Summary

THE APPLICABILITY OF GENERAL TERMS AND CONDITIONS

The present research addresses the part played by contracting parties’ declarations and acts regarding the applicability of general terms and conditions. In particular, it has been researched whether the part played by the other party’s declarations and acts differs from that played upon the creation of the relevant agreement and, should this be the case, whether there are good grounds for this.

In this connection, a distinction has been made between different situations, i.e. the situation in which the parties both have their offices in the Netherlands and one of the parties declares general terms and conditions to be applicable, and the situation in which the parties both have their offices in the Netherlands and both apply general terms and conditions. These situations have also been researched with one of the parties having its offices outside the Netherlands. The present research also focused on the question whether the Holleman/De Klerk rule – meaning, in sum, that, if the other party accepts the general terms and conditions, its intention cannot automatically be deemed to have been focused on the acceptance of provisions in general terms and conditions with unexpected contents – is still relevant in answering questions regarding the applicability of general terms and conditions.

In Chapter 2, particular attention is paid to parliamentary history and legal literature. No specific criteria can be deduced from such history or from legal literature on the basis of which it can be established against what criteria any tests are carried out to determine whether any general terms and conditions are applicable to the agreement. The purport of legal literature is that the operation of Section 6:232 of the Dutch Civil Code [Burgerlijk Wetboek] extends to the application of Section 3:35 of the Dutch Civil Code. The combination of these Sections is decisive for the answer to the question whether a party qualifies as ‘the other party’ within the meaning of Part 6.5.3 of the Dutch Civil Code, as Section 6:231, subsection c., of the Dutch Civil Code defines ‘the other party’ as the party that accepted the applicability of general terms and conditions by signing a document or in some other way. It follows from Section 6:232 that the other party is also bound by general terms and conditions where the user knew that the other party was not aware thereof.
The extended operation referred to above is evident from the fact that legal commentators commonly assume that the application of the rule laid down in Section 6:232 results in quick acceptance having to be taken as a basis in the light of Section 3:35. This picture is confirmed in case law, in particular in case law in which it must be deduced from the other party's silence that it accepted the applicability of the general terms and conditions. Striking elements in such case law are that the number of references to general terms and conditions made in invoices seems to be decisive for the answer to the question whether the other party accepted the applicability of the general terms and conditions, and that the number of such invoices is very low in such cases.

One of the conclusions is that Section 6:232 – and the rule laid down in it – does not become relevant until it has been established on the basis of Section 3:35 that the other party accepted the applicability of the general terms and conditions. If so, it will follow from Section 6:232 that the acceptance pertains to the full set of general terms and conditions. However, if Section 3:35 is applied, the circumstances on the part of the user must be examined in more detail than is currently the case. In particular in the event of the – alleged – tacit acceptance by the other party, a court must examine whether the user was allowed to rely on the other party in fact agreeing to and accepting the general terms and conditions, as the other party’s supposed intention is an important criterion, if Section 3:35 is applied, against which a test must be carried out. It is impossible to deduce from case law whether the courts are sufficiently aware of this criterion. However, it is clear that the application of this rule is not at any time set forth in judgments or rulings. If the individual cases are studied, and if the judgments and rulings are considered in that light, it may be assumed that the courts do not involve the aforementioned criterion in their assessment, or insufficiently so.

In Chapter 3, it is researched whether the alleged existence of ampler options to test the contents of general terms and conditions provides compensation for the fact that the other party has been deprived of a certain level of protection by Section 6:232, as that Section prevents the other party from invoking the Holleman/De Klerk rule. Furthermore, it has been researched whether the test of the contents may affect questions pertaining to the applicability of general terms and conditions. In this connection, various methods of testing contents have been analysed, and the conclusion was that it cannot be clearly indicated against what exactly general terms and conditions are tested. This is different only for consumer agreements, for which the black and grey lists (Sections 6:236 and 6:237 of the Dutch Civil Code), in particular, provide a clear framework for testing. Research of the relevant case law reveals that the Holleman/De Klerk rule is no longer invoked by litigants. Only very sporadically do courts attach value to the unexpected nature of a general condition, which then plays a part in testing the contents of the condition in question. But even
in that case, any such protection cannot be put on a par with the protection the other party was able to derive from the Holleman/De Klerk rule, as, in testing the clause, its contents occupy a central position and, in applying the aforementioned rule, its acceptance occupies such position.

