

FACTSHEET

Rules of the Game General Terms and Conditions

Schematic overview of the statutory framework
for general terms and conditions.

Rules of the Game

General Terms and Conditions



General terms and conditions: a set of general rules between parties

In practice, when you do business with consumers or organisations, you usually record agreements in a 'contract'. Although a contract can be concluded in any form - including orally - parties generally record their arrangements for a service or product in writing. For example, in a quotation, form, agreement or another written document. If you do business frequently, however, it is useful to have a set of general rules. Think of general provisions on delivery, services, warranties, payment, liability etc. Such a set of rules is known as 'general terms and conditions' and is applied as a standard in every contractual relationship.

General terms and conditions exist in various forms. These include general sales or delivery terms, general purchasing terms, sector-specific terms and insurance conditions. The party using a set of general terms and conditions will logically want to conduct as much

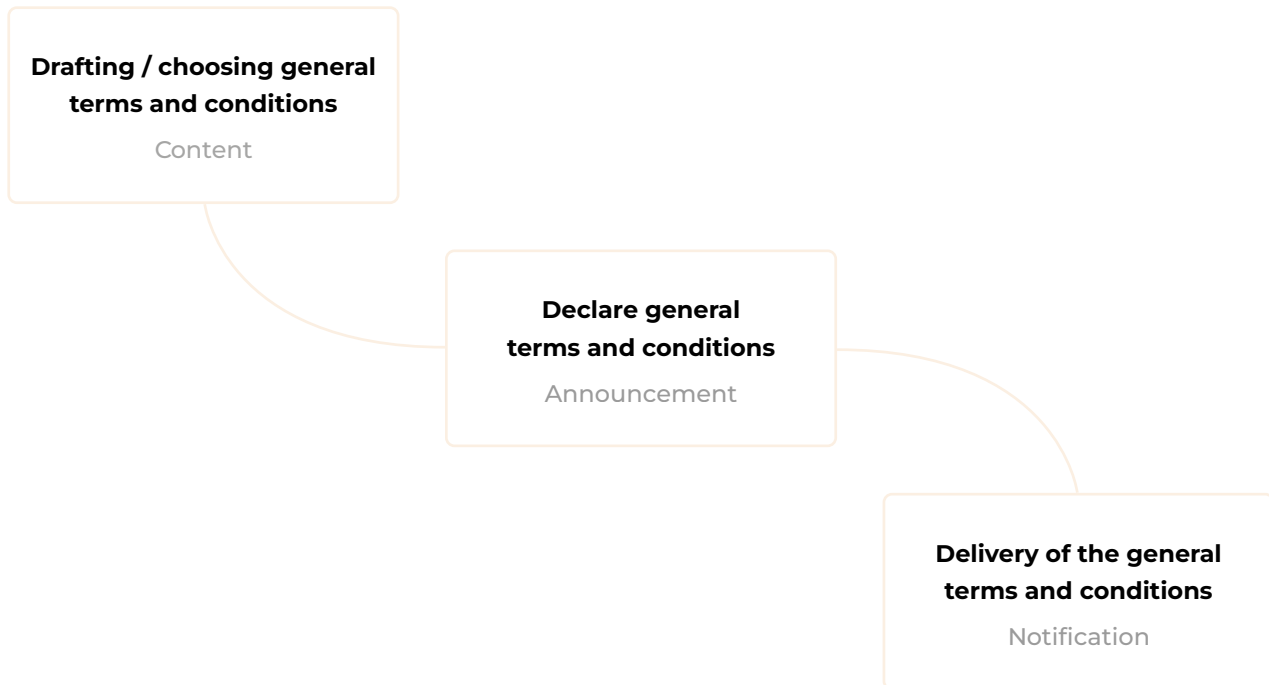
business as possible under those terms. However, there are rules regarding the use of general terms and conditions. These are legal rules contained in the Dutch Civil Code and case law. Together, these rules form the statutory framework for general terms and conditions.

