendant/seller had moved for a summary judgement, claiming – among other arguments – that the disclaimer clause was a valid part of the contract and, therefore, barred plaintiff's claims. The court held that 'the shared intent' of the parties should be decisive, and that it is a matter for the fact-finder to establish whether the parties intended the 'Terms and Conditions' with its disclaimer and merger clause to prevail over an oral agreement to the contrary between the sellers's agent and the buyer:

> 'There exists a genuine issue of material facts as to whether Schubert and TVT shared the intent to be bound by the "Terms and Conditions" portion for the February 1995 Quotation Contract or the written Merger Clause contained therein. If the final writing evinces the shared intent of TVT and Schubert (by their agents) to proceed with a meaningful Merger Clause, then the "Terms and Conditions" is part of the February 1995 Quotation Contract such that the liability limitations apply, see CISG art. 6, 19 IL.M. at 673 (allowing contracting parties to "derogate from or vary the effect of any of [the CISG's] provisions"), meaning that the warranty provision in the "Terms and Conditions" section would override the protections of CISG Article 35 and would undermine TVT's Article 35 cause of action. If, however, there was no shared intent of TVT and Schubert (by their agents) to be bound by either the "Terms and Conditions" section or the Merger Clause, then the "Terms and Conditions" section and Merger Clause would drop out, and TVT would be entitled to the full panoply of implied warranties offered by the CISG, including the Article 35 provisions forming the basis of the contract claim.'[3]

This being a 'genuine matter of material facts', the court denied summary judgement on this issue.

[3] U.S. District Court (S.D.N.Y.), 23 August 2006 (*TeeVee Toons, Inc. & Steve Gottlieb, Inc. v. Gerhard Schubert GmbH*), available at: http://cisgw3.law.pace.edu/cases/060823u1.html.

INCORPORATION OF STANDARD CONTRACT FORMS INTO A CONTRACT AND INTERPRETATION OF A MERGER CLAUSE

As reported by the court, the oral exchange between the parties – or their representatives – took place between 3 February 1995 (the date that the February 1995 Quotation Contract[4] was drafted) and 13 February 1995 (the date that TVT had sent its acceptance of the proposed contract); the contract contained a reference to the 'Terms and Conditions' 'attached' to the contract. The exact words exchanged orally are in dispute; in particular it is unclear – and for the fact finder to establish – whether Schubert's agent had offered to forego the Standard Conditions altogether ('not worry about the fine print', ... 'those pages are inapplicable to this deal' and that TVT 'should ignore them') or whether only the disclaimer clause was to be dropped ('that the boilerplate fine print was meaningless on the project').

If the wider formula was used – to ignore the fine print altogether – , then, as the court correctly summarized, the 'Terms and Conditions' with the Merger Clause and the Disclaimer Clause 'would drop out', and no collision between the Merger Clause and an oral discarding of the boilerplate provision could occur. The case would be easy.

In order to evaluate the exchange based on the wider formula – to ignore the fine print, ie the seller's 'Terms and Conditions' altogether – , one should remember, how Standard Forms are incorporated into an individually drafted contract.

Incorporation of Standard Terms

The safest way to incorporate Standard Terms Forms into a contract is to attach them to the contract document, covered by the parties' signatures at the end of the document or on each page. The validity of certain standard terms such as disclaimer clauses can still be controlled by the applicable domestic law and its provisions invalidating unfair, surprising and similar 'unwanted' conditions, this being a matter left to domestic law under Article 4 sent 2(a)

[4] Although the defendant had undertaken to manufacture and deliver the packaging system, the contract was governed by CISG under its Article 3(1).

CISG.[5] Incorporation is more uncertain, if the user of standard terms only refers to them as being, eg, accessible on his website or being sent on request, and the addressee does not respond. Whether the addressee could access the Standard Conditions of the other party, and whether he agreed with them by accepting the main contract, is often a matter of interpretation of conduct, Article 8 CISG being the linchpin for effective incorporation in such cases. I cannot lay out the details of the discussion and court decisions on the requirements for such an incorporation by reference becoming effective, but this is unnecessary for the case to be discussed here: Since the 'Terms and Conditions' were 'attached' to the February 1995 Quotation Contract proposal, they were directly accessible by the addressee TVT and covered by its acceptance.

