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The following CMS Guide on Battle of Forms situations illustrates how this important issue in commercial contracts is addressed in various countries worldwide. This CMS Guide addresses commercial contracts between companies (hereinafter also “B2B contracts”). In certain cases, the country chapters also refer to specific provisions applicable to consumers, without outlining them in detail or comprehensively.

In commercial contracts, each party usually makes reference to its “own” standard terms and conditions (hereinafter “Ts&Cs”). For example: in a sales contract, the seller refers to his standard delivery terms in his offer document, whereas the purchaser refers to his standard purchase conditions in his order document. Usually, both Ts&Cs contradict each other in important areas, e.g. when it comes to warranty rights or limitation of liability. The question which Ts&Cs apply, or if any apply at all, is commonly described as the “Battle of Forms”.

Generally, a Battle of Forms situation can be addressed in two ways which will be presented from a general perspective under no. 3 of this Introduction and specifically in the individual country chapters. To apply either method to address a Battle of Forms situation, however, requires that the respective Ts&Cs have been validly agreed on between the parties; i.e. validly included in the contractual relationship. Thus, in this Guide, before illustrating which rule applies to Battle of Forms situations, under no. 2 of this Introduction we describe how Ts&Cs can be included.

**Inclusion of Ts&Cs**

When it comes to the inclusion of Ts&Cs, parties in B2B contracts often refer to their respective Ts&Cs in the offer documents, the order documents, the order confirmations, the shipment documents and/or the respective invoices.

When referring to their respective Ts&Cs, the parties usually only refer to their Ts&Cs or highlight the fact that the Ts&Cs can be found on the homepage of the respective party. The actual wording of the Ts&Cs is often not attached.

The individual country chapters illustrate which requirements the respective national law sets out for a valid inclusion of Ts&Cs, in particular for the situations just described.

**Addressing Battle of Forms**

a. **Last-Shot Rule**

According to the Last-Shot Rule, the Ts&Cs of the party which refers to its Ts&Cs most recently apply. The Last-Shot Rule can lead to a “ping-pong” situation. Both parties continue to refer to their respective Ts&Cs so that their Ts&Cs are the ones which apply.

b. **Knock-Out Rule**

According to the Knock-Out Rule, if Ts&Cs contradict each other both sets of Ts&Cs do not apply. Therefore, no “ping-pong” situation can occur. The Knock-Out Rule thus does not require the parties to again make reference to their respective Ts&Cs. However, in jurisdictions which apply the Knock-Out Rule it is difficult to have one’s Ts&Cs included at all. Often, the parties end up by having statutory law applied.
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Inclusion of Ts&Cs

National Law
As a general rule, under Italian Law Ts&Cs to be effective must be known by the party upon the execution of the contract or at least the opportunity to take notice of their content must be given.

Accordingly, Ts&Cs have to be included or attached to the offer documents (and/or order documents) and reference has to be made therein so that Ts&Cs constitute a part of the offer documents.

For online sales, the finalization of the order should be made possible only after acceptance of the Ts&Cs by flagging the relevant option (with the possibility to download/print Ts&Cs).

However, second paragraph of sect. 1341 states that Ts&Cs providing for:

1. limitation of liability of the supplier;
2. right to terminate the contract or to suspend its performance;
3. limitation of the right of the customer to raise objections;
4. restriction of the freedom of customer to negotiate with third parties;
5. tacit extension or renewal of the contract;
6. arbitration clauses and
7. derogations from ordinary rules on competence,

are ineffective unless expressly accepted in writing by the party.

In such cases, according to the case law flagging an acceptance banner is not sufficient as Ts&Cs must be expressly accepted in writing by the customer to be legally binding.

CISG
In B2B contracts where CISG applies, it prevails over both domestic law and Ts&Cs.

Indeed, pursuant to Article 6 of CISG “The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions”.

When applying the CISG the situation of including Ts&Cs from an Italian law perspective is somewhat unclear. As the application of the CISG is often excluded from agreements subject to Italian jurisdiction and Italian law, there is no significant published case law in this respect.

Battle of Forms

National Law
Under Italian law, the Last-Shot Rule (both statutory law and in case law) applies.

CISG
From an Italian law perspective, under the CISG, some legal commentators have pointed out the inappropriateness of the „mirror-image“ rule, proposing to relax it by extending to all contracts the rule under Article 19, para 2 CISG.
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The battle of forms (contract law) in Austria
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Inclusion of Ts&Cs

National Law
According to Austrian law, Ts&Cs used by a contractual party must be validly agreed on between the parties in order to form part of the contract. This agreement can be express or implied. The implied inclusion in principle requires a noticeable reference to one’s Ts&Cs.

A reference to one’s Ts&Cs on offer documents and/or order documents is sufficient.

A reference to Ts&Cs after the conclusion of the contract, e.g. on invoices, is generally not sufficient for their valid inclusion. However, the Austrian Supreme Court has ruled that in case of a continuing business relationship between the parties, the reference on invoices or delivery notes might be sufficient, if this already used to happen in the past and the other party does not object.

It is not necessary to provide the other party with the actual wording of the Ts&Cs. The contracting party must rather have the possibility of obtaining the terms. It is therefore in principle sufficient if reference is made to a homepage or a google search and if it is stated that the Ts&Cs will be sent upon request.

