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A Comparative View on 'Battle of the Forms' under the CISG and in the German and US American Experiences

by

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Abstract

Although the CISG has been in force more than 25 years, it does not have a uniform solution to the 'battle of the forms'. The courts have had to resolve these battles using the general rules and principles of the Convention. An analysis of CISG case law reveals that German courts and US courts approach the battle of the forms problem differently and, consequently, produce different outcomes. This article analyzes and compares the possible solutions to the battle of the forms. Based on this analysis of CISG case law, it is submitted that the (more) correct interpretation of the CISG rules will lead to the last-shot solution.

1 Introduction

This article addresses a much-debated issue: The so-called 'battle of the forms'.[1] Just about any business worth its salt outlines its business practices in standard terms and conditions that it attempts to incorporate into its contracts. A 'battle of the forms' occurs when two parties negotiating to see if they can reach an agreement on a contract both seek to incorporate their respective standard terms but fail to agree on which party's terms apply before they perform. That the parties do not agree on all terms creates a potential legal problem. The problem, however, often remains dormant until a conflict arises and one of the parties wants to invoke the terms of the contract. Before such a dispute can be resolved, two underlying questions must be answered: (1) Have the parties in fact formed a contract, and if so, (2) what is its content, that is, which party's terms apply, if any?

Even though these questions are the identical in every jurisdiction, they may receive fundamentally different answers. This article focuses on the battle of the forms under the United Nations Convention on Contracts for the International Sale of Goods 1980 (CISG).[2] The problem is that the Convention does not contain an express universal solution to the battle, and the courts have therefore had to decide cases using the CISG's general rules and principles. This has resulted in non-uniform interpretations. The CISG case law appears to be split between the so-called 'last-shot' and the 'knockout' solutions, or 'rules'. These two approaches, and to a lesser extent the 'first-shot' rule, are the most widely used solutions among the different jurisdictions of the world.

Although the CISG must be applied autonomously, it does not exist in a vacuum. This article therefore takes a comparative look at the solutions offered in different jurisdictions to shed light on the 'normal' understanding of the issue, as this may reflect on the understanding of the battle under the CISG. The article then focuses on the solutions that can exist under rules similar to those in the CISG, which offers a plain mirror image principle approach to offers and acceptances and, as mentioned, no express rules on the battle of the forms. In theory, only certain variants of the knockout and last-shot rules are conceivable under the Convention.

The circumstances leading to a battle of the forms and the legal understanding hereof are presented in section 2. Different implementations of the three solutions in various jurisdictions are presented in section 3. Section 4 focuses on battle of the forms under the CISG, and contains, *inter alia*, an analysis of case law from German and US courts. The solution to the battle of the forms under the CISG is discussed in section 5–both *de lege lata* and *de lege ferenda*.

1 *See*, *e.g.*, Gerhard Dannemann, *The "Battle of the Forms" and the Conflict of Laws*, *in* Lex Mercatoria: Essays on International Commercial Law in Honour of Francis Reynolds 199 (Francis Rose ed., 2000), who notes that 'One gains the impression that the number of learned articles exceeds the number of reported cases where such a "battle" has occurred'.

2 *United Nations Convention on Contracts for the International Sale of Goods,* U.N. Doc. A/CONF.97/18 (1981) (opened for signature Apr. 11, 1980) [hereinafter CISG]. A current table of Contracting States is available at the UNCITRAL website, http://www.uncitral.org/uncitral/en/uncitral\s\do5(t)exts/sale\s\do5(g)oods/1980CISG\s\do5(s)tatus.html (last visited Aug. 15, 2015).

2 Breakdown of the Battle of the Forms

2.1 *Social Norms–the Behaviours Leading to a Battle*

Battles of the forms result from how businesses contract with each other in practice.[3] Studies of commercial transactions show that businessmen interact with each other on the basis of social norms and often tend to ignore the requirements imposed by contract law.[4] A business wants to signal that it is trustworthy and flexible, that it is one you would trust to do business with again; whereas focusing on legal issues sends the opposite signal.[5] Making legal demands during negotiations can come across as confrontational and may jeopardize the deal. A business that gains a reputation for being 'difficult' may find its future opportunities limited. Self-interest, therefore, may motivate businesses to forgo making legal demands and focus on the commercial terms of the deal, such as price and quality–after all, a deal on uncertain terms can still be good business.

