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General terms and conditions: how can they prevail in business relationships?

Alexandre Bailly
Partner
Morgan Lewis

Xavier Haranger
Partner
Morgan Lewis

Laetitia de Pelet
Associate
Morgan Lewis

A trader's general terms and conditions are only enforceable if they have been notified to the contractual partner (trader) and the latter has accepted them. As this may prove tricky to demonstrate, a review of relevant case law illustrates some cases where the general terms and conditions were found enforceable or, on the contrary, unenforceable.

In a dispute between traders, it is not uncommon that each of them relies on the application of its general terms and conditions of sale (GTCS), notably to claim late payment penalties or challenge the jurisdiction of a court.

In principle, "*any manufacturer, service provider, wholesaler or importer is bound to disclose its general terms and conditions of sale to any person purchasing products or seeking services who requests the same for the purposes of a professional activity*". This disclosure can be made in "*any manner that complies with customary professional practice*"[1], failing which the party under the disclosure obligation may incur its liability[2].

The issue of enforceability of the general terms and conditions of sale is covered by Article 1119 of the French Civil Code[3] which enshrined the standard case law[4] according to which general terms and conditions of sale disclosed to the opposing party (or, more specifically, which such party was made aware of) and accepted thereby are enforceable.

This rule being reminded, one must look into case law examples to increase the chances, for a professional, of a judge ruling in favor of the application of its general terms and conditions of sale.

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[1] C. com., Art. L. 441-6.
[2] C. com., Art. L. 442-6, I 9°.
[3] In its wording adopted in order no. 2016-131 of 10 February 2016.
[4] Mémento Droit Commercial, Éditions Francis Lefebvre, 2018, no. 12145.

I. – The business partner's need to know the general terms and conditions

Beyond the mere communication of its general terms and conditions (referred to in Article L. 441-6 of the French Commercial Code), a professional must ensure that its contractual partner has actually been informed thereof and, especially, must be capable of demonstrating the same (provided that, in case of dispute, the burden of proof regarding the enforceability of the said conditions rests with the party claiming their application).

There is ample case law to identify cases where the contractual partner's knowledge of the general terms and conditions is upheld and others where the evidence provided is deemed insufficient.

A. – The proof of the business partner's knowledge of the general terms and conditions

In some instances, it does not pose any problem to prove the knowledge of the general terms and conditions between professionals.

This is the case when a contracting partner directly signs the general terms and conditions or a contract referring to the said conditions[5]. Indeed, the contracting partner's signature is a strong indication of the latter's knowledge of the general terms and conditions submitted to it.

The same goes when the front page of the contract clearly indicates, using a different ink and font, that the contract is subject to specific general terms and conditions mentioned on the back of the contract[6].

However, this signature is not an obligation since the general terms and conditions "*do not need to be expressly approved by the client's signature if it can be proven that it was aware thereof at the time of signing the contract"*.[7]

Hence, the opposing party's knowledge of the general terms and conditions cannot result only from an external expression of will (such as the signature on the said conditions), but can also be inferred from the contracting partner's conduct.

For example, it has been ruled that a party cannot be ignorant of an opposing party's general terms and conditions that have been negotiated[8] or of a clause that is contained in the general terms and conditions sent to clients and also included in the price list, which must be consulted with a view to placing an order[9].

Along similar lines, the commercial chamber of the Court of cassation considered that a sufficiently legible clause appearing on the back of business documents was enforceable against the service provider. In this case, insofar as multiple invoices had been issued in the course of the business relationship built over a number of years, the Court considered that the contracting partner was obviously aware of the clause[10]. The duration of the business relationship between business partners thus does have an impact, as judges sometimes infer the knowledge of the general terms and conditions from the frequency and length of such relationship.

The issue of the knowledge of the general terms and conditions of sale also arises when reference is made

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[5] Cass. 1st civ., 27 Feb. 2013, no. 11-23.520.
[6] CA Lyon, 5 Apr. 2016, no. 15/00281.
[7] *Ibid.*
[8] CA Amiens, 20 May 2003 no. 03/00726.
[9] Cass. com., 11 June 1996, no. 93-15.376.
[10] Cass. com., 11 Oct. 2005, no. 97-14.072.

thereto and they are available on a website. In that respect, a Court of appeal found that "*the fact that company A's business documents do not comprise such general terms and conditions, but invite to consult its website, does not suffice in itself to infer that company B is not aware thereof*"[11], and the Court took care to note that this form of communication is conditional upon the ability to access the website and to download the said general terms and conditions of sale.