CISG
From an Austrian law perspective, the inclusion of standard terms under the CISG is determined according to the rules for the formation and interpretation of contracts as well.

Regarding the inclusion of Ts&Cs into a contract under the CISG, the Austrian Supreme Court has ruled that it is not necessary to provide the other party with the actual wording of the terms, if the other party is already familiar with them due to previous negotiations. It furthermore stated that – apart from previous negotiations –, practices which the parties have established between themselves and the language of the Ts&Cs, as well as the language in which the reference to the terms is made, can be of relevance when determining their incorporation into the contract.

Battle of Forms

National Law
Under Austrian law, the Knock-Out Rule applies.

CISG
From an Austrian law perspective, under the CISG, the Knock-Out Rule applies.

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**Inclusion of Ts&Cs**

**National Law**
In Belgium, the Ts&Cs will only be binding for the parties if they reached an agreement about them. An agreement requires that the Ts&Cs are known by the parties (or ought to be known) and that the parties gave their consent to be binding by the Ts&Cs. The consent can be express, e.g. in a framework agreement, but also implied, e.g. by not making any reservation when receiving a copy of the Ts&Cs. A mere reference to one's Ts&Cs via a website or via a chamber of commerce is not sufficient.

**CISG**
From a Belgian law perspective, under the CISG, the same situation as under national law applies.

**Battle of Forms**

**National Law**
If the parties have informed each other about their respective Ts&Cs and have not rejected the other party's Ts&Cs, both sets of Ts&Cs will apply. In case of contradiction between respective stipulations, no less than 3 theories exist in case law: (i) the nullity of the respective stipulations (i.e. the Knock-Out Rule), (ii) the terms & conditions first communicated prevail (i.e. the First-Shot Rule), (iii) the terms & conditions most recently communicated prevail.

The Knock-Out Rule with the nullity of the respective stipulations is most commonly applied by the Belgian courts. Statutory law will be applicable.

**CISG**
From a Belgian law perspective, under the CISG, the same situation as under national law applies.

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Inclusion of Ts&Cs

National Law
Under Bulgarian law, in commercial contracts, the Ts&Cs are binding for the other party, if the latter accepted them in writing. The written form of acceptance is considered to be complied with, if the acceptance is given through electronic signature too. Confirmation by email should be considered as a valid acceptance as well, however, the authenticity of the acceptance may be challenged and difficult to prove.

More importantly, though, if the other party is a merchant/a commercial entity and it was aware of the Ts&Cs or was obliged to know them and has failed to object to them immediately, then the Ts&Cs are also considered binding for this other party. Meaning, that if the party offering its Ts&Cs has referred to a website where these could be found, the other party-merchant should be bound by the Ts&Cs, unless it explicitly object to them. The Ts&Cs could be referred in any type of document(s); the actual contract, an invoice serving the purpose of a contract, etc.

Please note that when the validity of a transaction requires the transaction to be concluded in writing, the Ts&Cs shall be binding upon the other party only if the latter received them upon execution of the transaction.

The topic of arbitration clauses included in Ts&Cs is a bit more peculiar. The latest case law adopts the understanding that pointing of Ts&Cs on a website shall not be sufficient for considering the other party bound by an arbitration clause incorporated in Ts&Cs. Also, the rule that if the other party fails to object to them immediately, then the arbitration clause shall be considered binding for this other party, shall not be valid.

As a general rule, in the event of discrepancies between what was agreed upon by the parties in the contract and the Ts&Cs, the provisions of the contract shall prevail.

CISG
From a Bulgarian law perspective, under the CISG, the same situation as un-der national law applies.

Battle of Forms

National Law
Under Bulgarian law, there is no settled relevant case law regarding the Battle of Forms. Only where the parties’ actual common intention cannot be established do the legal commentators seem to favour the Knock-Out Rule, including in the contract only the terms upon which both parties agree. However, there is a statutory presumption regarding commercial transactions that Ts&Cs become binding upon the other party if it was aware of such Ts&Cs and did not object immediately. The non-mandatory statutory terms (i.e. the Commerce Act of 1991 and the Contracts and Obligations Act of 1950 as well as the Private International Law Code of 2005 re choice of governing law) will apply to fill in the gaps, if any, in the agreed contract.

CISG
From a Bulgarian law perspective, under the CISG, the same situation as under national law applies.

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Inclusion of Ts&Cs

National Law
Chinese law generally requires that where a contract is concluded by use of Ts&Cs, the party providing the Ts&Cs shall abide by the principle of fairness when determining the rights and obligations of the parties, and shall, in a reasonable manner, draw the attention of the other party to clauses which restrict its liability and, if so requested by the other party, explain such clauses. “Reasonably drawing the other party's attention” requires that the party providing the Ts&Cs shall use, at the time of conclusion of the contract, a special indication, such as words, symbols or a font sufficient to draw the attention of the other party to provisions of such Ts&Cs which restrict that party's liability.

Other than the above, Chinese law does not provide specific guidance on the requirements regarding the inclusion of Ts&Cs into an agreement.

