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Standard Terms under the CISG and Turkish Law

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Standard terms are the set of terms which are not individually discussed during the negotiation of a sales contract. Due to its aforementioned nature, it is difficult to determine whether parties have actually incorporated the standard terms in question into their contracts.[1]

Article 2.1.19 The Principles of International Commercial Contracts ("PICC") (2010) defines standard terms as "*provisions which are prepared in advance for general and repeated use by one party and which are actually used without negotiation with the other party.*" Furthermore, the PICC, indirectly but nevertheless expressly, regulates the issue of incorporation of standard terms into a contract by way of referring to general rules of formation of contract.

[1] DIMATTEO, L., DHOOGE, L., GREENE, S., MAURE, V., & PAGNATTARO, M. International Sales Law an Analysis of CISG Jurisprudence, Cambridge: Cambridge University Press, 2005, p. 66-67.

Conversely, the issue of incorporation of standard terms is not specifically addressed under the United Nations Convention on Contracts for the International Sale of Goods ("CISG") despite the major practical importance the subject holds in today's speedy transactions scheme.[2] This is why in 2013 the Advisory Council had published an Advisory Opinion No. 13[3] on the issue of incorporation of standard terms into a sales contract under the CISG. Accordingly, it is accepted that the provisions on the contract formation as well as rules on interpretation of the Convention are sufficient to determine, whether or not, or to what extend standard terms have been validly incorporated into the contract.[4]

The first and foremost issue to consider for the party who wishes to incorporate its own standard terms is to ensure that they are fairly communicated to the other party.[5] In other words, parties should have had a reasonable opportunity to take notice of the terms. The Advisory Opinion No. 13 provides certain non-exhaustive presumptions where it is considered that a party had a reasonable opportunity to take notice of the standard terms which are: where the terms are attached to a document used in connection with the formation of the contract or printed on the reverse side of that document, where the terms are available to the parties in the presence of each other at the time of negotiating the contract, where, in electronic communications, the terms are made available to and retrievable electronically by that party and are accessible to that party at the time of negotiating the contract and where the parties have had prior agreements subject to the same standard terms.

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[2] SCHLECHTRIEM, P. & BUTLER, P., UN law on international sales the UN Convention on the International Sale of Goods, Berlin: Springer, 2008, p. 5.
[3] 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.
[4] DIMATTEO, L., OSTAS, D., "Comparative Efficiency in International Sales Law", In *American University International Law Review 26* No. 2, 2011, p. 371-439.
[5] DIMATTEO, L., DHOOGE, L., GREENE, S., MAURE, V., & PAGNATTARO, M. (2005), pp. 66-67.

Additionally, the Advisory Opinion No. 3 stipulates that a "reasonable person of the same kind in the same circumstances" test should be applied in order to determine the inclusion of the standard terms as well as whether or not the terms themselves were sufficiently clear for the other party. In order to fulfill this criterion, it is stipulated by the Opinion that the standard terms should be readable and understandable by a reasonable person and be in a language that the other party could reasonably be expected to understand; i.e. the language of the negotiated part of the contract, the negotiations or the language ordinarily used by that party.

Other than these, the Advisory Opinion also provides that the standard terms which are particularly surprising or unusual are not incorporated into the agreement. Again, "reasonableness" test shall determine whether a term amounts to such particularity; meaning it shall be asked whether or not a reasonable person of the same kind as the relevant party could reasonably expect such a term in the agreement. On the other hand, where there is a conflict between negotiated terms and standard terms in the contract, the negotiated terms override the standard terms.

Advisory Opinion stipulates that where the meaning of a standard term provided by one party remains unclear in spite of interpretation; then the meaning more favorable to the other party shall prevail; thus embracing the internationally well-known interpretation rule of *contra proferentem.*

The party who argues that its standard terms are included in the contract bears the burden of proof that the parties actually agreed to their incorporation. This principle is in line with the general rule; although not expressly declared in the CISG, that party who benefits from proving a proposition is required to prove its existence. [6]

[6] DIMATTEO, L., OSTAS, D. (2011).

Under Turkish Code of Obligations Article 21, a standard term which is unfavorable to one party is only valid provided that the latter has accepted such term upon having been informed about the existence and context of such term by the other party. Otherwise, such term is deemed "unwritten". Furthermore, standard terms must not contain provisions that are so unfavorable or burdensome for the other party that it is contrary to the good faith principle. In addition to this, standard terms which are alien to the contract in question or the nature of the transaction are also deemed "unwritten".

All other terms except for those which are deemed "unwritten" stand valid and the party who had propounded those standard terms, which no longer hold valid, may not assert that it would not have concluded the said contract without those terms being part of it.

It should be noted that *contra proferentem* rule is expressly regulated under Article 23 of the Turkish Code of Obligations.

Should you have any questions on international sales law, the CISG or Turkish contract law, please contact us at info@guzeloglu.legal.