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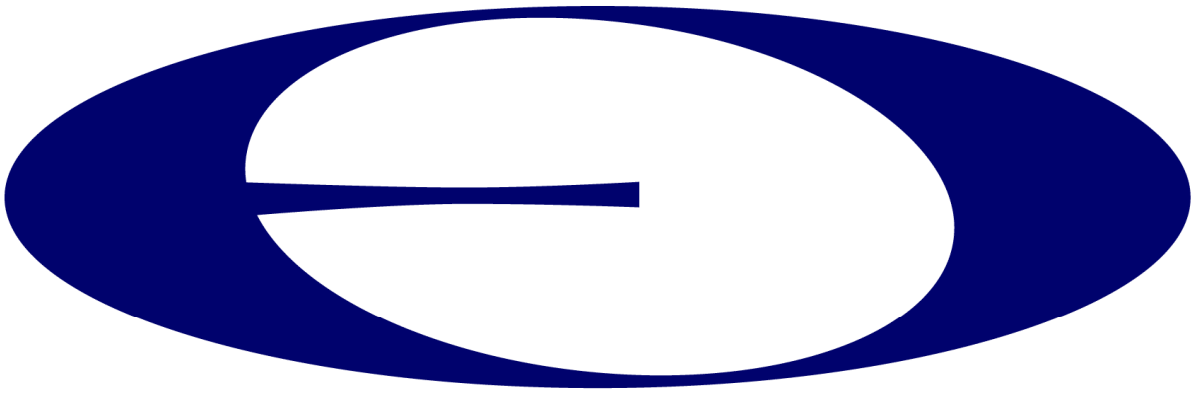
a brief introduction of the law

in Belgium, Germany, Greece, Malta and the Netherlands on

GENERAL TERMS AND CONDITIONS



EUROJURIS

Practice Group Transport & Insurance Law

PREFACE

Dear reader,

This is the first publication of the Eurojuris International Practice Group Transport & Insurance Law.
Eurojuris International (www.eurojuris.net) is the leading network of law firms in Europe, covering 630 cities in over 40 countries worldwide. Its members team up in Practice Groups, which focus on specific legal fields.

One of the goals of our PG is to deliver a publication on a cross border topic at the occasion of each Eurojuris International event. These publications will be made available not only to the PG members but also to their (prospective) clients and other interested parties.

For our first publication we chose "General Terms and Conditions" as our topic. Although GTC are not a specific transport or insurance law item, GTC of course play a major role in these fields of law. A basic knowledge of the law on this subject is key for every company dealing with international agreements. Especially since – even in a united Europe – the law in different jurisdictions can vary significantly.

We sincerely hope that this publication will be of use to its readers and that it will be followed by many more.

Bram Marcus & John Wolfs
Chairmen Eurojuris International Practice Group Transport & Insurance Law

Note: this text is a summary of a more comprehensive paper put together by the PG members. For the full paper please send us an e-mail and we will be glad to provide you with a copy.

Introduction

General Terms and Conditions (GTC) can be defined as any group of contractual terms which are formulated in advance for use in a large number of contracts and which one party – the user – imposes on the other party when the contract is concluded. It is quite common that both parties to a contract use their own GTC.

In the following text attention will be given to the way this subject is handled in the Belgian, Dutch, German, Greek and Maltese law system.

Legal regulatory basis

Whereas the Dutch and German legislator have dedicated a specific section of the civil code to the regulation of GTC (Section 6.5.3 respectively §§ 305-310), both the Maltese and the Greek legislator have chosen a very different path: the rules concerning the GTC are scattered over a number of (specific and non-specific) laws. The Belgian system stands somewhere in the middle of these two opposites. Art. 25 of the Belgian Commercial Code – which according to Belgian case law is applicable to all commercial transactions for which invoices are issued - specifies that a sale of goods can be proved by means of an accepted and undisputed invoice. Under Belgian law, the GTC which are stated on this invoice, are considered to be a part of it.

Applicability

From an entrepreneur's point of view, one of the most important GTC-related questions, concerns the applicability of the GTC itself. For Belgian and Dutch law the conditions for applicability of GTC do *not* differ from the conditions for applicability of any other civil contract (in short: the user's offer has to be - explicitly or tacitly – accepted by the other party). Next to this general rule, there are some specific rules to take into consideration, which seem similar, but are actually quite different.

