IV.3.5 - Unfair standard terms

(a) A standard term that is unfair is not binding on the party who did not supply it.

(b) A standard term in a b2b contract is unfair only if it significantly disadvantages the other party and is of such a nature that its use grossly deviates from good commercial practice, contrary to good faith and fair dealing. When assessing the unfairness of a term for the purposes of this Subsection, regard is to be had to the nature of what is to be provided under the contract, to the circumstances prevailing during the conclusion of the contract, to the other terms of the contract and to the terms of any other contract on which the contract depends.

(c) Contract terms are not subjected to an unfairness test under Subsection (b) if they reflect provisions of the law which would apply if the terms did not regulate the matter. The unfairness test under Subsection (b) does not apply to the definition of the main subject matter of the contract, or to the appropriateness of the price to be paid in so far as the relevant contract terms are presented in an accessible and comprehensible way.

(d) If the contract can reasonably be maintained without the unfair term, the other terms remain binding on the parties.

Commentary:

1 The Principle provides a special kind of content control for standard terms used in b2b-contracts, i.e., contracts concluded between businessmen. The unfairness test underlying this content control must be distinguished from the one established by the Principle of boni mores. While the latter relates to fundamental values of society as a whole, the present Principle merely relates to unfairness as between the parties to a contract. This means that a standard term can be void because it does not pass the unfairness test established by this Principle even though the term does not violate boni mores (see Commentary to Principle IV.7.1, Para. 1).

2 Subsection (a) provides that standard terms which have become part of the contract but whose content is unfair are void. The fact that such terms are subject to a special fairness test results from the experience that there is a natural tendency for the drafters and users of standard terms to disadvantage the other side. The fairness test results from the Principle of good faith and fair dealing in international trade. Subsection (b) makes it clear that the liberal fairness test contained therein applies only to b2b contracts. Because of the Principle of the presumption of the professional competence, businessmen must accept standard terms which may be qualified as unfair in contracts concluded with a consumer.

3 The unfairness test in Subsection (b) involves two elements which must both be present for the standard term to be qualified as unfair and void. Both relate to the nature of the standard term under scrutiny: the standard term is unfair and void only if 1) it significantly disadvantages the other side and 2) it is of a nature which results in the fact that its use grossly deviates from good commercial practice, contrary to good faith and fair dealing. The first element must be determined in comparison with the law which would apply absent the standard term. The test requires more than a simple deviation from the law. The deviation must be of such a nature as to constitute a "significant" disadvantage for the other side. The second element requires an examination of the practice in the trade in which the parties are operating. It is not the content of the standard term, but its use, i.e., its practical effects, which must deviate from good commercial practice. It is important to note that the text does not refer to any commercial practice but to "good" commercial practice. This means that businessmen may not establish their own practice as a benchmark which would allow them to escape the unfairness test. Rather, the court or arbitral tribunal must always judge that practice against the Principle of good faith and fair dealing. Also, the wording makes it clear that a slight deviation from that good commercial practice is not enough to render the standard term unfair but that a "gross", i.e., serious and obvious deviation is required. Finally, the good faith and fair dealing criterion allows a very flexible test: the more significant the disadvantage for the other party is, the better the justification for the standard term must be. The Subsection provides that in order to determine the unfairness of a standard term, regard is to be had to the nature of what is to be provided under the contract, to the circumstances prevailing during the conclusion of the contract, to the other terms of the contract, and to the terms of any other contract.
on which the contract depends.

4 Subsection (c) contains two exceptions from the unfairness test. That test may not be applied to terms which merely reflect provisions of the law which would apply if the terms did not regulate the matter. The purpose of the unfairness test is to determine the unfairness of contract terms but not to determine the fairness of the law. The unfairness test also does not apply to the definition of the main subject matter of the contract, or to the appropriateness of the price to be paid insofar as the relevant contract terms are presented in an accessible and comprehensible way. The reason for that exception is that in a free economy, the main subject of the contract and the price are determined by the parties or by the market and not by the law.

5 Subsection (d) clarifies that the mere fact that a standard term is unfair and void does not affect the validity of the contract itself and of the other standard or individually negotiated terms.