

# Inkorporacija općih uvjeta prodaje po Konvenciji Ujedinjenih nacija o ugovorima o međunarodnoj prodaji robe - analiza slučaja

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INKORPORACIJA OPĆIH UVJETA PRODAJE PO KONVENCIJI  
UJEDINJENIH NARODA O UGOVORIMA O MEĐUNARODNOJ PRODAJI  
ROBE – ANALIZA SLUČAJA

Diplomski rad

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Zagreb, ožujak 2024.

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## SAŽETAK:

Predmet ovog diplomskog rada je analiza nužnih elemenata za valjano uključivanje općih uvjeta prodaje u trgovački ugovor. Analiza je izvršena na fiktivnom predmetu izloženom na Willem C. Vis International Commercial Arbitration Moot natjecanju 2021./2022. godine. Predmet analize vjerno prikazuje česte probleme na koje trgovci nailaze prilikom ugovaranja trgovačkih ugovora.

Pitanje sklapanja ugovora, kao i opći uvjeti prodaje, uređeno je Konvencijom Ujedinjenih naroda o ugovorima o međunarodnoj prodaji robe iz 1980. godine. Opći uvjeti prodaje su standardizirane odredbe pripremljene za nekoliko ugovora koje predlaže strana koja ih želi uključiti u ugovor. Glavni problem općih prodajnih uvjeta je činjenica da su oni često vrlo opširni i da se u praksi njihove pojedine odredbe uglavnom ne pregovaraju. Drugim riječima, znatan opseg novih ugovornih prava i obveza postaje dio glavnog ugovora o kojima se prethodno nije raspravljalo. Pitanje općih uvjeta prodaje nije precizno regulirano Konvencijom, stoga je praksa arbitražnih sudova od presudne važnosti za donošenje zaključka. Za valjano uključivanje općih uvjeta prodaje u glavni ugovor bit će potrebno upućivanje na opće uvjete prije sklapanja ugovora, a drugoj strani mora biti omogućeno da se upozna s njihovim sadržajem prije pristanka na ponudu koja ih uključuje.

## ABSTRACT:

The subject of this thesis is the analysis of the necessary elements for the valid inclusion of general conditions of sale in the commercial contract. The analysis was performed on a fictional case from the Willem C. Vis International Commercial Arbitration Moot Competition of 2021/2022. The case which is analyzed faithfully depicts the frequent problems that international traders encounter when concluding commercial contracts.

The issue of concluding a contract, as well as the general conditions of sale, is governed by the United Nations Convention on Contracts for the International Sale of Goods from 1980. General conditions of sale are standardized provisions prepared for several contracts that are proposed by the party who wants to include them in the contract. The main problem presented by the general conditions of sale is the fact that they are often very extensive and in practice their individual provisions are generally not negotiated. In other words, a substantial scope of new contractual rights and obligations becomes part of the main contract that were not previously discussed. The issue of general conditions of sale is not precisely regulated by the Convention, therefore the practice of arbitration courts proved to be of crucial importance for reaching a conclusion. For the valid inclusion of the general conditions of sale in the main contract, a reference to the general conditions will be necessary and the other party must be given the opportunity to become familiar with their content before agreeing to an offer that includes them.

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## 1. UVOD

The Willem C. Vis International Commercial Arbitration Moot je međunarodno natjecanje iz trgovačke arbitraže koje već 30 godina okuplja studente prava iz skoro 400 sveučilišta iz cijelog svijeta. Natjecanje se sastoji od pisanog i usmenog djela. Za pisani dio natjecanja, studenti imaju pristup spisu koji je izmišljen za potrebe natjecanja. Spis se sastoji od podnesaka stranaka, arbitražnih podnesaka i raznih materijala vezanih za problem osmišljen te godine. Studenti na temelju dokumentacije iz spisa pišu podneske gdje je glavni zadatak što uvjerljivije zastupati stranu tužitelja, a zatim i tuženika<sup>1</sup>. Cilj natjecanja je razvoj i prezentacija vješte argumentacije neovisno o dodijeljenim činjenicama i poziciji. Natjecanje se u cijelosti održava na engleskom jeziku i iz tog razloga će središnji dio ovog rada također biti izložen na engleskom jeziku.