According to Belgian law GTC (for 'regular' and electronic contracts alike) can only be applicable if the user has given the other party the *opportunity* to peruse the GTC prior to the conclusion of the agreement and in the language of the contract between the parties (e.g. publication in the Belgian Official Journal, availability upon application, publication on the internet, ...). An actual perusal of the GTC is not required, so the user of GTC is not obliged to hand the GTC over to the other party.

The Dutch Civil Code contains a (seemingly) similar rule, that a contracting party always has to get the *opportunity* to take note of the GTC. If this opportunity is *not* given and the user therefore did *not* know their content, this does *not* however - contrary to Belgian Law - affect the *applicability* of the GTC. This means that if the GTC are *not* handed over by the user, they can still be applicable, but the other party to the contract then may have the right to nullify them. If the actual handing over should be impossible (e.g. in case of a contract that has been entered into by phone or a contract between a train carrier and its passengers), the user gives above mentioned opportunity by informing the other party, before the formation of the contract, that the user has GTC available for inspection and that they will be sent to the other party free of cost upon his first request. In case of an electronic contract, Dutch law states that the user can suffice by making the GTC available to the other party before or at the time of the conclusion of the contract in a manner allowing the other party to store them to have them accessible for later perusal. When this is not reasonably possible, the user can again suffice by informing the other party prior to conclusion of the contract where the GTC may be consulted by electronic means and (again) that, upon request, they will be sent by electronic or other means.

Just like it remotely resembles Belgian Law, Dutch Law also contains a rule that reminds of Greek Law. And again it can be said that there is a major difference between both systems. In order for GTC to be *applicable*, Greek Law only demands that – whether it concerns a regular contract or an electronic one - they are *not* 'unreasonably erroneous'. Dutch Law does not go that far: if GTC are unreasonably erroneous, this does *not* mean that they are not applicable. Depending on the circumstances of the case, they may just be annullable.

Just like the Dutch system, the Greek law system demands that the GTC are handed over to the other party. Only if the user can prove he has handed over the GTC, he will be allowed to call upon them in front of a court of law. On specific issues like insurance policies, the 'handing over' of GTC is regulated in specific laws.

Maltese Law reminds of both Belgian and Dutch law in the way the basic rules of contract law are applicable next to more specific rules. As mentioned though – just like in the Greek system - the majority of specific GTC-oriented rules in Maltese law have to be found in an abundance of separate laws (e.g. the Commercial Code, the Consumer Affairs Act, the Carriage of Goods by Sea Act, the Electronic Commerce Act). In general, Maltese law does *not* require the user to hand over the GTC. When dealing

with consumer contracts however, Maltese Law does state that the conditions of sale must be made known to the consumer. Even in this case though, physical handing over of the GTC is *not* required ad literam, except in the event of contracts relating to distance selling. In the context of the transport industry the handing over of general terms and conditions usually occurs by handing the bill of lading. Under Maltese law once the bill of lading is endorsed and handed over from carrier to endorsee it becomes conclusive evidence of its terms and conditions. The law does not however make specific provision for the handing over of GTC in a contract of carriage. With regards to electronic contracts part II and III of *The Electronic Commerce Act* contain some specific rules. Similar to Dutch law, the Maltese law states that the other party has to be able to store and reproduce the GTC.

Last, but not least, German Law is different still. The provisions which can be found in §§ 305-310 of the Bundesgezetsbuch can only be ignored if the contractual terms are *individually negotiated*. If they are *not* individually negotiated - and the German Courts are very reluctant to assume they are - the applicability of the GTC relies on the moment the GTC are referred to: the reference must be made *during* the negotiation of the specific contract. A reference on documents provided before negotiation or after conclusion of the contract therefore is usually *not* sufficient. German law requires that GTC become an integral part of a contract, but not that they are handed over. The GTC only become a part of the contract if the other party has been able to review them in a reasonable manner prior to entering into a contract. If a user just refers to his GTC and if the GTC are named clearly and the other party does not object, the terms shall be deemed to have been agreed upon tacitly. Also a mere reference to the applicability of the GTC while offering to provide a copy upon request is sufficient, since according to German Courts, it can be expected from businessmen to ask for a copy of the GTC if they are interested in the details. On an international level though this reference only is *not* enough. Just like Dutch Law, German Law is practical though. If the circumstances make other measures impractical, it is sufficient that the standard terms are prominently displayed at the place of business of the user. When dealing with electronic contracts, German Law states the user has to establish a possibility to get access at the moment of conclusion of the contract and to save them in a reproducible form. With regards to the “classic“ e-commerce the clear description of the GTC for example by a link on the homepage of the contractual offer is deemed sufficient.

