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The “Battle of the Forms” under the 1980 United Nations Convention on Contracts for the International Sale of Goods: A Comparison with the UNIDROIT Principles, the European Principles and some domestic laws

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I hereby declare that I have read and understood the regulations governing the submission of Master of Laws dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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A. Introduction

The United Nations Convention on Contracts for the International Sale of Goods, known as the Vienna Convention 1980 (hereinafter referred to as “CISG”)¹ was the first universal legal instrument intended to govern the most common contract within the international economic community and is now presently part of the law of approximately fifty countries.

One of the most disputable problems is the so called *battle of the forms*. The *battle of the forms* is an expression that refers to a situation in which the parties exchange general conditions.² Each party tends to use conditions which are favorable to it. Those prepared by the supplier, or by a trade organization representing suppliers, may, for example, contain limitations of liability in case of difficulties in production and supply or of defective performance, and provide that customers must give notice of any claim within short time limits.³ The forms prepared by the customer or its trade association, in contrast, hold the supplier liable for these contingencies, and give the customer ample time for complaints. The problem is that the parties purport to conclude the contract

¹ For the English text, see, for example, United Nations Conference on Contracts for the International Sale of Goods, Apr. 10, 1980, 19 I.L.M. 668.

² Maria Pilar Perales Viscasillas, Editorial remarks to: Guide to Article 19 – Comparison with Principles of European Contract Law (PECL), under <http://www.cisg.law.pace.edu/cisg/text/peclcomp19.html>; in addition: Article 2:209(3) PECL provides a definition: "General conditions of contract are terms which have been formulated in advance for an indefinite number of contracts of a certain nature, and which have not been individually negotiated between the parties."

³ Comment and Notes: PECL Article 2:209: Conflicting General Conditions – under: <http://www.cisg.law.pace.edu/cisg/text/peclcomp19.html>.

each using its own form although the two forms contain conflicting provisions.⁴ There is an element of inconsistency in the parties' behavior. By referring to their own general conditions, neither wishes to accept the general conditions of the other party, yet both wish to have a contract.⁵ A party will only be tempted to deny the existence of the contract if the contract later proves to be disadvantageous for that party.⁶

That problem raises different issues in relation to contract formation and has led to divergent points of views among scholars, the case law and international and domestic legal rules. This paper will analyze practical problems that arise when the offer and the acceptance do not precisely match.

There are several kinds of collisions thinkable. The most collisions are caused by incorporation of a defense clause: The offeror who wants to order something refers to his ordering terms and conditions. Only these shall become the basis of the contract. However, the other side claims that her conditions become the basis of the contract. The will of concluding the contract and the validity of the respective terms are linked and put under one condition. It is also possible that only single clauses differ, such as, e.g., different arbitration clauses, choice of forum, warranty or payment periods also included in the respective delivery or ordering terms. Finally there is a quite often not obvious contradiction: one side regulates certain aspects in its terms, which are not considered by the other side. The collision in these cases exists if one assumes that the silent party proposes the statutory rules to become effective to the extent her terms do not cover this aspect. There is a contradiction then usually by the statutory rule and the rules proposed by one side.

⁴ *ibid.*

⁵ *ibid.*

⁶ *ibid.*

Beside the different variations of collisions, for the examination of the *battle of the forms* problem, it is also decisive how the respective party reacts. Insofar for example, the party that got at last the terms from the other party can clearly object and refuse to perform the contract. The party that got at last the terms can also first remain silent but before starting with performance this party can claim the contradiction between the terms to get out of the contract. Furthermore it is thinkable that after the start with the performance one party relies on the invalid conclusion of the contract. In addition, there is a possible constellation that both parties have fully performed the contract and after this one party relies on the invalidity.

The questions raised in *battle of the forms* litigations are: “Under these circumstances, has a contract been concluded?” and, “If so, what are the terms of the contract?” Practice shows that the answer to the first question is often affirmative.⁷ The parties go ahead with the contract although each has referred to its own general conditions, the problem being the determination of the content of the contract.⁸

It is a common understanding among legal scholars that comparative law serves other important purposes⁹ beyond the acquisition of knowledge. It undoubtedly aids in the preparation of legal texts.¹⁰ Furthermore, comparative law both serves as a tool of

⁷ Maria del Pilar Perales Viscasillas *Battle of the Forms and the Burden of Proof: An Analysis of BGH 9 January 2002*, *Vindobona Journal of International Commercial Law and Arbitration* 2002, No. 2, p.217-228, 217.

⁸ *ibid.*

⁹ For more detailed discussions of the functions of comparative law, see Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 *Mod. L. Rev.* 1 (1974); Eric Stein, *Uses, Misuses -- and Nonuses of Comparative Law*, 72 *Nw. U. L. Rev.* 198 (1977).

¹⁰ For further details on this point, see Helmut Coing, *Rechtsvergleichung als Grundlage von Gesetzgebung im 19. Jahrhundert*, 7 *Ius Commune* 160 (1978); Ulrich Drobnig & Peter Dopffel, *Die Nutzung der Rechtsvergleichung durch den deutschen Gesetzgeber*, 46 *Rabels Zeitschrift für*

construction¹¹ and helps in the unification of law. By keeping these two functions in mind, this Essay will examine different approaches of regulations of the *battle of the forms* problem. Strictly speaking, it will be particularly examined the solutions in the American, English, South African and German Law as well as in the Principles of International Commercial Contracts formulated by the International Institute for the Unification of Private Law, known as UNIDROIT or the Rome Institute¹² (hereinafter UNIDROIT) and in the Principles of European Contract Law (hereinafter PECL). After considering the diverse approaches the paper will turn to the Convention itself and will eventually focus on some problems which might arise from the application of Article 19 CISG.

ausländisches und internationales Privatrecht [R.Z.P.] 253 (1982); Norman S. Marsh, *Comparative Law and Law Reform*, 41 R.Z.P. 649 (1977).

¹¹ See, e.g., Konrad Zweigert, *Rechtsvergleichung als universale Interpretationsmethode*, 15 R.Z.P. 5 (1949/50).

¹² The International Institute for the Unification of Private Law (UNIDROIT) is an independent intergovernmental organisation with its seat in Rome. Its purpose is to study needs and methods for modernising, harmonising and co-ordinating private and in particular commercial law as between States and groups of States. UNIDROIT work started in the early 1970's. The first session, which convened in 1974, was limited in scope and focused mainly on the general part of contractual law of some contracts, among them, the sales contract. After several drafts, the final text was approved in 1994. It contains 109 Articles with 7 chapters; its objectives are several: to serve as a model for national and international legislators; to serve as well as a model of interpretation to the international instruments, among them, the Vienna Convention of 1980; to be useful as a guide for the drafting of contracts; and, finally, to create a sort of common principles for all legal systems.

B. Introduction of the different approaches

The *battle of the forms* problem may be solved in basically two ways that are dictated by the performance of the contract. Generally speaking, the two solutions include the application of either the classical pattern of two declarations of will (offer and acceptance), or the understanding of formation of a contract through its performance, even though the content of the contract is incomplete. The conflict between forms creates the question: Is there a contract, and what are its terms? There is an approach that requires perfect identity between the contents of two declarations of will. Strictly applied, this would lead to the non-existence of the contract. One other alternative to resolve *battle of the forms* issues is a good faith principle. This results in a neutral solution, preventing either party from gaining an advantage by being the first or the last to send a declaration of will. These two main approaches (offer and acceptance or performance) are based on opposite assumptions: that the parties read and understand the contents of each other's forms, or that pre-printed forms are not read. In the latter case, a contract could be determined to be concluded by the existence of an agreement on the essential terms, even though there remain some terms that are contradictory.

I. Approaches in domestic laws

Following it will be focused on the solutions given by the common law systems: American, English and South African law. For civil law it will be described the German law of contracts and a brief comparison will be made between the solutions given in German, French, Swiss, Scandinavian and Japanese law.

1. The Common law approach

In Common Law systems, there are major differences in the resolution of problems caused by discrepancies in conditions that accompany offers and replies. The English legal system follows the classic conception of the Common Law, whose bastion is the *mirror image* rule. The United States legal system, on the other hand, only partially follows the dictates of the *mirror image* rule.

a. The English approach

The English approach leads to a consideration of the classical theory set forth at common law. It applies the so-called *mirror image* rule. Under this rule, a contract is not formed unless the acceptance corresponds exactly to the terms of the offer.¹³ An acceptance which is not conform with the offeror's terms is considered as a rejection of the offer.¹⁴ It can be also a counter-offer which the previous offeror can accept or reject. So long as the parties do not perform, the exchange of the forms does not create a binding contract.

¹³ *Tinn v. Hoffman & Co.* (1873), 29 L.T. 271.

¹⁴ *ibid.*

The rationale of the *mirror image* rule is based on an expectation that the original offeror, making an offer according to his own terms, cannot anticipate being bound on terms other than those that he presented.¹⁵ It is assumed that each part of a contract, not just the primary elements of price, quantity and character of the item exchanged, has a value to the offeror that is incorporated into his original offer.¹⁶ While the common law rule does not assume that any change to the offer is necessarily a deal-breaker, it contemplates that the offeror will want to weigh any changes to determine the value of the contract.¹⁷ The *mirror image* rule asserts that additions or modifications to the offer render that offer void, and those changes become a counter-offer, or a "last shot."¹⁸

In the famous English case of *Hyde v. Wrench*,¹⁹ the seller offered to sell the buyer a property for £ 1000. The buyer, in his response, offered £ 960, which the seller refused. Then the buyer agreed to give the seller £ 1000, but the seller refused to sell. The buyer sued for specific performance of the alleged contract. The Court held that the offer of the buyer to buy at £ 950 in response to the offer was a refusal followed by a counter-offer, and that no contract was formed. In a situation where a purported acceptance introduces new terms, no contract is formed, the initial offer has been rejected, and a counter-offer has been made. In the case of *Jones v. Daniel*,²⁰ where in response to an offer to buy property for £ 1450, the offeree's attorney wrote to accept the offer and enclosed a draft contract containing special terms not referred to in the offer. The Chancery Division held that even though there was an agreement as to the price, there was no contract between the parties.

¹⁵ Marvin A. Chirlestein, *Concepts and Case Analysis in the Law of Contracts*, 3d edition, 1998, p. 54.

¹⁶ *ibid.*

¹⁷ *ibid.*

¹⁸ *ibid.*

¹⁹ (1840), 3 Beav. 334.

²⁰ (1894), 2Ch. 332.

Normally, however the contract does not remain executory because the seller delivers and the buyer receives the goods. When the parties agree that they have an agreement and have behaved accordingly there is under the English Common law system no doubts that a binding contract exists. The problem then arises to determine the terms of the contract. Because the last form constitutes a counter-offer, it is assumed that the performance describes an acceptance. Insofar the so-called *last shot* rule applies. According to this rule the terms of the last form are the terms of the agreement.²¹

An illustration of strict adherence to the *last shot* doctrine is found in an English case, *Brogden v. Metropolitan Railway Co.*²² A sent B a draft contract which provided that any dispute between the parties would be submitted to an arbitrator. The name of the arbitrator was left blank. B sent the draft back to A with his signature and the insertion of the name of an arbitrator. A dispute subsequently arose and the House of Lords held that the arbitration provision and the contract were valid. In effect, though the insertion of the name amounted to a material alteration so that the offer and the acceptance did not match, the silence of A amounted to an acceptance of B's counter-offer. Another example is the *British Road Services Ltd. v. Arthur V. Crutchley Ltd.* Case.²³ In that case, when the plaintiffs delivered some whiskey to the defendants for storage, the plaintiffs' driver gave the defendants a delivery note that referred to the plaintiffs' "conditions of carriage." The defendants accepted the note by stamping it: "Received under the defendants' conditions." The court held that the defendants' stamp amounted

²¹ Stewart, 2 W.W.R. at 284 (quoting Von Hatzfeldt-Wildenberg v. Alexander, 1 Ch. 284, 288-89 (1912)).

²² (1877), 2 App. Cas. 666.

²³ 1 All E.R. 811 (1968).

to a counter-offer that the plaintiffs accepted once the goods were delivered.²⁴ Thus, the contract was composed entirely of the defendants' conditions.

However, it is to note that the common-law courts have not strictly adhered to a mechanistic approach to contract formation with the *battle of the forms*. This shows the decision in the case *Butler Machine Tool Co. Ltd. v. Ex-Cell-O Corp. (England) Ltd.*²⁵ In this case after an inquiry from the buyer, the seller offered to sell a machine tool to the buyer for a specified price, with the delivery in ten months. The seller stated that the offer was subject to specific terms and conditions that " would prevail over any terms and conditions in the buyer's order."²⁶ This included an escalation clause which set the price at "prices ruling upon date of delivery."²⁷ In reply, the buyer placed an order for the machine tool on a form with the buyer's own terms and conditions. This form did not contain a price-escalation clause. The buyer's reply also included a tear-off slip to be signed by the seller and returned to the buyer. The tear-off slip stated that the seller accepted the order "on the terms and conditions stated thereon."²⁸ The seller signed the tear-off form and returned it to the buyer with a letter saying that they were entering the order "in accordance with the offer ."²⁹ The court held that the seller's communication was an acceptance of the buyer's counter-offer.³⁰ Therefore, the contract was on the buyer's terms, and the seller was not entitled to the benefit of the price-escalation clause.³¹ The court found that the seller's reply to the buyer's order did not prevail, even though it was the last shot, because the reference in the reply to the original offer was

²⁴ *ibid.* at 817.