Although social norms take precedence, businesses will often try to use standard terms and conditions to secure a favorable legal position in the event of a dispute.[6] They may only negotiate openly on the commercial terms and attempt to incorporate their respective standard terms by reference in their correspondence. Aware that standard terms are not necessarily read, the parties apply this dual course of action in an attempt to keep the potentially troublesome legal issues off the radar during the negotiations.[7]

3 This section relies on studies of the contracting practices of manufacturers in Wisconsin, USA, and Bristol, UK, and the findings may therefore not necessarily transpose to sales contracts on a global scale. The interviewees in one of the studies, for example, repeatedly said 'that they would take much greater care when contracting with relatively unknown parties', Hugh Beale & Tony Dugdale, *Contracts between Businessmen: Planning and the Use of Contractual Remedies*, 2 Brit. J. L. & Soc'y 45, 47 (1975). Similarly, some interviewees reported that they put more effort into the contract negotiations for deals that were big and complex, or where there would be significant negative consequences if something went amiss, Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 Am. Soc. Rev. 55, 57 (1963); *see also* Daniel Keating, *Exploring the Battle of the Forms in Action*, 98 Mich. L. Rev. 2678, 2695-704 (1999-2000); Hugh Collins, Regulating Contracts 136-40 (first published 1999, photo. reprint 2005). Nevertheless, not only do these findings consistently show that businesses focus more on the commercial terms than on ensuring legal enforceability when negotiating a contract, they are also consistent with patterns that can be observed in the international cases.

4 *See* Macaulay, *Non-Contractual Relations*, *supra* note 3; Beale & Dugdale, *supra* note 3, at 50-51; Collins, *supra* note 3, at 127-48; Stewart Macaulay, *The Real and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules*, 66 MLR 44, 45-47 (2003); see also Jonathan Morgan, Great Debates in Contract Law 16 (2012), who, under English law, considers the studies 'ample evidence that businesses making contracts give no thought to contract *law*' (emphasis in original).

5 Macaulay, *Non-Contractual Relations*, *supra* note 3, at 61-5, 61: 'You can settle any dispute if you can keep the lawyers and accountants out of it. They just don't understand the give-and-take needed in business'; *see* Beale & Dugdale, *supra* note 3, at 47-9 and 52-9.

6 On the lawyers' role in drafting standard terms, *see* Collins, *supra* note 3, at 149-73; *see also* on the considerations of businesses in: Grant G Murray, *A Corporate Counsel's Perspective of the 'Battle of the Forms'*, 4 Can. Bus. L. J. 290 (1979-80).

7 *See* Beale & Dugdale, *supra* note 3, at 49-50; *accord* Ole Lando, *Kampen om formularen*, Ugeskrift for retsvæsen B 1, 2 (1988).

Once the parties have reached an agreement on the openly negotiated terms, however, they may believe they have a fully formed and binding contract and commence performance–even though they have yet to settle the question of applicable standard terms. This creates an unfortunate legal uncertainty, but if the transaction goes smoothly, this uncertainty does not become a problem. Problems only emeerge in the event of a dispute between the parties. If the dispute cannot be settled amicably and one or both parties decides to invoke its legal rights under the 'contract', it becomes necessary to determine whether the parties had actually formed a valid contract, and if so, on what terms.