In short, these rules can be divided into three crucial steps. ICTRecht refers to this as the three-step approach for general terms and conditions:



Three-step approach

General terms and conditions

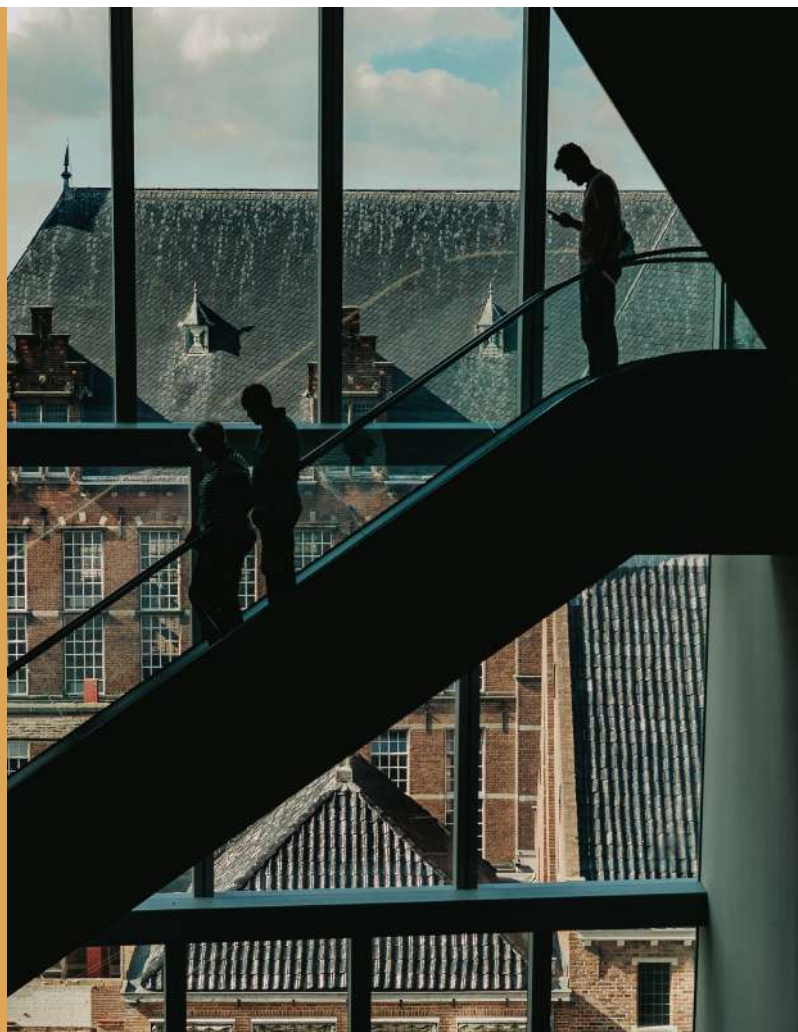


The three-step approach for general terms and conditions

In this factsheet, “Rules of the Game for General Terms and Conditions”, we explain the three-step approach by guiding you through the Dutch rules on general terms and conditions. The following topics are covered:

1. What general terms and conditions are
2. Declaring general terms and conditions applicable
3. Making general terms and conditions available
4. Review of content
5. Unreasonable clauses
6. FAQ: frequently asked questions

ICTRecht supports and advises on both drafting general terms and conditions and using them in a legally valid manner. Please contact us if you have any questions.



1. What are “general terms and conditions”?

What exactly are general terms and conditions? This question matters because the answer determines the content and scope of the general terms and conditions. You cannot simply label any rules (also called: clauses) as general terms and conditions at will. What qualifies as general terms and conditions is determined by law and case law.

In short, an arrangement between parties qualifies as a general term if it meets the statutory definition. The Dutch Civil Code defines ‘general terms and conditions’ as: one or more clauses drawn up to be included in a number of agreements, with the exception of clauses that define the core of the performances, insofar as the latter clauses are clearly and comprehensibly formulated.

It is a mouthful. But the definition makes clear that:
(a) clauses qualify as general terms and conditions only if they are ‘intended’ to be included in multiple agreements; and

(b) core clauses cannot be general terms and conditions. In other words, if you understand what core clauses are, you can also better understand what qualifies as general terms and conditions.

But what are core clauses then? Core clauses generally coincide with the essential elements without which a contract cannot be formed. These clauses must be clearly and comprehensibly formulated and must not be hidden in general terms and conditions.