²⁵ 1 All E.R. 965 (1979).

²⁶ *ibid.* at 967.

²⁷ *ibid.*

²⁸ *ibid.*

²⁹ *ibid.*

³⁰ *ibid.*

³¹ *ibid.*

not made to reiterate all of the terms of the original offer, but was made only to identify the subject matter of the contract.³² Eschewing the decision of the trial court that the seller's terms controlled because the original quotation provided that the "terms and conditions would prevail over any terms and conditions in the buyer's order,"³³ the appellate court asserted that all of the documents must be considered as a whole.³⁴

So far it can be seen that up to now the common-law courts continue to use the *mirror image* rule to determine which form will prevail.³⁵ Whether a form was actually the last form sent will not necessarily control.

Lord Denning expresses the current thinking in English law. He assumes that when a *battle of the forms* arises there is usually a contract "as soon as the last of the forms is sent and received without objection being taken on it".³⁶ Regarding the problem of the determination of the content of the contract he suggests three ways:

"In some cases the battle is won by the man who fires the last shot. He is the man who puts forward the latest terms and conditions: and if they are not objected to by the other party, he may be taken to have agreed upon."

This approach is consistent with the traditional theory. But Lord Denning suggests two other possibilities:

"In some cases, however, the battle is won by the man who gets the blow in first. If he offers to sell at a named price on the terms and conditions

³² *ibid.*

³³ *ibid.*

³⁴ *ibid.*

³⁵ Francois Vergne *The "Battle of the Forms" under the 1980 United Nations Convention on Contracts for the International Sale of Goods*, *American Journal of Comparative Law* 1985, p. 233-258.

³⁶ 1 All E.R. 968 (1979).

stated on the back and the buyer orders the goods purporting to accept the offer on an order form with his own different terms and conditions on the back then, if the difference is so material that it would affect the price buyer ought not to be allowed to take advantage of the difference unless he draws it specifically to the attention of the seller.”

"There are other cases where the battle depends on the shots fired on both sides. There is a concluded contract but the forms vary. The terms and conditions of both parties are to be construed together. If they can be reconciled so as to give a harmonious result, all well and good. If differences are irreconcilable, so that they are mutually contradictory, then the conflicting terms may have to be scrapped and replaced by a reasonable implication."³⁷

This testimony can be interpreted to that effect that the *mirror image* rule is mitigated by imposing the additional question of whether new terms are material. However, academics have been struggling with the impact of Lord Denning’s opinion on English law. Some scholars believe that this opinion relaxed rigid common law standard.³⁸ Others deny any influence on English law, arguing that the two other judges in the *Butler Machine* case, Lawton L.J. and Bridge L.J., “emphatically rejected” Lord Denning’s opinion.³⁹ The majority, however, do not really comment on the impact of Lord Denning’s opinion on English law, thereby indicating that they do not consider it

³⁷ *ibid* at 969.

³⁸ see among others: Henry D. Gabriel, *The Battle of the Forms: A Comparison of the United Nations Convention for the international sale of goods and the Uniform Commercial Code*, 49 *Bus. Law.* 1994, p. 1053, 1056.

³⁹ Arthur Taylor von Mehren *The “Battle of the Forms”: a comparative view*, 38 *Am. J. Comp. L.* 1990, p. 265, at 273.

to have affected the application of the last shot rule.⁴⁰ In comparison to other countries like the United States or Germany, academic discussion is extremely sparse and is usually in principle in support of the last shot rule. Only a few legal writers have criticized the traditional common law approach or even attempted to find new solutions to the battle of the forms.⁴¹ However, as yet, the courts have applied none of these solutions.⁴²

b. The American approach

Prior to the adoption of the U.C.C., American courts generally followed the common law. In the *Poel v. Brunswick-Balke-Collender Co.* case⁴³ which exemplifies the classic *battle of the forms*, the court followed the traditional, mechanistic, common-law *mirror image* rule by refusing to find a contract based on the exchange of conflicting forms, even though the parties believed they had a binding agreement.⁴⁴

Because the parties' "factual bargain" was ignored, the buyer was permitted to act in bad faith and the seller was "unfairly surprised" by the court's result.⁴⁵ Thus, the *Poel* decision became the example of why classical contract law needed to be changed in America.

⁴⁰ See the cited authors in the Article of Gisela Ruehl *The Battle of the Forms: comparative and economic observations*, 24 U. Pa. J. Int'l Econ. L. 189, p. 189, at 195 note 22, (2003).

⁴¹ *ibid* at 195.

⁴² See *O.T.M., Ltd. v. Hydranautics*, 2 Lloyd's Rep. 211 (1981); *Zambia Steel & Bldg. Supplies Ltd. v. James Clark & Eaton, Ltd.*, 2 Lloyd's Rep. 225 (1986) (applying the traditional common law approach to hold that the defendant's application for a stay would be refused); *Muirhead v. Indus. Tank Specialties, Ltd.*, Q.B. 507, 530 (1986) (allowing appeal to go forward based on common law principles).

⁴³ 110 N.E. 619 (N.Y.1915).

⁴⁴ *ibid* at p. 623.

⁴⁵ *Ibid*.

The American dissatisfaction with the *last shot* doctrine led to the adoption of an alternative approach in the Uniform Commercial Code.⁴⁶ Under the U.C.C., where there is a conflict between clauses contained in exchanged terms and conditions, the *mirror image* rule is displaced by the rule recited in Section 2-207 UCC. This is a somewhat complicated provision, which creates some contradictions among the courts. Its text is:

"2-207 UCC: (Additional Terms in Acceptance or Confirmation).

"(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

"(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(a) the offer expressly limits acceptance to the terms of the offer;

(b) they materially alter it; or

(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

"(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise

⁴⁶ Charles Sukur: *Harmonizing the Battle of the Forms: A Comparison of the United States, Canada, and the United Nations Convention on Contracts for the International Sale of Goods*, Vanderbilt Journal of Transnational Law 2001, p. 1481-1515, p. 1485.

establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act."

Generally speaking, section 2-207 UCC seeks to have parties avoid escaping obligations due incompatibility of the terms and conditions they exchange.⁴⁷ What is considered a counter-offer under the Common law is often treated as an acceptance under the dictates of section 2-207 UCC.⁴⁸ With the objective of overcoming the *last shot* doctrine the drafters of section 2-207 UCC regulated three situations. First, conditional acceptance; second, written confirmations which have an additional term; and, finally, the problem of the battle of the forms. This regulatory scheme answers the questions of whether a contract exists and, if so, what are its terms.⁴⁹ The UCC approach divorces the formation of the contract from questions relating to its terms.

In detail: according to subsection (1) once the parties have exchanged forms that purport to establish an agreement, a contract is formed, and neither party may terminate the contract even the acceptance contains additional or different terms. However, not every purported acceptance with nonmatching terms will count as a valid acceptance. First, the acceptance must still qualify as a "definite and seasonable expression of acceptance" according to the language of the statute. Thus, for example, the acceptance still must be sent within a reasonable time following the offer. Further, there must be some point at which the terms in the purported acceptance so diverge from the terms of the offer that

⁴⁷ Maria del Pilar Perales Viscasillas "*Battle of the Forms*" under Nations Convention on contracts for the international sale of goods: a comparison with Section 2-207 UCC and the UNIDROIT Principles 1998, 10 Pace Int'l L. Rev. 97, p. 98, at p.124.

⁴⁸ *ibid.*

⁴⁹ *ibid* at p.125.

you do not really have an acceptance at all. If the buyer offers to buy apples and the seller accepts the buyer's offer for the seller to sell oranges, the seller's "acceptance" should not create a contract. An acceptance to sell oranges is not a "definite and reasonable expression of acceptance" to the buyer's offer to buy apples. The second way in which a purported acceptance with nonmatching terms will not operate as an acceptance is if the offeree uses the magic language of section 2-207(1) and makes it clear that its acceptance of the offer "is expressly made conditional on [the offeror's] assent to the additional or different terms [contained in the acceptance]." When that language or something very close to it is used, then there is no contract formation until the offeror gives its specific assent to the offeree's additional or different terms. Performance alone by the offeror should not count as such assent to the new terms, or else we are simply back to the *last shot* doctrine.

Whereas section 2-207(1) more or less reverses the *mirror image* rule of the common law, section 2-207(2) changes the *last shot* doctrine. If a contract is formed by the exchange of writings under section 2-207(1), then section 2-207(2) tells us what the contract's terms are. Between merchants, any additional terms in the acceptance document will become part of the contract unless those terms materially alter the offer, or unless the offeror has specifically indicated either in its offer or after receiving the acceptance that the offer is limited to its terms.

However, there is a problem, if the conflicting boilerplates address the same issue differently. Section 2-207 (2) addresses "additional" terms, but is silent regarding "different" or conflicting terms. Courts have not been consistent decided this statutory

gap.⁵⁰ There are three widely divergent paths followed by various courts in assessing the effects of differing terms. Some courts assume that a differing form is viewed as either a “counteroffer” or as a “proposal to modify”.⁵¹ It seems so far that they preserve portions of the *mirror image* rule.⁵² Hence, the party who send the last form is privileged. In a contrast to the *last shot* rule, other courts seem to privilege the first form.⁵³ Here, the rationale is that since the U.C.C. does not expressly provide a means for a differing term to modify an offer, such terms cannot enter the agreement.⁵⁴ In so far the offer controls the agreement. Finally, the most courts follow the *knock out* rule, which ignores the conflicting terms and looks instead to the U.C.C. gap-fillers for those terms.⁵⁵ Determining which rule will be decisive, therefore, seems to depend more on the skills of the advocates and the identity of the judge than on the language of the U.C.C.⁵⁶

Section 2-207(3), the last subsection of section 2-207, covers the case in which the parties exchange forms but the forms themselves do not make a contract, either because the terms are too divergent or because the acceptance was expressly made conditional on the offeror's assent to the different or additional terms and no assent was forthcoming. In that case, if the two sides proceed to perform anyway, then the conduct of the two parties serves to establish the existence of the contract. The terms that govern

⁵⁰ Professors White and Summers identified these three ways - James J. White, Robert S. Summers, *Uniform Commercial Code*, third edition, 1998, p. 33-35.

⁵¹ *ibid* at p. 33 – citing *Roto-Lith, Ltd. Vs. F.P. Bartlett & Co.*, 297 F.2d 497 (1st Cir. 1962).

⁵² Daniel T. Ostas, Frank P. Darr *Redrafting U.C.C. Section 2-207: An Economic Prescription for the Battle of the Forms*, Denver University Law Review 1996, p. 406.

⁵³ See James J. White, Robert S. Summers, *Uniform Commercial Code*, third edition, 1998, at p. 34 – citing *Reaction Molding Techs., Inc. vs. General Elec. Co.*, 588 F. Supp. 1280 (E.D. Pa. 1984).

⁵⁴ See Daniel T. Ostas, Frank P. Darr *Redrafting U.C.C. Section 2-207: An Economic Prescription for the Battle of the Forms*, Denver University Law Review 1996, at p. 406.

⁵⁵ *Daitom, Inc. v. Pennwalt Corp.*, 741 F.2d 1569, 1578-80 (10th Cir. 1984); *Idaho Power Co. v. Westinghouse Elec. Corp.*, 596 F.2d 924, 927 (9th Cir. 1979); *Southern Idaho Pipe & Steel Co. v. Cal-Cut Pipe & Supply, Inc.*, 567 P.2d 1246, 1253-55 (Idaho 1977).

⁵⁶ See Daniel T. Ostas, Frank P. Darr *Redrafting U.C.C. Section 2-207: An Economic Prescription for the Battle of the Forms*, Denver University Law Review 1996, at p. 406.

such a conduct-formed contract are "those terms on which the writings of the parties agree, together with [the U.C.C. gap-fillers]." These situations become reality if the parties are inadvertent. For example, the parties agree in an informal way on a sale, and each sends a confirming memo. One memo calls for the price twice that of the offer. The seller and the buyer do not recognize the divergence on this central term. Hence, the seller delivers and the buyer takes the delivery. According to Section 2-207(1) there is no contract between the parties because the memos do not state a "definite and reasonable expression of acceptance". However the conduct of the parties will create the contract, with the courts providing a reasonable price in accord with other provisions of Article 2.⁵⁷

A good example of the battle of the forms under the American approach is the *Roto-Lith, Ltd v. F.P. Barlett & Co.* case⁵⁸. In this case, the buyer made an offer to buy a barrel of emulsion from the seller. The offer did not refer to warranties but stated the particular purpose for which the emulsion was to be used. The seller sent an acknowledgment and an invoice providing: "goods sold without warranties express or implied and subject to the terms on reverse side." One of these terms stated: "The seller's liability hereunder shall be limited to replacement of the goods which differ from the seller's sample order. If these terms are not acceptable, the buyer must notify the seller at once." The buyer did not object to the terms and accepted the goods on delivery, paid for them and put them in use. The emulsion was defective. The action brought was one for breach of warranty. The court considered first that the seller's response was a proposal which materially altered the agreement, and second, that a response that does not in all respects correspond to the offer constitutes an acceptance of the offer and is a

⁵⁷ *ibid* at p. 407.

