General terms of business

Frequently neglected, frequently not updated

Selected legal insight for the sporting goods and consumer goods sector.

DR. JOCHEN M. SCHAEFER · CONTRACTS / INTERNATIONAL TRADE

> *“The practical value of general terms and conditions is very often heavily underestimated.”*

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A wake-up call for the sporting goods industry and trade. Throughout the last few years – when the economy was still relatively stable, negative topics such as the pandemic, supply chain constraints, and war zones in the heart of Europe did not exist – the general terms and conditions of business (“GTCs”) were quite frequently not in the foreground of thinking of commercial operators. Yes, there was consensus that having a set of GTCs at B2B or B2C level was nice, e.g., as part of a company’s web presentation or accompanying an order confirmation. Still, their practical value was very often heavily underestimated. As long as business transactions were successfully carried out without any frictions or difficulties, the respective commercial actors did neither pay much attention to the wording of these standardized terms nor did they see a pressing need for an update – even when their GTCs had come into effect already numerous years ago. In the event of cross-border purchases or sales transactions, I have very often been confronted with a scenario where, e.g., a German company had created a set of German language GTCs and subsequently instructed a translation bureau to provide them with a 1:1 translated English language version. This may be a comparable inexpensive exercise, but it also implies considerable risks that such GTCs may, in whole or part, not be enforceable or even void. One concrete example may illustrate this: A very prominent portion of many B2B general sales terms of German companies covers provisions dealing with the retention of title topic (in German: ”Eigentumsvorbehalt”), which concern situations where goods are already delivered but have not yet been paid. A quite sophisticated wording is aimed at adequately safeguarding the seller’s interests by considering various scenarios. Such terms have been created mostly by German legal professionals, who have looked at these issues from a German law perspective only by entirely neglecting the specifics of cross-border sales transactions. Even if such GTCs stipulate that German laws shall exclusively govern these terms and that German courts shall exclusively deal with those in any case of dispute, this does by no means imply that the retention of title clauses will then be legally valid and/or enforceable in case of foreign buyers. This starts already with the neighboring country of Switzerland: On the grounds of Article 715 of the Swiss Civil Code, any retention of title arrangement must be recorded in a specific retention of title register at the place where the Swiss buyer is domiciled/has its seat of business. Otherwise, any such arrangement is void. There are alternative possibilities to secure the legitimate interests of the seller at international level, but one has to be aware of those as a legal advisor, be it in an in-house or external capacity, by looking over the fence. Yet Covid has taught the business community also in the sporting goods sector lessons, which should serve as a wake-up call to pay more attention to this specific area of law than before. Contractual parties, who wanted to invoke force majeure during the times of lockdown and supply chain constraints, suddenly realized that their contractual arrangements with the other party and, in particular, their GTCs did either not contain a force majeure clause at all or such provision was deficient in terms that it did not properly protect them in these extraordinary situations. The denomination “force majeure” has its origins in French civil law. Very much simplified, force majeure means that a contract party is relieved from the performance of its contractual obligations, where such performance is permanently or temporarily negatively affected by events outside of its control, e.g., by natural disasters or war. Yet, it came as a surprise to many commercial actors that, e.g., under common law (like in England and Ireland), but also in countries such as Germany, there is no statutory (=written) law in place, respectively, no doctrine of force majeure. Other countries, such as the Netherlands, have dealt with these scenarios by inserting a specific provision in their written laws, where Article 6:75 of the Dutch Civil Code states, ”A shortcoming cannot be attributed to the debtor if it is not due to his fault, nor is he responsible for its by law, legal act or prevailing views.” This is only one example out of many, which clearly demonstrates the necessity for commercial operators to nowadays also take a closer look at standard terms and what has been in the past referred to as boilerplate clauses, whether they are still up to date and sufficiently mitigate risks in a very challenging economic environment, where it is definitely much more difficult to navigate a company through trouble waters safely.

