Fourteen Internationally Renowned Scholars… Are Wrong?

Michael Tucker

The CISG Advisory Council takes pride in "offering worldwide authoritative opinions"[1] on the interpretation of the United Nations Convention on the International Sale of Goods (CISG).[2] In its thirteenth opinion[3], fourteen members of the Council outlined their interpretation of the CISG's position on the incorporation of standard terms. The Council reasoned that for a successful incorporation of a contracting party's standard terms, there must be a clear reference[4], paired with a reasonable opportunity to take notice of the terms.[5] This essay will argue that the second of these requirements, outlined in the way the Council has, imposes too strict a requirement, which goes against the fundamental principle of the CISG, namely that it imposes no form requirements on contracts.[6]

The CISG

As a preliminary matter, it should be noted that the CISG does not specifically outline the requirements for the incorporation of standard terms. The Advisory Council has therefore stated, from the outset, that they seek to use the normal rules on contractual formation under the CISG to find the requirements for incorporation of standard terms.[7] The rules on formation of contract are therefore extracted from articles 8[8], 14[9] and 18[10] of the CISG. These can be found below:

[1] 'About Us' (*Cisgac.com*, 2022) <http://www.cisgac.com/about-us/> accessed 5 April 2022.
[2] United Nations Convention on the International Sale of Goods 1980.
[3] CISG-AC Opinion No. 13 Inclusion of Standard Terms under the CISG, Rapporteur: Professor Sieg Eiselen, College of Law, University of South Africa, Pretoria, South Africa. Adopted by the CISG Advisory Council following its 17th meeting, in Villanova, Pennsylvania, USA, on 20 January 2013.
[4] CISG-AC Opinion No. 13 Inclusion of Standard Terms under the CISG, art 5.
[5] Ibid, art 2.
[6] United Nations Convention on the International Sale of Goods 1980, art 11.
[7] CISG-AC Opinion No. 13 Inclusion of Standard Terms under the CISG, art 1.
[8] United Nations Convention on the International Sale of Goods 1980, art 8.
[9] Ibid, art 14.
[10] Ibid, art 18.

Article 8:

(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware of what that intent was.

(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.

(3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.[11]

Article 14:

(1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.

(2) A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.[12]

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[11] Ibid, art 8

[12] United Nations Convention on the International Sale of Goods 1980, art 14.

Article 18:

(1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.

(2) An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.

(3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down in the preceding paragraph.[13]

Reasonable Opportunity to Take Notice

Article 8(2) of the CISG requires a court to interpret the words and conduct of a party as that of a reasonable person of the same kind as the other party in the same circumstances.[14] The Advisory Council uses this in order to find the requirement of a *reasonable opportunity to take notice*; the rationale of this is that if a party did not have a reasonable opportunity to take notice of the standard terms, they could not have reasonably been expected to intend their incorporation. This general rationale seems sound, however the form in which the Advisory Council, and some courts, view this opportunity to take notice seems unreasonable when considering it is supposed to be extracted from, and therefore compatible with, the CISG.

[13] United Nations Convention on the International Sale of Goods 1980, art 18.
[14] Ibid, art 8(2)

The Advisory Council follows the opinion of the German Federal Court of Justice in the German Machinery case.[15] In this case, the court held that the recipient of a contract offer based on standard terms must have the possibility to become aware of them in a reasonable manner. This was wrongly interpreted by the appellate court of Oldenburg in Germany, which found that the only way to fulfil this requirement would be to present the terms to the other party at the time of contract conclusion.[16] This is too strict a standard and, in effect, creates a form requirement, which is incompatible with article 11 of the CISG. Article 11 states:

> *"A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirements as to form. It may be proved by any means, including witnesses."*[17]

Essentially, by placing a requirement on incorporation of standard terms that they must be presented at the time of contracting, the German Appellate Court of Oldenburg imposed a requirement that is stricter than formation under the CISG. It would present a situation where two parties (X and Y) could contract for a sale worth billions of pounds through a phone call, but when X tells Y that their standard terms apply, and Y agrees, the court is asserting that the standard terms have not been incorporated. Essentially, it means parties can contract freely, except where standard terms come into play, in which a form requirement is imposed. Considering this rule is supposed to be extracted from the CISG, it seems incompatible with the core of formation under the CISG, itself, namely article 11's insistence on party autonomy in the fact of form requirements.

