

Legal Practice | 法律实践

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What are the legal consequences under Chinese law, if the parties to the transaction apply their respective GTC (General Terms and Conditions)?

A common phenomenon in business transactions is that there is no signed contract between the parties to the transaction and a large amount of business is conducted directly through purchase orders (by mail, electronically). In practice, the parties to a transaction usually refer to "their own" standard terms and conditions (hereinafter referred to as "GTC") in the order. For example: in the sale of goods, the seller mentions its standard delivery terms in his supply order, while the buyer mentions its standard purchase terms in its purchase order. Often, these two clauses are contradictory in some key areas, for example, when it comes to warranty rights or limitation of liability. Once a dispute arises after the transaction, both parties will insist on defending their claims under their own GTCs. So in this case, whose GTC will be applied under Chinese law? And what specific provisions will be applied?

This article attempts to give some hints on the legal risks of applying the respective GTC to both parties of the transaction under Chinese law, in the hope that it will help multinational companies to manage their risks in their daily transactions

1. Requirements of Chinese law for GTC

GTC (General Terms and Conditions) usually refers to the terms and conditions that are pre-drafted by the parties for the convenience of repeated use in the transaction and are not negotiated with the other party; they belong to the format terms set by Chinese regulations. With regard to form terms, Chinese law stipulates that if a contract is concluded using form terms, the party providing the form terms shall follow the principle of fairness in determining the rights and obligations be-

tween the parties and take reasonable means such as special characters, font size, symbols, bolded content and other forms to draw the other party's attention to the terms that exclude or reduce its liability and other terms that are of significant interest to the other party. Furthermore, when requested by the other party, an explanation of the clause shall be provided.

2. Legal Consequences

In the international judicial practice, there are the following main streams of the Battle of the Forms: First Shot Rule¹ Last Shot Rule², Knock-Out Rule³. The knock-out doctrine is a widely adopted doctrine in international commercial dispute jurisprudence; we believe that, in practice, Chinese law also favors the knock-out rule.

We believe that under Chinese law, once a transaction is underway, each party applies its own GTC; in the event of a dispute afterwards, only those terms that do not conflict with each other are considered valid. For those conflicting terms, it should be considered that the parties have not reached an agreement or the agreement is unclear. And for the terms that are not agreed or unclearly agreed, Chinese law also provides that the parties to the transaction can remedy them in the following order in order to facilitate the realization of the contractual transaction. Agreement supplement > relevant terms of the contract, transaction customary determination > applicable legal provisions

3. Conclusion

In summary, once a commercial entity uses GTC to conduct transactions with the other party, it needs to first pay attention to the fact that the formulation of the GTC itself shall follow the principle of fairness to divide the rights and obligations of their own party and the other party and it shall do its duty to inform the counterparty of the terms and conditions that may exclude or reduce its liability and other significant interests, so as to avoid disputes and the risk of the contract terms being deemed invalid.

In addition, due to the dispute over form terms in practice, Chinese law tends to the Knock-Out Rule. For some important clauses, it is recommended that the parties to the transaction still need to reach an agreement and retain it through correspondence and other forms, so as to avoid that due to the lack of agreement or unclear reasons, only remedial measures can be taken to promote the realization of the transaction, and the interests of all parties cannot be guaranteed.

¹ Refers to that if the parties have quoted different form terms in their offers and acceptances, the form terms quoted for the first time should in principle apply, unless the parties expressly reject the form terms quoted for the first time.

² In the dispute over form terms, according to this rule, in commercial transactions, there are often cases where the offer goes back and forth and the acceptance contains new terms, and these new terms should be regarded as new offers. In this case, the last offer to be made is the final effective offer.

³ Under this rule, conflicting form terms are struck down by each other for lack of agreement, and the corresponding loopholes are filled by legal provisions. If the parties have agreed on the substantive part of the contract, but not on the non-substantive part of the contract, the contract shall be deemed to be formed. This rule is adopted in Article 2.1.22 of the General Principles of Commercial Contracts and Article 2-4:209 of the Draft European Civil Code.

