

The background is a light blue gradient with several realistic water droplets of various sizes scattered across the surface. The droplets have highlights and shadows, giving them a three-dimensional appearance.

# THE USE OF GENERAL CONDITIONS (GC) OF SALE/PURCHASE IN THE CISG

UIA POZNAN CONFERENCE

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# GCS ARE BASICALLY WIDELY ADMITTED AND USED IN CISG CONTRACTS...

- THE FOLLOWING ASPECTS OF GCS ARE GOVERNED BY THE CISG
  - HAVE THE GCS BEEN VALIDLY INCLUDED IN THE CONTRACT ?
  - IF SO, HOW ARE THE GCS TO BE INTERPRETED ?
  - HOW ARE “SURPRISING CLAUSES” TO BE DEALT WITH ?

# GCS ARE BASICALLY WIDELY ADMITTED AND USED IN CISG CONTRACTS...

- THE MATERIAL/SUBSTANTIVE VALIDITY OF THE PROVISIONS CONTAINED IN GCS **IS NOT GOVERNED** BY THE CISG
  - BUT BY THE LAW APPLICABLE BY VIRTUE OF THE RULES OF PRIVATE INTERNATIONAL LAW
  - ART. 4 (A) CISG

# HAVE THE GCS BEEN VALIDLY INCLUDED IN THE CONTRACT ?

- ART. 8 (1) CISG:
  - COULD THE CONTRACT PARTNER OF THE “GC-USER” KNOW (OR SHOULD HE HAVE KNOWN) ABOUT THE GC-USER’S INTENT TO INCLUDE HIS GCS INTO THE SALES AGREEMENT ?
- IF NOT, ART. 8 (2) CISG:
  - COULD A REASONABLE PERSON OF THE SAME KIND AS THE CONTRACT PARTNER UNDERSTAND THE GC-USER’S STATEMENTS/CONDUCT AS AN INTENT TO INCLUDE HIS GCS INTO THE SALES AGREEMENT ?
- IN ANY EVENT, ART. 8 (3) CISG
  - ....IN LIGHT OF ALL RELEVANT CIRCUMSTANCES OF THE CASE, INCLUDING THE NEGOTIATIONS, PAST/CURRENT PRACTICES BETWEEN THE PARTIES, USAGES, SUBSEQUENT CONDUCT OF THE PARTIES (ART. 8 (3) CISG)

# HAVE THE GCS BEEN VALIDLY INCLUDED IN THE CONTRACT ?

- MORE PRECISELY....
  - RULE: TEXT OF THE CGS SHOULD BE **GIVEN**, OR AN ACCESS TO THE TEXT...
  - EXCEPTIONS:
    - **ART. 9 (1) CISG**: OTHER/DIVERGING USAGES/PRACTICES BETWEEN THE PARTIES
    - OR **ART. 9 (2) CISG**: OTHER/DIVERGING USAGES/PRACTICES IN THE SAME TRADE

# HAVE THE GCS BEEN VALIDLY INCLUDED IN THE CONTRACT ?

- CISG IS STRICTER THAN MANY DOMESTIC REGIMES (E.G. SWITZERLAND OR GERMANY)
  - JUST A MENTION OF THE GCS IS NOT ENOUGH...
  - ATTACHING THE GCS IS NOT ENOUGH
  - LANGUAGE

# HAVE THE GCS BEEN VALIDLY INCLUDED IN THE CONTRACT ?

## USE OF GCS IN ELECTRONIC CONTRACTS

- FOR ELECTRONIC OFFERS...
  - GCS MUST BE ATTACHED OR (READILY) ACCESSIBLE/DOWNLOADABLE THROUGH A LINK, AND CAN BE STORED AND PRINTED EASILY BY THE COUNTERPART, AT NO ADDITIONAL COST
- FOR CONTRACTS, WHICH ARE NOT CONCLUDED *ONLINE*... WHAT ABOUT GCS WHICH WOULD BE ONLY AVAILABLE ONLINE ?
  - YES IF...
    - EXPLICIT REFERENCE TO THE INCLUSION/APPLICATION OF THE GCS
    - THE GC-USER MAY ASSUME IN LIGHT OF THE CIRCUMSTANCES (ESP. THE USE OF INTERNET BY THE COUNTERPART IN PREVIOUS CORRESPONDENCE) THAT THE GCS MAY BE (1) EASILY PRINTED AT NO ADDITIONAL COST AND (2) CAREFULLY/QUIETLY PERUSED

# HAVE THE GCS BEEN VALIDLY INCLUDED IN THE CONTRACT ?

- NO REQUIREMENT THAT THE COUNTERPART OF THE GC-USER READ EFFECTIVELY THE GCS...
- **GLOBAL ACCEPTANCE\*** IS VALID....., PROVIDED HE WAS GIVEN EFFECTIVELY THE POSSIBILITY TO STUDY THEM.