Nevertheless, the Advisory Council made clear that they do not agree with the lower court's interpretation of the German Machinery case.[18] They agree that this sets too strict a standard, and that the reasonable opportunity to take notice requirement could, for example, be fulfilled by referring to a website,

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[15] Germany, 31 October 2001 Federal Court of Justice (Machinery Case) [http://cisgw3.law.pace.edu/cases/011031g1.html].
[16] Germany, 20 December 2007 Appellate Court Oldenburg (Industrial Tools Case) [http://cisgw.law.pace.edu/cases/071220g1.html]
[17] United Nations Convention on the International Sale of Goods 1980, art 11.
[18] CISG-AC Opinion No. 13 Inclusion of Standard Terms under the CISG, art 2.5.

accompanied by a URL, which would not require the terms to be expressly sent.[19]

The Advisory Council, here, is straying from the German Appellate Court in form, but they are not doing it in substance. By asserting that sending the terms is too strict but sending a URL link to the terms is better is a falsity. Sending a URL link to the terms and sending the terms faces the same problem: they are imposing a form requirement, where there should not be one.

Austrian "Propane Case" Model

The Austrian Supreme Court in the Propane Case sets out a more lenient approach, which this essay considers the better approach to incorporation under the CISG.[20] The court, there, reasoned as the Advisory Council did that as the CISG does not contain express provisions for the incorporation of standard terms under the CISG, the general rules of formation apply. However, rather than merely speculating what sort of requirements must be needed under Article 8, the court reasoned with regard to offer and acceptance, starting with Article 14. The standard terms therefore need to be part of the offer according to the offeror's intent, and where the offeree could not be unaware of that intent. This means that whether standard terms are incorporated or not, essentially comes down to whether the parties intended them to be, without regard to requirements of being sent the terms or being sent some form of URL.

The CISG Advisory Council rejects the view of the Austrian Supreme Court,[21] siding with Magnus that this makes an unfair risk allocation, asking the offeree to request a copy of the standard terms from the other party.[22] However, this should be rejected. Firstly, it doesn't make an unfair risk allocation because if the party was being responsible, it wouldn't agree to contract on the basis of the standard terms if they do not know the contents of the standard terms. Therefore, the only risk is if they wish to proceed without reading them, which cannot be solved by sending the terms, because the law cannot, and should

[19] Ibid
[20] Austria, 6 February 1996 Supreme Court (Propane Case) [http://cisgw3.law.pace.edu/cases/960206a3.html].
[21] CISG-AC Opinion No. 13 Inclusion of Standard Terms under the CISG, art 2.8.
[22] Magnus Festschrift Kritzer 320-321

not, resort to forcing the parties to read standard terms if they decide they will not. Secondly, even if one agrees that this is an unfair risk allocation, these requirements are supposed to be extracted from the CISG. The CISG rules on formation ask for two things:

1. An offer[23] (sufficiently definite with an intention to be legally bound[24])

2. An acceptance (indication of assent to the terms of the offer[25])

At no point is there a requirement that a party read the terms, or even be sent the terms. Article 11's insistence on no form requirement means that if X says to Y "I would like to purchase 100 tonnes of wheat for 20,000 pounds" and Y replies "I agree, let's do it!", that is a valid contract for sale. If X, instead, says "I would like to purchase 100 tonnes of wheat for 20,000 pounds subject to my general conditions of sale", Y can reply "I agree, let's do it!" or can reply "I would like to read the general conditions before agreeing to this contract."

As the above shows, party autonomy is central to formation under the CISG. As long as there is an offer and acceptance, there is a contract. The Advisory Council, albeit full of internationally renowned scholars, impose a form requirement which is incompatible with the normal rules on contract formation. It may pose an unfair risk, but trying to "solve" a problem in commercial trade is not the responsibility, nor the ability, of a body which claims it merely "interprets" the CISG. This essay is not saying there should not be a reasonable opportunity to take notice of the terms- if Y asks for them, X should send them, however the requirement to present the terms to the other, or direct them to a URL where the other party has not asked imposes a requirement which, as stated, imposes a form requirement, but also takes away from the speed in which deals could be made. If Y really isn't bothered about reading the terms, why is it necessary for X to send them? Y won't read them anyway, and it is Y's intention that the terms are incorporated whatever they are. All of this would be a perfectly valid contract under the CISG, so why not under the Advisory Council's direction?