Predmet koji se izlaže na natjecanju rješava se u dva dijela, materijalni i procesni dio. Dok se procesni dio bavi pitanjima vezanim za ugovaranje arbitraže, materijalni se bavi pitanjima vezanim za sam ugovor. U predmetu izloženom u 29. Vis Moot natjecanju postavljena su dva pitanja iz materijalnog dijela. Prvo se pitanje odnosilo na činjenicu je li ugovor između stranaka sklopljen. Drugo je pitanje bilo postavljeno uvjetno, odnosno u slučaju da je ugovor sklopljen, jesu li u ugovor valjano inkorporirani opći uvjeti prodaje. Cilj ovog rada je sustavno izložiti pitanje jesu li opći uvjeti prodaje bili valjano inkorporirani u ugovor. Rad polazi od pretpostavke da je ugovor između stranaka valjano sklopljen.

U radu će prvo biti obrazložene činjenice slučaja relevantne za razumijevanje problema (točka 2.), uokviriti će se mjerodavno pravo za konkretni slučaj (točka 3.), nastavno će se argumentirati pozicija tužitelja (točka 4.) i tuženika (točka 5.) te će se konačno rad završiti sveobuhvatnim zaključkom.

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<sup>1</sup> Willem C. Vis International Commercial Arbitration Moot, About the Moot, <https://www.vismoot.org/about-themoot/>, pristupljeno 05.02.2024.

## 2. FACTS OF THE CASE

**ElGuP plc** is one of the largest producers of RSPO-certified palm oil and pal kernel oil based in Mediterraneo (hereinafter "**Claimant**").

**Mr James Chandra** is Claimant's chief operating officer COO. He and his assistant, **Mr Forrest Rain**, were authorized to conclude the contract.

**JAJA Biofuel**, is a well-established producer of biofuel based in Equatoriana (hereinafter "**Respondent**"). Respondent was acquired in late 2018 by **Southern Commodities**, a multinational conglomerate engaging in all kinds of commodities and their derivates. Southern Commodities has its headquarters in Ruritania.

Since 2019, **Ms Claire Bupati** has held the role of Head of Purchasing for Respondent. Prior to this, she served as the primary purchase manager for the palm kernel oil division of Southern Commodities. Ms Bupati, along with her assistant Ms Fauconnier, was authorized to finalize contracts.

Ms Bupati has been part of the purchasing team at Southern Commodities since 2004, transitioning to overseeing palm kernel oil purchases in 2010. During her employment there, she maintained regular communication with Mr. Chandra on behalf of the Claimants. Their professional collaboration spanned from 2010 to 2018, resulting in the conclusion of approximately 40 contracts.

Their practice was that Ms Bupati would initiate contact with Mr Chandra to request quotations. Following receipt of these quotations, Ms Bupati would give an offer, and Mr Chandra would then forward the contractual paperwork to her. If upon review Ms Bupati found the documents unacceptable, she would raise her concerns within a week of receiving them. Finally, if deemed acceptable, she would either sign them within the same week or she would just proceed with contract implementation.

The contractual documents sent by Mr Chandra always referred to Claimant's General Conditions of Sale (hereinafter "the General Conditions").

On **28 March 2020**, Mr Chandra attended the Palm Oil Summit in the Capital City of Mediterraneo with the goal of finding a purchaser for two-thirds of the Claimant's yearly palm oil output. It was during this event that he encountered Ms Bupati, who was working in a palm oil enterprise. They quickly reached a consensus on all important commercial terms for a palm oil sales contract (hereinafter "the Contract"). Mr Chandra informed Ms Bupati right there that



Claimant's usual General Conditions of Sale will apply. Ms Bupati needed management approval before she could conclude the Contract, so they agreed that she would get back to Mr Chandra with a firm offer within the next 3 days.

On **1 April 2020**, Ms Bupati sent an email reflecting the commercial terms agreed at the Palm Oil Summit. It specified the quality and quantity of the palm oil and set the price.

On **9 April 2020**, Mr Rain sent an email containing the contractual documents to Ms Bupati and Ms Fauconnier. The email stated that Claimant accepts the terms of the offer and that the General Conditions apply to the Contract.

On **3 May 2020**, Ms Fauconnier contacted Mr Rain to ask about the banks that were acceptable to Claimant for opening the letter of credit.

In **November 2020**, the Parties engaged in several rounds of negotiations and mediation. The Parties failed to settle the dispute.

On **14 July 2021**, Claimant initiated the arbitration against Respondent.