A mere internet link as reference to Ts&Cs involves risks. Also, it is generally not recommendable to state that the current version of the Ts&Cs (as accessible via web link) shall govern the contractual relationship. The respective version of the Ts&Cs which had been in force at the time of the conclusion of the contract must be clearly definable and obtainable. In case of a dispute, it may otherwise be very difficult for the party providing the Ts&Cs to successfully claim that such provisions have become part of the contractual relationship.

Generally, we advise to make an explicit reference to the application of Ts&Cs in the respective contract or purchase order and to deliver any new version of the Ts&Cs to the contracting party. For reasons of proof, it is furthermore recommended that the contracting party agrees with the Ts&Cs in writing or at least confirms its receipt.

CISG
As far as we can see, from a Chinese law perspective, under the CISG, the same situation as under national law applies.

Battle of Forms

National Law
Under Chinese law, the situation is unclear. Two main theories exist: The Last-Shot Rule and the Knock-Out Rule. Some legal commentators are of the opinion that the Last-Shot Rule applies. However, most legal commentators favour the Knock-Out Rule and, as far as we can see, this also constitutes the practice of most PRC courts; i.e. in the case of conflicting Ts&Cs, only those provisions which do not contradict each other will be considered valid. The contradicting provisions will be considered invalid. Instead of the contradicting provisions, the provisions of statutory law will apply.

CISG
From a Chinese law perspective, under the CISG, the same situation as under national law applies.

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The battle of forms (contract law) in Croatia
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Inclusion of Ts&Cs

National Law
Croatian law requires that Ts&Cs need to be agreed between the parties in order for them to be considered as a part of the specific contract.

A reference to specific Ts&Cs in offer or order documents is generally sufficient (provided that such offer or order documents fulfills other conditions necessary in order to consider that the contract has been entered into).

It is unclear whether a mere reference to Ts&Cs in a confirmation document is sufficient for the Ts&Cs to be considered as a part of the specific contract.

In most cases, a reference to Ts&Cs in shipment documents and invoices did suffice for a valid inclusion of Ts&Cs (i.e. valid inclusion shall be evaluated and decided upon in each individual case).

TS&Cs need to be published in an appropriate way (i.e. it is not enough to state that Ts&Cs will be sent upon request) and incorporated in the contract itself or referred to; the person who was presented with an offer needs to be familiar (or should have been familiar) with the TS&Cs in order for them to be considered as a part of the contract.

CISG
There is not enough published court practice of Croatian courts with regard to applicability of Ts&Cs under CISG, in order to identify any discrepancies between national law and CISG.

Battle of Forms

National Law
In principle, under Croatian law, the Last-Shot Rule should apply. However, only a few court decisions have been rendered which might have certain connections with the Battle of Forms and date back to the 1990s.

CISG
No case law to be found in this respect. Legal commentators do not have a common approach to this problem either. Some legal commentators believe that if the contract has been fulfilled the application of the Knock-Out Rule would be more appropriate.

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Inclusion of Ts&Cs

National Law
Under the laws of England and Wales, Ts&Cs must be agreed in order to be validly included. Agreement may be express e.g. in a framework agreement, or may be implied, provided reasonable notice of the Ts&Cs has been given. This will usually be by reference to the time the contract is created. Whether notice is “sufficient” is a question of fact and cases are generally very fact specific. However, where, for example, Ts&Cs are printed on the reverse of a document, there should be a clear reference to the Ts&Cs on the face of it.

Case law has shown that stating that Ts&Cs are “available on request” on a work order may be sufficient to incorporate terms into a contract.

Where reference is made to Ts&Cs on a website, the same rule applies, namely whether reasonable notice has been given of the relevant terms.

Any unusual or onerous terms (including many exclusion clauses) should have particular attention drawn to them.

Where contracts are on standard terms and are not negotiated, the courts may conclude that certain terms (particularly any extensive and significant exclusions) are unreasonable and not legally binding.

Care should be taken where there are competing Ts&Cs, which may result in a Battle of Forms situation.

CISG
The UK is not a CISG signatory.

Battle of Forms

National Law
Under the laws of England and Wales, either the Last-Shot Rule or the Knock-Out Rule applies. Traditionally, the Last-Shot Rule applies. However, in more complex cases and in recent years the appeal courts have seemed to favour either a "no contract" finding or a contract conducted through conduct with terms implied by statute or by common law.

CISG
The UK is not a CISG signatory.

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Inclusion of Ts&Cs

National Law
Under French law, Ts&Cs are in principle enforceable if they have been communicated to and known by the party against whom they are enforced before the conclusion of the agreement.

Hence, Ts&Cs should appear on documents communicated and known by the parties before such conclusion (for instance purchase orders). Their inclusion in documents communicated after the contract conclusion (i.e. shipment documents, invoices etc.) should not, in principle, be sufficient to establish their acceptance by the parties except in certain cases where the parties have been in commercial relationships for several years (where there is a “course of business”).

Ts&Cs shall be displayed in an apparent and readable manner, especially their onerous clauses (limitation of liability, jurisdiction clause, retention of title etc.).

In practice, it is highly recommended to include an express reference to the Ts&Cs in the contractual documentation (i.e. whole reproduction, express reference and extracts, annex embodying the Ts&Cs etc.) and not only a reference to a website.