The distinction between general terms and conditions and core clauses can be summarised as follows:

- **Core clauses:**

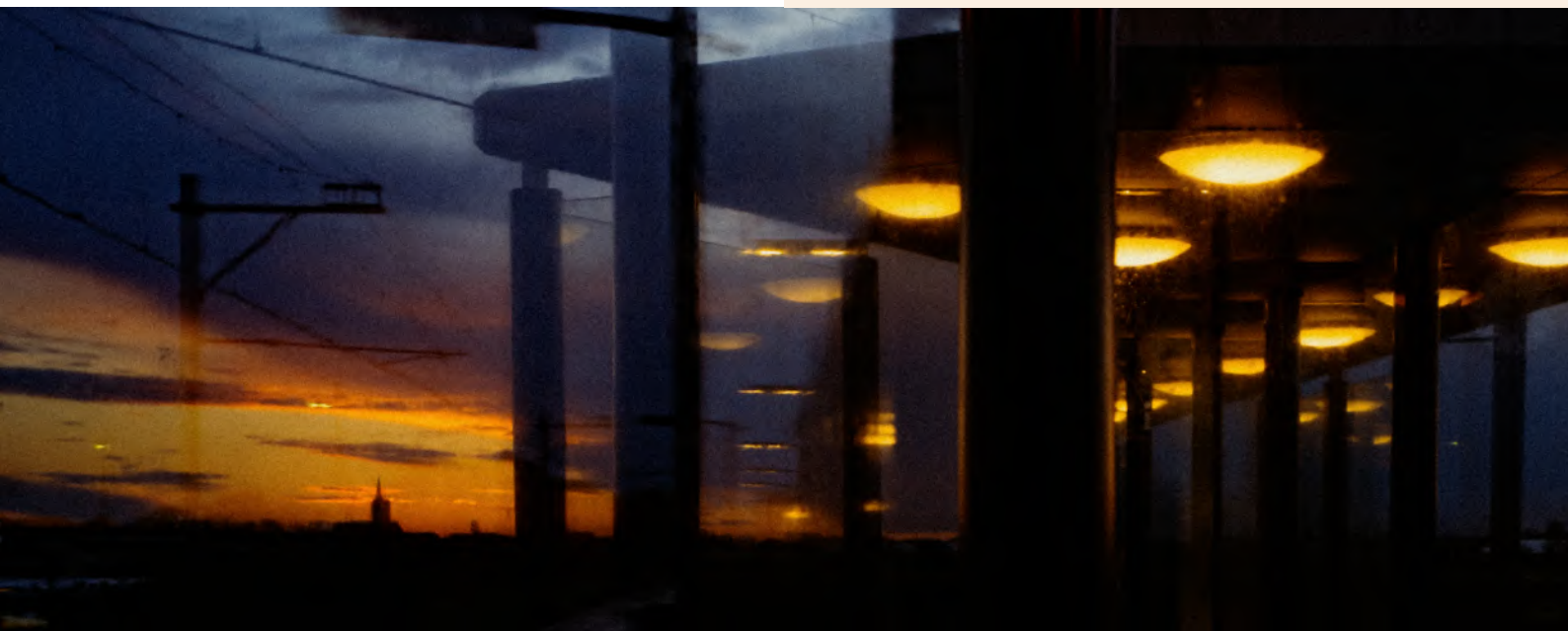
Clauses that define ‘the actual subject matter of the contract’. In other words, they determine the core of the performances of the contracts. It is about the essence that is decisive for the counterparty’s decision whether or not to enter into the contract. Examples include: price, rates, type, quantity and weight. Such clauses cannot be concealed in general terms and conditions.

- **General terms and conditions:**

Clauses that supplement or support the core clauses. These are arrangements that do not relate to ‘the actual subject matter of the contract’. These are generally terms that the user typically does not wish to negotiate. Examples include warranties, quality standards, liability, duration, termination and renewal.

- **Where is this stated in the law?**

- Article 6:231(a) Dutch Civil Code
- Article 4(2) of Directive 1993/13



2. Declaring general terms and conditions applicable

When using general terms and conditions, two key questions must be distinguished:

1. Have the general terms and conditions been declared applicable to the agreement?
2. Have the general terms and conditions been validly made available?

The first step is to declare the general terms and conditions applicable to the intended contractual relationship. This follows the offer and acceptance model. Applicability must therefore be communicated with the offer. By including a reference to the applicability of the general terms and conditions in the offer, they become an integral part of that offer. The counterparty can then take note of their applicability and accept or reject them, explicitly or implicitly.

References may also be included in documents that do not technically qualify as an offer, such as an invitation to make an offer and the subsequent offer itself.

The offer and acceptance process can be complex and conflicts may arise. For example, the counterparty may refer to its own general terms and conditions when accepting the offer. This can create uncertainty as to which set applies. Lawyers refer to this as the battle of forms. The law resolves this by requiring that you must explicitly reject the applicability of the other party's terms before declaring your own applicable. If you fail to do so, the first shot rule applies: the terms referred to first will govern.

Declaring general terms and conditions applicable is not sufficient on its own. The law also requires that the terms be validly made available to the counterparty.