### 3. LAW APPLICABLE

On the authority of Article 1. Paragraph 1. of the United Nations Convention on Contracts for the International Sale of Goods from 1980. (hereinafter "**the CISG**"). This CISG applies to contracts of sale of goods between parties whose places of business are in different States. This applies when the States are Contracting States or when the rules of private international law lead to the application of the law of a Contracting State. However, according to the Article 6. the parties may exclude the application of the CISG or they may derogate from or vary the effect of any of its provisions.

Claimant is based in Mediterraneo, while Respondent based in Equatoriana<sup>2</sup>. Both Mediterraneo and Equatoriana are Contracting States of the CISG<sup>3</sup>. It is also undisputed that the Mediterranean law will govern the Contract<sup>4</sup>. As the General Conditions are a part of the main Contract, the same law will apply regarding their valid incorporation. Therefore, the

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<sup>2</sup> Notice of Arbitration, p.4

<sup>3</sup> Procedural Order No.1, p. 46

<sup>4</sup> Claimant's Exhibit C4, p. 17

CISG will apply as the parties did not exclude the application of the CISG, nor did they derogate or vary the effect of any of its provision.

The CISG does not provide provisions regarding the General Conditions, therefore the rules on contract formation will apply<sup>5</sup>. For General Conditions to be validly incorporated into the contract there needs to be an offer and acceptance of the said Conditions based on Article 14. and Article 18. of the CISG.

#### 4. THE GENERAL CONDITIONS WERE VALIDLY INCORPORATED INTO THE CONTRACT

As it was stated earlier, the CISG rules on contract formation will also apply for the inclusion of the general conditions into the main contract. This means that the party who wishes to include their general conditions into the contract needs to offer them to the other party (Art. 14 CISG). In return, the other party has to accept the added general conditions (Art. 18 CISG). The acceptance by the second party will often be given when accepting the entire contract.

The previous provisions tend to lead to confusion in real life as they do not give specifics about the necessary elements that need to be met for an addition of general condition to be valid. The solution is offered by the commentators and the case law, as they both agree that there are two elements that need to be fulfilled in order to include the general conditions into the contract. There needs to be a clear reference to general conditions by the offeror and the offeree has to be given a reasonable opportunity to take notice of their content.

Respondent states that the General Conditions have not been validly incorporated into the Contract<sup>6</sup>. The main argument Respondent provides is the fact that they were never delivered to Respondent<sup>7</sup>. However, Respondent does not dispute that they were delivered to Southern Commodities, its parent company, and Ms Bupati while she was still employed there<sup>8</sup>.

Claimant argues that the General Conditions were offered to Respondent by a clear reference, and Respondent had a reasonable opportunity to take notice of their content.

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<sup>5</sup> Schlechtriem/Schwenzer pp. 172, 226; Huber/Mulis p. 30; Kroll/Mistelis/Perales Viscasillas p. 232-233

<sup>6</sup> Response to the Notice of Arbitration, p. 27 § 14

<sup>7</sup> Response to the Notice of Arbitration, p. 27 § 13

<sup>8</sup> Response to the Notice of Arbitration, p. 27 § 13

#### 4.1.CLAIMANT MADE A CLEAR REFERENCE TO THE GENERAL CONDITIONS

As it is disputed whether there was an acceptance of the General Conditions it is also important to mention how the will of the contracting parties is prescribed under the CISG. According to the Article 8 Paragraph 1, statements and conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was. The next Paragraph expands, when the Article 1 is not applicable statements and conduct of a party are to be interpreted according to the understanding that a reasonable person would have had in the same circumstances. Therefore, the offeror's reference to its general conditions is understandable if a reasonable person of the same kind as the offeree would understand that the offeror suggested their application. According to the general principle of informality, the reference to the general conditions does not have to be in writing<sup>9</sup>.

During the communication with Respondent, Claimant has definitely referred to General Conditions several times. First time they were mentioned was at the Palm Oil Summit, on 28 March 2020, when Mr Chandra told Ms Bupati that Claimant's General Conditions would apply to the Contract they were concluding<sup>10</sup>. Second time was in email from 9 April 2020 when Mr Rain notified Ms Bupati and Ms Fauconnier that “*Seller’s general conditions apply to issues not regulated in the attached document*”<sup>11</sup>. Finally, the third time was on the first page of contractual documents, under “*Special Conditions*”, where it is stated that “*Seller’s General Conditions of Sale apply*”<sup>12</sup>.

The intention of Claimant to incorporate its General Conditions in the Contract is unquestionable since the wording used is unambiguous and every reasonable person would understand Claimant's efforts.