Annulment/dissolution

Above, it has already been mentioned how Dutch Law gives the other party the right to nullify GTC, if said party did not have the opportunity to get to know them or if they can be considered unreasonably erroneous. Just like Dutch Law, the other four law systems also contain grounds to declare GTC annullable.

Whenever GTC are considered to be contrary to the public order and/or public morality, they are void according to Belgian Law and – under certain circumstances – also according to Dutch law. In the relationship with consumers, there is binding legislation for business practices which contains an extensive list of forbidden – because unreasonably erroneous – and therefore void stipulations. Even though Greek and Maltese Law do *not* contain a list of invalid stipulations, both systems do 'keep track' of invalid GTC. In the Greek Law system the High Courts' and Second Instance court's Decisions fulfill the role of precedents which are in general followed by other courts on similar cases and in the Maltese Law system the grounds for rescission are found in the Civil and Commercial Codes. Finally, German Law declares GTC invalid if they are unfair (unreasonably erroneous) and establish a significant imbalance between the rights and obligations of the contracting parties. The Bundesgezetsbuch contains a detailed list of clauses which are deemed to be unfair and thus invalid. Surprising terms (i.e. terms that – by their objective appearance – are so inconvenient that the other party did not need to anticipate on them) do not become a part of the contract.

Complications

As complicated as some of the rules mentioned above are, things can get even more complicated. For example when there are *different versions* of the GTC a party uses or a contract refers to different sets of GTC which are all applicable.

When there are different versions of GTC available, according to Maltese, Belgian, Dutch and Greek Law, that version has to be used, which meets all the demands of applicability. Next to that Greek law contains a "general case-law rule" that in case of doubt the general terms and conditions should be interpreted in favor of the consumer-contractor. German Law states the user is allowed to refer to the current

version of the GTC, but that he has to provide the other party with the first version and has to inform it about all changes made.

When a contract refers to different sets of GTC which are all applicable, Belgian Law says that the GTC can be applied together, but that if they are contradictory, they are always interpreted to the disadvantage of the stipulating party. In the same situation, German courts assume that an agreement is only reached regarding the non-contradictory clauses; the rest are ignored. Greek law decides that the Civil Code fills in the gaps of the contradictory stipulations and Dutch Law determines that none of the GTC will apply, unless it has been made sufficiently clear which of the sets will be applicable in a particular situation (in which case it is even allowed, in case of unclarity, for the user choosing the desired GTC!).

In the case both contracting parties refer to their own applicable GTC, Belgian case law is extremely varied and there are various trends to be noted. In Germany, Greece and Malta the same rules apply as described in the previous paragraph. Dutch law however contains a specific rule for this situation: where offer and acceptance refer to different general terms and conditions, the second reference is without effect, unless it expressly rejects the application of the general terms and conditions in the first reference.

Third parties

Almost all of the law systems allow special interest groups to file a procedure against a company's GTC. In Belgium legislation on this matter is currently being drawn-up. There are some restrictions though. For example German Law states that consumer associations can *not* file against GTC, which are just addressed to other traders. Maltese Law allows special interest groups to start a GTC-related procedure, but demands they indicate to the Court their legal interest.

Just like third parties – in some cases – have the right to file a procedure against GTC, they can also be affected by them. Belgian and German Law contain a rule which states that GTC cannot result in any disadvantages for third parties though. Dutch, Greek and Maltese Law look at the relation between the third party and the contractors: third parties entering the contract are also bound by the GTC.

Special Clauses

In essence GTC are meant to shape the legal relation between the contracting parties (in the advantage of the user). The law systems which are being discussed here, all contain rules to limit these possibilities though.

According to Belgian Law the possibility of a so-called *forum clause* depends on the identity of the other party. With respect to a trader, it is sufficient to mention an accepted and undisputed invoice in the General Terms and Conditions. With respect to private persons, it must be proven that the conditions for applicability have been satisfied (opportunity of perusal followed by acceptance). German Law too looks at the quality of the contractors. If they are both business people, corporate bodies organized under public law or separate assets under public law, they can agree on a forum clause in their GTC. Greek Law on the other hand lets the applicability of the forum clause depend on the nature of the *contract* (international sale, insurance contract, bank contract etc.). Even here though, the judge takes into consideration if a "consumer-contractor" has had no variety of choices. Maltese and Dutch Law stand apart. Dutch law explicitly stipulates that a writing referring to GTC, is sufficient proof of a forum choice, provided that this writing explicitly or tacitly has been accepted by the other party. Maltese law usually respects jurisdiction clauses, but also determines that the jurisdiction of the Maltese Courts is not excluded by the fact that a foreign court is seized with the same case or with a case connected with it.