● Where is this stated in the law?

- Offer (Article 3:33 Dutch Civil Code)
- Acceptance (Article 3:35 Dutch Civil Code)
- Binding effect (Article 6:232 Dutch Civil Code)

Battle of forms

- Explicit rejection (Article 6:225(3) Dutch Civil Code)
- First shot rule (Article 6:225(3) Dutch



3. Making general terms and conditions available

As mentioned, for the terms and conditions to be applicable, the user must take the initiative to publish the general terms and conditions, so that it is clear which terms and conditions apply (step 1). But step 2 is that the counterparty must be able to take note of them easily. This is achieved by validly making the general terms and conditions available.

The purpose of making terms available is to achieve 'informed consent' regarding the content of the applicable terms. The counterparty must therefore be given the opportunity to review their content. According to the law, this opportunity must be provided before or at the time the contract is concluded. If not, the general terms and conditions (or individual clauses) are voidable.

The law and case law determine how valid provision must take place. The law gives two options as possibilities:

1. Either physical provision; or
2. Electronic provision.

For electronic provision, the explicit consent of the counterparty is generally required. However, the so called 'service provider' may choose between physical or electronic provision without such consent.

● Where is this stated in the law?

Provision

- Article 6:233(b) Dutch Civil Code
- Article 6:234(1) Dutch Civil Code

Electronic provision

- Article 6:234(2) Dutch Civil Code

Exceptions to provision

- Article 6:234(1) Dutch Civil Code

Provision by service providers

- Article 6:230c Dutch Civil Code



4. Clause to review the content

When drafting general terms and conditions, freedom of contract applies: Parties may prioritise their own interests and therefore also determine which terms they agree to. This freedom is not absolute, however. A Party may not (completely) ignore the law and the interests of their counterparty. There are mandatory and regulatory rules governing the content and formation of agreements. For example: a prohibition on agreements that conflict with the law, public policy or morality, rules regarding defects of consent or abuse of circumstances and the restrictive effect of reasonableness and fairness. Clauses that conflict with these rules and/or principles may be deemed null or voidable. Therefore it is important to always test the desired conditions against mandatory and regulatory law beforehand. This test can also be performed retrospectively by a judge.

Precisely because the content of general terms and conditions is usually not negotiated, there is a risk of abuse of economic dominance. Market participants therefore have a responsibility to apply balanced terms that are in line with statutory law and case law. The Dutch Civil Code supports this by providing a statutory framework that regulates the content and scope of such terms. This includes a reasonableness test for general terms and conditions, as well as the general application of the principles of reasonableness and fairness. For consumer contracts, the law provides a list of (presumed) unfair clauses against which terms can be assessed. This list may also play an assessment role in contracts between two business parties.

Reasonableness test and black and grey lists

Agreements – read: general terms and conditions - between a business and a consumer may be subject to the reasonableness test. Where a clause is disputed, its fairness may be assessed, with or without reference to the so-called black and/or grey list in the Dutch Civil Code. The outcome of this assessment may be that a clause is voidable if it is considered unreasonably onerous. In this context, relevant circumstances may include the nature of the parties, their position in society, their mutual relationship and their level of expertise.

For consumer contracts, there are therefore two statutory lists containing examples of clauses that are unreasonably onerous:

1. A list of clauses that are deemed to be unreasonably onerous (the 'black list' in Article 6:236 of the Dutch Civil Code).
2. A list of clauses that are presumed to be unreasonably onerous (the 'grey list' in Article 6:237 of the Dutch Civil Code).

Although the black and grey lists relate to contracts with consumers, they may also apply where the counterparty is a small business. This is referred to as the reflex effect: a small business is then equated with a consumer and is afforded the same level of protection. In addition, these lists are also used as an assessment tool outside these two 'vulnerable' groups. Through open standards, they are taken into account when assessing agreements between business parties. They therefore have a certain normative effect on general terms and conditions.

● Where is this stated in the law?

Contract content

- Article 3:40 of the Dutch Civil Code
- Article 3:44 of the Dutch Civil Code

Open standard: "reasonableness test"

- Article 6:233, opening words and under (a), of the Dutch Civil Code

Black list (deemed to be unreasonably onerous)

- Article 6:236 of the Dutch Civil Code
- Article 6:233, opening words and under (a), of the Dutch Civil Code

Grey list (presumed to be unreasonably onerous)

- Article 6:237 of the Dutch Civil Code
- Article 6:233, opening words and under (a), of the Dutch Civil Code



5. Examples of unreasonable clauses and the test

Open standard: 'reasonableness test'

Article 6:233, opening words and under (a), of the Dutch Civil Code

The open standard assessment:

A clause in general terms and conditions is voidable if, having regard to the nature and other content of the agreement, the manner in which the terms were concluded, the interests of the parties as mutually known, and the other circumstances of the case, it is unreasonably onerous for the counterparty.