#### 4.2.RESPONDENT HAD A REASONABLE OPPORTUNITY TO TAKE NOTICE OF THE GENERAL CONDITIONS

The offeree's opportunity to take notice of the content of the offeror’s general conditions should also be evaluated with the Art. 8 (2) of the CISG, or perspective of a reasonable person of the same kind as the other party would have had in the same circumstances.

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<sup>9</sup> Schlechtriem/Schwenzer, p. 292; CISG AC Op. No. 13, pp. 15, 16; Eiselen, p. 7

<sup>10</sup> Procedural Order No. 2, p. 49 § 13

<sup>11</sup> Claimant Exhibit C 4, p. 17

<sup>12</sup> Claimant Exhibit C 3, p. 13

It is established by the commentators and case law that a reasonable offeree could become aware of the general conditions if, for example: a) it had the opportunity to request information from the offeror about their content, b) the general conditions were previously available online or, c) offeree had to be aware of the general conditions due to its previous practice with the offeror<sup>13</sup>.

In this case, Respondent did in fact have an opportunity to take notice of Claimant's General Conditions. Especially, Respondent had an opportunity to easily inquire Claimant about General Conditions (4.2.1.), they could have been retrieved online (4.2.2.) and finally, it could be aware of their content based on the established practice (4.2.3.).

#### 4.2.1. Respondent had an opportunity to inquire Claimant about the General Conditions

The offeree was presented with a reasonable opportunity to take notice of the general conditions if, upon inquiry, it could quickly become acquainted with their substance<sup>14</sup>.

In the *Incorporation of the Orgalime S2000 Conditions case*, the Slovenian Court of Appeal stated that the offeree had a reasonable opportunity to become aware of their content and protest their application. The Court found it convincing since the offeror was always especially available for questions, including inquiries regarding the referenced general conditions. In this case the offeree did not object to the repeated references the general conditions became a part of the contract.

Since Claimant referred to the General Conditions several times, Respondent definitely had an opportunity to inquire about their content if there was any concern. Furthermore, Mr Rain sent an email on 9 April 2020 to Ms Fauconier which clearly stated “*if you have any questions, I will be your point of contact. Please do not hesitate to contact me*”<sup>15</sup>.

Ms Bupati and Ms Fauconier have already addressed multiple issues. The issues were raised before and after the Contract was concluded. However, none of them were regarding the General Conditions.

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<sup>13</sup>Schlechtriem/Schwenzer, pp. 174, 295, 297, 300; Huber/Mulis p. 31; Kroll/Mistelis/Perales Viscasillas p. 234; CISG AC Op. No. 13, pp. 8, 12, 14; Eiselen, p. 11; Kruisinga, p. 72, 75; Dutch-Italian sales contracts case; Tantalum powder case II; Incorporation of the Orgalime S2000 Conditions case

<sup>14</sup> Schlechtriem/Schwenzer, p. 174; Kruisinga, p. 75; Incorporation of the Orgalime S2000 Conditions case; Tantalum powder case II

<sup>15</sup> Claimant Exhibit C 4

In case law, the offeree's opportunity to inquire about the general conditions was also made dependent on the importance of the transaction for the party involved. In the *Tantalum powder case II*, the offeree claimed that the general conditions were in a language it did not understand and therefore not relevant for the contract. The Austrian Supreme court held that, because the transaction was of great importance for the party, the offeree had a reasonable opportunity to translate the general conditions or even require from the offeror to provide for their translation.

In the present case, the Contract was of immense importance for both Parties<sup>16</sup>. The main benefit for Claimant was the opportunity to sell 2/3 of its annual palm oil production for the next five years<sup>17</sup>. On the other hand, RSPO-certified palm oil is considered very hard to obtain and with this Contract Respondent secured a steady supply for a very favorable price<sup>18</sup>.

Ultimately, if Respondent had any reservations or questions regarding the General Conditions it would have been easy to inquire about them since there was an open line of communication already established.

#### 4.2.2. The General Conditions were available online

The offeree had a reasonable opportunity to become aware of the content of the general conditions if they were generally accessible over the internet at the time of contracting<sup>19</sup>.

The General Conditions were available on Claimant's website at the time of the negotiations and at the time of conclusion of the contract<sup>20</sup>. It is important to notice that even though the General Conditions were published online they were not easily accessible<sup>21</sup>. However, the Parties were already communicating electronically, it could not have been unreasonable to expect from Respondent to look them up online. Especially with how many times the General Conditions were mentioned, Respondent could have easily asked for a pdf document over an email or a link to the General Conditions on the website. Therefore, Respondent did have an opportunity to take notice of the General Conditions.