⁵⁸ 297 F.2d 497 (1st Cir. 1962).

counter-offer only as to the difference. The court finally held that "a response which states a condition materially altering the obligation solely to the disadvantage of the offeror is an acceptance . . . expressly . . . conditional on assent . . . to the additional terms." Here, since the buyer accepted the goods with knowledge of the conditions specified in the acknowledgment, he became bound. Thus the court held that the seller's response was a counter-offer that the buyer accepted when he paid. The buyer similar result could have been reached by the common law approach, concluding that the seller's action and writing did not constitute an expression of acceptance.

Finally, it can be said that the majority of academics in the United States essentially support the application of the *knock out* rule in battle of the forms cases. However, the wording of U.C.C. Section 2-207 has been the subject of harsh criticism⁵⁹ and has caused numerous academics to make suggestions for both reasonable interpretations⁶⁰ and revisions.⁶¹ The National Conference of Commissioners on Uniform State Laws responded in 1994 and appointed the Drafting Committee to Amend Uniform Commercial Code Article 2. The revision process has produced countless suggestions on how to revise or replace U.C.C. Section 2-207, the most recent dating from August 2002. However, since no new version has yet been adopted, the United States still applies the original version of U.C.C. Section 2-207.

⁵⁹ The points of criticism are too numerous to be comprehensively discussed here. For a detailed discussion of the problems incurred by Section 2-207 U.C.C. see John E. Murray, *The Chaos of 'The Battle of The Forms': Solutions*, 39 Vand. L. Rev. 1307, 1322-54 (1986); Corneill A. Stephens, *On Ending the Battle of the Forms: Problems with Solutions*, 80 Ky. L.J. 815, 823-24 (1992).

⁶⁰ Paul Barron & Thomas W. Dunfee, *Two Decades of 2-207: Review, Reflection and Revision*, 24 Clev. St. L. Rev. 171, 200-04 (1975); John E. Murray, *Section 2-207 of the Uniform Commercial Code: Another Word about Incipient Unconscionability*, 39 U. Pitt. L. Rev. 597, 597-651 (1978); E. Hunter Taylor, *U.C.C. Section 2-207: An Integration of Legal Abstractions and Transactional Reality*, 46 U. Cin. L. Rev. 419 (1977).

⁶¹ Paul Barron & Thomas W. Dunfee, *Two Decades of 2-207: Review, Reflection and Revision*, 24 Clev. St. L. Rev. 171 204-13 (1975); Richard Hyland, *Draft*, 97 Colum. L. Rev. 1343, 1356-62 (1997); Corneill A. Stephens, *On Ending the Battle of the Forms: Problems with Solutions*, 80 Ky. L.J. 815, 836-40 (1992).

c. The South African approach

aa. In general, the South African Law requires that the acceptance corresponds with the offer.⁶² Anything more or less than an unqualified acceptance of the entire offer amounts to a counter-offer and constitutes a rejection of the original offer.⁶³ Notwithstanding of an apparent deviation from the terms of an offer, a declaration may still be an unqualified acceptance. For example, "Yes, but..." does not signify an agreement. The validity of the acceptance is destroyed.⁶⁴ But this reaction of an offer has to be treated as a counter-offer, as an unqualified acceptance.⁶⁵ The validity of the acceptance will not be affected, as long as modification is not intended as a condition for acceptance.

However, the necessity for exact correspondence between offer and acceptance must be interpreted as a question of substance rather than form.⁶⁶ This concern for substance rather than forms means that a minor lack of correspondence between offer and acceptance will be ignored if it can be brought within the ambit of the maxim de minimis non curat lex.⁶⁷

⁶² RH Christie *The Law of Contract in South Africa*, fourth edition, p.69; Schalk van der Merwe/L.F. van Huysteen/M.F.B. Reinecke/G.F. Lubbe, *Contract General Principles*, second edition 2003, p.55; Jörg Walter Haase/Nicolas Grimm/Eva Versfeld, *International Commercial Law from a South African perspective*, Aachen 2003, at p.28.

⁶³ Schalk van der Merwe/L.F. van Huysteen/M.F.B. Reinecke/G.F. Lubbe, *Contract General Principles*, second edition 2003, p.55; Jörg Walter Haase/Nicolas Grimm/Eva Versfeld, *International Commercial Law from a South African perspective*, Aachen 2003, at p.28.

⁶⁴ RH Christie *The Law of Contract in South Africa*, fourth edition, p.69.

⁶⁵ *ibid*, at p.69 f.

⁶⁶ *ibid*, at p.70.

⁶⁷ *ibid*.

bb. The matter of the battle of forms has not received explicit attention in South African law.⁶⁸ However, considering the requirement that acceptance should conform precisely to the offer, and that a deviating acceptance constitutes a counter-offer, might the *battle of the forms* situation similar be solved to the last shot rule of English law.⁶⁹ The fact that the battle of forms problem is largely absent from South African case law and literature is probably based on the tendency of South African courts to resolve the battle of forms situation directly with reference to the principles applicable to instances of disagreement rather than rules of offer and acceptance.⁷⁰

In *Guncrete (Pty) Ltd v Scharrighuisen Construction (Pty) Ltd*⁷¹ a contractor purported to accept the tender of a sub-contractor with the clause that the sub-contract would be subject to the terms of its contract with the building owner. The court held that this acceptance was a counter-offer and suggested that it was 'impliedly' accepted by the sub-contractor.⁷² However, the claim of the sub-contractor that it was unaware of the basis of which it was contracting was rejected with recourse to the principle of quasi-mutual assent.⁷³ Not merely the concurrence of offer and acceptance was decisive for the result that the sub-contract was subject of the main contract but the objective principle of reasonable reliance.

⁶⁸ Schalk van der Merwe/L.F. van Huysteen/M.F.B. Reinecke/G.F. Lubbe, *Contract General Principles*, second edition 2003, p.57.

⁶⁹ *ibid.*

⁷⁰ *ibid.*

⁷¹ 1996 2 SA 682 (N).

⁷² *ibid.*

⁷³ This principle was found in *Smith v Hughes* (1871) LR 6 QB 597 at 607.

Van der Merve/van Huyssteen/ Reinecke/Lubbe are of the opinion that the mentioned approach of the South African courts "is to be preferred to an approach in terms of the rules of offer and acceptance, which reflects the relatively greater emphasis on the declarations of the will, which is characteristic of English and German law in comparison to South African law.⁷⁴ An analysis of this type of situation in terms of disagreement - in respect of incidental terms rather than the existence of a contract - might enable the South African law to follow the more progressive trend discernible in those systems which have rejected the strict adherence to the mirror image rule.⁷⁵

2. The Civil law approach

a. The German approach

In Germany there is no regulation that deals with the *battle of the forms* problem. Although the problem was well known under the AGB-Gesetz⁷⁶, the legislator did not regulate the problem in the new German Civil Code expressively. Thus, it belongs to the courts to find a solution according to the general regulations of the law of contract.⁷⁷

The German courts used to apply the *last shot* rule, in German law usually called the "theory of the last word" (Theorie des letzten Wortes). On the basis of Section 150 (2) of the German Civil Code, which says that an acceptance with modification is a

⁷⁴ Schalk van der Merwe/L.F. van Huyssteen/M.F.B. Reinecke/G.F. Lubbe, *Contract General Principles*, second edition 2003, p.58.

⁷⁵ *ibid.*

⁷⁶ The AGB-Gesetz was the spezial law for standardized form.

⁷⁷ Markus Stoffels *AGB-Recht*, Munich 2003, p. 132.

rejection of the offer coupled with a new offer, German courts usually held that in a *battle of the forms* case a contract was only concluded if the terms of offer and acceptance perfectly matched.⁷⁸ Thus, as to the question which party prevailed with its terms, it was decisive which party managed to make the last offer, or with other words which party managed to “fire the last shot”. The German courts mostly decided that the seller won the *battle of the forms*. The courts argued that the seller, by accepting the offer under his own standard terms, rejected the offer made by the buyer and made a new offer that was accepted through receipt of delivery on the part of the buyer without objection to the seller’s terms.⁷⁹ Only once the Supreme Court held that the buyer’s terms governed the contract nevertheless the seller had accepted his offer under his own standard terms. For the court it was decisive that, under the principles of good faith and fair dealing, the seller’s acceptance, which contained only minor modifications, was to be understood as acceptance without modifications and thereby as acceptance of the buyers offer.⁸⁰

In the 1970’s the German courts gradually began to departure from the *last shot* rule. In 1970, the Supreme Court held twice that acceptance of delivery without objection to the others seller’s terms did not amount to acceptance where the buyer had indicated that he only wanted the contract under his own terms.⁸¹ However, the courts were of the opinion that a contract had been formed.⁸² They argued that Section 150 (2) of the German Civil Code had to be interpreted in light of the principle of good faith and fair

⁷⁸ BGH, BB 882, No. 1624; BGH, NJW 1248; OLG Köln, WM 846, 847 (1971).

⁷⁹ BGH, BB 882, No. 1624; BGH, NJW 1248; OLG Köln, WM 846, 846 (1971).

⁸⁰ BGH, BB 238.

⁸¹ BGH, BB 1136; BGH, WM 451.

⁸² BGH, BB 1136; BGH, WM 451.

dealing established in Section 242 of the German Civil Code.⁸³ If the seller and the buyer behaved as if they had a contract, in the light of good faith and fair dealing they were not allowed to deny the existence of a contract.⁸⁴ The courts decided that also Section 154 (1) of the German Civil Code, which provides that a contract is not concluded if the parties have not agreed upon all terms of the contract upon which at least one party wanted to reach an agreement, did not prevent the formation of a contract.⁸⁵ Section 154 (1) should be seen only as a presumption that was overcome when the parties performed the contract.⁸⁶ As to the question of the content of the contract, the courts held that the contract was completely governed by the default rules of the law. It can clearly be seen that the courts departed from the *last shot* rule.⁸⁷

The decision of the Court of Appeals in Cologne 1980 was the first which actually applied the *knock out* rule to solve the problem of the *battle of the forms*.⁸⁸ The court dealt with a dispute that revolved around a forum selection clause contained in one party's terms.⁸⁹ Like the German courts in the 1970s, the court held that acceptance of delivery did not amount to acceptance of the other party's standard terms where the party had insisted on its own terms or rejected the terms of the other party. Even though, as to the opinion of the court a contract was formed.⁹⁰ In contrast to the former jurisdiction the court held that the contract was not completely governed by default rules of the law, but only insofar as the standard terms of the parties did not match.⁹¹

The terms that are common in both sets of general conditions became part of the

⁸³ BGH, BB 1136; BGH, WM 451.

⁸⁴ BGH, BB 1136; BGH, WM 451.

⁸⁵ BGH, BB 1136, 1137.

⁸⁶ BGH, BB 1136, 1137.

⁸⁷ OLG Karlsruhe, BB, (1972) 1162, 1162; OLG Hamm, BB, (1979) 701, 701.

⁸⁸ OLG Köln, BB, (1980) 1237, 1240.

⁸⁹ OLG Köln, BB, (1980) 1237, 1240.

⁹⁰ OLG Köln, BB, (1980) 1237, 1240.

⁹¹ OLG Köln, BB, (1980) 1237, 1240.

contract.⁹² The differing terms knock each other out and are replaced by the default rules of the law.⁹³ In the next years, other German courts followed the solution of the Court of Appeals of Cologne. The German Supreme Court applied the *knock out* rule for the first time in 1985.⁹⁴ The classic summary for this solution can be taken from a decision of the OLG Koblenz:

“Where parties exchange letters and each time refer to their contradicting terms and conditions, none of their standard forms becomes part of the contract. Nevertheless, a contract is validly concluded if it becomes clear that the parties did not want to have the contract fail just because of the lack of consensus on the general terms and conditions.”⁹⁵

Today, the *knock out* rule is a common rule and will be applied in all *battle of the forms* cases. Under the German academics, the *knock out* rule finds an overwhelming acceptance.⁹⁶ Like the courts, the commentaries largely take the position that in cases where a contract is actually performed, the collision of terms is a dissent in part which does not hinder the validity of the contract but has the colliding terms replaced by statutory law. Because of this wide acceptance, there is not a big discussion yet. The most recent law review articles dealing with the problem battle of the forms date back to the late 1980s.

⁹² OLG Köln, BB, (1980) 1237, 1240.

⁹³ OLG Köln, BB, (1980) 1237, 1240.

⁹⁴ BGH, NJW 1838, 1839.

⁹⁵ OLG Koblenz WM 1984, 1347.

