Phenomenon of standard terms

Problems that are encountered in practice

Inclusion of standard terms in various legal systems and CISG

CISG Advisory Council Opinion no. 13
Phenomenon and Problems in Practice
Phenomenon of Standard Terms

There is no standardized definition

Common characteristics  →  Contract terms that are:

• defined in advance, before the contract conclusion
• formulated through repeated use, without changes during negotiations
• formulated by one party, without the input from the other party
• formulated by trade organization for a certain industry

→  Result of:

• increase of mass production in the mid 19th century
• need for standardized production without negotiations in every single transaction
Problems in practice

Problems:

• Openness to some from of abuse - one-sided, unfair or surprising to the other party

• Not in the center of parties' attention during negotiation - "below the radar"

Two form of interventions:

1. Indirect controls  →  Restrictive interpretation and stricter requirements for inclusion

   Applied by the courts

   Not very successful

2. Direct measures  →  Court interpretation

   Legislative measures (Israel and Germany among the first countries to introduce legislation)
CISG approach and AC Opinion no. 13
Standard Terms and the CISG

Negotiations during the drafting of the CISG

No provision on substantive control

Question discussed: should there be a provision for inclusions?

Consensus: no specific provision necessary, the contract formation provisions suffice

After CISG became operative → Courts treated the matter differently

Relaxed common law approach

Strict civil law approach
Different ways to include standard terms and conditions

Are these methods sufficient?  \[\rightarrow\] \textit{Machinery} case - German Supreme Court in 2001 set a principle

The party that wants to include standard terms must transmit them or \textit{make them available in another way}

\[\downarrow\]

Common law countries - ignored the decision

Courts in Europe - followed the decision and applied a stricter standard
CISG Advisory Council Opinion no. 13

Role of a rapporteur and the making of an AC Opinion

CISG AC Opinion no. 13 → Principle → There must be a reasonable opportunity for the other party to take notice of the standard terms

- Rules that determine when this method will provide such a reasonable opportunity
- Rules on interpretation: inclusion must be clear to a reasonable person
- Rule 10. deals with the battle of the forms

Impact of the opinion → 2 Dutch cases

- 2 American cases
- German Supreme Court