Delivery and payment modalities are another example. In times where due to a reduced consumer spending mentality in numerous European countries, growth at the industry and retail level is no more guaranteed, but signs of a recession are written on the wall, one can by no means continue to rely on the financial soundness of even long-term business partners, as, for instance, the most recent example of the Galeria Karstadt Kaufhof (GKK) Group demonstrates. Despite enormous financial subsidies from the German government, the GKK Group is currently in the status of self-administered insolvency, which could lead to full insolvency within a few weeks. Therefore, it becomes essential to be able to react flexibly to adverse financial developments at a contractual level in order not to incur a substantial financial loss. Remedies, if enforceable, might be to end open payment terms and, e.g., revert to stricter forms of payment, such as letters of credit or payment in advance. Supply chain constraints may require a different delivery policy of a brand, including varied order mechanisms and safeguards of a brand vis-à-vis wholesale and retail customers in the event of delayed deliveries caused by pre-suppliers, including OEM manufacturers. All this has to be preemptively reflected in the respective GTC provisions. Another vibrant subject I have frequently been dealing with at individual client level within the last few months is the immediate necessity to adjust, or more precisely, to increase prices on a very short-term basis due to the steep increase of, e.g., energy prices and transportation costs. In this area, same as in others, applicable statutory and/or case law may render it difficult to enforce such price increases quasi from one minute to the other. Yet, properly worded GTCs may at least be a helpful tool to accelerate such a process in a fair manner. Further, GTCs may also contain elements of a selective distribution scheme, such as contractual resale restraints or the existence of precise rules on how to use pictures, text materials and the like in the course of a B2B customer’s marketing activities. When times get tough, wholesalers such as distributors and also retailers may be tempted to return goods they purchased from a sporting goods brand, which now got stuck in their inventory without much concrete hope that they can be sold within a reasonably foreseeable time to consumers. If the GTCs of a brand do not deal with

such scenarios, legal disputes are frequently the consequence, which can otherwise be avoided or at least become manageable. GTCs also have the advantage compared to individual contract terms that their modification does quite frequently not require a countersignature of the other business partner but can be simply submitted to the other party, be it electronically or as part of an order confirmation, or may also well serve as an attachment to an individual contract to form an integral part thereof. In this context, one should remember that standardized terms are not seldomly treated differently by applicable laws and based on case law of competent courts rather than individually negotiated and agreed upon contract terms if it comes to their interpretation and enforceability. It should also be noticed that, particularly in scenarios where two major players intend to conclude a business transaction, neither of them may agree to the GTCs of the other party. Such situations are quite frequently labeled as ‘the battle of forms’ and are treated by statutory European laws and case law of national courts differently. Not seldomly, the commercial actors (reluctantly) renounce the application of their respective GTCs and then refer only to the applicable law/laws by hoping that any dispute arising among them could then be properly resolved with the help of a competent court or during an arbitration proceeding. This hope will, however, quite frequently not be fulfilled. Again, a very concrete example I have been very recently dealing with shall demonstrate this: If a renowned major brand with a dense European retailer customer net intends to take on the distribution of a new innovative product manufactured by an equally major company, product liability scenarios need to be properly covered. Since either party refused to accept the purchase, respectively the other side’s sales GTCs, the manufacturer proposed to refer to “the applicable laws” governing the framework contract. Yet such a “solution” is only on the very surface a promising one, since, e.g., in product recall scenarios and relating to the question of who should bear which cost, it turned out that without a contractual legally binding clause one would have to deal with such a topic by looking into the laws and case laws of every single European country, where such recall would be performed, which rendered such “solution” impractical for the other party…

CONCLUSION In light of this article, which is by no means of an exhaustive nature or shall replace individual consultation, it is recommended to look at a company’s GTCs and check whether there is a need for updating/modifying those. Yet this applies not only to B2B general terms but also to those used at the B2C level, e.g., in the context of DTC selling schemes of a brand or by retailers selling products to end consumers through their own websites. Not every company may, for instance, be aware that since May of this year, the revocation notification requirements have changed, and if the corresponding text in an online web presentation is not compliant, such party then faces the concrete risk of receiving C&D letters from consumer protection associations or lawyers systematically screening the web combined with sometimes quite high financial payment requests.

About the author: Dr. Jochen M. Schaefer is a German practicing attorney based in the Munich area. For numerous years, he has been representing the World Federation of the Sporting Goods Industry (WFSGI) and the European Federation of the Sporting Goods Industry (FESI) as their legal counsel. He is also chairing the WFSGI’s legal committee and co-chairing FESI’S digital working group. At the individual client level, he represents a significant number of well-known brands within and beyond the bicycle/sporting goods sector; he is a specialist in national and international distribution topics, intellectual property (IP) and risk management issues, and the drafting and negotiation of comprehensive contracts at the operational level, in particular in the area of European selective distribution schemes. In case of any questions about this article (and in general), he can be reached at sj@sjlegal.de and on his cell phone at +49-151-16407932.