Opposability of general terms and conditions

General terms and conditions are valid only on condition that the following 2 requirements are met, i.e. knowledge and acceptance.

Notification

In order for standard terms to be considered part of the content of the contract, case law and legal doctrine firstly apply the rule that a standard term binds the parties if the co-contractor has knowledge (*effective knowledge*) or could reasonably have knowledge (*possible knowledge) of* it before or at the latest at the time of the conclusion of the contract.

To a large extent, case law requires that the text of the standard terms be communicated to the other party in extenso, and the mere reference to the possibility of perusal of the applicable standard terms is insufficient.
The question of the enforceability of standard terms that are merely referred to at the conclusion of the contract and where it is stated that these standard terms will be communicated at the co-contractor's request, or that they have been published in the annexes to the ~~Belgian~~ Official Gazette, or that they are available for inspection at the court registry, is often raised. Case law often rejects the enforceability of standard terms whose applicability was only stipulated by mere reference.

The general terms and conditions shall form part of the contract concluded only if the full text of these terms and conditions is unambiguously and clearly reproduced either in the exchange of letters or attached to the exchange of letters. Neither a brief summary nor a single reference on the documents to their place of reference shall suffice.

There is no unequivocal answer to the question of whether one can be content with **sending such a copy once to one's customers or whether one must always attach a copy with each contract**. The Supreme Court leaves the possibility of a one-off communication of the terms untouched, as does the most authoritative legal doctrine. Nevertheless, there are also cases where the court stated that the general terms and conditions should always be communicated in full at the conclusion of each contract.

Regarding the opposability of standard terms **in the case of long-term commercial relationships**, where the invoice terms refer to standard terms, the majority seems to be of the opinion that here, too, reliance by one of the contracting parties on the standard terms should be rejected. However, based on the commercial relationship between the contract parties, a **distinction** should be made here **between, on the one hand, a continuous commercial relationship with a regular, durable and similar pattern and, on the other hand, a (long-term) series of successive individual orders.** In the former case, standard terms and conditions are sometimes referred to as an established customary clause between the contracting parties.

Acceptance

In order for standard terms and conditions to be considered part of the content of the contract between the parties, it is not only required that they be known, or reasonably likely to be known, before or at the latest at the time of concluding the contract, but the co-contractor must also have accepted the terms.

Needless to say, however, actual acceptance *(explicit acceptance*) of standard terms is mostly a fiction in practice, and acceptance must usually be inferred from the attendant circumstances of the case *(tacit acceptance).*

Express acceptance by a contracting party poses the least problems. However, it is noted that it is the exception rather than the rule that standard clauses are expressly accepted. However, case law assumes that acceptance can be tacit as well as explicit. Thereby, the mere silence of the co-contractor is in itself insufficient to conclude acceptance of the standard terms. What is required is a so-called "circumstantial silence", which means that, given the circumstances of the case, the silence cannot be interpreted in any other way than as an acceptance and consent to the applicability of the standard terms.

The proof of acceptance of the standard terms, which rests on the commission agent forwarder, when such acceptance is tacit, is also subject to varying standards. To conclude tacit acceptance, according to certain legal doctrine, three conditions must be met:

1) the contractual counterparty must have taken note or could reasonably have taken note of the standard terms;
2) this knowledge must precede the conclusion of the contract;
3) acceptance must be evidenced by certain elements, such as the absence of express or tacit protest.

Consequently, in each individual dispute, it is necessary to examine whether tacit or implied acceptance is available. This obviously involves a judicial factual appreciation based on the individual elements of the dispute raised.

In most cases, it is not enough that the parties have been working together for years and that the commission agent's letterhead refers to the standard clauses to conclude acceptance of these clauses. It is usually required that the full text has been communicated, in which case there is a presumption that the principal has accepted these terms with sufficient knowledge.

Consequently, the freight forwarder will have to send the general terms and conditions to his customer by registered mail. Preferably, he will attach a letter stating the desired applicability of the conditions to the transaction and a request to sign and return them for approval. Several firms already print on their own letterhead anyway that the application of any general terms and conditions must be explicitly confirmed in writing in advance.

In recent years, however, there have been a number of favourable rulings that may simplify life for freight forwarders in this area. For example, the Ghent Court of Appeal ruled that "the systematic reference in correspondence to the forwarding terms and conditions between parties (traders) who had been in commercial relations for many years and were familiar with transport and forwarding, lead to

the implicit but unambiguous acceptance of these terms in the absence of any protest". In 1999, the Supreme Court stated that general terms and conditions can be considered as a custom, with the result that the law in such a case presumes that the parties know this custom. In other words, it must be presumed that the parties could not have been ignorant of it and therefore the parties are deemed to have agreed to the application of those terms and conditions unless their application was expressly excluded.
It can be inferred from the above that the Belgian general forwarding conditions can be considered (taking into account the concrete circumstances) to be used in a certain professional circle and region. To where exactly that professional circle and region extends is not exactly clear as yet; this depends, inter alia, on the familiarity and awareness of the general terms and conditions, but it may be expected that it is not limited to only the freight forwarding sector. It can be emphasised, however, that such use does not extend to private individuals and that companies abroad might also be excluded from application. Future rulings will have to clarify this.

The law of 20/10/2000 on the use of telecommunication means and the electronic signature also makes it possible to notify general terms and conditions by e- mail instead of by registered mail. A hyperlink in an e-mail should also be possible under the new legal provisions, but here we are still waiting for the interpretation of the courts.

As a **conclusion,** we can say that it is often **difficult to find the only correct and legally watertight way, which is also practically workable. In the case of long-standing commercial relations between firms and between parties from the same industry, recent case law seems to be a little more flexible.**