Ts&Cs are heavily regulated under French law so that both their content and communication methods should be checked carefully.

CISG
From a French law perspective, under the CISG, the situation is unclear. As the application of the CISG is often excluded from agreements subject to French jurisdiction and French law, there is no significant published case-law in this respect.

Battle of Forms

National Law
Under French law, the Knock-Out Rule applies.

French civil law principles and case law support the Knock-Out Rule. However, for several years, there has been a statutory trend to give preference to general terms of sale over general terms of purchase. Recently, the Loi Hamon of 17 March 2014 even provided that “general terms of sale constitute the unique basis of commercial negotiation”. In practice, this means that the general terms of sale constitute the starting point of any negotiation and that the general terms of purchase will only be communicated in a second phase.

CISG
From a French law perspective, under the CISG, the situation is controversial. There are lots of debates among legal commentators as to the application of the Last-Shot Rule or the Knock-Out Rule under Article 19 of the CISG. There is no significant case-law from French courts in this respect.

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**National Law**
German law requires that the Ts&Cs must be agreed on in order to have them validly included.

The agreement can be express, e.g. in a framework agreement, but also implied. The implied inclusion requires a noticeable reference to one's Ts&Cs. In particular, it is necessary to unambiguously name the Ts&Cs to which reference is made.

A reference to one's Ts&Cs on offer documents and/or order documents is sufficient (unless there is a Battle of Forms situation).

Whether a reference on a confirmation document is sufficient, is somewhat unclear under German law. The majority of case-law and legal commentators seem to advocate that such reference is sufficient.

A reference on shipment documents or invoices is generally not sufficient for a valid inclusion of Ts&Cs.

It is not necessary to include the Ts&Cs' actual wording. It is sufficient if in either of the above-described documents reference is made to a homepage or if it is stated that the Ts&Cs will be sent upon request.

**CISG**
From a German law perspective, under the CISG, the situation equals the situation described for national law.

However, there is one major difference when it comes to the question whether Ts&Cs only must be referred to or whether their actual wording must be provided. The German Federal Court of Justice has ruled that Ts&Cs must be actually sent to the other party in order to have them validly included. The mere reference to a homepage or any comparable statement is not sufficient under the CISG.

**Battle of Forms**

**National Law**
Under German law, the Knock-Out Rule applies.

**CISG**
From a German law perspective, under the CiSG, the majority of legal commentators supports the Knock-Out Rule. Furthermore, a decision by the German Federal Court of Justice, which was rendered in 2002, seems to support the Knock-Out Rule.

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The battle of forms (contract law) in Hungary
Inclusion of Ts&Cs

National Law
Under Hungarian law, Ts&Cs are deemed to be included in the agreement if the party applying Ts&Cs made them available to the other party prior to the conclusion of the agreement and such Ts&Cs were accepted by this other party. In practice, in order for Ts&Cs to be deemed as made available to the other party prior to the conclusion of the agreement, it is sufficient if reference to one’s Ts&Cs is made in any documents prior to the conclusion of the agreement. Acceptance of the Ts&Cs may be express or implied. In case of agreements concluded by electronic means, the party providing the electronic means shall make available its Ts&Cs in a way that allows the other party to store and reproduce them.

Notwithstanding the above general rule, terms of Ts&Cs significantly differing from the applicable legislation or from the standard contractual practice (except for Ts&Cs in conformity with the ongoing contractual practice / a previously established term between the parties) shall only become part of the agreement if the other party is expressly informed of such terms and if such other party expressly accepted them after being informed thereof.

In case of B2C agreements, any terms of Ts&Cs entitling a company to demand extra payments in addition to the consideration due for the fulfillment of the primary obligation of the company under the agreement shall only become part of the agreement if the consumer expressly accepted such term after being explicitly informed thereof.

CISG
From a Hungarian law perspective, under the CISG, the situation equals the situation described for national law. No relevant court practice is available in this regard.

Battle of Forms

National Law
Under Hungarian law, it is necessary to distinguish between individually negotiated contractual terms and Ts&Cs.

If contractual terms are individually negotiated:

1. if the terms differ from each other on material issues, there is no agreement;
2. if the terms differ from each other only on non-material issues, the Last-Shot Rule applies (except if the offer explicitly stated that it can only be accepted with unchanged terms or the party making the offer objects to the differing terms without delay).

In case of general terms and conditions:

1. if the Ts&Cs are not contradictory both Ts&Cs will become part of the agreement;
2. if the Ts&Cs differ from each other only on non-material issues, the Knock-Out Rule applies;
3. if the Ts&Cs differ from each other on material issues, the agreement is not established.

CISG
From a Hungarian law perspective, under the CISG, the major legal commentators support the Knock-Out Rule. There is no publicly available case law on this issue.
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The battle of forms (contract law) in Poland
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Inclusion of Ts&Cs

National Law
Polish law determines two ways to include Ts&Cs in a contract, depending on the form of the document.