The burden of proof for the incorporation of Standard Forms is on the party basing its claims or defences on terms on the Standard Form.[6]

The incorporation of Standard Forms requiring an agreement, the oral exchange between TVT's and Schubert's representatives could mean that both parties agreed not to incorporate the seller's 'Terms and Conditions' despite the reference in s. 32 of the (draft) February 1995 Quotation Contract. This reference to the 'Terms and Conditions' would have been orally revoked, before the Quotation Contract became binding by TVT's acceptance. If this is established by the fact-finder, there is no room for the question, whether the Merger Clause prevented oral changes of the contract, for the Merger Clause never became part of the contract.

Should it be established, however, that the parties (or their representatives) intended to drop only the disclaimer clause, but incorporate the rest of the 'Terms and Conditions' by referring to them in s. 32 of the main contract, by physically attaching them to the draft and by accepting the draft without further reservations, then the problem of a collision between oral agreements and the Merger Clause might come up.

5 Cf Lookofsky, J (2007) 'The 1980 United Nations Convention on Contracts for the International Sale of Goods' in Blanvain, R (ed) (2007) *International Encyclopedia of Laws* Kluwer Law International at para 63.

6 Cf Schlechtriem, P in Schlechtriem, P and Schwenzer, I (eds) (2005) *Commentary on the UN-Convention on the International Sale of Goods (CISG)* (2nd ed) Oxford University Press, Art 4 para 22.

Interpretation of a Merger Clause in light of an oral agreement between the parties

A 'Merger Clause' should 'merge' all agreements between the parties and all circumstances relevant for the interpretation of their communications into *one* 'entire contract' and the document fixing its content.[7] But under the CISG, the Merger Clause itself is open to interpretation,[8] and an established subjective and concurring intention of the parties prevails even if contradicting the words of the Merger Clause and their objective meaning. Article 8(1) CISG 'trumps' Article 8(2) CISG, and this is the core of the court's reasoning in *TeeVee Toons* sub C. pages 6-8.[9] One could argue that this collision of a Merger Clause and oral modifications of a contract draft can only pose problems, if the modifications were agreed upon orally *after* the Merger Clause became binding. Under the CISG a contract is concluded by an acceptance of a respective offer becoming effective, Article 23 CISG, this being in most cases the moment the acceptance reaches the offeror, Article 18(2) sent 1 CISG. Before that moment, the offeror – here Schubert – is free to alter his offer, and if the offer is formulated as a contract proposal drafted by both parties, the parties are free to modify it by oral agreements any time before its acceptance by the offeree. Before becoming a binding contract, there seems to be no collision of such oral modification(s) before acceptance with the Merger Clause in the contract, and no need to 'reconcile' the Merger Clause with an oral modification by way of interpretation. However, a Merger Clause is deemed to 'merge' also pre-contractual negotiations, agreements and other circumstances relevant for the understanding and meaning of the contract into the final document and its interpretation, thereby having some retroactive effects. The court was therefore correct in asking, whether and to what extent the oral exchange of the parties before the conclusion of the

[7] Cf in regard to Merger Clauses in CISG contracts AC-CISG opinion no 3 (Reporter: Prof. *Richard Hyland*), available at: http://www.cisg-online.ch/cisg/docs/CISG-AC_Op_no_3.pdf, headnote 3(1).

[8] AC-CISG opinion no 3 (previous fn) headnote 3(2): 'In determining the effect of such a Merger Clause, the Parties' statements and negotiations, as well as other relevant circumstances shall be taken into account'; furthermore reasons in paras 4.5, 4.6.

[9] See also quote of the court's reasoning above. How likely the fact-finder will establish a concurring subjective intention of the parties contrary to their words, I shall not guess.

contract by acceptance were either made obsolete by the Merger Clause or, on the contrary, could have influenced and limited the effects of the Merger Clause by way of interpretation under Article 8(1) and (3) CISG (if the respective words 'to ignore the disclaimer' were indeed spoken and this was to be proven).

