since customers in country X would not reasonably expect to find a choice-of-law clause designating a foreign law as the law governing their contracts in the standard terms of a company operating in their own country.

3. A, a commodity dealer operating in Hamburg, uses in its contracts with its customers standard terms containing, among others, a provision stating "Hamburg – Freundschaftliche Arbitrage". In local business circles this clause is normally understood as meaning that possible disputes are to be submitted to a special arbitration governed by particular rules of procedure of local origin. In contracts with foreign customers this clause may be held to be ineffective, notwithstanding the acceptance of the standard terms as a whole, since a foreign customer cannot reasonably be expected to understand its exact implications, and this irrespective of whether or not the clause has been translated into the foreign customer's own language.

4. Express acceptance of "surprising" terms

The risk of the adhering party being taken by surprise by the kind of terms so far discussed clearly no longer exists if in a given case the other party draws the adhering party's attention to them and the adhering party accepts them. This Article therefore provides that a party may no longer rely on the "surprising" nature of a term in order to challenge its effectiveness, once it has expressly accepted the term.

ARTICLE 2.1.21
(Conflict between standard terms and non-standard terms)

In case of conflict between a standard term and a term which is not a standard term the latter prevails.

COMMENT

Standard terms are by definition prepared in advance by one party or a third person and incorporated in an individual contract without their content being discussed by the parties (see Article 2.1.19(2)). It is therefore logical that whenever the parties specifically negotiate and agree on particular provisions of their contract, such provisions will prevail over conflicting provisions contained in the standard terms

since they are more likely to reflect the intention of the parties in the given case.

The individually agreed provisions may appear in the same document as the standard terms, but may also be contained in a separate document. In the first case they may easily be recognised on account of their being written in characters different from those of the standard terms. In the second case it may be more difficult to distinguish between the provisions which are standard terms and those which are not, and to determine their exact position in the hierarchy of the different documents. To this effect the parties often include a contract provision expressly indicating the documents which form part of their contract and their respective weight. Special problems may however arise when the modifications to the standard terms have only been agreed upon orally, without the conflicting provisions contained in the standard terms being struck out, and those standard terms contain a provision stating the exclusive character of the writing signed by the parties, or that any addition to or modification of their content must be in writing. For these cases see Articles 2.1.17 and 2.1.18.

ARTICLE 2.1.22
(Battle of forms)

Where both parties use standard terms and reach agreement except on those terms, a contract is concluded on the basis of the agreed terms and of any standard terms which are common in substance unless one party clearly indicates in advance, or later and without undue delay informs the other party, that it does not intend to be bound by such a contract.

COMMENT

1. Parties using different standard terms

It is quite frequent in commercial transactions for both the offeror when making the offer, and the offeree when accepting it, each to refer to its own standard terms. In the absence of express acceptance by the offeror of the offeree's standard terms, the problem arises as to whether a contract is concluded at all and if so, which, if either, of the two conflicting sets of standard terms should prevail.

2. "Battle of forms" and general rules on offer and acceptance

If the general rules on offer and acceptance were to be applied, there would either be no contract at all since the purported acceptance by the offeree would, subject to the exception provided for in Article 2.1.11(2), amount to a counter-offer, or if the two parties have started to perform without objecting to each other's standard terms, a contract would be considered to have been concluded on the basis of those terms which were the last to be sent or to be referred to (the "last shot").

3. The "knock-out" doctrine

The "last shot" doctrine may be appropriate if the parties clearly indicate that the adoption of their standard terms is an essential condition for the conclusion of the contract. Where, on the other hand, the parties, as is very often the case in practice, refer to their standard terms more or less automatically, for example by exchanging printed order and acknowledgement of order forms with the respective terms on the reverse side, they will normally not even be aware of the conflict between their respective standard terms. There is in such cases no reason to allow the parties subsequently to question the very existence of the contract or, if performance has commenced, to insist on the application of the terms last sent or referred to.

It is for this reason that this Article provides, notwithstanding the general rules on offer and acceptance, that if the parties reach an agreement except on their standard terms, a contract is concluded on the basis of the agreed terms and of any standard terms which are common in substance ("knock-out" doctrine).

Illustration

1. A orders a machine from B indicating the type of machine, the price and terms of payment, and the date and place of delivery. A uses an order form with its "General Conditions for Purchase" printed on the reverse side. B accepts by sending an acknowledgement of order form on the reverse side of which appear its own "General Conditions for Sale". When A subsequently seeks to withdraw from the deal it claims that no contract was ever concluded as there was no agreement as to which set of standard terms should apply. Since, however, the parties have agreed on the essential terms of the contract, a contract has been concluded on those terms and on any standard terms which are common in substance.

A party may, however, always exclude the operation of the "knock-out" doctrine by clearly indicating in advance, or by later and without undue delay informing the other, that it does not intend to be bound by a

contract which is not based on its own standard terms. What will in practice amount to such a "clear" indication cannot be stated in absolute terms but the inclusion of a clause of this kind in the standard terms themselves will not normally be sufficient since what is necessary is a specific declaration by the party concerned in its offer or acceptance.

Illustrations

2. The facts are the same as in Illustration 1, except that A claims that the contract was concluded on the basis of its standard terms since they contain a clause which states that "Deviating standard terms of the party accepting the order are not valid if they have not been confirmed in writing by us". The result will be the same as in Illustration 1, since merely by including such a clause in its standard terms A does not indicate with sufficient clarity its determination to conclude the contract only on its own terms.

3. The facts are the same as in Illustration 1, except that the non-standard terms of A's offer contain a statement to the effect that A intends to contract only on its own standard terms. The mere fact that B attaches its own standard terms to its acceptance does not prevent the contract from being concluded on the basis of A's standard terms.