2.2 *The Battle From a Legal Perspective*

In both attempting to incorporate their respective standard terms and at the same time acting as if they do not exist, the parties rely on a flexibility not found in the law. One of the cornerstones of contract formation is the so-called *mirror image principle*, which prescribes that a contract can only emanate from an offer that is met by *complete mirrored assent*. In other words, to form a legally binding contract, an acceptance must signal an unconditional acceptance of all the terms of the offer, both the individually negotiated terms and the standard terms.[8] A purported acceptance of (standard) terms that are different from those in the offer will in most cases 'break the mirror';[9] it therefore does not function as an acceptance, but operates instead as a rejection of the offer and a counteroffer on its own terms.[10]

Although the parties may not perceive their negotiations as an exchange of counteroffers, that is, legally speaking, the consequence of applying the mirror image principle.[11] Parties that agree on the negotiated terms but also attempt to incorporate their respective standard terms into their agreement do not at any time express the required *complete mirrored assent* and have in principle failed to conclude a contract.

When the parties initiate performance without settling the issue of conflicting standard terms, they may be acting on the basis of what they perceive to be a contract. However, in (strict) legal sense that contract may never have come into being–and it is, consequently, unenforceable. Even

8 Rudolf B Schlesinger, Formation of Contracts: A Study of the Common Core of Legal Systems, Vol 1, 125-26 (1968); *see also* Reinhard Zimmermann, The Law of Obligations: Roman Foundations of the Civilian Tradition 559-69 (1996); Arthur Taylor von Mehren, *The Formation of Contracts*, *in* International Encyclopedia of Comparative Law, Vol VII/I, Ch 9, paras 157-60 (2008).

9 *See infra* note 42 on Art 19 CISG.

10 *See generally and comparatively* Hyde v. Wrench, [1840] EWHC Ch J90, (1840) 49 ER 132; Lov nr. 242 om aftaler og andre retshandler på formuerettens område [Aftaleloven][Contracts Act], May 8, 1917, as amended, § 6(2) (Den.); Bürgerliches Gesetzbuch [BGB][Civil Code], Aug. 18, 1896, Reichsgesetzblatt [RGBl.] 195, as amended, § 150(2); Art 19(1) CISG; Art 2:208 of the Principles of European Contract Law; Art 2.1.11(1) of the UNIDORIT Principles of International Commercial Contracts.

11 Minor and insignificant deviations are in most cases tolerated under the various implementations of the principle. Some legal systems have exempted conflicting standard terms from the mirror image principle; *see infra* sections 3.2 and 3.4.

so, the existence of a contract can be difficult to dispute once performances have been exchanged. The content of this contract is not necessarily discernible outright, and may have to be determined by the courts; how that can be done is addressed in the following sections.

3 Solving the Battle

3.1 *Introduction*

We saw in section 2 that there is very little correlation between how businesses act and the legal understanding of their conduct. This discrepancy gives rise to the question; if the contract is a creation of the parties' agreement, what happens if the parties believe they did agree but, in fact, never fully did? The answer must follow from the applicable law. The contract derives its enforceability from the law, and the courts are bound by the law; it is therefore not within the court's discretion to simply pick any answer it considers preferable.[12]

A limited number of solutions and variations are operable under the laws of the various national jurisdictions. In practice, only three solutions are seen: the *first-shot rule*, the *last-shot rule*, and the *knockout rule*. These solutions also have variations that require varying degrees of special regulation to apply.

3.2 *'First Shot'*

The first-shot rule prescribes that the terms of an offer prevail over those contained in a modified acceptance. A first-shot solution is, for example, prescribed in Art 6:225(3) of the Dutch Civil Code:[13] 'Where offer and acceptance refer to different general [standard] conditions, the second reference is without effect, unless it explicitly rejects the applicability of the general conditions as indicated in the first reference'.[14]

12 Examples of inapplicable solutions are for example found in suggestions that are based on considerations from law and economics: Victor P Goldberg, *The 'Battle of the Forms': Fairness, Efficiency, and the Best-Shot Rule*, 76 Or. L. Rev. 155, 166-71 (1997); Giesela Rühl, *The Battle of the Forms: Comparative and Economic Observations*, 24 U. Pa. J. Int'l Econ. L. 189, 221-24 (2003); Omri Ben-Shahar, *An Ex-Ante View of the Battle of the Forms: Inducing Parties to Draft Reasonable Terms*, 25 Int'l Rev. L. & Econ. 350, 357-63 (2005); as here, Naudé *in* Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC) Art 2.1.22 para 13 (Stefan Vogenauer & Jan Kleinheisterkamp eds., 2009), who rightly points out that these solutions cannot be justified by interests of the parties either; *see also* Keating, *supra* note 3, at 2710-11.