#### 4.2.3. Ms Bupati has previously concluded contracts with the same General Conditions

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<sup>16</sup> Respondant Exhibit R 3, p. 31, § 6

<sup>17</sup> Notice of Arbitration, pp. 4-5, §§ 3, 6

<sup>18</sup> Response to the Notice of Arbitration, p. 26, § 7

<sup>19</sup> CISG AC Op. No. 13, pp. 12-13; Schlechtriem/Schwenzer, p. 174

<sup>20</sup> Procedural Order No. 2, p. 50, § 18

<sup>21</sup> Procedural Order No. 2, p. 50, § 18

At last, the offeree had a reasonable opportunity to take notice of the content of the general conditions if they have already been validly included in one or more previous contracts between the parties<sup>22</sup>.

In the *Exclusive distribution contract case*, the Austrian Supreme Court held that the offeree was aware of the content of the offeror's general conditions even if they were not delivered with the offer. This decision of the Court was based on the previous business relationship between the parties. The general conditions did not need to be delivered with the offer as they were known to the offeree.

Furthermore, in the *Dutch plants case I*, German District Court ruled that the general conditions can become part of the contract during a long lasting business relationship through the way of repeated and recognizable references.

In this case, Mr Chandra and Ms Bupati negotiated, concluded and preformed around 40 contracts over 8 years<sup>23</sup>. Ms Bupati received a copy of the General Conditions and surely took a closer look at them in 2014<sup>24</sup>. Although Mr Chandra and Ms Bupati had negotiated certain terms of their contracts from time to time, the application of the General Conditions was never discussed or brought into question<sup>25</sup>.

Respondent states that established practice should not bind Respondent since Ms Bupati has changed the company she is working for<sup>26</sup>. However, Ms Bupati herself has called upon this existing practice stating „It was good to see you at the Palm Oil Summit last week, to catch up and to re-establish our long lasting and successful business relationship in my new function“<sup>27</sup>.

Also, Southern Commodities transferred Ms Bupati to her new position at Respondent's precisely because of her previous business experience in the palm oil industry<sup>28</sup>.

Respondent should not be able to change whether the long existing relationship between Mr Chandra and Ms Bupati is relevant for the new Contract or not.

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<sup>22</sup>Schlechtriem/Schwenzer, pp. 300, 301 § 58; Huber/Mulis p. 32; CISG AC Op. No. 13, p. 14; DiMatteo/Dhooge/Greene/Maurer, p. 348; Dutch-Italian sales contracts case; Industrial Equipment case

<sup>23</sup> Respondent Exhibit R 3, p. 31

<sup>24</sup> Response to the Notice of Arbitration, p. 27 § 11

<sup>25</sup> Procedural Order No. 2, p. 48, § 7; Respondant Exhibit R 3, p. 31 § 2

<sup>26</sup> Response to the Notice of Arbitration p. 27 §15

<sup>27</sup> Claimant Exhibit C 2, p. 12

<sup>28</sup> Respondent Exhibit R 3, p. 31 § 4

## 5. THE GENERAL CONDITIONS OF SALE WERE NOT VALIDLY INCORPORATED INTO THE CONTRACT

The CISG governs the incorporation of general conditions into a sales contract that falls within its scope<sup>29</sup>. The incorporation of general conditions follows the rules on formation and interpretation of contracts<sup>30</sup>.

Respondent claims that for General Conditions to become a part of the Contract it is necessary for there to be an explicit reference to the said Conditions. However, the text of the General Conditions must be also made readily available to Respondent as the offeree.

### 5.1.A REFERENCE TO THE GENERAL CONDITIONS IS NOT SUFFICIENT

Claimant argues that explicit references to the General Conditions are sufficient for them to be incorporated into the main Contract. It is true that the General Conditions were referenced a couple of times, however, Claimant never made them available to Respondent<sup>31</sup>.

The party entering a sales contract must be able to take notice of the content of general conditions in a reasonable manner<sup>32</sup>. Otherwise, the offeree would not be able to give an informed and legally binding acceptance. Thus, is not sufficient that the offering party only has to make a reference to its general conditions and state they will apply by default<sup>33</sup>.

It is of great importance that the general conditions are made available to the offeree<sup>34</sup>. This is a way to make sure that the offeree is aware or could have easily been aware of additional contractual obligations that they could be bound by<sup>35</sup>.