[23] United Nations Convention on the International Sale of Goods 1980, art 14.
[24] Ibid, art 8.
[25] Ibid, art 18.

Regard to Article 7

A final reason why we should follow the direction of the Austrian Supreme Court is with reference to article 7 of the CISG. Article 7 states:

> (1) *In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.*
>
> (2) *Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law appliable by virtue of private international law.*[26]

Article 7 is relevant to this discussion because the incorporation of standard terms is an issue which is governed by the CISG (through formation of contract) but not expressly settled. The key principle which is relevant is that expressed in Article 7(1), namely the observance of good faith in international trade. We can apply it to the following hypothetical example.

> X and Y contract for the sale of 100 tonnes of wheat at a price of 50,000 pounds. X sends over the contractual documents and makes clear that X's general conditions of sale apply. X asks Y whether Y would like to see the general conditions of sale, to which Y says "I accept your terms; I do not wish to see your general conditions."

Under the Austrian Supreme Court approach[27], this is enough to (i) create a contract through offer and acceptance under the CISG and (ii) incorporate the standard terms by a clear reference backed by intention of both parties to incorporate the terms.

[26] United Nations Convention on the International Sale of Goods 1980, art 7.
[27] Austria, 6 February 1996 Supreme Court (Propane Case) [http://cisgw3.law.pace.edu/cases/960206a3.html].

Under the German Appellate Court of Oldenburg[28], German Federal Court of Justice[29] and CISG Advisory Council approaches[30], this is enough to create a contract through offer and acceptance but not incorporate the standard terms because they have not been made available.

Of the two approaches, it seems most consistent with a good faith interpretation of the CISG that where the parties clearly intend, or use words that show intention, that the standard terms are to be incorporated, it seems strange to then say Y can later claim the standard terms were never incorporated because they never had access to them. The Advisory Council therefore imputes a form requirement that doesn't give effect to the very standard imposed by the CISG in article 7 for how to deal with areas not expressly dealt with under the articles in the Convention.

Conclusion

The CISG Advisory Council, by insisting on the 'making available' requirement[31], whether through the presentation of terms or providing a URL link, has 'extracted' a rule that is incompatible with core provisions of the CISG. Article 11 is supposed to prioritise, above all, party autonomy in the creation of contracts. If parties do not want to send the terms, the CISG doesn't aim to force them, and the Advisory Council should not, either. Article 7 states that when interpreting areas that are not expressly dealt with under the Convention, we should have regard to good faith in international trade. The Advisory Council has provided a way for one party to get out of an obligation by asserting that they have never been sent the terms, despite agreeing to their incorporation. The Austrian Supreme Court's model[32] is much closer to the wording of the CISG and doesn't fall to the "unfair risk allocation" rejection that has been put by Magnus[33] and the Council[34]. This rejection is both flawed and more importantly not the responsibility of an *interpreting* body.

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[28] Germany, 20 December 2007 Appellate Court Oldenburg (Industrial Tools Case) [http://cisgw.law.pace.edu/cases/071220g1.html]
[29] Germany, 31 October 2001 Federal Court of Justice (Machinery Case) [http://cisgw3.law.pace.edu/cases/011031g1.html].
[30] CISG-AC Opinion No. 13 Inclusion of Standard Terms under the CISG, art 2.5.
[31] CISG-AC Opinion No. 13 Inclusion of Standard Terms under the CISG, art 2.5.
[32] Austria, 6 February 1996 Supreme Court (Propane Case) [http://cisgw3.law.pace.edu/cases/960206a3.html].
[33] Magnus Festschrift Kritzer 320-321
[34] CISG-AC Opinion No. 13 Inclusion of Standard Terms under the CISG, art 2.8.