⁹⁶ Among others: Manfred Wolf et al., *AGB-Gesetz – Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen*, 4th edition 1999, § 2, para. 73-80, at 129-32; Peter Ulmer et al., *AGB-Gesetz – Kommentar zum Gesetz der Regelung des Rechts der Allgemeinen Geschäftsbedingungen*, 9th edition 2001, § 2, para. 98-105, at 258-62;

However, it is to note that the *last shot* was not completely discarded by the courts. The application of the *knock out* rule depends on the parties' indication that they only want to contract under their own terms and that they reject the terms of the other party. Hence, there is still room for the *last shot* rule where the parties do not explicitly insist on their own terms or do not explicitly reject the other party's terms. In these cases, German courts are of the opinion that acceptance of delivery amounts to acceptance of the offer and thus to formation of the contract under the terms of the offer last made. But, in this connection it has to take into account that standard terms in Germany usually contain so-called defensive clauses. These clauses explicitly state that the contract is only subject to the party's own terms or that the other party's terms are rejected. Insofar, it can finally be said that the *knock out* rule is applicable in all *battle of the forms* cases.

b. The Dutch approach

The DUTCH BW art. 6:225(3) provides that if offer and acceptance refer to different general conditions, the second reference is without effect, unless it explicitly rejects the applicability of the general conditions contained in the first reference. It appears that the explicit rejection must be one which the offeree communicates for the occasion and not one which only appears in his general conditions. This regulation is often called as *first shot* rule – in opposition to the *last shot* rule.

c. The French approach

The French law applies like Germany and the United States the *knock out* rule. Its structure under French law very much similar its structure under German law.⁹⁷ However, there is one important difference: French courts even apply the *knock out* rule where standard terms do not contain a defensive clause that explicitly states that the contract is only subject to the party's own terms or that other party's terms are rejected. The courts hold that the use of standard terms alone is sufficient to show that the party insists on application of its own terms and rejects the other party's terms.⁹⁸ This understanding is obviously different from the one in Germany. How already mentioned, under German law, the parties must state explicitly that they do not intend to contract under terms different from their. If not then the *last shot* rule applies. However, despite the fact that almost all French courts apply the described approach, it should be noted that the French Supreme Court itself departed from the *knock out* rule in two cases. In the first case, the Court decided that a contract was concluded under the buyer's terms.⁹⁹ The seller made an offer under his standard terms, which contained in bold and striking letters a forum selection clause in favor of the court of first instance at the seller's domicile. The buyer accepted the offer referring to his own standard terms, which contained a different forum selection clause and which were found on the back of the acceptance in fine print. The French Supreme Court found that the two forum selection clauses were irreconcilable and that under traditional theory, they should knock each

⁹⁷ See Gisela Ruehl *The Battle of the Forms: comparative and economic observations*, 24 U. Pa. J. Int'l Econ. L. (2003), at p. 205 – citing: Cass. com., Oct. 25, 1994, Bull. Civ. IV, No. 316; Cass. Com., July 12, 1994, Bull. Civ. IV, No. 268; Cass. com., Nov. 20, 1984, Bull. Civ. IV, No. 313; Cass. 2e civ., Nov. 16, 1961, D. 1962, 420; Cass. 2e civ. Nov. 7, 1956, D. 1957, somm. 67; Cass 2e civ., Nov. 7, 1956, Bull. Civ. III, No. 280; CA Douai, Nov. 20, 1964, D. 1965, 506; Trib. com. Lille, Nov. 19, 1956, D. 1957, somm. 99; CA Angers, Jan. 9, 1952, D. 1952, 404.

⁹⁸ *ibid* – citing: Cass. 2e civ. Nov. 7, 1956, Bull. Civ. III, No. 280; CA Angers, Jan. 9, 1952, D. 1952, 404; JCP 1952 II 6969; Trib. com. Lille, Nov. 19, 1956, D. 1957, somm. 99.

⁹⁹ Cass. com., Oct. 29, 1964, Gaz. Pal. 1965, 45.

other out. However, the court held that the seller's forum selection clause became a part of the contract because it was written in bold and striking letters, in contrast to the buyer's forum selection clause, which was written in fine print. In the second case, the French Supreme Court apparently applied the *last shot* rule.¹⁰⁰ In that case, the seller made an offer under his standard terms, which contained, among others, a condition reserving property to the seller after delivery. The buyer accepted the offer referring to his own standard terms, which explicitly rejected any clause reserving property to the seller. The French Supreme Court held that the term in the reservation of property clause in the seller's standard terms did not form part of the contract. Noteworthy, however, was the Court's reasoning: It did not refer to the traditionally applied *knock out* rule, which would have led to the same result. Instead, the Court argued that the buyer's term rejecting any reservation of property clause prevailed because it was brought to the seller's knowledge. It thus gave effect to the last standard terms sent. The ruling in fact amounted to application of the *last shot* rule. However, it should be pointed out that apart from the rare exceptions of these two cases, the general rule that French courts apply in battle of the forms cases is the *knock out* rule.

d. Regulations in other countries

The Swiss law follows the approach of the German Civil Code. The Swiss Code of Obligations contains the following provisions:

¹⁰⁰ Cass. com., July 11, 1995, Bull. Civ. IV., No. 211; JCP 1996 II 22583.

Article 1: “The contract is perfect when the parties have mutually an in similar terms manifested their intention. This manifestation can be express or implied.”

Article 2: “If the parties have agreed upon all the essential points, the contract is deemed concluded even if subsidiary points have been reserved.”

The law most of the Scandinavian countries reflects the same analysis. When a purported acceptance contains terms which differ from those of the offer, it is deemed to be a rejection of the offer and to constitute a counter-offer unless the offeree considers his response to conform to the offer and the offeror is aware of it. In that case, if the offeror does not want to be bound, he must give notice.¹⁰¹

In Japanese law, the solution is also similar. Under Article 528 of the Japanese Civil Code, if the offeree has accepted an offer conditionally or with modifications, he is deemed to have rejected the original offer and made a new offer himself. However, literal and precise compliance of an acceptance with the terms of the offer is usually not required. Generally an acceptance with minor modifications will not invoke the application of Article 528. Despite the possibility that this article may lead to a practical or theoretical confrontation, as seen in the battle of forms, it has not been the subject of either scholarly concern or actual dispute.¹⁰²

¹⁰¹ Honnold, *Uniform Law for International Sales under the 1980 United Nation Convention*, para. 167 p. 191 (1982).

¹⁰² Kitagawa, *Doing Business in Japan*, Vol. III, section 1.03[5](ii) (1982).

II. The UNIDROIT Principles approach

The UNIDROIT Principles of International Commercial Contracts have been published in May 1994 by the Rome-based International Institute for the Unification of Private Law (UNIDROIT), an intergovernmental organization established in 1926. The Working Group on the UNIDROIT Principles was found in 1980 and consisted of independent legal scholars of all major legal systems of the world. The UNIDROIT Principles are not binding law. Most legal writers agree that they can be characterized as a restatement of the law of international commercial contracts¹⁰³ and despite the controversial issue about the very existence, scope and content of a *lex mercatoria* - the possibility of applying supranational law to international legal relationships- it is approved that it exists and that the UNIDROIT Principles are a significant part of it. The purpose of the UNIDROIT Principles is described by the Preamble. Its text is:

These Principles set forth general rules for international commercial contracts.

They shall be applied when the parties have agreed that their contract be governed by them.

*They may be applied when the parties have agreed that their contracts be governed by general principles of law, the *lex mercatoria* or the like.*

They may provide a solution to an issue raised when it proves impossible to establish the relevant rule of applicable law.

They may be used to interpret or supplement international uniform law instruments.

They may serve as a model for national and international legislators.

¹⁰³ F. Bortolotti *The UNIDROIT Principles and the arbitral tribunals* 1 Uniform Law Review (2000) 141 at p.142.

Article 2.22

Where both parties use standard terms and reach agreement except on those terms, a contract is concluded on the basis of the agreed terms and of any standard terms which are common in substance unless one party clearly indicates in advance, or later and without undue delay informs the other party, that it does not intend to be bound by such a contract.

The regulation distinguishes between the conclusion of the contract itself and the content. The provision accepts the general possibility that a valid contract can be formed despite conflicting terms and conditions. Agreed essential terms become part of the contract. Where there is a disagreement about some clauses, the *knock out* rule applies, canceling contradictory clauses and excluding those which alter the terms of the offer or the acceptance. The *last shot* rule is explicitly rejected. The contract is to amend by the respective regulations of the UNIDROIT Principles or of the applying domestic law.¹⁰⁴ However, it is to note that only contradictory material alterations will be cancelled. According to Art. 2.11 UNIDROIT a disagreement of non-material terms leads to the result that the acceptance which contains non-material variations is deemed part of the contract.

The application of the UNIDROIT results by virtue of a presumption that the parties have agreed on the essential terms, and existing discrepancies around some standard terms may be disproved. The parties may exercise either of the two options. First, one party clearly communicates, after the conclusion of the contract, without undue delay,

¹⁰⁴ Peter Schlechtriem *Battle of the Forms in International Contract Law, Translation of "Kollidierende Geschaeftsbedingungen im internationalen Vertragsrecht"*, in: Karl-Heinz Thume ed., *Festschrift fuer Rolf Herber zum 70. Geburtstag*, Newied 1999, p. 36, 40, 41.

his intention not to be bound to the contract. Second, before the conclusion of the contract, one of the parties declares the same intention. This implies an obligation of an immediate indication of acceptance. Because of the fact that the general rules of the formation of the contract are completely operative it is necessary that the standard terms be accepted by the other party.¹⁰⁵ There is a presumption that the standard terms on both forms, which are not common in substance, have not been assented to. Therefore, they are displaced in accordance with the rules for determining the content of the contract.¹⁰⁶

Finally, it can be said that the *knock out* rule thus established in the UNIDROIT Principles is similar like the German and French *knock out* rules. However, there are two important differences. First, the UNIDROIT Principles do not answer the question of how to fill the gaps in the contract caused by elimination of differing terms; whereas both German and French laws provide that the gaps are to be filled by the applicable national law. Second, according to the Official Commentary, the intention not to be bound cannot be declared in advance in the standard terms under the UNIDROIT Principles. In contrast, under German and French law, objection against formation of the contract or the other party's terms can be raised in the standard terms. Under French law the objection does not even have to be explicit. The simple use of standard terms is sufficient.

¹⁰⁵ Maria del Pilar Perales Viscasillas “*Battle of the Forms*” Under the 1980 United Nations Convention on Contracts for the International Sale of Goods: A Comparison with Section 2-207 UCC and the UNIDROIT Principles, Pace International Law Review 1998, p.97, 109.

¹⁰⁶ *ibid.*

III. The European Principles approach

The European Principles solve the *battle of the forms* problem in a quite similar way.

Article 2:209 provides a special provision for conflicting general conditions:

(1) If the parties have reached agreement except that the offer and acceptance refer to conflicting general conditions of contract, a contract is nonetheless formed. The general conditions form part of the contract to the extent that they are common in substance.

(2) However, no contract is formed if one party: (a) has indicated in advance, explicitly, and not by general conditions, that it does not intend to be bound by a contract on the basis of paragraph (1); or (b) without delay, informs the other party that it does not intend to be bound by such contract.

(3) General conditions of contract are terms which have been formulated in advance for an indefinite number of contracts of a certain nature, and which have not been individually negotiated between the parties.

Like the UNIDROIT the PECL has decided to apply the *knock out* rule to solve the *battle of the forms* problem. According to article 2:209(1) PECL, the general conditions form part of the contract to the extent that they are common in substance; therefore, any conflicting terms would be expelled out of the contract.¹⁰⁷ However, following article 2:209(2) PECL, no contract is formed if one party: a) has indicated in advance, explicitly, and not by general conditions, that it does not intend to be bound by a contract on the basis of paragraph (1), i.e., there is a so-called "*clause paramount*"; or b)

¹⁰⁷ Maria Pilar Perales Viscasillas, Editorial remarks to: Guide to Article 19 – Comparison with Principles of European Contract Law (PECL), under <http://www.cisg.law.pace.edu/cisg/text/peclcomp19.html>.

without delay, informs the other party that it does not intend to be bound by such contract. This provision corresponds with the regulation under Article 2.22 UNIDROIT.

C. The CISG approach

The CISG does not govern specially *the battle of the forms* problem.¹⁰⁸ However, the drafters were well aware of this problem. The Belgian delegation for example suggested to create a fourth clause of Article 19 with the content that in the case of contradicting conditions a contract without terms and conditions should be concluded.¹⁰⁹ The Secretariat proposed a solution that provides for an effective acceptance when the additional or material terms are not materially different than the offer.¹¹⁰ Both proposals

¹⁰⁸ Zoi Valiotti *The Rules on Contract Formation under the Vienna Convention on Contracts for the International Sale of Goods (1980)* (2003), <http://www.cisg.law.pace.edu/cisg/biblio/valiotti.html>; Schlechtriem *Commentary* at 144.

¹⁰⁹ The suggested clause stated: *When the offeror and the offeree have expressly (or implicitly) referred in the course of negotiations to general conditions the terms of which are mutually exclusive the conflict clauses should be considered not to form an integral part of the contract.*; Moccia, *Fordham International Law Journal* 13(1989-1990), p. 661; A/CONF.97/C.1/L.87, OFFICIAL RECORDS 96, Art. 17 (19) Nr.3, OFFICIAL RECORDS 289, Art. 17 (19) Nr. 102.

