



Presentation continued in the next video



Standard Terms



Phenomenon and Problems in Practice



CISG approach and AC Opinion no. 13



Standard Terms



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 \longrightarrow 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

\longrightarrow 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 form 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?  *Machinery* case - German Supreme Court in 2001 set a principle

The party that wants to include standard terms must transmit them or *make them available in another way*



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



Standard Terms