In *Machinery case*, the German Supreme Court decided it was the offerors duty to make general conditions available to the offeree. The main reason behind it was because for the offeror “*it is*

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<sup>29</sup> CISG AC Op. No. 13, p. 6; Kroll/Mistelís/Perales Viscasillas, p. 233; Schlechtriem/Schwenzer, p. 290; Bax Chemicals B.V. v. Amcor Flexibles Kreuzlingen AG case

<sup>30</sup> Schlechtriem/Schwenzer, p. 172; Huber/Mulis, p. 30; Kroll/Mistelís/Perales Viscasillas, pp. 32-233; Blue poppy case; Shelving systems case

<sup>31</sup> Procedural Order No. 2, p. 49 § 13; Claimant Exhibit C 4, p. 17; Claimant Exhibit C 3, p. 13

<sup>32</sup> Kroll/Mistelís/Perales Viscasillas, pp. 233-234

<sup>33</sup> Kroll/Mistelís/Perales Viscasillas, p. 233; Schlechtriem/Schwenzer, p. 292; Huber/Mulis, pp. 30-31; Kruisinga, p. 81, Italian knitwear case III; Shelving systems case; Machinery case; Blue poppy case; Rotary compound liner case

<sup>34</sup> CISG AC Op. No. 13, p. 8; Kroll/Mistelís/Perales Viscasillas, pp. 233-234; Schlechtriem/Schwenzer, p. 295; Huber/Mulis, p. 31; Machinery case; Steatite grinding balls case

<sup>35</sup> Kroll/Mistelís/Perales Viscasillas, p. 234, Kruisinga, p. 82

*easily possible to attach to his offer the general terms and conditions” and furthermore, because the offeree “can often not foresee to what clause he agrees in a specific case”.*

In *Blue poppy case*, the German Court of Appeal concluded that the offeree does not have a “*duty to investigate the content of any standard terms which the declaring party has not sufficiently communicated*”. To clarify, the offeree should not be “*burdened with the risk of unfavorable standard terms which had never been made known to it*”

It is also of great relevance to refer to CISG AC Opinion No. 13. CISG AC Opinion No. 13, regarding the incorporation of the general conditions, favors the approach which requires that the general conditions are made available to the offeree<sup>36</sup>.

In other words, in the present case Respondent did not have to inquire or search for the General Conditions. Instead, it was Claimant's duty to deliver them to Respondent.

## 5.2. THE GENERAL CONDITIONS WERE NEVER MADE AVAILABLE TO RESPONDENT

General conditions are considered to be made available to the offeree in case they meet at least one requirement from the following: the text of the general conditions has been delivered to the offeree, they were easily accessible online, or they were known to the offeree based on their previous established practice<sup>37</sup>.

In this case, Claimant's General Conditions do not meet any of the criteria necessary for them to become a part of the Contract. This is based on the fact that Claimant never delivered the General Conditions to Respondent (5.2.1.), the General Conditions were not easily accessible online (5.2.2.), and Claimant and Respondent do not have an established practice (5.2.3.).

### 5.2.1. Claimant never delivered the text of the General Conditions to Respondent

The most transparent and effortless way to give the offeree an opportunity to readily accept general conditions is with delivery or transmission of their text<sup>38</sup>. General conditions usually favor the offeror so they should know what they are signing up for, for this to be a good start

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<sup>36</sup> CISG AC Op. No. 13, p. 9

<sup>37</sup> CISG AC Op. No. 13, p. 12; Schlechtriem/Schwenzer, pp. 299-301; Rotary compound liner case; Blue poppy case; Steatite grinding balls case

<sup>38</sup> Schlechtriem/Schwenzer, p. 298; CISG AC Op. No. 13, p. 9; Machinery case



of a long contractual relationship<sup>39</sup>. If the offeree is given a fair chance to go through the general conditions, it should also allow to avoid at least some prospective disputes down the line<sup>40</sup>.

In the case at hand, Claimant did not deliver its General Conditions to Respondent even though it had every opportunity to do so. Claimant and Respondent were in constant communication from late March, to late October when Respondent terminated negotiations<sup>41</sup>. The negotiations were conducted for 7 months. This time was long enough where Claimant could have delivered the General Conditions if it really was a *conditio sine qua non*.

### 5.2.2. The General Conditions were not easily accessible online

When contracts are finalized via electronic communication, it suffices for the offeror to provide a hyperlink that directly accesses the general conditions<sup>42</sup>.