¹¹⁰ Report of the Secretary-General: Formation and Validity of Contracts for the International Sale of Goods, [1977] 8 Y.B. UNCITRAL 90, 100, annex II, U.N. Doc. A/CN.9/128/1977. The relevant suggestion, contained in the proposed alternative text of Article 7, states:

(2)(a) However, a reply to an offer which purports to be an acceptance but which contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance unless the offeror objects to the discrepancy without delay. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

(b) If the offer and a reply which purports to be an acceptance are on printed forms and the non-printed terms of the reply do not materially alter the terms of the offer, the reply constitutes an acceptance of the offer even though the printed terms of the reply materially alter the printed terms of the offer unless the offeror objects to any discrepancy without delay. If he does not so object the terms of the contract are the non-printed terms of the offer with the modifications in the non-printed terms contained in the acceptance plus the printed terms on which both forms agree. Id. art. 7.

were rejected by the drafters. Thus, it is belonging to the courts and scholars to find a solution. Before I will introduce the respective different opinions I will outline the regulation of Article 19, which governs the deviate acceptance in general.

I. Regulation of the deviate acceptance in general

Article 19 CISG has the following purport:

(1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.

(2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

(3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.

Section 1 of Article 19 follows the *mirror image* rule which is based on an expectation that the original offeror, making an offer according to his own terms, cannot anticipate being bound on terms other than those that he presented.¹¹¹ However, according to Section 2 of Article 19 the *mirror image* rule should not be applied at all. It allows non-material terms to remain in a contract. “Although this is inconsistent with the traditional mirror image rule, it represents the same kind of attempts at mitigation made by courts applying equitable principles to alleviate the rule’s harshness.”¹¹²

Even if it seems impossible to lay down abstract rules distinguishing between material and immaterial differences, the list of Article 19 (3) makes it possible to draw clear lines for the majority of contractual clauses which are used in practice.¹¹³ Because this list contains the expression “among other things” strengthened by the phrase “are considered to alter the terms of the offer materially” it can be assumed the list is non-comprehensive.¹¹⁴ The courts and the scholars have tried to concretize the scope of application of Article 19 (3). With the view of the solution of the *battle of the forms* problem it is important to know about this concretion, especially the differentiation between material and immaterial deviations.

¹¹¹ See part B,I,1,a.

¹¹² Charles Sukur: *Harmonizing the Battle of the Forms: A Comparison of the United States, Canada, and the United Nations Convention on Contracts for the International Sale of Goods*, Vanderbilt Journal of Transnational Law (2001), at p.1495.

¹¹³ Peter Schlechtriem *Commentary on the Un Convention on the international Sale Of Goods (CISG)*, New York 1998, at p.140.

¹¹⁴ Among others Maria del Pilar Perales Viscasillas *Battle of the Forms and the Burden of Proof: An Analysis of BGH 9 January 2002*, Vindobona Journal of International Commercial Law and Arbitration (2002), No. 2, at p.110.

1. Differentiation between material and immaterial deviations

a. The determination of material and immaterial deviations according Article 19 (3) was the matter of several judgments. Following I will summarize some and give so a short overview about the interpretation of Article 19 (3) by the courts.

The U.S. Circuit Court of Appeal (9th Circuit) had to deal with additional or different terms relating, inter alia, to the settlement of disputes.¹¹⁵ A Canadian buyer and a French seller concluded a contract for the sale of wine corks, produced by the latter. The buyer contracted via telephone with a US Company based in California - a wholly owned subsidiary of the seller - for the total delivery of 1.2 million corks, agreeing on payment and shipping terms. The seller delivered the goods in eleven shipments to the buyer and for each delivery it sent an invoice with a choice of forum clause in favour of a French court written in French on its face, and further clauses in French written on the verso, among which another jurisdiction clause. The court held that this clause became not part of the contract because it was a clause relating to the settlement of disputes altering the terms of the offer materially.

The Oberlandesgericht Muenchen held that a change with respect of the time of delivery presents a material deviation according to Article 19 (1), (3).¹¹⁶ The decided case was the following: A German seller and an Italian buyer entered into a contract for the sale of eleven cars at a stated price. The cars were to be delivered by the end of October. About one month after conclusion of the contract, the seller informed the buyer in a

¹¹⁵ *Chateau des Charmes Wines Ltd. v. Sabate USA Inc., Sabate S.A.* (2003), under : <http://www.unilex.info/dynasite.cfm?dssid=2376&dsmid=13356&x=1>

¹¹⁶ *R. Motor s.n.c. v. M. Auto Vertriebs GmbH*, Number: 7 U 1720/94, under: <http://www.unilex.info/dynasite.cfm?dssid=2376&dsmid=13356&x=1>.

subsequent letter of the exact price for each car, option package included. In the same letter, it also informed the buyer that it would deliver the cars during 'July, August, September or October'. The buyer replied by sending back the seller's original letter and added in handwriting that it wanted to receive delivery of all cars that were on rush order by 'July or August and at the latest by August 15'. Some days after August 15, the seller informed the buyer that five of the ordered cars were ready for delivery and that the remaining six cars would be available by the beginning of October. By the end of October, the buyer notified the seller that it could not take delivery of the cars at that time due to substantial currency fluctuations and asked the seller to extend the delivery period until the currency situation returned to normal. The seller alleged damages for lost profits as a consequence of the buyer's breach of contract. The buyer commenced an action for restitution of the sum that the seller had obtained by executing a stand-by guarantee and asked for damages, alleging the seller's breach of contract for late delivery. The court held that reduction of the time of delivery from 'July, August, September or October' to 'July or August and at the latest by August 15' was a substantial modification of the terms of the offer. Therefore it constituted a counteroffer which the seller had not accepted pursuant to Article 19 CISG.

According to the opinion of the Oberlandesgericht Frankfurt a divergence of quality constitutes a material deviation in terms of Article 19 (3).¹¹⁷ The court had to decide about the subsequent facts: Following an offer from a German glass producer, an Italian buyer ordered a certain quantity of test tubes. The buyer's order differed from the seller's offer insofar as it contained a different term as to the quality of the glass. After an exchange of correspondence between the parties and without reaching an actual

¹¹⁷ *Parties Unknown* (1995), Number: 25 U 185/94, under:
<http://www.unilex.info/dynasite.cfm?dssid=2376&dsmid=13356&x=1>.

agreement about the glass type, the seller delivered test tubes made of the type of glass supposedly needed by the buyer. The buyer refused to pay the purchase price and the seller commenced an action to recover it. The Court held that a contract had not been validly concluded because the parties did not reach an agreement about the glass type. In the opinion of the Court, since the buyer's order modified the seller's offer as to the quality of glass, it did not constitute an acceptance of the seller's offer. Accordingly, no contract had been concluded between the parties (Article 19 (1) and (3) CISG).

The Oberste Gerichtshof Austria¹¹⁸ and the Cour d' Appel Paris¹¹⁹ had to decide about a deviation in the scope of the purchase price. While the Oberste Gerichtshof Austria held that this deviation was material the Cour d' Appel Paris was of the opinion that divergence relating the price was immaterial. In the by the Austrian court to decide case an Austrian buyer entered in negotiations with a German seller for the purchase of metal profiles. The buyer offered a purchase price of 28 Schilling per kilo which was the one contained in a framework contract existing between the parties. The reply by the German seller stating a price of 40 Schilling per kilo was accepted by the buyer in writing without any objections. The seller commenced an action against the buyer claiming the rest of the purchase price. The first instance Court granted the seller's action. The appellate Court held that the seller's reply, expressly accepted by the buyer, was a counter-offer according to Article 19 CISG because it materially altered the offer of the framework contract. The modification was considered to be material because of the big difference between the purchase price agreed upon in the framework contract and the one in the seller's reply.

¹¹⁸ *Parties Unknown* (2000), Number: 6 Ob 311/99z, under:
<http://www.unilex.info/dynasite.cfm?dssid=2376&dsmid=13356&x=1>.

¹¹⁹ *Sté Fauba France FDIS GC Electronique v. Sté Fujitsu Mikroelektronik GmbH* (1992), under:
<http://www.unilex.info/dynasite.cfm?dssid=2376&dsmid=13356&x=1>.

The Court d' Appell Paris had to decide about the following facts: a French buyer ordered electronic components from a German seller through the seller's liaison office ('bureau de liason') in France. The order specified that the final purchase price, previously indicated by the seller, would have to be revised taking into account a possible decrease in market prices, and that the goods would be delivered at certain dates, upon confirmation by the seller. The seller replied, specifying that the purchase price would have to be revised according to both the increase and decrease in market prices. In its statement, the seller also declared that it was not yet able to confirm the order with regards to some components ('item 5' of the order). Shortly after the parties agreed to modify the 'item 5' of the order, specifying the price and dates of delivery. Later, the buyer cancelled the order involving some other components. The seller objected to such partial cancellation, alleging that it had already dispatched the goods concerned for delivery. Upon delivery the buyer rejected the goods in excess and requested the seller to take back the said goods. The seller refused to take back the goods rejected by the buyer and demanded payment. The Court held that the first reply by the seller to the buyer's offer did not materially alter the terms of such offer and therefore constituted an acceptance pursuant to Article 19(2). The Court de Cassation¹²⁰ rejected the appeal but without arguing with questions of Article 19 (2).

Besides interpreting the term material deviation, the courts also tried to definite what an immaterial deviation is. In the opinion of the Austrian Oberster Gerichtshof¹²¹, a modification concerning the elements listed in Article 19(3) is to be considered material

¹²⁰ *Sté Fauba France FIDIS GC Electronique v. Sté Fujitsu Mikroelektronik GmbH* (1995), under: <http://www.unilex.info/dynasite.cfm?dssid=2376&dsmid=13356&x=1>.

¹²¹ Parties Unknown Number: 2 Ob 58/97m, under: <http://www.unilex.info/dynasite.cfm?dssid=2376&dsmid=13356&x=1>.

only if the circumstances of the case, the practices which the parties had established between themselves, the negotiations or the usages do not indicate otherwise. In particular, a modification of the offer concerning the quantity of the goods which is exclusively favorable to the offeror would have to be considered non material. Given that the offeror did not object, the contract should be validly concluded as it results from the modified acceptance.

The German Landgericht Baden-Baden¹²² held that the time-limit for notice of defects as fixed in the general conditions of the seller could not be considered a material modification of the terms of the offer in accordance with Article 19(2). A German buyer, who from 1982 had had a business relationship with an Italian seller, ordered tiles from the seller. The seller agreed in writing and referred to its general conditions, which provided 'Notice of defects are valid only if made within 30 days after the date of the invoice'. The buyer paid only a part of the price, alleging non-conformity of the tiles sent. The seller commenced action to recover the purchase price. The buyer counterclaimed for damages. The Court was of the opinion because of the in beginning mentioned reasons that as the buyer did not give notice of the non-conformity within 30 days after the date of the invoice the buyer had to pay the entire price and rejected the buyer's counterclaim.

b. It is to be assumed under the scholars that Article 19(3) provides only a disprovable presumption.¹²³ That is why it is possible that in an individual case a marginal alteration, for instance in the scope of quality and amount of the article, can be regarded

¹²² Parties Unknown Number: 4 O 113/90, under:
<http://www.unilex.info/dynasite.cfm?dssid=2376&cdsmid=13356&x=1>.

¹²³ Among others Peter Schlechtriem *Commentary on the Un Convention on the international Sale Of Goods (CISG)*, New York 1998. at p.140.

as an immaterial alteration according to Article 19(2).¹²⁴ The parties should always have the autonomy and the offeror the power to frame the terms of his offer, to characterize terms as not important, or to allow the offeree to make alternative proposals.¹²⁵ It is to agree with Schlechtriem if he says that “changes made to the advantage of the offeror (e.g. a greater discount, delivery free of charge to the buyer, an extension to the warranty period requested in the buyer’s offer) should all be capable of forming part of the contract without further formality and should not require an acceptance by the offeror.”¹²⁶

c. Article 19(3) contains only an enumeration of examples.¹²⁷ Above all, there are more matters which can be assumed as material deviations. The respective decision depends on the circumstances of the individual case.¹²⁸ Among others, insofar it is decisive the significance which particular modifications have for the contract and the parties, the size of the order, the relationship between the parties, the economic position etc.¹²⁹ Bianca/Bonell/Farnworth are of the opinion that clauses which declare oral agreements to be invalid or exclude oral amendments to a written contract (Article 29 (2)) will have to be regarded as material alterations.¹³⁰ Schlechtriem points out that “a divergent choice of law clause will always be a material alteration, assuming that it is not already a matter covered by the term ‘settlement of disputes’ in the list in Article 19 (3).”¹³¹ Furthermore, the inclusion of standard business terms presents in general a material

¹²⁴ *ibid.*

¹²⁵ *ibid.*, at p. 141.

¹²⁶ *ibid.*, at p. 140.

¹²⁷ *ibid.*, at p. 141.

¹²⁸ *ibid.*

¹²⁹ *ibid.*

¹³⁰ Bianca/Bonell/Farnworth *Commentary on the International Sales Law*, Milan 1987.

¹³¹ Peter Schlechtriem *Commentary on the Un Convention on the international Sale Of Goods (CISG)*, New York 1998, at p. 141.

alteration, regardless whether or not they belong to the matters listed in Article 19(3).¹³² Not important in this connection is the question if the alteration is disadvantageous for the offeror. Also disadvantageous alterations can be immaterial in an individual case because it is possible that the interest to conclude a contract is so big for the offeror that he would accept a detrimental modification.