1. i. If a business entity uses an electronic format for Ts&Cs, Ts&Cs should be made available to the customer before the contract is concluded. The law requires that a customer is able to store and reproduce the Ts&Cs in the normal course of business (i.e. without excessive inconvenience). In practice it is possible to send Ts&Cs as an attachment to an e-mail. It is, however, essential that the document is available in a generally accessible format (e.g. PDF format). It is doubtful whether it would be sufficient to provide only a hyperlink to the Ts&Cs or simply inform the customer where the document may be found (e.g. on a specific website). Anyway, it is not required that customers confirm that they have received the Ts&Cs; it is sufficient that they had the possibility to become acquainted with them.

2. ii. If a business entity uses Ts&Cs in written format, Ts&Cs should be delivered to the customer before the contract is concluded. To meet this requirement, the Ts&Cs should be printed out and delivered to the customer; e.g. personally, by courier or post. In practice, the Ts&Cs may be attached to the invitation to conclude a contract (offer presented by one party). In such case, it is also not required that the customer confirms receipt of the Ts&Cs.

CISG
From the perspective of Polish law, there is an unclear situation under the CISG. As the application of the CISG is usually ruled out, no court decisions are available.

Battle of Forms

National Law
Under Polish law, the following situation applies: Generally, if a contract is concluded between business entities applying different Ts&Cs, such contract does not include the provisions of the parties' Ts&Cs which are contradictory.

A contract is not deemed to be concluded if the party which has received the offer promptly declares that it does not intend to enter into the contract on such conditions (i.e. that the contradictory provisions of the parties' Ts&Cs will not apply), the contract will not be concluded.

CISG
From a Polish law perspective, under the CISG, there is an unclear situation. As the application of the CISG is usually ruled out, there are no court decisions available.

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The battle of forms (contract law) in Portugal
**Inclusion of Ts&Cs**

**National Law**
As there is no specific provision, general rules regarding Ts&Cs, foreseen in Decree-law no. 446/85 of October 25th, shall apply.

This entails the parties’ duties to communicate and inform all that is envisaged to be agreed as Ts&Cs, in such a way that the counterparty agrees freely and clearly on the terms included.

Nonetheless, as an agreement may be expressed or implied, it is sufficient, and not unusual, for parties to issue invoices referring to each other Ts&Cs.

**CISG**
Portugal has not yet ratified the CISG and thus there is no relevant case law on this matter.

**Battle of Forms**

**National Law**
Under Portuguese law, the situation is unclear since there is no relevant case law available and few legal commentators address the issue.

**CISG**
Portugal has not yet ratified the CISG and thus there is no relevant case law on this matter.

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Inclusion of Ts&Cs

National Law
Romanian law requires that the Ts&Cs must be agreed on in order to have them validly included. If the contract expressly references such Ts&Cs, the law implies that the parties have agreed on them.

When both parties to a contract use their own Ts&Cs and fail to reach an agreement with respect to such Ts&Cs, the contract shall be concluded on the grounds of those Ts&Cs agreed upon (if any) as well as on the grounds of those Ts&Cs that have a common substance (on their merits), except the situation when one of the parties expressly states, either before the conclusion of the contract, or afterwards, but immediately, that it does not intend to be a part of such contract.

Please note that unusual clauses comprised within Ts&Cs have a specific regime. The following clauses are considered unusual: regarding liability limitation, the right to unilaterally terminate the contract, stay the contract’s performance, or that read, to the other party’s expense, disqualifications in terms of rights and terms, limiting the party’s rights to rise please, restricting the party’s possibilities to contract to others, tacit contract renewal, applicable law, arbitration clauses or any clauses departing from the rules on court’s jurisdiction. Such clauses become effective only when expressly accepted, in writing, by the other party.

CISG
From a Romanian law perspective, under the CISG, the same situation applies as under national law.

Battle of Forms

National Law
Under Romanian law, the Knock-Out Rule applies. The rule is that courts would seek evidence on last terms (and forms) consented to by both parties to a contract, and would knock-out any conflicting terms (and forms), by applying the applicable rule of law instead.

CISG
From a Romanian law perspective, under the CISG, the same situation applies as under national law.

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Inclusion of Ts&Cs

**National Law**
Russian law requires that the Ts&Cs must be agreed by the parties in order to be part of the contract.

To include Ts&Cs into the contract parties shall make a reference to a particular version of Ts&Cs to avoid any ambiguities.

A reference to one’s Ts&Cs on offer documents is sufficient (unless there is a Battle of Forms situation) if the other party does have an access to such Ts&Cs.

**CISG**
From a Russian law perspective, under the CISG, the situation equals the situation described for national law.

**Battle of Forms**

**National Law**
Under Russian law, the Last-Shot Rule applies.

**CISG**
From a Russian law perspective, under the CISG, the Last-Shot Rule applies.

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The battle of forms (contract law) in Scotland
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Inclusion of Ts&Cs

National Law
Under Scots law, Ts&Cs may be incorporated into commercial contracts by both express and implied reference.

In terms of implied reference, it must be reasonable to expect the document containing the Ts&Cs to have a contractual effect.

A document issued after a contract is made will not be a part of a contract unless incorporated into the contract by express reference or through a consistent course of prior dealing between the parties. For example, Ts&Cs included on invoices and delivery notes will not be incorporated into a contract earlier concluded in respect of the same subject matter.

It is not necessary to set out the Ts&Cs in the contract in order for them to be incorporated, so long as adequate notice is given which identifies the Ts&Cs. This can include a reference to the Ts&Cs being available on request.