Black list - deemed to be unreasonably onerous.

- A Article 6:236 of the Dutch Civil Code
- B Article 6:233, opening words and under

Grey list – presumed to be unreasonably

- A Article 6:237 of the Dutch Civil Code
- B Article 6:233, opening words and

A clause included on the 'blacklist' as being unreasonably onerous may therefore be annulled by the counterparty, the consumer, without further assessment.

Black list clauses relate, in summary to:

- A. Exclusion of the right to performance
- B. Exclusion/limitation of the right of termination
- C. Limitation/extension of suspension rights
- D. Assessment of the user's non-performance
- E. Consent to assignment of debt or transfer of contract
- F. Powers/ defences in the event of assignment of debt or transfer of contract
- G. Shortening of limitation or forfeiture periods
- H. Indemnity clauses
- I. Price increases
- J. Tacit renewal of the agreement
- K. Evidence clauses
- L. Formal requirements
- M. Choice of domicile
- N. Dispute resolution
- O. Termination of the agreement
- P. Tacit renewal of the agreement

A clause included on the "grey list" may be annulled by the counterparty, the consumer, unless the user of the general terms and conditions rebuts the presumption that the clause is unreasonably onerous.

Black list clauses relate, in summary, to:

- A. Time limits for responding to an offer or
- B. declaration
- C. Material limitation of the user's own obligations
- D. Unilateral amendment rights
- E. Termination of the agreement by the user
- F. Vague or excessively long delivery periods
- G. Exclusion or limitation of liability
- H. Exclusion or limitation of set-off
- I. Forfeiture clauses
- J. Compensation payable upon termination of the agreement by the counterparty
- K. Mandatory contracting obligations
- L. Duration of the contract
- M. Notice periods
- N. Formal requirements
- O. Powers of attorney

FAQ: frequently asked questions

When using general terms and conditions, it is advisable to follow the statutory framework and the core rules as closely as possible. In practice, however, the use of general terms and conditions is complex and often challenging,

and various situations may arise. For that reason, a number of frequently asked questions and answers on general terms and conditions are set out below.

Question

How do I explicitly reject general terms and conditions?

Answer

Answer
The requirements that a rejection must meet in order to be explicit depend on the circumstances of the case. It does follow from the wording of the law, however, that a mere reference to your own general terms and conditions is insufficient. In any event, your response to an offer must reject the other party's general terms and conditions as clearly as possible, for example by expressly stating that you do not accept them. At the same time, you can emphasise that you declare your own terms and conditions applicable and provide them immediately (by making them available).

Question

Can I include a provision in the agreement stating that the counterparty declares that it has

Answer

Yes, you may include a provision in an agreement stating that the counterparty declares that it has received a copy of the general terms and conditions. Under the law, such a declaration constitutes conclusive evidence, subject to proof to the contrary that the terms were not in fact received. However, you must still always ensure that the general terms and conditions are actually made available in a legally valid manner.

Vraag

Is the counterparty bound by the general terms and conditions if it was not aware of their content?

Answer

With regard to general terms and conditions, the law specifically provides that a counterparty is also bound by 'legally valid' general terms and conditions even if, at the time the agreement was concluded, the user understood or should have understood that the counterparty was not aware of their content. In other words: a counterparty will readily be bound by general terms and conditions if they have been properly declared applicable and validly made available.

Vraag

When am I a service provider?

Answer

For the qualification as a service provider, it is essential that a 'service' is performed. The law defines a service as an economic activity, other than employment, that is normally carried out for remuneration. This is therefore a broad concept, encompassing at least the majority of services, including ICT services.

Question

Is a reference to general terms and conditions included in a standard disclaimer at the bottom of an email legally valid?

This question requires a two-part answer:

Answer

Applicability:

Where a so-called disclaimer is included at the bottom of an email message, it must be clear that the party making the offer is willing to contract only on the basis of the general terms and conditions referred to therein (declaring their applicability). The disclaimer must therefore be formulated with sufficient clarity in order to be effective.