B. – The contractual partner's lack of knowledge of the general terms and conditions

It may also prove delicate to establish the contractual partner's knowledge of the general terms and conditions.

For example, "*the potential knowledge by one of the parties, in connection with past transactions, of the other party's general terms and conditions containing a jurisdiction clause, or the knowledge of the existence of such a clause in documents falling outside the disputed transaction, does not in itself, even in case of an ongoing business relationship, render such clause enforceable against it if the contract does not bear any direct or indirect reference thereto*"[12].

Therefore, just maintaining an ongoing business relationship with a contractual partner does not allow waiving the obligation to ensure that the latter is aware of the general terms and conditions whose application is sought. Indeed, "*although an ongoing relationship allows characterizing an implicit acceptance [of the general terms and conditions] when the contracting partner never challenged them despite having been validly informed thereof, this does not however allow imposing them on a contractor who has never been informed thereof and as a result could not, even implicitly, accept them*"[13].

Likewise, reference to the general terms and conditions in a contract may not be sufficient to establish their knowledge. In that regard, a court of appeal considered that general terms and conditions (i) that were neither signed, nor initialed, (ii) that were briefly referred to in the contract and, in addition, (iii) for which it was not proven that they had been delivered or notified to the other party, were unenforceable. The company's capacity as informed professional is irrelevant in the latter case[14].

Indeed, it was found in the past that the business partner had not been informed of general terms and conditions of sale sent prior to the entry into the contract[15] or which the partner indicated to be aware of (through signing a contractual clause) but which such partner had not actually received, as the court did not only rely on the letter of the contract but considered that there had been no actual delivery[16].

However, it does not suffice to provide proof that the business partner was actually informed of the general terms and conditions. The partner's acceptance thereof remains to be established.

II. – The complex determination of the acceptance of the general terms and conditions

The determination of a business partner's acceptance of the general terms and conditions is difficult, because it requires characterizing a consent, which can be explicit or implicit.

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[11] CA Montpellier, 1st March 2011, no. 10/008674.
[12] Cass. 1st civ., 30 June 1992, no. 90-21.491, Bull. civ. I, no. 203.
[13] CA Lyon, 7 Sept. 2017, no. 16/02279. See in that respect: C. Aronica et L. Ostojski, Les conditions générales de vente, un incontournable de la relation commerciale, AJCA 2014, p. 165.
[14] CA Versailles, 3 May 2016, no. 15/02478.
[15] Cass. com., 28 Apr. 1998, no. 95-20.290.
[16] Cass. com., 19 Feb. 2013, no. 11-22.827.

Once again, the issue is primarily of a probative nature. In some instances, case law acknowledges that the general terms and conditions have actually been accepted whereas, in some others, the evidence submitted is insufficient.

A. – The expression of the business partner's acceptance of the general terms and conditions

With a view to ruling on the acceptance of the general terms and conditions, courts will need to determine whether they fall within the parties' contractual scope[17].

As such, the explicit acceptance of the general terms and conditions is hardly debated at all. This is the cases (referred to above in paragraph I, A) of the signature of the said conditions or of documents clearly referring thereto.

The issue of tacit acceptance of the general terms and conditions of sale is more complicated, as it requires a concrete analysis of the partner's conduct.

For example, the first civil chamber of the Court of cassation found that general terms and conditions had been accepted when the documents setting out the contractual relationship comprised an invitation to consult the general terms and conditions of sale on the front, and, on the back, displayed the said conditions in full (even if they were drafted in a foreign language)[18].

The lack of reservations when receiving the conditions has also sometimes been considered as an acceptance thereof[19].

To determine the enforceability of the general terms and conditions, certain jurisdictions analyze the parties' conduct throughout their entire contractual relationship. On that point, the Court of appeal of Montpellier ruled that the general terms and conditions of sale applied even if the business partner had "*never signed any document comprising the general terms and conditions of sale, [since] it is established that [the partner] has accepted them through the reiterated payment of invoices[20], without complaints or reservations, on the back of which they were printed*"[21].