- \* DEFINITION – SEE NEXT SLIDE



# HAVE THE GCS BEEN VALIDLY INCLUDED IN THE CONTRACT ?

\* *GLOBAL ACCEPTANCE* DESIGNATES THE SITUATION OF THE COUNTERPART WHO IS VALIDLY INFORMED ABOUT THE EXISTENCE AND APPLICATION OF THE GCS AND HAS VALIDLY BEEN OFFERED THE POSSIBILITY TO STUDY THEM, BUT:

- EITHER DOES NOT READ THE GCS;
- OR READS THEM BUT DOES NOT MAKE ANY FURTHER ANALYSIS ABOUT THEIR REAL MEANING;
- OR READS THEM BUT DOES NOT UNDERSTAND THEM.

# HAVE THE GCS BEEN VALIDLY INCLUDED IN THE CONTRACT ?

- WHAT ABOUT GCS COMMUNICATED AFTER THE CONCLUSION OF THE CONTRACT (TYPICALLY WITH THE INVOICE) ....?
- RULE: ART. 29 (1) CISG)
  - BURDEN OF PROOF ON THE GC-USER.
- WHAT IN CASE OF SILENCE OF THE COUNTERPART ?

# HAVE THE GCS BEEN VALIDLY INCLUDED IN THE CONTRACT ?

- WHAT ABOUT CONTRADICTORY GCS – SO-CALLED *BATTLE OF FORMS*...?
  - BY MINOR DISCREPANCIES, ART. 19 (2) CISG
  - BY MAJOR DISCREPANCIES, *KNOCK-OUT RULE* SHOULD BE GIVEN THE PREFERENCE OVER THE *LAST-SHOT RULE*
    - *KNOCK-OUT RULE NOT ALWAYS UNIFORM FOR THE CISG*

# INTERPRETATION OF GCS...

- GOVERNING PRINCIPLES: ART. 8 CISG
  - REAL AND COMMON INTENT OF THE PARTIES... ART. 8 (1) CISG
  - IF NOT, PRINCIPLE OF TRUST – ART. 8 (2) CISG
- *CONTRA-PROFERENTEM* (SEE ALSO ART. 4.6 UNIDROIT)
- CASES OF RESTRICTIVE INTERPRETATION...

# “SURPRISING CLAUSES”...?

- PROVISIONS WHICH THE COUNTERPART COULD IN GOOD FAITH ABSOLUTELY NOT EXPECT TO BE IN THE CONTRACT
  - NARROWER DEFINITION
- RELEVANCE OF THE RULES OF GOOD FAITH

# NO VALIDITY CHECK... (ART. 4 (A) CISG)

- VALIDITY OF THE INDIVIDUAL GCS PROVISIONS IS A MATTER OF DOMESTIC LAW DESIGNATED BY THE CONFLICT OF LAW RULES.
- HOWEVER A VERY LIMITED CONTROL OF VALIDITY/SUBSTANCE IS UNAVOIDABLE FOR THE IDENTIFICATION OF *SURPRISING CLAUSES*...
- MINIMUM UNIFORMITY IN EUROPE ABOUT VALIDITY/INVALIDITY OF CLAUSES.

# EXCURSUS – CHOICE OF LAW AND JURISDICTION CLAUSES IN GCS....

- CASE STUDY
- READ BRUSSELS IA REGULATION (1215/2012)
  - ART. 25 (1) BRUSSELS IA
  - ART. 25 (5) BRUSSELS IA
  - ART. 7 (1) (A) AND (B) BRUSSELS IA
  - ART. 29 (1) AND (3) BRUSSELS IA

# CHOICE OF LAW AND JURISDICTION CLAUSES IN GCS....

- HOW IS THE GERMAN COURT GOING TO HANDLE THE CASE ?
  - GERMAN COURT WILL CHECK *LEGE FORI* THE VALIDITY AND EFFECTIVENESS OF THE CHOICE OF COURT CLAUSES IN BOTH GENERAL CONDITIONS [ART. 25 (1) BRUSSELS IA].
  - *KNOCK-OUT RULE*
    - GERMAN LAW
    - WHAT ABOUT CISG ?...SEE NEXT SLIDE



# CHOICE OF LAW AND JURISDICTION CLAUSES IN GCS....

- HOW IS THE GERMAN COURT GOING TO HANDLE THE CASE ?
  - SHOULD THE CISG BE TAKEN INTO ACCOUNT ?
  - WITH THE PROBLEM THAT CISG IS REGARDED
    - SOMETIMES AS BASED ON A *LAST-SHOT RULE* MECHANISM
    - SOMETIMES AS BASED ON A *KNOCK-OUT RULE* SCHEME
  - ART. 25 (5) BRUSSELS IA
    - “AN AGREEMENT CONFERRING JURISDICTION WHICH FORMS PART OF A CONTRACT SHALL BE TREATED AS AN AGREEMENT INDEPENDENT OF THE OTHER TERMS OF THE

# CHOICE OF LAW AND JURISDICTION CLAUSES IN GCS....

- HOW IS THE GERMAN COURT GOING TO HANDLE THE CASE ?
  - *LEGE FORI*, THE GERMAN COURT WOULD THEREFORE VERY PROBABLY APPLY ITS OWN *KNOCK-OUT RULE*
    - BOTH JURISDICTION CLAUSES IN BOTH STANDARD TERMS WOULD PROBABLY BE KNOCKED-OUT
  - ART. 7 (1) (A) AND (B) BRUSSELS IA
  - ART. 29 (1) AND ART. 29 (3) BRUSSELS IA