2. Legal consequences

A material alteration to the terms of the offer is considered to constitute a rejection of the offer. Insofar, the rejection terminates the offer.¹³³ However, according to Article 19(1) an invalid acceptance is considered as a counter-offer. For this offer the same provisions (Article 14-17) are applicable like for the original offer. Insofar, the counter-offer can be withdrawn under the requirements of Article 15 (2). If the offer has reached the addressee it can be revoked according to Article 16.

The counter-offer needs an acceptance. In this respect Article 18 applies. Normally, the required acceptance will be shown by a conduct, in particular by starting with the performance.¹³⁴ If there is no reaction of the original offeror to the counter-offer, no contract will be concluded.¹³⁵

¹³² *ibid.*

¹³³ *ibid.*

¹³⁴ *ibid.*, at p. 142.

¹³⁵ *ibid.*

An acceptance with only immaterial deviations is a valid acceptance with the result that a contract will be concluded. Content of the contract will be the regulations of the offer as well as the immaterial alterations of the acceptance. However, the conclusion of a contract can fail because of an objection of the offeror according to Article 19(2). Insofar, the subject-matter of any objection must be taken into account an extracted if necessary. If it is only pointed against the other side's attempt to create the contract's contents, then the contract has been concluded, and only the contents remain to be determined.¹³⁶ If, however, the objection is pointed against the conclusion itself – maybe according to the conditional linking of a respective implementation or defense clause and as expressed by the wording “does not intend to be bound” – then the conclusion of the contract initially failed.¹³⁷ Whether the one or other objection was intended and expressed must be determined by interpretation of the objecting declaration. In this respect, Article 8 is helpful.¹³⁸ By the way, it is assumed that the possibility of objection according to Article 19(2) is not conforming with the purpose of Article 19 to ease the conclusion of a contract because the offeror can object the acceptance without having a reason.¹³⁹ The Netherland delegation suggested while drafting the Convention, in the event of an objection, the acceptor should be permitted to withdraw the modifications in order to save the contract. However,¹⁴⁰ this proposal was rejected. Vergne believes that a court will be inclined to scrutinize the objection in

¹³⁶ Peter Schlechtriem *Kollidierende Geschäftsbedingungen im internationalen Vertragsrecht*, Festgabe für Rolf Herber, Neuwied (1999), p.45.

¹³⁷ *ibid.*

¹³⁸ *ibid.*

¹³⁹ Francois Vergne *The “Battle of the Forms” under the 1980 United Nations Convention on Contracts for the International Sale of Goods*, American Journal of Comparative Law 1985, at 256.

¹⁴⁰ Official Records at 96.

the light of the interpretation rule of Article 7(1), which enjoins the courts to promote “the observance of good faith in international trade”.¹⁴¹

II. Solution of the *battle of the forms* problem

General speaking, terms and conditions become part of a contract if an offer and an acceptance conform in this regard. Deviations between offer and acceptance emerge if the terms and conditions are only part of the acceptance or if both parties refer in their statement to their own terms and conditions respectively. Such deviations are not problematic if the parties are conscious about the divergence, what means that they agree that a contract was not concluded. However, a problem arises if the contract was performed despite the deviated terms and conditions. Insofar it is questionable if a contract was concluded and if so what does the contract contain.

How I already mentioned in the beginning of the chapter “CISG approach”, there is no regulation of the *battle of the forms* problem within the CISG. Therefore, following I will introduce all the different solutions given by the courts and scholars.

¹⁴¹ Francois Vergne *The “Battle of the Forms” under the 1980 United Nations Convention on Contracts for the International Sale of Goods*, American Journal of Comparative Law 1985, at 256.

1. Judgments

The German Supreme Court (Bundesgerichtshof)¹⁴² confirmed that in application of the *knock out* doctrine, generally accepted in scholarly opinions, conflicting standard terms only do not become part of the contract. Furthermore, the court held that the evaluation of such a conflict must proceed, however, from a systematic interpretation of all the rules involved.¹⁴³ This decision was based on the following in a shortened form reproduced case: a German seller and a Dutch buyer entered into several contracts for the sale of powdered milk. The contracts were concluded by telephone and subsequently confirmed in writing by both parties. Both parties referred to their own terms and conditions. The buyer resold the milk to an Algerian and a Dutch company. Later it became clear that the sold powdered milk was inadequate. The buyer commenced an action for damages against the seller, alleging that the non-conformity of goods was caused by a defect that already existed at the time of the passing of risk, but that became apparent only after processing. Among others, the court had to decide about the question whether a contract between the parties was concluded and if so which terms and conditions became part of the contract. The Supreme Court agreed with the lower Court in assuming that a partial conflict of the parties' standard terms (*battle of the forms*) could not lead to a failure of the entire contract, since the parties, in performing the contract, had shown that such a conflict was not to be considered a material modification of their agreement (Article 19(1) and (3)). Thus, the liability of the seller for lack of conformity was governed by CISG, being both buyer's and seller's standard terms not applicable to the contract as far as non conformity was concerned.

¹⁴² *Parties Unknown* (2002) Number: VIII ZR 304/00, under:
<http://www.unilex.info/dynasite.cfm?dssid=2376&dsmid=13356&x=1>.

¹⁴³ *ibid.*

The German court Amtsgericht Kehl¹⁴⁴ was of the same opinion like the German Supreme Court. A German buyer and an Italian seller concluded a contract for the sale of fashion goods. Each of them relied on its own standard terms which contained, inter alia, a choice of law clause respectively in favor of German law and of Italian law. The buyer ordered the goods on the basis of a sample delivered by the seller. The buyer refused to pay the purchase price alleging that the goods did not conform with the contract as they did not possess the qualities which the seller had held out to the buyer. The buyer claimed that it had given the seller notice of non conformity by telephone one week after discovery. Six weeks after discovery the buyer sent a fax to the seller and declared the contract avoided. As to the choice of law clause in favor of Italian law contained in the seller's standard terms, the Court held that it had not become part of the contract. According to the Court, the fact that the parties had started performance of the contract showed their intention to be bound by it and by the terms already agreed upon as well as by any standard terms which were common in substance, with the exclusion of the conflicting terms such as the choice of law clauses. This meant that the parties had impliedly derogated from Article 19(1), which provides that a reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.

Two decisions of American Courts regarding the *battle of the forms* problem show that the courts have not found a unique solution for the problem yet. While the *Filanto*,

¹⁴⁴ *Parties Unknown* (1995) Number: 3 C 925/93, under:
<http://www.unilex.info/dynasite.cfm?dssid=2376&dsmid=13356&x=1>.

*S.p.A. v. Chilewich International Corp.*¹⁴⁵ case illustrates the room left in the CISG for court creativity in seeking out the intent of the parties, the *Magellan International Corp. v. Salzgitter Handel GmbH*¹⁴⁶ case suggests that the strict application of the mirror image rule may be more common.¹⁴⁷

The court in the first mentioned case had to decide about the following facts: a New York buyer entered into multiple contracts with an Italian seller in order to fulfill a master agreement that the buyer had concluded with a Russian. The Russian master agreement contained a clause which required disputes to be arbitrated in Moscow. The buyer partly performed one of the contracts and the seller commenced action in New York claiming breach of contract. The buyer sought a stay of the action and arbitration in Moscow pursuant to the arbitration clause in the Russian master agreement. The issue in this case was whether the arbitration clause in the Russian master agreement had been incorporated into the contract between the buyer and the seller. The U.S. District Court for the Southern District of New York ruled that this action was governed by the CISG. Although the court recognized that Filanto's acknowledgment would be "an acceptance with a proposal for a material modification" under UCC § 2-207, CISG Article 19(1) required it to be considered a counter-offer.¹⁴⁸ The court held that Chilewich did not implicitly accept this counter-offer through his non-objection under Article 19(2), because the arbitration clause has to be seen as a material alteration under Article

¹⁴⁵ *Filanto, S.p.A. v. Chilewich International Corp.* (1992), under: <http://www.unilex.info/dynasite.cfm?dssid=2376&dsmid=13356&x=1>.

¹⁴⁶ *International Corp. v. Salzgitter Handel GmbH.* (1999), under: <http://www.unilex.info/dynasite.cfm?dssid=2376&dsmid=13356&x=1>.

¹⁴⁷ Charles Sukurs: *Harmonizing the Battle of the Forms: A Comparison of the United States, Canada, and the United Nations Convention on Contracts for the International Sale of Goods*, *Vanderbilt Journal of Transnational Law* 2001, p. 1481-1515, at 1496.

¹⁴⁸ *ibid.*

19(3).¹⁴⁹ However, that subsequent oral negotiations evinced Filanto's assent to arbitration and it sent the case to Russia to settle the dispute as agreed. Thus, the court invoked Article 19.¹⁵⁰

The *Magellan International Corp. v. Salzgitter Handel GmbH*¹⁵¹ dealt with the question whether there had been an adequate offer and acceptance to constitute a contract. A United States distributor entered into negotiations with a German trader with a view to reaching an agreement for the purchase of steel bars from an Ukrainian manufacturer. In its first letter, Magellan provided Salzgitter with written specifications for the product, proposed pricing, and agreed to issue a letter of credit as payment. Salzgitter responded by proposing prices higher than Magellan suggested. Magellan then accepted those increases and memorialized the material terms of the deal in the form of two purchase orders. Salzgitter accepted those purchase orders, but sent its own confirmation form that differed from Magellan's purchase orders with respect to vessel loading conditions, dispute resolution, and choice of law. Although there was not an agreement about all facts yet Magellan opened the line of credit, but then was asked to amend the line of credit to permit inclusion of substitute guarantees of delivery. Magellan refused to change the letter of credit. For Salzgitter the refusal was a breach of contract. That is why they stopped the delivery. This provoked Magellan to withdraw the line of credit. Magellan sued Salzgitter because of failing to deliver. The Court held that although the CISG did not make specific reference to demanding requirements, the general structure of the CISG illustrated the "common sense" requirements of contract

¹⁴⁹ *ibid.*

¹⁵⁰ *ibid.*

¹⁵¹ *International Corp. v. Salzgitter Handel GmbH*. (1999), under:
<http://www.unilex.info/dynasite.cfm?dssid=2376&dsmid=13356&x=1>.

formation, performance by the plaintiff, breach by the defendant, and injury to the plaintiff.¹⁵² For the Court it was decisive whether there was a sufficient offer and acceptance to constitute a contract. The Court stated that although Magellan's purchase orders certainly constituted an offer, Salzgitter's response with price changes has to be seen as a counter-offer according to Article 19(1).¹⁵³ The Court found the subsequent exchanges by the parties to be continued offers and counter-offers that concluded with Magellan's performance when it issued the line of credit.¹⁵⁴ The Court did not discuss what the terms of the contract would be, but was content to find only that a contract existed based on Magellan's performance. In finding a contract-by-conduct, it the Court seems to have implied that the *last shot* doctrine would apply.¹⁵⁵ As such, the terms of the contract would include the provisions of its confirmation form sent by Salzgitter.¹⁵⁶ Also it is assumed¹⁵⁷ that CISG tries to mitigate the harshness of the *last shot* doctrine in contracts-by-conduct, the Court in *Magellan* applied the doctrine strictly.

After comparing these both decisions Sukurs comes to the conclusion “that the reality of Article 19 is its strict adherence to the *mirror image* rule and that efforts at mitigation are dependent on a court's discretion.”¹⁵⁸

¹⁵² *ibid.*

¹⁵³ *ibid.*

¹⁵⁴ *ibid.*

¹⁵⁵ Charles Sukurs: *Harmonizing the Battle of the Forms: A Comparison of the United States, Canada, and the United Nations Convention on Contracts for the International Sale of Goods*, *Vanderbilt Journal of Transnational Law* 2001, p. 1481-1515, at 1498.

¹⁵⁶ *ibid.*

¹⁵⁷ See in the following the opinions of several scholar.

¹⁵⁸ Charles Sukurs: *Harmonizing the Battle of the Forms: A Comparison of the United States, Canada, and the United Nations Convention on Contracts for the International Sale of Goods*, *Vanderbilt Journal of Transnational Law* 2001, p. 1481-1515, at 1498.

2. Opinions of legal writers

The majority of legal writers support the application of the *last shot* rule in *battle of the forms* cases under CISG. However, this application has been vigorously disputed. In fact, the *battle of the forms* problem has turned out to be one of the most debated topics within the discussion of the CISG. Some academics favor the application of the domestic law (under Section a.). Though, most of the scholars plead for the application of the CISG (under Section b. and c.). A number of them have made suggestions that are primarily designed to avoid the application of Article 19 and, thus, the *last shot* rule. Those suggestions range from interpretation of the parties' declarations as waiver of Article 19 (under Section c. bb.), limitation of Article 19 to those cases in which no performance has taken place (under Section c. cc.) and application of the general principles of the CISG (under Section c. aa.). As already shown above, none of these suggestions have prevailed in the courts.

a. Application of domestic law

aa. Some scholars assume that CISG gives no solution for the *battle of the forms* problem. Thus, conflicting general conditions is a question outside the scope of the Convention by virtue of Article 4. The respective domestic law should be applied.

