No. IV.3.4 - Conflicting terms; battle of forms

(a) In case of conflict between a standard term and a term which is not a standard term the latter prevails.

(b) Where both parties use standard terms and reach agreement except on those terms, a contract is concluded on the basis of the agreed terms and of any standard terms which are common in substance.

(c) Notwithstanding Subsection (b), no contract is concluded if one party:

i) has indicated in advance, explicitly or by way of standard contract terms, an intention not to be bound by a contract on the basis of Subsection (b); or

ii) without undue delay, informs the other party of such an intention.

Commentary:

1 Subsection (a) requires a two tier test. First, the meaning of the two clauses must be determined through the usual means of interpretation. Secondly, the meaning of the two clauses so determined must be compared in order to decide whether there is a conflict between them. If the answer to that latter question is in the affirmative, the term which is not a standard term prevails. The rationale behind this rule is that terms which are individually negotiated and which, because of these negotiations, have been specifically accepted by both sides, have a stronger contractual force than standard terms which apply even if the party which has not drafted the standard terms has not taken notice of each and every of those standard terms.

2 Subsection (b) embodies the so-called "knock out-rule". The rule is based on the presumed intentions of the parties. The mere fact that both parties want to conclude the contract on the basis of their own standard terms does not mean that the parties did not want to conclude the contract if some of these terms are contradictory.

3 However, the parties' intention not to conclude the contract under these circumstances may be deduced from specific contract clauses, or their previous and/or subsequent conduct.

4 The "last shot rule", according to which those standard terms prevail in case of conflict with the terms of the other side which have been introduced last, is based on pure coincidence and is therefore not widely accepted in international contract law.

5 A party may always indicate that it does not want to be bound by the contract in case of conflicting standard terms. In that case, the "knock out-rule" of Subsection (b) does not apply and no contract is concluded between the parties. Such a declaration may be made either by way of a provision in its standard terms or by way of a written or oral declaration prior to or, if made without undue delay, after the purported conclusion of the contract. In such a case, no contract is concluded between the parties. Because of this strict consequence which runs counter to the principle that contracts should be upheld as much as possible, a clear and unambiguous declaration by one of the parties is required.