交易双方适用各自GTC，中国法项下的法律后果

商业交易中，一种现象普遍存在，交易双方之间没有签署合同，大量的业务都是直接通过采购订单（邮件、电子化）进行。实践中，交易各方通常会在订单中提到“自己的”标准条款和条件（以下简称“GTC”）。例如：在货物销售中，卖方在他的供货订单中提到了它的标准交货条款，而买方在它的采购订单中提到了它的标准购买条款。通常情况下，这两种条款在一些关键领域是相互矛盾的，例如，涉及保证权或责任限制时。一旦交易后发生纠纷，双方都会坚持根据己方的GTC进行维权索赔。那在这种情况下，中国法下，谁的GTC会被适用？具体又有哪些条款会被适用呢？

本文尝试对在中国法下，交易双方适用各自GTC的法律风险给出一些提示，希望有助于跨国公司在日常交易中进行风险管理。

一. 中国法对GTC的要求

由于GTC（General Terms and Conditions），通常是指当事人在交易中为了重复使用的便利而预先拟定好，并与对方未经协商的条款；属于中国法规定下的格式条款。针对格式条款，中国法律规定采用格式条款订立合同的，提供格式条款的一方应当遵循公平原则确定当事人之间的权利和义务，并采取合理的方式如特殊字符、字号、符号、内容加粗等形式在内的显著方式提示对方注意免除或者减轻其责任等与对方有重大利害关系的条款。并在对方提出要求时，对该条款做出解释。

二. 法律后果

国际司法实践上对格式条款之争（Battle of the Forms）有如下的主流通说：第一枪规则（First Shot Rule）¹、最后一击规则（Last Shot Rule）²、相互击倒规则（knock-out）³。相互击倒规则（knock out doctrine），是时下国际商事争议判例中广泛采纳的通说；我们认为，实践中，中国法也偏向于相互击倒规则（knock-out）。

我们认为，在中国法下，一旦交易中，双方各自适用己方的GTC；事后发生纠纷，只有那些互不冲突的条款才被视为有效。对于那些互相冲突的条款，则应被视为双方未达成合意或合意不明确。而针对没有约定或约定不明的条款，中国法也规定了交易双方可以依次按照如下顺序进行补救，以促进合同交易的实现。协议补充>合同相关条款、交易习惯确定>适用法律规定

三. 结语

综上，各商事主体，一旦采用GTC与对方进行交易，首先需注意GTC本身的制定须遵循公平原则对己方与对方的权利义务进行划分；并对可能免除或者减轻其责任等与对方有重大利害关系的条款向交易方尽到提示义务，以免出现纠纷，出现该合同条款被认定无效的风险。

此外，由于实践中对格式条款之争，中国法倾向于相互击倒规则，对一些重要条款，建议交易双方还是需要通过往来邮件等形式达成合意并留存，避免因没有约定或约定不明的原因，只能采取补救措施促成交易实现，而无法保障各方利益最大化。

¹ 指如果双方当事人在要约和承诺中引用了不同的格式条款，除当事人明确拒绝第一次所引用的格式条款外，原则上应当适用第一次所引用的格式条款。

² 在格式条款之争中，按照该规则，商事交易中，常常出现要约来回往复、承诺中含有新的条款的情况，这些新的条款应³ 当被视为是新的要约。在这种情况下，最后一个发出的要约的才是最终生效的要约。

³ 按照这一规则，冲突格式条款因未达成合意而被相互击倒，以法律规定填补相应漏洞。如果双方当事人就合同的实质部分达成了合意，但对合同的非实质部分没有达成合意，则应当认定合同成立。《商事合同通则》第2.1.22条和《欧洲民法典草案》第2-4:209条采纳了这一规则。

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