It is thus advisable, to ensure their application, to expressly refer to one's general terms and conditions at the very beginning of the contractual relationship. Indeed, some general terms and conditions were deemed accepted when the quote stipulated that "*any order entails acceptance of our general terms and conditions of sale annexed hereto*" and an order was actually placed afterwards[22].

Concerning orders placed between traders over the Internet, the Court of appeal of Lyon considered that "*the method of acceptance by 'click' made it possible to print and save the text of the general terms and conditions prior to the entry into the contract*"[23]. As such, "*the fact that the internet page displaying these conditions did not automatically open when saving the order on the website and at the time of each purchase cannot call into question the enforceability of the general terms and conditions accepted by the professional*

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[17] For an arbitration clause contained in general terms and conditions see: CA Paris, 30 Nov. 1990, no. 90/4790, Revue de l'arbitrage 1992, no. 4, p. 625-684, obs. J. Pellerin.

[18] Cass. 1st civ., 15 May 2018, no. 17-12.044.

[19] Cass. com., 11 March 2014, no. 13-14.699.

[20] In the case in point, the invoices included the following wording: "*General terms and conditions of sale: the buyer declares that it has read the general terms and conditions of sale printed on the back page and that it accepts them in full*".

[21] CA Montpellier, 11 Dec. 2012, no. 11/06438. For another illustration: CA Paris, 3 Apr. 2015, no. 12/13777.

[22] Com. Court Bordeaux, 28 Apr. 2016, no. 2015F00841.

[23] CA Lyon, 7 Apr. 2016, no. 14/01639.

partner"[24].

As the implicit acceptance of the general terms and conditions often results from a body of evidence analyzed by the judge, it is recommended to carefully keep all pieces of evidence that allow proving such acceptance by the contractual partner (business documents mentioning the GTCS, quotes, invoices, proof of transmission, etc.).

B. – The business partner's lack of acceptance of the general terms and conditions

The issue of implicit application of the general terms and conditions of sale arises in case of lack of clear expression of the parties' will. This is the case in particular when the parties, with a view to avoiding putting their business relationship at risk, refrain from mentioning the issue of the application of the general terms and conditions of sale and remain, whether willingly or not, rather vague on the subject.

This imprecision does not withstand the analysis of the exchange of consents. Indeed, a buyer cannot claim the application of its general terms and conditions if the seller only received them after completion of the sale, since they fall within the contractual scope[25]. It appears that consensus is a requisite and, as has been concluded by doctrine, the last gunner is not necessarily the winner[26].

Hence, according to case law, general terms and conditions are not deemed accepted by the other party in the following cases:

- when terms printed on invoices issued after the execution of the contract amend the applicable rules[27];
- when it could not be established that the general terms and conditions were attached to the contract and could therefore not be approved by the purchaser[28];
- when the first party issues a letter containing the general terms and conditions which it seeks to apply whereas the order preceded the date of the letter[29];
- when the sender has not signed the shipper's general terms and conditions of sale. The compensation limits stated therein are thus not enforceable against it, regardless of whether they are set out in a guide or on an internet page[30];
- when the client has not signed them and the contract incidentally refers thereto without indicating that they had been provided to it and it had accepted them[31].

In practice, even if the professional has ensured that its general terms and conditions have been appropriately transmitted and are enforceable, it may be the case that its general terms and conditions and those of its contractual partner are both potentially applicable and, above all, are contradictory.

This type of case is now expressly provided for by the French Civil Code.

[24] *Ibid*.
[25] RJDA 8-9/98, no. 938.
[26] Y.-M. Laithier, *La* « bataille » des conditions générales : le vainqueur n'est pas le dernier tireur, RDC 2013, p. 528.
[27] Cass. com., 16 Oct. 1967, D. 1968, p. 193.
[28] Cass. 1st civ., 12 Apr. 2012, no. 11-12.061.
[29] CA Paris, 23 Nov. 1994, DMF 1995, p. 887, obs. Y. T.
[30] CA Versailles, 25 Nov. 2014, no. 12/03975.
[31] CA Versailles, 3 May 2016, no. 15/02478.

III. – Solution in case of contradiction between general terms and conditions

The recent reform of the law of obligations covered the case of inconsistency between the general terms and conditions relied on by one and the other parties. More specifically, Article 1119 of the French Civil Code states that, in case of discrepancy between general terms and conditions, the inconsistent clauses are null and void. Hence, in such a case, it is "*as if the parties had not included any provisions regarding the conflicting issue*"[32].