In Chapter 4, those general terms and conditions are addressed that have been declared applicable to international agreements. The literature on the applicability of general terms and conditions in the event of Dutch law being applicable to international agreements is scarce. There is plenty of case law, but it does not reveal a consistent picture of the criteria against which such applicability is tested. A striking element in such case law is that the jurisdiction of the forum provides an important point for debate in many of the judgments and rulings, in particular in those cases in which the forum in question has been chosen in the general terms and conditions whose applicability is challenged. The present research makes it clear that the jurisdiction of the forum, where chosen in general terms and conditions, must be determined autonomously under the Council Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, if such Regulation is applied, on the basis of Article 23 of that Regulation. The European Court of Justice has refined and interpreted the criteria laid down in Article 23 of the Regulation (or of Article 17 of the EC Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters) in various rulings. Lower case law shows a diffuse picture with respect to the proper application of the criteria included in Article 23 of the Regulation.

The Supreme Court of the Netherlands has ruled on criteria regarding the applicability of general terms and conditions to international agreements in a few cases only. In its most recent relevant ruling, it seems to have formulated as a legal rule that, in case of international agreements concluded between professional parties, the other party may be expected to carry out a certain amount of research in the event that the language of the reference to the general terms and conditions is stated in a language unknown to it. In the present research, it is concluded that the Dutch Supreme Court seems to formulate an application of Section 3:35 for the applicability of general terms and conditions to international transactions between professional parties. The rule formulated by it seems arbitrary, because the other party’s position is taken as a basis here too where Section 3:35 is applied, and neither any circumstances on the part of the user of the general terms and conditions, nor the other party’s supposed intention need to be weighed in the court’s assessment.

If a court considers itself competent under the rules of international procedural law to try a dispute, it must establish the law on the basis of which it must assess whether the general terms and conditions are applicable to the agreement. In the present research, it is concluded, as to the rules applying in the
event of the applicability of general terms and conditions to international purchase agreements, that: i) it is assumed in lower national case law and by some legal commentators that the question as to the applicability of general terms and conditions is not dealt with in the UN Convention on Contracts for the International Sale of Goods (‘the CISG’); ii) the Supreme Court has ruled that this may be the case, but that such applicability is not realised directly but indirectly, on the basis of ‘gap filling’ (Article 7, paragraph 2, of the CISG); iii) it follows from international case law and international legal literature that the applicability of general terms and conditions is a subject that is directly provided for in the CISG (on the basis of the provisions laid down in Articles 8, 9 and 14 et seq.); and iv) it is evident from national and international case law and legal literature that the provisions laid down in the Convention on the Law Applicable to Contractual Obligations – in particular in Article 8, paragraph 2, thereof – are not always properly applied in establishing the law on the basis of which the applicability is to be assessed.

It is difficult to define the exact part played by a choice of law made in general terms and conditions in answering the question whether any general terms and conditions are applicable to an international purchase agreement. If the parties both have their offices in a contracting State of the CISG, issues involving such choice of law will be decided by the Convention. If the parties to an international purchase agreement have their offices in different States and one of the parties does not have its offices in a Contracting State of the CISG, the Dutch courts must establish on the basis of the Convention on the Law Applicable to Contractual Obligations whether the applicable law is the law of a Contracting State of the CISG. If so, the provisions laid down in the CISG will be applicable in answering the question whether the general terms and conditions were agreed upon between the parties. If the general terms and conditions contain a choice of law, the reasoning must be as follows. If the choice of law is the law of a Contracting State of the CISG, it will be determined in accordance with Article 6 et seq. of the CISG whether the general terms and conditions are applicable. If the choice of law made in the general terms and conditions excludes the applicability of the CISG, it must be established whether the general terms and conditions are applicable on the basis of Article 8, paragraph 1, of the Convention on the Law Applicable to Contractual Obligations, in accordance with the provisions laid down in the internal law chosen.