It is possible for the offeror to make its general conditions available by disclosing them on its website<sup>43</sup>. In that case, access to general conditions must be simple for the offeree to find. More specifically, this means that they have to be easily discoverable and retrievable on the offeror's homepage<sup>44</sup>.

Even though the General Conditions were somewhere on Claimant's webpage, they could not be found easily<sup>45</sup>. According to the commentators and the case law Respondent does not have a duty to look for the General Conditions on the Claimant's webpage<sup>46</sup>.

Claimant and Respondent were already exchanging emails throughout the negotiations. This would have been an especially convenient way to send a hyperlink to the text of the General Conditions located on Claimant's webpage. However, this never happened.

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<sup>39</sup> Kroll/Mistelis/Perales Viscasillas, p. 234

<sup>40</sup> Magnus II, pp. 319; Kruisinga, p. 82

<sup>41</sup> Notice of Arbitration, p. 5 § 7

<sup>42</sup> Schlechtriem/Schwenzer, pp. 299; CISG AC Op. No. 13, p. 13

<sup>43</sup> Schlechtriem/Schwenzer, p. 299; CISG AC Op. No. 13, p. 13; Cheese case

<sup>44</sup> Schlechtriem/Schwenzer, p. 299; Cheese case

<sup>45</sup> Procedural Order No. 2, p. 50 § 18

<sup>46</sup> Schlechtriem/Schwenzer, p. 299; Cheese case

### 5.2.3. Claimant and Respondent do not have an established practice

General conditions are considered to already be made available if the same parties have repeatedly used the same general conditions in prior contracts. This is based on the idea that offeror does not have to transmit them if the offeree was already aware of their content<sup>47</sup>.

The offeree's awareness will depend on the circumstances of each particular case<sup>48</sup>. Consideration has to be given to whether the contracts have been handled by the same or different branches of the offeree, and to the intervals between those contracts<sup>49</sup>.

Claimant heavily relies on the practice established between Ms Bupati and Mr Chandra, however, there are a plethora of reasons why such practice does not bind Respondent in this case.

First, the established practice that Claimant is calling upon was established when Ms Bupati worked for a different employer, Southern Commodities. Despite Southern Commodities being the parent company of the Respondent, Respondent itself remains a distinct and autonomous legal entity with unique business goals. It also operates within a completely different nation under distinct social and specific political conditions<sup>50</sup>.

Second, the General Conditions were delivered to Southern Commodities in 2011, which is almost a decade before the negotiations between Claimant and Respondent even started. Moreover, the last time Ms Bupati has seen the General Conditions was in 2014<sup>51</sup>. Thus, it is not reasonable to expect from Ms Bupati to still have the entire content of the General Conditions memorized after all this time and the change of the employer.

Third, the practice between Claimant and Ms Bupati was suspended. Almost 2 years have passed since Claimant and Ms Bupati concluded a contract<sup>52</sup>. In the meantime, Claimant found a new customer, and Ms Bupati changed employers<sup>53</sup>.

Fourth, at her new place of work with Respondent, Ms Bupati does not have an access to the General Conditions<sup>54</sup>. This is not unexpected in any way since Ms Bupati changed employers.

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<sup>47</sup> Schlechtriem/Schwenzer, p. 300; Kroll/Mistelis/Perales Viscasillas, pp. 234-235

<sup>48</sup> CISG AC Op. No. 13, p. 10; Schlechtriem/Schwenzer, p. 301

<sup>49</sup> Schlechtriem/Schwenzer, p. 301

<sup>50</sup> Procedural Order No. 2, p. 48 § 4; Respondent Exhibit R 1, p. 29; Claimant Exhibit C 1, p. 10 § 10

<sup>51</sup> Response to the Notice of Arbitration, p. 27 § 11; Procedural Order No. 2, p. 50 § 18

<sup>52</sup> Procedural Order No. 2, p. 48 § 7

<sup>53</sup> Procedural Order No. 2, pp. 48-49 § 8; Claimant Exhibit C 1, p. 10 § 8

<sup>54</sup> Procedural Order No. 2, p. 50 § 18

Fifth, Ms Bupati did not have a reason to believe that in the past ten years not one article in the General Conditions was changed. Ultimately, the General Conditions did in fact change since in 2016, Claimant changed the Arbitration Agreement in Art. 9 of the General Conditions. Instead of FOSFA/PORAM arbitration clause, it inserted an AIAC model clause<sup>55</sup>. There is no proof that Claimant ever delivered this new Arbitration Agreement to Ms Bupati<sup>56</sup>. Claimant did inform Ms Bupati that there was some sort of change in the General Conditions four years prior, but it was over the phone and Ms Bupati could not have possibly remembered this. This was demonstrated in her email of 1 April, where she was especially worried about the commodity arbitration which was no longer a part of the General Conditions<sup>57</sup>. Claimant could have not possibly relied on a clearly wrong memory of the General Conditions when it would have been so easy to deliver or make them otherwise available.