Deviation from Form Requirement Clauses

The Merger Clause in this case is – as such clauses often are[10] – 'double-barrelled': It not only intends to merge all agreements and extrinsic evidence into one 'entire' contract, thus in principle excluding all agreements and extrinsic evidence not incorporated into the contract document from being operative, but it also contains a clause requiring writing as constitutive for all agreements between the parties. The full clause here reads:

> Sentences 1 and 2 (Merger Clause): *This quotation comprise our entire quotation. On any order placed pursuant hereto, the above provisions entirely supersede any prior correspondence, quotation or agreement.*
>
> Sentence 3 (Form Requirement Clause): *There are no agreements between us in respect of the product quoted herein except as set forth in writing and expressly made a part of the quotation.*

Could the Form Requirement Clause in sentence 3 be 'superseded' by an oral agreement expressing the concurring subjective intentions of the parties and taking priority in the interpretation of the 'Terms and Conditions' under Article 8 CISG? At first sight, the answer seems to be clear: Both parts of the clause are subject to the parties concurring intentions, even if manifested only orally. But there is a catch: Article 29(2) CISG does not allow oral modifications of clauses requiring the contract to be in writing. Article 29(2) CISG is the result of long discussions in the preparation of the Convention and in Vienna, where there were repeated motions to allow oral modification of form requirement clauses. They were rejected, and, instead, the estoppel solution of Article 29(2) sent 2 CISG was chosen and codified.

[10] Cf the clauses in Klotz, JM and Barrett, JA (1998) *International Sales Agreements. An Annotated Drafting and Negotiating Guide, International Edition* Kluwer Law at 342-6.

DOES ARTICLE 29(2) SENTENCE 1 CISG PREVENT THE ORAL MODIFICATION OF THE 'TERMS AND CONDITIONS' IN THE CONTRACT BETWEEN SCHUBERT AND TVT?

Effect of Article 29(2) CISG

The court did not mention Article 29(2) CISG. The reason why it was not introduced might have been that the oral exchange between Schubert's agent and TVT took place before the Quotation Contract was effectively concluded, and that Article 29 CISG, although it does not say so expressly, only deals with modifications of the contract *after* its conclusion.[11] The basic policy underlying Article 29(2) CISG, i.e. the strengthening of form clauses, and the often accidental and uncertain point in time of oral amendments or modifications – before or after conclusion of the contract – justify to ask here, whether Article 29(2) CISG or the policies underlying it (as 'general principles' in the meaning of Article 7(2) CISG) would bar an oral modification of a contract clause requiring writing. And the answer to this question might be of interest in other cases, where the amendment or modification is agreed upon later, i.e. after the valid conclusion of the contract, Article 29(2) CISG being directly applicable.

German courts since long have allowed to modify or amend contracts orally despite clauses requiring writing for any alteration or amendment;[12] 'entire contract' – 'merger' clauses – were treated alike.[13] The basic reason

[11] 'Modification and termination' presuppose a concluded contract; cf also Geldsetzer, A (1993) *Einvernehmliche Änderung und Aufhebung von Verträgen* Nomos at 31; Schlechtriem in Schlechtriem & Schwenzer *Commentary* supra fn 6 at Art 29 paras 2, 5.

[12] Cf Heinrichs, H in Palandt, O (ed) (2006) *Bürgerliches Gesetzbuch* (66th ed) C.H. Beck at § 125 para 14; Geldsetzer *Einvernehmliche Änderung* supra fn 11 at 124 et passim; the respective rule is, however, controversial, cf Einsele, D (2006) in *Münchener Kommentar* (5th ed), C.H. Beck at § 125 para 70, but is accepted by a majority of writers, in particular in cases where the form clause is incorporated into the contract by way of Standard Form Conditions, while the oral modification was agreed upon individually. .