Vergne is of the opinion that the application of the domestic law is required because the CISG is not able to determine the content of the contract in cases of a conclusion of a contract by respective performances despite contradictory terms and conditions.¹⁵⁹ He believes that in these cases two different variations are thinkable. The deviating acceptance is a counter-offer according to Article 19. If the counter-offeree does not get an acceptance, so the delivery of the articles can be seen as an acceptance of the original offer or as an acceptance of the counter-offer in each case with the result that the terms and conditions become part of the contract. “To escape such a labyrinth, a court may have no alternative other to refer to a domestic solution.”¹⁶⁰

Some authors see the history of CISG as a reason for their assumption that domestic law has to apply.¹⁶¹ As I have already mentioned, in the last stage of the legislative process of the Convention, the Belgian delegation proposed to add a new paragraph to the draft of the CISG in which the *battle of the forms* problem should be explicitly regulated. However, this proposal was ultimately rejected. This rejection shows, according to some scholars, that the drafters of CISG did not want to regulate the *battle of the forms* problem by the CISG.¹⁶²

bb. The most academics however reject the application of domestic law. They argue with a reference of Article 7 (2) that recourse of the national law requires that a matter is not governed by the CISG. But the CISG provides a sufficient regulation. Also the

¹⁵⁹ Francois Vergne *The “Battle of the Forms” under the 1980 United Nations Convention on Contracts for the International Sale of Goods*, American Journal of Comparative Law 1985, p. 233-258, at 256, 257.

¹⁶⁰ *ibid.*, at p. 257.

¹⁶¹ Among others: Jan Hellner, *The Vienna Convention and Standard Form Contracts*, International Sales of Goods 342 (1986).

¹⁶² *Ibid.*

historical argumentation is not convincing.¹⁶³ The proposal of the Belgium delegation does not mean that the *battle of the forms* is a gap in the Convention. It shows only that a different solution to the one in Article 19 was proposed, without success. Against the opinion of Vergne it can be argued that the delivery of the ordered articles is not an implicit acceptance of the original offer. According to Article 19, the deviating acceptance presents a rejection of the original offer. Thus, the original offer gets terminated (Article 17). An acceptance of the original offer by performance after that is impossible.

Although the majority of the scholars rejects the application of domestic law, within these academics it is very disputable in which way the CISG solves the problem.

b. Application of the *last shot* rule by application of Article 19

It is widely held that the *battle of the forms* problem is solved by Article 19.¹⁶⁴ Thus, if the contract is performed despite contradictory terms and conditions, it is assumed that a contract was concluded. For the determination of the content of this contract the *last shot* rule applies. As a result, when the reply to an offer has additional or different terms that materially alter the offer, it will be regarded as a rejection and a counter-offer. Such

¹⁶³ Maria del Pilar Perales Viscasillas “*Battle of the Forms*” under Nations Convention on contracts for the international sale of goods: a comparison with Section 2-207 UCC and the UNIDROIT Principles, 10 Pace Int’l L. Rev. (1997), at 111.

¹⁶⁴ among others: Henry D. Gabriel, *The Battle of the Forms: A Comparison of the United Nations Convention for the international sale of goods and the Uniform Commercial Code*, 49 Bus. Law. (1994), at 1058; Maria del Pilar Perales Viscasillas “*Battle of the Forms*” under Nations Convention on contracts for the international sale of goods: a comparison with Section 2-207 UCC and the UNIDROIT Principles, 10 Pace Int’l L. Rev. (1997), at 113.

a counter-offer may be accepted by acts of performance. Where there is such a counter-offer and acceptance by acts of performance, the terms of the contract will be those of the counter-offer¹⁶⁵.

c. Application of the *knock out* rule

There are a lot of scholars who feel uncomfortable with the application of Article 19 in respect of *battle of the forms* problems because they think it is not appropriate to decide an issue involving a *battle of the forms*. To avoid the application of the *last shot* rule they have developed different methods. Insofar, it can be distinguished at least three approaches: the arguing with the good faith thought of Article 7 (under aa.), the implicit exclusion of Article 19 (under bb.) and the partial application of Article 19. The borders between the different theories are fluent. However, all opponents of the *last shot* rule favor in general the solution which says that a contract with agreed terms is concluded. For the rest the contract is to amend.

aa. The good faith thought of Article 7

A couple of academics are of the opinion that any *battle of the forms* should be solved by the application of the general principles of the Convention (Article 7). This theory is based on the invalidity of acts of performance as an acceptance (Article 18) when there

¹⁶⁵ Maria del Pilar Perales Viscasillas “*Battle of the Forms*” under Nations Convention on contracts for the international sale of goods: a comparison with Section 2-207 UCC and the UNIDROIT Principles, 10 Pace Int’l L. Rev. (1997), at 113.

is a *battle of the forms*. The scholars assume that in that circumstance a valid acceptance cannot exist, and the contract is not concluded under the scope of the Convention.¹⁶⁶

Louis Del Duca and Patrick Del Duca state that the CISG does not give any answer where there is a *battle of the forms* conflict and a subsequent performance of the contract. Therefore, the general principles of the CISG and private international law must be looked at to resolve such questions.¹⁶⁷

The application of the general principles lead to the result that despite contradictory terms and conditions a valid contract will exist if the parties have agreed about the terms mentioned in Article 14, namely goods, price and quantity. To complete the rest of the elements of the contract, pursuant to the general principles mentioned in Article 7 (2) it is asserted that the contract will include the common of both set of forms, filling the rest with terms that the court deems appropriate. Insofar, the court has to take into the consideration all the circumstances of the case, the parties' interest, and the media.¹⁶⁸

In this connection Schlechtriem refers to a possible will of the parties.¹⁶⁹ According to his opinion it is possible "that interpretation of the parties' declarations, having regard in particular to their negotiations and practices as required by Article 8 (3), may allow the conclusion that the parties placed less weight on their terms of business or the reference to them than on the contract they wished to conclude, and therefore that they

¹⁶⁶ Frans van der Velden, *Uniform International Sales Law and Battle of Forms* in: Unification (Jean G. Sauveplanne eds., 1984), 233, at 243; Louis Del Duca and Patrick Del Duca, *Practice Under the Convention on International Sale of Goods (CISG): A Primer for Attorneys and International Traders (Part II)*, 29 Uniform Commercial Code L. J. (1996), at 122.

¹⁶⁷ Louis Del Duca and Patrick Del Duca, *Practice Under the Convention on International Sale of Goods (CISG): A Primer for Attorneys and International Traders (Part II)*, 29 Uniform Commercial Code L. J. (1996), at 122.

¹⁶⁸ Frans van der Velden, *Uniform International Sales Law and Battle of Forms* in: Unification (Jean G. Sauveplanne eds., 1984), 233, at 243.

¹⁶⁹ Peter Schlechtriem *Commentary on the Un Convention on the international Sale Of Goods (CISG)*, New York 1998, at p. 144, 145.

wished to be bound despite a patent or latent dissent concerning standard business terms and their incorporation.”¹⁷⁰

bb. The implicit exclusion of Article 19

Some academics unsatisfied with the result following the rule of Article 19 and thus reject the respective application, avoid the application of the *last shot* rule with an artificial¹⁷¹ theory. They assume that if the parties have agreed on the essential terms and have performed the contract in spite of the existence of contradictions between the terms, then there is a tacit exclusion of Article 19. Insofar, these scholars believe that the performance of the contract is the determining factor. Because of the performance they conclude that the parties have the application of Article 19 tacitly excluded, that a valid contract was concluded and that the parties excluded contradictory terms and conditions from the content of the contract. Schlechtriem is of the opinion that especially framework contracts between the parties, established practices or a relevant trade usage observed by the parties in accordance with Article 19 permitting appropriate interpretation of their declaration with respect of derogation from Article 19 and its rule that the last shot wins the battle of the forms.¹⁷²

¹⁷⁰ *ibid.*

¹⁷¹ In the same way Viscasillas describes this theory: Maria del Pilar Perales Viscasillas “*Battle of the Forms*” under Nations Convention on contracts for the international sale of goods: a comparison with Section 2-207 UCC and the UNIDROIT Principles, 10 Pace Int’l L. Rev. (1997), at p. 112.

¹⁷² Peter Schlechtriem *Commentary on the Un Convention on the international Sale Of Goods (CISG)*, New York 1998, at p. 145.

cc. The partial application of Article 19

In contrast to the theory of the implicit exclusion of Article some legal writers believe that the two questions, “Is there a contract?” and if so “What is its content?”, require separate regulations.¹⁷³ They think that Article 19 is typically applied only to situations where there are no acts of performance by the parties. If there is performance, than according to these scholars there is a problem not regarding the formation but determination of the content of the contract.¹⁷⁴ To determine which terms become parts of the contract they propose that the contract is built on common terms, as well as those supplied by the dispositive law, general principles of contract interpretation, business usage and good faith.¹⁷⁵

d. Comment

After the introduction of the approach that wants to apply domestic law in *battle of the forms* cases, it was already argued with a reference of Article 7 (2) that recourse of the national law requires that a matter is not governed by the CISG. However, the CISG provides a sufficient regulation. Especially because of this argument, the application of domestic law was denied. Thus, in the following is only to examine if the *last shot* rule

¹⁷³ Luis Diez-Picazo, *Condiciones Generales de la Contratación y Cláusulas Abusivas*, In Encuentros sobre Derecho Iberoamericano, Derecho Privado, Fundación BBV, 1995, p. 8; and Una nueva doctrina general del contrato? Anuario de Derecho Civil, 1993, tomo XLVI, fasc. IV, p. 1716 – cited in: Maria del Pilar Perales Viscasillas “*Battle of the Forms*” under Nations Convention on contracts for the international sale of goods: a comparison with Section 2-207 UCC and the UNIDROIT Principles, 10 Pace Int’l L. Rev. (1997), at 112, fn. 100.

¹⁷⁴ *ibid.*

¹⁷⁵ *ibid.*

or the *knock out* rule is the most appropriate approach to solve *battle of the forms* cases in the scope of application of the CISG. Within this examination it is only to ask what kind of solution the CISG as a law provides. By the way, it would be the false way to ask what kind of method would be as to benefits and disadvantages the best solution. The question is subject of a separate point.¹⁷⁶

Against the scholars who favor the application of the *knock out* rule within the CISG it can be argued in general that they only have the aim to get a special purpose and that they are in contradiction to the purport of Article 19 (1). Thus, the aim of uniform application of the CISG would be jeopardized.

In addition, each of the three described theories that refuse the *last shot* rule within the CISG is not free of criticism. Against the theory that argues with the good faith thought of Article 7 it can be said that the foundation of which this theory is constructed is not solid because Part II of the Convention contains express norms which can be applied.¹⁷⁷ The application of the general principles of the Conventions requires that there is a matter that is regulated by the Convention, but not expressly settled in the Convention (Article 7 (2)). Against the theory that assumes that if the parties have agreed on the essential terms and have performed the contract in spite of the existence of contradictions between the terms, then there is a tacit exclusion of Article 19, it can be argued that the contract performance by the recipient of the counter-offer indicates objective, subjective, and reasonable assent to an offer.¹⁷⁸ There is no reason to support

¹⁷⁶ See under “D. Comments as to the different approaches”

¹⁷⁷ Maria del Pilar Perales Viscasillas “*Battle of the Forms*” under Nations Convention on contracts for the international sale of goods: a comparison with Section 2-207 UCC and the UNIDROIT Principles, 10 Pace Int’l L. Rev. (1997), p. 112.

¹⁷⁸ *ibid.*

a tacit derogation from Article 19. Moreover, even if assuming that the *last shot* rule does not apply, this result is unfounded. Taking the same reasons, it could be deemed that the *first shot* rule or some other rule applies.¹⁷⁹ The thesis that suggests a partial application of Article 19 to solve the conflict of the *battle of the forms* exposes to the objection that this division in the application of the Convention rules is not justified. Only the rules of the Convention provide comprehensive regulation of the formative scheme of the contract and the traditional declarations of will in the form of offer and acceptance.¹⁸⁰ The exchange of forms is regulated in its entirety by the Convention.

Thus, it can be said that after examining the suggested solutions within the scope of application of the CISG, there is a merit to a rule that draws the contents of the contract from the terms of one of the parties tied to an acceptance by performance. Of course, it cannot ignore all the disadvantages of the *last shot* rule¹⁸¹. However, all alternative solutions are not compatible with the CISG. Moreover, the *mirror image* and *last shot* rule provide a certainty and legal security for the parties that is reinforced by the special configurations of paragraphs (1) and (3) of Article 19 when they list the elements that materially alter the offer. A mere comparison between the purchase and sale forms is sufficient to determine the concordance or discordance of the forms.