Whether all of the Ts&Cs have been validly incorporated into a contract by reference will depend on their contents. Ts&Cs which are particularly onerous (such as indemnity, exclusion of liability, and liquidated damages provisions) or unusual must be made particularly clear.

Assent to contract conditions may also be given by way of previous dealings between the parties. For this to validly incorporate Ts&Cs into a contract, there must be a previous course of consistent dealing; the other party must have knowledge of the Ts&Cs; and there must be assent to the Ts&Cs relied upon.

Where a contract has been signed, the parties will generally be bound by its terms, including any Ts&Cs included by reference. Express agreed terms may prevail over conflicting provisions in standard Ts&Cs.

CISG
The United Kingdom has not yet ratified the CISG and thus there is no relevant Scottish case law on this matter.

Battle of Forms

National Law
Traditionally, under Scots law, the Last-Shot Rule applies. However, recent case law suggests a move towards a more holistic approach.

Historically, the approach in Scotland has not differed from that adopted in England and Wales. The courts adopted a traditional offer-and-acceptance analysis of the exchange of forms to determine whether or not there was a contract and what the applicable terms would be. This approach has often resulted in the party who was last to communicate its terms prior to performance of the contract “winning” the battle of the forms (i.e. the Last-Shot Rule). However, in a number of recent instances, the courts have instead opted to look at the parties’ communications as a whole to determine what was intended on an objective basis.

CISG
The United Kingdom has not yet ratified the CISG and thus there is no relevant Scottish case law on this matter.
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The battle of forms (contract law) in Serbia
Inclusion of Ts&Cs

**National Law**
Serbian law requires that Ts&Cs need to be agreed between the parties in order for them to be considered as contracts or as a part of a contract (same condition as in concluding any other contract, primarily meeting of the minds). The agreement can be express, e.g. in a framework agreement, but also implied, e.g. reference to one’s Ts&Cs. A reference to specific Ts&Cs in offer or order documents is generally sufficient (provided that such offer or order documents fulfil other conditions necessary for conclusion of any other contract) unless there is a Battle of Forms situation.

Ts&Cs need to be provided to the other contracting party in an appropriate manner (i.e. it is not enough to state that Ts&Cs will be sent upon request) and incorporated in the contract itself or referred to; the party which was presented with an offer needs to be familiar (or should have been familiar) with the Ts&Cs in order for them to be considered a part of the contract.

**CISG**
From a Serbian law perspective, under the CISG, the same situation as under national law applies.

Battle of Forms

**National Law**
Under Serbian law, the following distinction applies: Knock-Out Rule regarding mandatory provisions. Otherwise, Last-Shot Rule can be applied (discretion of the court depending on concrete case).

**CISG**
From a Serbian law perspective, under the CISG, the same situation applies as under national law.

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Inclusion of Ts&Cs

**National law**
Under Slovenian law, Ts&Cs are binding for the parties if the Ts&Cs are included in the agreement. The consent for the use of Ts&Cs may be given either expressly or implicitly.

The Ts&Cs are binding for the parties if the wording of the Ts&Cs is included in the agreement or through a mere reference to the Ts&Cs in the agreement. An attachment or a reference to specific Ts&Cs in an offer is sufficient (provided the offer fulfills the conditions for an agreement). The Ts&Cs shall be published in a customary manner.

However, the Ts&Cs may be considered part of the agreement even though the agreement does not include or specifically refer to them. If a party knew or should have known of the mere existence of the Ts&Cs (therefore not even the actual wording) when the agreement was concluded, a consent for the use of Ts&Cs is deemed given, provided the Ts&Cs were published in a customary manner.

It is, for example, deemed that the party was aware of the existence of the Ts&Cs if (i) they are generally used in connection with a certain type of agreements, (ii) they are published in a customary manner, or (iii) if the use of the Ts&Cs is customary between the specific parties. An explicit notice about the Ts&Cs or their delivery to the other party is not required.

**CISG**
From a Slovenian law perspective, under the CISG, the same situation as under national law applies.

Battle of Forms

**National law**
If a second party accepts the offer of the first party by referring to its own Ts&Cs, it is considered a new offer, since the conditions of the agreement are changed. If the first party accepts this new offer, the agreement is concluded under the second party’s Ts&Cs. In this case, the Last-Shot Rule applies. However, if the first party does not accept the new offer, the agreement is not concluded at all.

**CISG**
From a Slovenian law perspective, under the CISG, the same situation as under national law applies.

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The battle of forms (contract law) in Spain
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Inclusion of Ts&Cs

National Law
Spanish law requires that the Ts&Cs must be agreed on in order to have them validly included, that is, the adherent shall accept their inclusion to the agreement and said agreement shall be signed by all parties.

Ts&Cs shall not be deemed included when the party that includes them has not informed the adherent about their existence and has not provided the other party with a copy.

When the agreement is not formalized in writing, the party who includes the Ts&Cs shall use any means that guarantee that the adherent knows the existence and content of said Ts&Cs.

CISG
From a Spanish law perspective, under the CISG, the situation equals the situation described for national law.