Chapter 5 deals with the theme of the ‘battle of the forms’. Section 6:225, paragraph 3, of the Dutch Civil Code is often viewed by legal commentators and in case law as a statutory provision from which it ensues that, if the general terms and conditions of the first reference are not also expressly rejected upon the second reference to general terms and conditions, it follows therefrom that the general terms and conditions of the first reference are applicable to the agreement. In the present research, the position is defended that this
interpretation of Section 6:225, paragraph 3, does not necessarily ensue from the explanatory notes in parliamentary history or from a literal reading of the wording of the Section. It is pointed out that any such reading does not relate very well to the provisions laid down in Section 6:231, subsection c., of the Dutch Civil Code, from which it follows that the other party must have accepted the applicability of the general terms and conditions. Such acceptance by the other party is difficult to prove by the first referrer if the other party, in contesting the acceptance of the applicability, invokes that such contestation may be deduced from the reference to its own general terms and conditions.

In the event of a battle of the forms in respect of international purchase agreements, there is little agreement – or so legal literature and case law reveal – as regards the application of the rules in question. The CISG apparently provides for a rule, laid down in Article 19, paragraph 3, meaning that the general terms and conditions last referred to are applicable. However, legal commentators do not uniformly interpret Article 19, paragraph 3, of the CISG as such. An analysis of the relevant case law reveals that the scheme laid down in Article 19 of the CISG, the creation of which has led to a very extensive debate, has little support in the case law of Germany, Austria and France. In these countries – where the ruling issued by the German Supreme Court [Bundesgerichtshof] on 9 January 2002 (NJW 2002, 1651 et seq.), in particular, is regarded as the ‘leading case’ – the issue of the battle of the forms is resolved under the CISG on the basis of the ‘knock-out’ rule. However, there are good grounds to argue that the issue of the battle of the forms must be settled in the CISG, on the basis of Article 19, applying the ‘last-shot’ rule.

International battles of the forms also lack clarity as to how a court must determine whether it has jurisdiction. Dutch legal commentators defend the position that it must first be established on the basis of what law the applicability of the general terms and conditions must established and that, subsequently, once it has been established what terms and conditions are applicable, it must be decided whether the choice of forum made in such general terms and conditions is in line with the conditions set by Article 23 of the Council Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. There are good grounds to assume that this order is incorrect and that it must first be determined in accordance with Article 23 of the Regulation whether a court may derive jurisdiction from the choice of forum made in the general terms and conditions and that, subsequently, it must be established, under the PIL of the competent court, on the basis of what law the question as to the applicability of the general terms and conditions must be answered.

Finally, in Chapter 6, the conclusions from the individual chapters have been interconnected. A striking element then is that the part played by the declara-
tion of the other party’s intention, to the extent that it is linked to the acceptance of the applicability of the general terms and conditions, differs from that played upon the creation of the agreement. Within the framework of Section 3:35, the fact that the other party failed actively to object to the applicability of the general terms and conditions and that, therefore, it is assumed fairly quickly, when the other party keeps silent, that it accepted the applicability of the general terms and conditions, seems to be a matter of attribution. This may also be assumed for the applicability of general terms and conditions in respect of international agreements, where it seems as if the other party is to respond pro-actively if it fails to understand a reference, for instance because it is put in a foreign language. The exact part played by the other party’s declarations and acts under the CISG is difficult to map out. International case law is too diverse where this issue is concerned. However, it may be assumed, on the grounds of Article 8 of the CISG, that the other party’s position is more neutral than its position when Section 3:35 is applied. The aforementioned attribution is not present in the case law under the CISG that has been researched. Moreover, in cases in which only one of the parties has its offices in a Contracting State of the CISG, the application of the provisions laid down in the Convention on the Law Applicable to Contractual Obligations and, in particular, the application of Article 8 must be taken into account. Here too, it is unclear how Article 8 – in particular paragraph 2 thereof – must be applied in the event of questions regarding applicability. In a battle of the forms, the part played by the other party’s declaration seems to be disregarded in national cases if such declaration fails to satisfy certain requirements. It is incorrectly assumed that such declaration plays no part if it is not firm enough. In a battle of the forms in respect of an international purchase transaction, the knock-out rule is a better rule than the last-shot rule, as the latter may be read in Article 19 of the CISG. The only reason to apply the latter rule would be because it allegedly ensues from the provisions laid down in the Convention, and that its application as a rule should, therefore, not be an item of discussion. The discussion would have to focus on its adjustment.