Arbitration clauses are not as easily accepted. In Belgium case law and legal literature require an explicit agreement between parties, in Germany this agreement is demanded on a b2c level only and in Greece an arbitration-clause has to be specifically undersigned by both parties to be effective. In Malta it is the arbitral tribunal which has the power to determine the existence or the validity of the contract of which an arbitration clause forms part. Also the Dutch law is clear on this matter: an arbitration agreement is proved by a written contract; a written agreement that refers to GTC is sufficient, if they have been tacitly or explicitly been accepted.

Finally GTC are often used to exclude certain rules. In Belgium both the CMR and the CISG can be excluded by means of GTC, but - with respect to the applicability of the CISG - the CISG will be referred to for all that is not regulated in the GTC. German law accepts the possibility to in- or exclude the CISG and neither the CMR provisions in principle are mandatory. In Greece both conventions have been integrated in the Greek

legal system with specific laws. Any provision of GTC next to CMR or CISG coming into conflict with the provisions of CMR or CISG is invalid. Dutch law permits a choice for (non)applicability of CISG. Dutch law also permits a choice for applicability of CMR, even if the road transport is completely "national", but a choice for *non*-applicability of CMR is not permitted. Finally, even though Malta has not ratified CISG, it has to be noted that if one of the contracting states has ratified CISG it becomes automatically applicable to all parties to the contract. The CMR Convention has force of law, notwithstanding anything contained in any other Maltese law.

Complications in an international setting

In case of an international contract between a user of GTC and another party, who may or may not have an office in the user's country, Belgian law is straightforward: the judge will first check which law is applicable and then - in accordance with the applicable law - he will verify the conditions under which the GTC may be relied upon against the other party. Dutch law states that the answer to the question to what extent GTC apply, depends on the law that governs the contract (and of course the contents of the general terms and conditions). Concerning bank and insurance law, the Greek High Court has declared that it is important which party has a registered office in Greece. In case that the issuer of the GTC has *no* registered office in Greece, the judge will probably ask for the applicable laws of the country where the contract took place, will then check the Greek mandatory provisions and after that he will try to interpret the GTC, while taking into consideration all aspects of the case. Maltese Courts on the other hand, will apply Maltese law to a contract having a connection with Malta, in default of a clause determining the applicable law. In the event of conflict of laws the Maltese Courts will determine the applicable law by means of the principle of "the closest connection". Maltese Law does *not* provide specifically for the applicability of Maltese Law but only provides for the jurisdiction of Maltese Courts.

When none of the parties have their office in Belgium, Greece, the Netherlands or Malta, the respective judges in general apply the same rules mentioned above. German law does not contain mandatory provisions in the case one party has its registered office in Germany, both parties have their registered office in Germany or none of the parties have their registered office here. It does have to be mentioned

though that in principle the GTC have to be written in the language of the other party or in the contractual language.

Expiration

While in Belgium no expiration period exists with regards to the annulment or dissolution of the GTC, contractual claims generally expire after 10 years. According to German law the injunctive relief falls under the statute of limitations after a period of three years, which starts at the end of that year in which the claim arises or the infringement occurs and the creditor becomes aware - or would have had to become aware - of such facts and the person of the debtor. Greece also does not have a specific limitation or expiration period for the dissolution of GTC. During any legal dispute of this nature, it is at the judge's discretion to rule that a particular article is invalid. In the Netherlands a claim for nullification of (stipulations in) GTC expires within 3 years after the beginning of the day following the day which the stipulation was invoked. As regards doorstep or distance contracts Maltese Law provides that such contracts are not binding and conclusive if they are cancelled by the consumer within fifteen days from the date of the agreement, or within such longer period as may be stipulated in the agreement/general terms and conditions. Maltese law does provide for other statutory periods for commencing procedures to annul or rescind a contract, or a specific clause, in a contract, but these periods are specific to the type of contract entered into.

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