13 Burgerlijk Wetboek [BW][Civil Code].

14 Translation: Mahé *in* The Principles of European Contract Law and Dutch Law: A Commentary 123 (Danny Busch et al. eds., 2002); *See also id.* at 123-5; Naudé *in* Commentary on the UNIDROIT Principles, *supra* note 12, at Art 2.1.22 para 11; Ingeborg Schwenzer, Pascal Hachem & Christopher Kee, Global Sales and Contract Law para 12.29 (2012).

A rule such as this negates the mirror-image principle by changing the effect of a modifying acceptance so that it does not operate as a rejection and a counteroffer, but rather actually functions to conclude the contract on the terms of the offer. This effect can only be avoided if the terms of the offer are expressly rejected by the acceptance. Because the approach departs from the mirror image principle, it requires another (independent) legal basis or rule, like Art 6:225(3) of the Dutch Civil Code, to apply. Such provisions are rare in practice, though, and that may explain the limited acceptance of the first-shot solution.

The first-shot solution will not be addressed in further detail because the CISG does not establish independent basis for application of the rule in lieu of the mirror image principle.

Another example of a (possible) first-shot solution can arguably be found in section 2-207 of the United States' Uniform Commercial Code (UCC), which, along with section 2-206 UCC, establishes the effects of offers and acceptances in the formation of a contract.[15] Section 2-207 is, however, a hybrid of different solutions. Depending on the circumstances, the parties, and the differences between the terms of the offer and acceptance, it may proviode for a first-shot, a last-shot, or a knockout result.

Section 2-207(1) UCC establishes the general conditions for contract conclusion, and states that a 'definite and seasonable expression of acceptance' operates as an acceptance, even if it contains terms that are additional to or different from those contained in the offer.[16] The rule differs fundamentally from the mirror image principle by allowing modified acceptances to conclude a contract. Section 2-207(2) defines the content of the resultant contract. If the parties are merchants, the *additional* terms in the acceptance become part of the contract if the offeror (1) did not expressly limit acceptance to the terms of the offer, (2) the additional terms do not change the terms of the offer materially, or (3) the offeror does not expressly object to the additional terms.[17] In other cases, the additional material terms in the acceptance are to be construed as proposals for additions to the offer, and, therefore, only make their way into the contract if they are accepted by the offeror–if he does not, the acceptance is, nevertheless, still effective and the terms of the offer prevail (first shot).[18] It is unclear, however, whether section 2-207(2) also applies to *different* or

15 *See* Arthur Taylor von Mehren, *The 'Battle of the Forms': A Comparative View*, 38 Am. J. Comp. L. 265, 277-90 (1990); Mehren *in* International Encyclopedia of Comparative Law, *supra* note 8, at paras 168-74; Edward J. Jacobs, *The Battle of the Forms: Standard Term Contracts in Comparative Perspective*, 34 Int'l Comp. L. Q. 297, 307-12 (1985); Howard O Hunter, Modern Law of Contracts § 4:24 (2013th ed.); Lary Lawrence, Lawrence's Anderson on the Uniform Commercial Code §§ 2-207:2 and 5 (3rd ed.); *see also* Sieg Eiselen & Sebastian K Bergenthal, *The Battle of Forms: A Comparative Analysis*, 39 Comp. & Int'l L.J. S. Afr. 214, 230-34 (2006).

16 The modifying acceptance can be made conditional on assent to the additional or different terms; *see* Clayton P. Gillette & Steven D. Walt, Sales Law: Domestic and International 76-84 (2nd ed. 2009); E. Allan Farnsworth, Farnsworth on Contracts § 3.21 (3rd ed. 2004); Hunter, *supra* note 15, at § 4:25; Lawrence, *supra* note 15, at §§ 2-207:26-30.

17 *See* Gillette & Walt, *supra* note 16, at 79-83; *see also* in detail Lawrence, *supra* note 15, at §§ 2-207:75-101.