## 6. ZAKLJUČAK

Tužitelj se prilikom sklapanja ovog ugovora pouzdao na staro poznanstvo između g. Chandre i gđe Bupati. To se čini logično s obzirom da je gđa Bupati 8 godina sklapala ugovore s g. Chandrom s istim Općim uvjetima prodaje. Tužitelj tvrdi da su uvjeti za sklapanje Ugovora s uključenim Općim uvjetima prodaje zadovoljeni. Tužitelj se je u više navrata pozvao na primjenu vlastitih Općih uvjeta prodaje koji su bili poznati gđi Bupati. Kako je gđa Bupati ista fizička osoba samo je na novom radnom mjestu, tužitelj je zaključio da je njezino znanje, uključujući i poznavanje Općih uvjeta prodaje, preneseno na novu pravnu osobu – Tuženika. U svakom slučaju, Tužitelj smatra da je tuženik u situaciji bilo kakve nesigurnosti vezane uz sadržaj Općih uvjeta prodaje mogao uvijek tražiti da joj se isti dostave, posebice s obzirom na konstantnu komunikaciju između stranaka. Također, isti se Opći uvjeti prodaje mogu pronaći i na web stranicama Tužitelja.

Kako Tuženik ni u jednom trenu nije prigovorio primjeni Općih uvjeta prodaje Tužitelja, Tužitelj smatra da je ugovor sklopljen s valjano uključenim uvjetima prodaje.

Tuženik, s druge strane, iako tvrdi da je Ugovor sklopljen smatra da se tužitelj nije ostvario preduvjete za valjanu inkorporaciju Općih uvjeta prodaje u isti. Tuženik ne osporava da je

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<sup>55</sup> Claimant Exhibit C 1, p. 9 § 4; Respondent Exhibit R 4, p. 32

<sup>56</sup> Claimant Exhibit C 1, p. 9 § 4

<sup>57</sup> Claimant Exhibit C 2, p. 12

Tužitelj u nekoliko navrata spomenuo Opće uvjete prodaje, no oni ni u jednom trenu nisu bili dostavljeni Tuženu. Prema pogledu tuženika, on nije mogao dati pristanak na dodatak ugovoru čiji sadržaj mu je u potpunosti nepoznat. Tužitelj je imao dužnost dostaviti Opće uvjete prodaje kako bi mogao donijeti educiranu odluku želi li na taj način proširiti ugovor. Tuženik ne osporava da su Opći uvjeti objavljeni na web stranici Tužitelja. Tuženik tvrdi da nije realno očekivati da će stranka kojoj se određuje dodatak ugovoru morati sama tražiti na što ju se točno obvezuje. Dodatno, Tuženik bi trebao tražiti navedene opće uvjete na web stranici za koju sam Tužitelj priznaje da nije jednostavna za korištenje. Tužitelj se dalje oslanja na poznanstvo između gđe Bupati i g. Chandre kao zamjenom za dostavom Općih uvjeta prodaje. Tuženik to osporava iz razloga što gđa Bupati godinama nije vidjela tekst općih uvjeta čak i prije no što je promijenila poslodavca.

Uzevši u obzir sve navedeno, smatram da, iako se tužitelj u više navrata pozvao na Opće uvjete prodaje i iako je tuženiku bila dana mogućnost da se sam upozna sa sadržajem istih to u ovom slučaju nije dovoljno da se Opće uvjete prodaje smatra valjano uključenim u glavni ugovor.

Glavni je razlog tome što smatram da su Opći uvjeti prodaje morali biti dostavljeni gđi Bupati barem jednom otkad je počela raditi kod novog poslodavce. Oslanjati se na sjećanje gđe Bupati pri sklapanju petogodišnjeg ugovora s novom strankom se u svakom slučaju čini jako rizičnim. Tužitelj je s Tuženikom imao otvoreni kanal komunikacije te je u bilo kojem trenu mogao dostaviti tekst Općih uvjeta prodaje ili Tuženika direktno uputiti na web mjesto gdje se točno nalaze spomenuti uvjeti.

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