In our view, one should bear in mind the main instances where general terms and conditions can be conflicting in an attempt to avoid them.

A. – The cases of inconsistency

The inconsistency sometimes results from successive mailings by the parties to the contract. In that instance, in order to determine which general terms and conditions are applicable, one should refer to the chronology of the contractual relationship. Indeed, a service provider cannot rely on the application of its own conditions of sale as stipulated on its invoices in case the orders previously placed by the client referred to the latter's general terms and conditions[33].

Certain professionals adopt an anticipatory approach in order to strictly define their contractual scope and to avoid being caught off guard by the application of their contracting partner's general terms and conditions. However, the success of this maneuver is not guaranteed.

A decision of the commercial chamber of the Court of cassation is an illustration of this: the buyer's general terms and conditions stated that "*unless provided otherwise in the special terms and conditions of an order, the ownership and risks shall be transferred upon satisfactory receipt; in any event, we disclaim any retention of title clause which we have not expressly accepted*". As for the seller, it relied on the application of its general terms and conditions of sale which included a retention of title clause but failed to prove the buyer's acceptance thereof. In a pragmatic manner, the highest court judged that "*due to the contradiction between the general terms and conditions of purchase and of sale, the seller could not avail itself of the silence on the part of the buyer to infer that the latter had accepted the retention of title clause*"[34].

Likewise, the same court also ruled that "*the contradiction between the general terms and conditions of sale and the general terms and conditions of purchase excluded the existence of any agreement between the parties on the application of the retention of title clause, so that company A could not rely on the silence on the part of company B after having received the invoices and acknowledgments of receipt of the orders that included that aforementioned clause, to infer that company B had accepted it whereas it had, on the contrary, expressly ruled out the application thereof unless it had been accepted in writing, which is not alleged in this case*"[35] .

In case of discrepancy, and in the event that none of the parties has accepted, in an unequivocal manner, one or more clauses included in the general terms and conditions of its contracting partner, only the legal conditions are applicable[36].

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[32] F.-X. Testu, Contrats d'affaires, coll. Dalloz Référence, 2010, no. 21.32.
[33] CA Versailles, 14 May 2013, no. 12/08680.
[34] Cass. com., 10 Jan. 2012, no. 10-24.847.
[35] Cass. com., 3 Dec. 1996, no. 94-21.796, Bull. civ. IV, no. 299.
[36] CA Dijon, 5 Oct. 2017, no. 17/00388.

B. – Advice to ensure that its general terms and conditions prevail in case of inconsistency between general terms and conditions

In order to increase the chances of its own general terms and conditions being applied, an informed trader shall ensure the following:

- It shall make sure that any subsequent acceptance is express rather than tacit, since the mere fact of signing the initially applicable general terms and conditions does not imply acceptance of a later change. Indeed, "*the signature of the delivery slips or the affixing of the company's stamp could not be considered as tacit and unequivocal acceptance of the clause, as the refusal previously expressed could only be revoked by an express acceptance*"[37] .

- It shall make sure that several of its business documents contain or refer to the general terms and conditions (as for instance a quote, delivery slip, contract or invoices[38]).

- It must be able to provide proof that its general terms and conditions have been brought to its clients' knowledge and accepted thereby (annex to the contract, box to be checked at the bottom of the contract confirming knowledge and acceptance, use of registered letters with acknowledgement of receipt, etc.)[39] .

- It can include a waiver clause in its general terms and conditions, indicating that the latter shall prevail over the contractual partner's general terms and conditions (although the efficiency of such a clause is somewhat questionable)[40] .

- Finally, prior to performing the contract or to paying the invoice, the trader shall ascertain the contractual scope because the performance or payment without challenge may be construed as tacit acceptance of the general terms and conditions.

[37] Cass. com., 25 Oct. 1994, no. 2-21.807, Bull. civ. IV, no. 316.
[38] Cass. com., 26 June 2013, no. 12-17.537.
[39] BRDA 10/16, no. 9.
[40] T. Charles, Conditions générales : et au milieu coule une rivière..., Lexbase Hebdo édition affaires, 2013, no. 363.