[13] Cf Bundesgerichtshof, 28 January 1981, (79) *Entscheidungen des Bundesgerichtshofes in Zivilsachen* 281 at 287; Bundesgerichtshof, 26 November 1984, (93) *Entscheidungen des Bundesgerichtshofes in Zivilsachen* 29 at 38; Bundesgerichtshof, 19 June 1985, *Neue Juristische Wochenschrift* (1985), 2329; Bundesgerichtshof, 14 October 1999, *Neue Juristische Wochenschrift* (2000), 207: Entire Contract Clauses

was that party autonomy combined with the principle of freedom of form should prevail over form clauses. As in Common Law, 'the hands that pen a writing may not gag the mouths of the assenting parties'.[14]

In the preparation of the drafts of the Vienna Convention and its discussion in Vienna, the 'German solution' was repeatedly proposed by delegates from several countries, but was finally rejected in favour of the estoppel solution in Article 29(2) sent 2,[15] not the least under the influence of the American delegation, which had based its proposals on Article 2-209(2), (4) and (5) UCC of the edition then in force.[16]

Opting out of Article 29(2) CISG

But does Article 29(2) sentence 1 CISG really 'immunize' form clauses from oral modifications? Article 6 CISG allows to exclude any provision of the CISG from application, and a respective agreement can be made orally under the general principle of freedom of form, Article 11 CISG. Thus, parties could remove the roadblock of Article 29(2) CISG by an oral agreement. In a second step they then can abrogate their own form clause and thereby open the road for the last step, i.e. the agreement to modify the substantive provisions of their contract, e.g., as claimed in *TeeVee Toons,* drop a disclaimer clause. Such a 'three step operation' of three different and distinguishable agreements to realize the intention of orally modifying a contract in writing fortified by a form clause is easily understood and exercised by the trained mind of a lawyer, but it has to be doubted that normal parties by agreeing

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constitute (only) a rebuttable presumption of completeness. See also Schlechtriem in Schlechtriem & Schwenzer *Commentary* supra fn 6 at Art 29 para 6; Geldsetzer *Einvernehmliche Änderung* supra fn 11 at 132 et passim; Teske W (1990) *Schriftformklauseln in Allgemeinen Geschäftsbedingungen* Heymanns at 60 et seq (on German case law).

[14] See infra fn 16.

[15] A meticulous report and analysis of the genesis of Article 29 CISG is to be found in Geldsetzer *Einvernehmliche Änderung* supra fn 11 at 26 et passim.

[16] It should be remembered, however, that under Common Law 'the most iron-clad writing can always be cut into by the acetylene torch of parol modifications. […] The hands that pen a writing may not gag the mouths of the assenting parties', *Wagner v. Graziano Const. Co*., 136 A.2d 82, 83, 84 (S.Ct.Pa. 1957) – a maxim that the District Court in *TeeVee Toons* may have had in mind.

orally on a contract modification intend to first abrogate a provision of the CISG (probably unknown to them), then drop their own form clause, and (only) then come to their real objective of modifying the contract. Should one generously imply the first two agreements to remove the form bar in order to let the parties achieve their ultimate goal of contract modification as do the German courts in order to overcome form clauses? I think not. It is one matter to imply generously that the parties agreed to drop their own form clause, thereby deviating from their own 'creation', but it is a different matter to generously imply derogations from a norm of the CISG, which is based on a policy strongly promulgated and extensively discussed in the course of drafting the Convention, for this would derogate the national legislators', who had ratified or had otherwise acceded to the Convention, intentions. Such derogations should not be implied lightly.

Therefore, in a case like *TeeVee Toons* (and even more so in cases of modifications *post* contract formation), it must be established that the parties indeed consciously intended to deviate from Article 29(2) CISG, the burden of proof for such an effective derogation of Article 29(2) CISG being on the party basing its claims or defences on the alleged oral alteration of the provisions applicable to the contract. And in light of the policy underlying the decision in Article 29(2) CISG and the retroactive effects of a merger + form clause, one should also be reluctant to imply generously that the parties did agree on removing the roadblock of a self imposed form requirement by mere oral alterations of certain substantive provisions in the contract by oral modification(s) of a draft with a merger + form requirement clause before the final acceptance of the proposed draft.

The clarification of the resolution of a conflict between merger + form requirement clauses and oral modifications has been facilitated by an AC-CISG opinion, thus, in the end, by one of Albert Kritzer's projects. His contribution to the CISG's recognition and acceptance in the United States cannot be overestimated. But colleagues sharing his interest in the CISG also owe him gratitude for having been a true friend, always prepared to help in whatever matter he was approached. This author, too, often had the benefit of such help, and it is a great honour and pleasure to have been his friend.