The agreement to the application of the *last shot* rule in the scope of the CISG does not mean that the rule is to apply absolutely in each case. In isolated cases it is possible that interpretations of the parties' declarations may allow the conclusion that the parties placed less weight on their standardized forms or the reference to them than on the

¹⁷⁹ *ibid.*

¹⁸⁰ *ibid.*

¹⁸¹ See under "D. Comments as to the different approaches"

contract they wished to conclude. Especially after an examination of the manner of the parties' negotiations and practices as required by Article 8 (3), it can be possible to prevent one party from using divergent standard terms as a means of escaping from a transaction which has become disadvantageous for him.¹⁸² That possibility of escape under the *mirror image* rule has, how already described, always been the subject of criticism of the *last shot* rule. Insofar it is necessary to examine, if the parties really agreed on the *essentialia negotii* of the contract. In this connection it is to take in to consideration for example framework contracts between the parties and established practices permitting appropriate interpretation of their declaration, or a relevant trade usage observed by the parties in accordance with Article 9 (1). If one can assume that the parties agreed on the *essentialis negotii*, it can be presumed that the conclusion of the contract is more important for the parties than the question after the valid standard forms. That does not lead to the exclusion of Article 19 but to an agreed waiver of the parties as to the contradictory standard terms. The contract than takes effect as one including the CISG rules and any parties' terms which agree. The examination of the manner of the parties' negotiations and practices has to be done also in cases in which one parties' contract has a defense clause, according to which – "in advance" – the declarator's intention to be bound depends on the implementation of his own and the invalidity of the other side's terms. Thus, the declaration to conclude the contract at the time of declaration is a conditional one, but the condition can later be dropped or waived which implies such intention.¹⁸³ Therefore, in cases where a longer period of time lies between the conclusion and the time of performance, claiming the invalidity

¹⁸² Heinrich Honsell *Kommentar zum UN-Kaufrecht*, Berlin (1997), p. 198; Peter Schlechtriem *Commentary on the Un Convention on the international Sale Of Goods (CISG)*, New York 1998, p. 144 f.; Wolfgang Wirtz, Hanns-Christian Salger, Manuel Lorenz *Internationales Einheitliches Kaufrecht: Praktiker-Kommentar und Vertragsgestaltung zum CISG*, Heidelberg 2000, p. 182.

¹⁸³ Peter Schlechtriem *Kollidierende Geschäftsbedingungen im internationalen Vertragsrecht*, Festgabe für Rolf Herber, Neuwied (1999), p. 44.

only shortly before performance due can also remain unsuccessful if the conduct at the time of conclusion permits the interpretation that the parties wanted to be bound. Examples would be preparations for the performance by one side, who then claims invalidity of the contract at a later stage, negotiations on further contracts without mentioning the diverging points, acceptance of parts of performances, etc.¹⁸⁴ By the way, the assumption of such a described will of the parties is valid especially with a view of Article 6.¹⁸⁵ Article 6 states that “the parties may exclude the application of this Convention, or subject to Article 12, derogate from or vary the effect of any of its provisions.”

As a consequence, I arrived at the conclusion that in *battle of the forms* cases that have to be solved according to the provisions of the CISG, the *last shot* rule is to apply basically. That means that the contract is concluded, either when one party, by express declaration, accepts the form sent by the other party or when there is a suitable act of performance by the recipient of the counter-offer in accordance with Article 18 (1) or (3) read in conjunction with Article 19. By way of exception despite an already started act of performance the *knock out* rule is to apply, if special circumstances suggest that the will of the parties is to waive as to the contradictory standard terms. The contract then takes effect as one including the CISG rules and any parties' terms which agree.

¹⁸⁴ Ibid.

¹⁸⁵ Heinrich Honsell *Kommentar zum UN-Kaufrecht*, Berlin (1997), p. 198.

D. The pro and cons the different approaches

The repetition of all approaches applied by the several law-systems has shown that it can be distinguished at least two methods: the *last shot* rule and the *knock out* rule. Both methods seek to enforce clauses in exchanged terms and conditions that do not contradict one another. Where there are “material” differences, however, the *knock out* rule differs from the *last shot* rule. If one clause contained in buyer’s and seller’s terms and conditions contains a difference that is regarded as material, the intent of the *last shot* rule is to enforce either the buyer’s version or the seller’s version, whereas under the *knock out* rule, the intent is to enforce neither. Under the *knock out* rule, the conflicting terms of the seller’s version and the buyer’s version are knocked out; and a new version of the clause is substituted as derived from the applicable governing law. In the following I will discuss all the pro and cons of both approaches.

Against the *last shot* rule it can be argued that it provokes an unjustified behavior of a party in cases of sales or purchases of goods in a price-volatile market. Forms exchanged which are materially inconsistent results in an application of the *mirror image* rule under circumstances in which the primary objective of the party applying this rule is to escape the consequences of a change in market conditions.¹⁸⁶ It is difficult unless impossible to find a reasonable basis for the *mirror image* rule. If a reply to an offer manifests an acceptance of all of the material terms of the offer but also contains a variant, immaterial term, why not permit the offeror to exclude that term from the contract by objecting to it rather than providing him with the power to preclude the

¹⁸⁶ John E. Murray, Jr. *An Essay on the Formation of Contracts and Related Matters under the United Nations Convention on Contracts for the International Sale of Goods*, *Journal of Law and Commerce* (1988), p. 43.

formation of the entire contract?¹⁸⁷ This view does not only benefit the offeree. It also protects the offeror from any, even immaterial, variant terms and still requires the reply to be characterized as an acceptance which is effective when it reaches the offeror and concludes a contract under the respective provisions.¹⁸⁸

A further big point of criticism as to the *last shot* rule is that the rule tends to favor the last party who sends his standard form. Thus, the rule can be regarded as a kind of arbitrary solution. Result of the application of the *last shot* rule in most of the cases is that the seller will be favored. The buyer on the other side has a vulnerable position. If the seller does not send the goods the contract will not be concluded, while if the buyer accepts the goods, he will have impliedly accepted the terms contained in the seller's form.

An advantage of the *last shot* rule is that it is very easy applicable in practice as a result of the willingness of both parties to recognize which declaration was the last one, with other words which declaration controls the contract terms. However, it has to be noted that each party, knowing the effect of the rule, can try, by all means, to have its form be the final form. It is a kind of "ping-pong" effect which leads to the practical consequence of increasing the volume of paper work that the parties exchange. It is to agree with Viscasillas who says that "such behavior - more appropriate in a tennis game than in real business – is anti-economical and places more of a premium on routines (matter of form) than business realities (matters of substance)."¹⁸⁹

¹⁸⁷ John E. Murray, Jr. *An Essay on the Formation of Contracts and Related Matters under the United Nations Convention on Contracts for the International Sale of Goods*, *Journal of Law and Commerce* (1988), p.50.

¹⁸⁸ *ibid.*

¹⁸⁹ Maria del Pilar Perales Viscasillas "Battle of the Forms" under Nations Convention on contracts for the international sale of goods: a comparison with Section 2-207 UCC and the UNIDROIT Principles, 10 *Pace Int'l L. Rev.* (1997), p. 118.

It is not justified if some opponents of the *last shot* rule argue that a comparison between forms produces in judges and arbitrators a kind of apathy in searching for solutions that might mitigate the rigidity of the *mirror image* rule. The case law, which I have introduced in some parts, illustrates that the opposite is true. In addition, the rigid application of the rule has been relaxed sufficiently to allow a difference between material and non-material terms. In this sense, it has been said that the *mirror image* rule exists only in text books.¹⁹⁰

Finally, it can be argued that the *last shot* rule has produced perverse responses from the business community. One such response is for business to flood each other with an unnecessarily high volume of standard forms with the hope of getting the *last shot*.¹⁹¹ It is also thinkable that because of the *last shot* rule in practice the front sides of the forms would be relatively blank, thus leaving space for the essence of the deal to be typed in, but the back sides would already be filled in with small print provisions designed to favor the drafter's side. As a result, the two contracts would match on the essence of the deal, such as price and quantity, but would differ on the pre-printed parts.¹⁹²

Also the *knock out* rule has been subject to wide criticism. It can be argued that the *knock out* rule does not favor one party but in some cases goes against the will of both parties. This point of criticism can illustrate the following cases: The seller's form includes a clause that determines that the period to give notice for the lack of conformity of the goods is four weeks; the buyer's form however states that the period is six weeks. By application of the *knock out* rule, the contradictory clauses cancel each

¹⁹⁰ Douglas Baird and Robert Wiesberg *Rules, Standards, and the Battle of the Forms: A Reassessment of 2-207*, 68 VA L.Rev. (1982), p. 1233.

¹⁹¹ Rick Rawlings, *The Battle of the Forms*, 42 Mod. L. Rev. (1979), p. 42.

¹⁹² Paul C. Blodgett *The U.N. Convention on the Sale of Goods and the "Battle of the Forms"*, Colorado Lawyer (1989), p.426.

other and the notice provision under a domestic law is therefore substituted. Insofar, it is possible that the applied statutory notice period is much shorter than the period governed by the forms of the both parties. According to Article 336 of the Spanish Commercial Code the notice period under Spanish law would be only four days. This result would be obvious unfair and not justified because the intention of the parties would be significantly undermined. Another example for undermining the intention of the parties and the bargain by applying the *knock out* rule is the case where the seller sells the buyer goods for a lower price than customary market price because of a restricted warranty. If the warranty is determined differently in the forms than according to the *knock out* rule a statutory warranty applies. Under special circumstances, this warranty can change the character of the intended bargain. In addition, the *knock out* rule can contradict the intention of the parties in cases where the both parties have agreed to arbitration but each has a different arbitration clause, perhaps with differences with respect to the place where the process will take place or other circumstances in connection to the arbitration. From a strict application of the *knock out* rule, the dispute would be decided before national courts.

The biggest benefit of the *last shot* rule is the certainty which the parties have as to the content of the contract. For both sides of the contract it is always possible to determine the exact terms of the contract. The *knock out rule* takes into consideration the real interests of the parties. It does not advantage only one party. The rule also notes that business people rarely read the boilerplate language on purchase forms.¹⁹³ Even if they

¹⁹³ Henry D. Gabriel, *The Battle of the Forms: A Comparison of the United Nations Convention for the international sale of goods and the Uniform Commercial Code*, 49 Bus. Law. (1994), p.1063; Charles Sukur: *Harmonizing the Battle of the Forms: A Comparison of the United States, Canada, and the United Nations Convention on Contracts for the International Sale of Goods*, Vanderbilt Journal of Transnational Law (2001), p. 1486.

do it, parties do not have the time to slow down negotiations to iron out minor differences between forms.¹⁹⁴ In most transactions, merchants agree to the basics, forms are exchanged, and contracts are concluded without regard for the differences in boilerplate. Both parties are relying on the existence of a contract despite their clashing forms.¹⁹⁵ It is said that “business would come to a halt” if parties were forced to read each other’s forms.¹⁹⁶ In addition, in place of a formal rule, the *knock out* rule substitutes a general standard under which the court is to look to the gist of the parties’ communications to determine if they have formed a contract. In so doing, the court is to overlook any express terms in those communications that do not fairly reflect the parties’ agreement.¹⁹⁷

Within the discussion which approach should be applied in *battle of the forms* cases, it has to be noted the international aspect. The *knock out* rule can function adequately as long as the decision-making authority is of the same general cultural background as the parties. For example, in a purely domestic contract action, the expectations of the parties, the fact-finder and the judge will be somewhat similar. Results are thus reasonably predictable despite the absence of black-letter law because everyone has a similar background – everyone speaks the same language. However, in the international setting, where is not certain who will act as the decision-making authority and the backgrounds of the parties may not be similar, delegating great discretion to the

¹⁹⁴ Charles Sukur: *Harmonizing the Battle of the Forms: A Comparison of the United States, Canada, and the United Nations Convention on Contracts for the International Sale of Goods*, Vanderbilt Journal of Transnational Law (2001), p. 1486.

¹⁹⁵ Henry D. Gabriel, *The Battle of the Forms: A Comparison of the United Nations Convention for the international sale of goods and the Uniform Commercial Code*, 49 Bus. Law. (1994), p.1063.

¹⁹⁶ Charles Sukur: *Harmonizing the Battle of the Forms: A Comparison of the United States, Canada, and the United Nations Convention on Contracts for the International Sale of Goods*, Vanderbilt Journal of Transnational Law (2001), p. 1486.

¹⁹⁷ Douglas Baird and Robert Weisberg *Rules, Standards, and the Battle of the Forms: A Reassessment of 2-207*, 68 VA L.Rev. (1982), p.1246.

decision maker to “do justice” presents greater dangers. Insofar, the application of the *last shot* rule mitigates this problem. It leads to a greater specificity in rule-making in order to control the decision-maker and increases certainty.

E. Conclusion

Above all, because of the fact that employees of the seller and the buyer will rarely, if ever, read and compare the printed terms, the *knock out* rule seems to me in general the most appropriate solution in *battle of the forms* cases. With this rule it can be avoided the already mentioned practical problems and injustices which arise with the application of the *last shot* rule. Especially, the *knock out* rule for varied acceptances has been that a contract is formed more often than under the *last shot* rule or the *mirror image* rule respectively since parties cannot back out simply because the acceptance is varied. Despite the of course existing points of criticism, the *knock out* rule solves the *battle of the forms* problem in a better way.

Nevertheless, the assumption of advantages of the *knock out* rule in comparison with the *last shot* rule does not lead to the conclusion that the *knock out* rule is to apply in CISG cases. Each respective approach of several academics cannot convince. Above all, according to the clear regulation within the CISG, especially the clear purport of Article 19, the *battle of the forms* cases has to be solved with the *last shot* rule.

In addition, despite the counted benefits of the *knock out* rule, the last-shot rule is a good approach in the international setting. The rule provides in the scope of

international contracts adequate protection to the parties in the majority of the cases and permits enterprises to more perfectly plan their standardized transactions. It leads to a greater specificity in rule-making in order to control the decision-maker and increases certainty.

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