Making available:

The law requires the user to take the initiative to bring the general terms and conditions to the attention of the counterparty, in such a way that it is clear which terms apply and that the counterparty can easily take note of them. This requirement is not, or is only with difficulty, met if the counterparty is merely given the opportunity to consult the applicable terms by searching for them on the internet.

Accordingly:

if it is reasonably possible to actually provide the general terms and conditions, for example by sending them by email or post, this must in fact be done.

Question

May I refer to (our) website homepage for the general terms and conditions?

Answer

The general rule is that the general terms and conditions must be made available to the counterparty in such a way that they can be stored and reproduced. It follows from the law that a mere reference to a website's homepage is insufficient. There must be a specific reference to the URL of the webpage where the general terms and conditions can be accessed directly, as otherwise the counterparty would still have to search the website for the general terms and conditions.

Question

Can references to general terms and conditions on invoices and delivery notes result in the counterparty being bound by them?

Answer

The general rule is that general terms and conditions must be declared applicable and made available before or at the time the contract is concluded. If a reference to general terms and conditions is made for the first time after the agreement has been concluded (as is the case with invoices and delivery notes) this is of course not legally valid.

That said, while such references cannot result in binding effect with retroactive force, it cannot be ruled out that, in certain circumstances within an ongoing commercial relationship, they may lead to applicability in relation to subsequent agreements between the parties.

Question

Is a web link on invoices to a website where the general terms and conditions can be found legally valid?

Answer

As a service provider, you may state on invoices that the general terms and conditions can be consulted on the website. Whether this means that the general terms and conditions are easily accessible electronically within the meaning of the law depends on the circumstances of the specific case.

If the general terms and conditions can be found directly on or via the website referred to on the invoices without any significant effort, they may be regarded as easily accessible electronically. There remains, however, a risk that, for example, a link does not function.

Question

When can I assume that my counterparty is already familiar with the general terms and conditions?

Answer

The exception based on prior familiarity with the obligation to make the general terms and conditions available follows from case law.

According to case law, the requirement to make the general terms and conditions available is also satisfied where, at the time the agreement is concluded, the counterparty was aware of the relevant clause or could reasonably be deemed to have been aware of it. This is, for example, the case where similar agreements are regularly concluded between the parties and the general terms and conditions were made available to the counterparty when the first agreement was concluded. Another example is where a clause is clearly presented to customers in a shop or business premises.

Question

Our general terms and conditions can be found online, so can the counterparty simply search for them on the internet?

Answer

Merely stating where the general terms and conditions have been deposited does not satisfy the duty to provide information. The starting point is that the general terms and conditions must be made available to the counterparty.

There is, however, an exception. Only where it is not reasonably possible to make the general terms and conditions available before or at the time the agreement is concluded may the user comply with its information obligation by way of a subsidiary method. A condition for relying on this subsidiary method is that, prior to the conclusion of the agreement, the counterparty is informed that: a) the general terms and conditions are available for inspection, and b) they will be sent upon request.

Vraag

Our general terms and conditions are deposited with the Chamber of Commerce, is that sufficient?

Antwoord

Merely stating where the general terms and conditions have been deposited does not satisfy the duty to provide information. The starting point is that the general terms and conditions must be made available to the counterparty.

There is, however, an exception. Only where it is not reasonably possible to make the general terms and conditions available before or at the time the agreement is concluded may the user comply with its information obligation by way of a subsidiary method. A condition for relying on this subsidiary method is that, prior to the conclusion of the agreement, the counterparty is informed that: a) the general terms and conditions are available for inspection, and b) they will be sent upon request.

Vraag

Do I need to repeatedly refer to and make the general terms and conditions available in the context of an ongoing commercial relationship and subsequent agreements?

Antwoord

Depending on the intensity of the commercial relationship and the circumstances of the case, repeated reference to the general terms and conditions in subsequent agreements is not always required for their applicability. It is, however, advisable to do so for each agreement.

Repeated reference may be omitted, for example, where the parties have entered into a framework agreement that provides for the applicability of general terms and conditions, or where a practice has developed between the parties whereby specific general terms and conditions are consistently applied.

Vraag

Is a discrepancy between a specific provision in the agreement and a general term a battle of forms?

Antwoord

This is not a case of a “battle of forms”, but rather a situation involving conflicting applicable contractual provisions. If no order of precedence has been agreed between the two documents, it will have to be determined, on the basis of the applicable rules of interpretation, which provision prevails.



Would you like additional information?

Would you like to know more or do you have specific questions? Please get in touch:

Email: contact@ictrecht.nl

Telephone number: 020 663 19 41

Read more

www.ictrecht.nl/en