When the agreement is not formalized in writing, in order for the Ts&Cs to be deemed validly included, the other party must have had actual access to the Ts&Cs, either by them being sent to the other party or by a reference or link which effectively enables the other party to access the Ts&Cs and their full content.

Battle of Forms

National Law
Under Spanish law, the Knock-Out Rule applies.

CISG
As a general rule, Spanish doctrine and case law support the Knock-Out Rule. The court will decide basing its argument on the common law, which is the Spanish Civil Code or the Spanish Commercial Code.

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The battle of forms (contract law) in Switzerland
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Inclusion of Ts&Cs

**National Law**

Swiss law requires that the Ts&Cs must be agreed on between the parties in order to have them validly included into a contract.

Such agreement can be express, e.g. in a framework agreement. While an implied agreement is not sufficient in consumer contracts, this should - according to the jurisprudence of the Swiss Federal Supreme Court – be adequate in B2B relations.

An express reference to the own Ts&Cs on offer and/or order documents is – even if not expressly accepted by the other party – sufficient (unless there is a Battle of Forms situation).

Whether a reference on a confirmation document is sufficient, is unclear under Swiss law. At least in situations where the recipient of the confirmation document, which newly contains a reference to the Ts&Cs, subsequently fulfils the contract, there are good arguments for supporting the position that such reference is sufficient. The situation is, however, less clear if the recipient of the confirmation document does not perform any contractual duties but only accepts the delivery by the other party.

A reference to the Ts&Cs on shipment documents or invoices is, however, generally not sufficient for a valid inclusion of Ts&Cs.

It is not necessary to include the Ts&Cs’ actual wording in the contract. However, the other party shall, prior to the conclusion of the contract, have the opportunity to take, in a reasonable manner, notice of the contents of the Ts&Cs. For fulfilling this requirement, it is not always necessary to physically handover the Ts&Cs to the other party. It is, for example, also sufficient if the contract is concluded by e-mail and the e-mail contains a reference/link to the website where the Ts&Cs can be downloaded or if the Ts&Cs are attached as a pdf-document to the corresponding e-mail. It is, however, unclear whether a reference to the website in ordinary written communication is also sufficient. And the latest jurisprudence of the Swiss Federal Supreme Court seems to indicate that it is even in B2B relations most likely not sufficient if the other party is only given the opportunity to ask for the Ts&Cs to be sent over (in consumer contracts, the mere offering to send over the Ts&Cs is never sufficient).

Finally, the Ts&Cs shall not be drafted in a language uncommon at the place where the contract is concluded if the other party is not familiar with such language.

**CISG**

The legal situation is similar to the national law, however:

There is a tendency that, also in B2B relations, the reference to the Ts&Cs in the main contract must always be an express one. At least, the requirements for an implied agreement seem to be higher than under Swiss law.

Furthermore, the mere reference to the website (containing the Ts&Cs) in ordinary written communication or the direction that the other party is given the opportunity to ask for the Ts&Cs to be sent over seem generally not to be sufficient for a valid incorporation of the Ts&Cs into the contract (whereas the corresponding situation under Swiss law is less clear in B2B relations).
Battle of Forms

National Law
Under Swiss law, the prevailing doctrine supports the Knock-Out Rule. Only a few legal commentators argue in favour of the Last-Shot Rule.

CISG
From a Swiss law perspective, under the CISG, the same situation applies as under national law.

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Inclusion of Ts&Cs

National Law
Under Czech law, Ts&Cs can become the part of the agreement by an inclusion through the reference to one’s Ts&Cs, attachment to the agreement or familiarization with the Ts&Cs.

In accordance with the judiciary, the Ts&Cs do not need to be signed. However, some commentators state that the express consent to familiarization is necessary whilst the mere reference is not enough. On the other hand, there are opinions of other experts asserting that it is impossible to secure the familiarization every time and therefore the reference is sufficient in the case that it was reasonable to presume that the other party familiarized with the Ts&Cs. The wording of the Czech Civil Code confirms the latter.

The reference to the Ts&Cs needs to be provided before the conclusion of the agreement, not later. Therefore, a reference on shipment documents or invoices is generally not sufficient for a valid inclusion of Ts&Cs.

It is not necessary to include the Ts&Cs' actual wording. However, if so, then the condition of familiarization is met.

According to some commentators it is sufficient if the hyper-text reference is made to a homepage provided that the agreement is concluded online. These commentators further state that the mere reference to homepage is not considered as the inclusion.

CISG
The regulation under the CISG is very similar to the Czech regulation.

The parties must expressly or impliedly agree to the inclusion of the Ts&Cs in the contract, otherwise the Ts&Cs would be invalid.

The party being provided with Ts&Cs must have a reasonable opportunity to take notice of the terms; a party is deemed to have had a reasonable opportunity to take notice of the standard terms (i) if the terms are attached to the contract or printed on the reverse side, (ii) if the terms are available to the parties in the present of each other at the time of negotiating the contract, (iii) or in the electronic communications if 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.

The Ts&Cs cannot be incorporated after the formation of the contract.

In case of reference to the inclusion of the Ts&Cs, the reference and the Ts&Cs must be clear to a reasonable person; the reference to the inclusion and the Ts&Cs are deemed to be clear if they are readable and understandable by a reasonable person and are available in a language that the other party could reasonably be expected to understand.

Battle of Forms

National Law
Under Czech law, with effect from 1 January 2014, the Last-Shot Rule was replaced by the Knock-Out Rule in the
new Civil Code. On this basis any contradicting provisions of either of the parties’ Ts&Cs will not apply (provided that the respective agreement was concluded as of 1 January 2014).

The application of the Knock-Out Rule cannot be excluded in Ts&Cs, however, it can be expressly excluded in a contract.

**CISG**
From a Czech law perspective, under the CISG, the majority of legal commentators favour the Last-Shot Rule (although there is no uniform legal opinion regarding the Battle of Forms situation). This is also partially supported by one decision of the Constitutional Court, which, however, concerned a rather specific case. Lately the situation seems to be changing in favour of the Knock-out Rule (at least among legal commentators). However, a clear court decision is yet to be rendered for the Czech Republic.

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The battle of forms (contract law) in The Netherlands
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Inclusion of Ts&Cs

National Law
Dutch law requires that the Ts&Cs must be agreed on in order to have them validly included.

The agreement can be express, e.g. in a framework agreement, but also implied. The implied inclusion requires a noticeable reference to one's Ts&Cs. In particular, it is necessary to unambiguously name the Ts&Cs to which reference is made.

A reference to one's Ts&Cs on offer documents and/or order documents is sufficient (unless there is a Battle of Forms situation).

Whether a reference on a confirmation document is sufficient, is somewhat unclear under Dutch law. The majority of case law and legal commentators seem to advocate that such reference is insufficient.

Ts&Cs must be declared applicable before or during the conclusion of the agreement to make sure Ts&Cs are applicable to the order. Therefore repeated reference on invoices or on shipment documents is generally not sufficient for a valid inclusion of Ts&Cs.

Moreover, Ts&Cs must be released to a customer before or during the conclusion of the agreement. If the Ts&Cs have been referred to, but have not been provided to the other party, the other party may nullify such conditions.

The requirement of making the Ts&Cs available does not apply to international agreements, i.e. agreements between a Dutch company and a non-Dutch supplier or customer

CISG
From a Dutch law perspective, under the CISG, the latest court decisions are in line with CISG-AC Opinion No. 13, Inclusion of Standard Terms under the CISG.

Battle of Forms

National Law
Under Dutch law, neither the Last-Shot nor the Knock-Out Rule applies. Instead, the „First-Shot Rule“ is applicable.

CISG
From a Dutch law perspective, under the CISG, the latest court decisions support the application of the Knock-Out Rule.

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The battle of forms (contract law) in Turkey
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Inclusion of Ts&Cs

National Law
Turkish law requires that the Ts&Cs must be agreed on by both parties in order for such Ts&Cs be valid and enforceable. However, the legislation does not make any clarification with respect to express or implied approval.

Since there is no precedent addressing this issue; acquiring express approval for the Ts&Cs is strongly advised. Moreover, in the event the Ts&Cs include provisions which are openly against the benefit of the counter party, unless proof can be submitted that the ramifications of such provisions have been explained to the counter party, such provision will be deemed invalid.

Additionally, if the Ts&Cs leads ambiguity or not clearly addressing the parties will, then these Ts&Cs would be interpreted as against the drafting party and in favor of the counter party.

A reference on shipment documents or invoices is not sufficient for a valid inclusion of Ts&Cs.

CISG
From a Turkish law perspective, under the CISG, the situation equals the situation described for national law.

Battle of Forms

National Law
Under Turkish law, the Knock-Out Rule applies.

CISG
Since the CISG came into force in Turkey on 1 August 2011, there has been no clear court precedent regarding the implementation of the CISG. Nevertheless, the prevailing doctrine supports that the courts implement the Knock-Out Rule; the contradiction in the Ts&Cs is resolved through the implementation of the good faith principle, and in the light of the benefits to both parties.

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The battle of forms (contract law) in Ukraine
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**Inclusion of Ts&Cs**

**National Law**

Ukrainian law does not specifically regulate the issue of inclusion of Ts&Cs into a contract, except for electronic contracts. The Law on Electronic Commerce explicitly indicates that e-contract may contain a reference (link) to the Ts&Cs, which are included into e-contract.

At the same time, in order for Ts&Cs to have effect in relations between the parties to any contract they should be explicitly agreed by the parties thereto. In principal, Ts&Cs (except for essential terms which must be included in a contract) can be express (i.e. actual wording is included in the contract) or implied (i.e. a reference to a different document is included, and a party may access and review such document any time).

From a practical standpoint, it is generally recommended to include Ts&Cs into a contract (as a part of the main body of the contract or as an annex thereto) to affirm that parties are aware of and agree to such respective Ts&Cs, as evidenced by parties’ signatures on a contract.

**CISG**

From a Ukrainian law perspective, under the CISG, the situation is the same as under national law.

**Battle of Forms**

**National Law**

Under Ukrainian law, the following situation applies: Due to its formalistic approach towards the conclusion of contracts (in writing, except for e-commerce), a Battle of Forms situation is very unlikely to occur in Ukraine. Hence, there is no case law in this regard.

**CISG**

From a Ukrainian law perspective, under the CISG, the same situation applies as under national law.

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