18 *See* Lawrence, *supra* note 15, at §§ 2-207:116-21; Litton Microwave Cooking Products v. Leviton Mfg Co, Inc, 15 F.3d 790 (8th Cir. 1994); Jacobs, *supra* note 15, at 311; Farnsworth, *supra* note 16, at § 3.21; Gillette & Walt, *supra* note 16, at 78-79.

modifying terms (as opposed to additional). The UCC Official Comment to section 2-207 favours a knockout solution in that case, while some scholars argue in favor of a first-shot solution.[19]

To complicate the situation even more, section 2-207(3) UCC establishes another possible means of contract formation. If sections 2-207(1) and (2) do not lead to a contract but both parties recognize the existence of one through their conduct, section 2-207(3) UCC holds a contract to be formed and stipulates a knockout rule to resolve which terms govern the contract.[20] The applicability of section 2-207(3) depends on the concrete facts of the case and the view of the court, and thus may leave the legal position somewhat unclear.[21]

3.3 'Last Shot'

The last-shot rule follows the mirror image principle to the letter and constitutes the logical extension of the principle.[22] When the battle of the forms, legally speaking, consists of a string of counteroffers, each met by and rejected by a modifying acceptance, there will be one non-rejected and operable (counter) offer at the end–this is the 'last shot'.[23] The counteroffer deemed to be the final offer is incorporated into the contract when the recipient either performs the contract (implying acceptance through its conduct) or fails to object to the modified terms. These two variants of the last-shot solution are discussed in the sections that follow.

3.3.1 Acceptance of the Last Shot Inferred From Conduct

The most widespread variant of the last-shot rule involves an implied acceptance. In this construct the final offer is deemed have to been accepted by the offeree through its conduct–typically through an act of performance, such as shipping the goods or paying the purchase price.[24] For example, if a seller responds to an incoming order by shipping the goods ordered, that in itself will count as the seller's acceptance of the terms in the buyer's purchase offer. This variant of the

19 Official Comment to UCC § 2-207 para 6, *reprinted in* Lawrence, *supra* note 15, at § 2-207:1; *see also* the discussion in James J White & Robert S Summers, Uniform Commercial Code (5th ed. 2000) para 1-3(1) and (3); Farnsworth, *supra* note 16, at § 3.21; Mehren, *Battle of the Forms*, *supra* note 15, at 286-87; Hunter, *supra* note 15, at §§ 4:29-30; Lawrence, *supra* note 15, at §§ 2-207:102-13.

20 Farnsworth, *supra* note 16, at § 3.21; Hunter, *supra* note 15, at § 4:31; Mehren, *Battle of the Forms*, *supra* note 15, at 287-90; Lawrence, *supra* note 15, at §§ 2-207:134-6, 157-60; Mehren *in* International Encyclopedia of Comparative Law, *supra* note 8, at para 174; Eiselen & Bergenthal, *supra* note 15, at 234-35.

21 Official Comment to UCC § 2-207, *supra* note 19, at para 7.

22 Henry Deeb Gabriel, *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. 1053, 1054 (1993-1994); Naudé *in* Commentary on the UNIDROIT Principles, *supra* note 12, at Art 2.1.22 para 2; similarly Michael P Van Alstine, *Consensus, Dissensus, and Contractual Obligation through the Prism of Uniform International Sales Law*, 37 Va. J. Int'l L. 1, 67 (1996-1997); Andrea Fejós, *Battle of the Forms under the Convention on Contracts for the International Sale of Goods (CISG): A Uniform Solution?*, 11 Vindobona J. Int'l Com. L. & Arb. 113, 118 (2007).

23 *See supra* section 2.2.

24 The form of the implied acceptance is not important unless the contract is subject to form requirements.

last-shot rule is therefore, in principle, based on the recipient's consent rather than on the action of the offeror.[25]

An example can be found in English contract law.[26] In *British Railroad v Crutchley*,[27] the recipient of a shipment of whiskey stamped the seller's delivery note with a stamp that included the recipient's own terms, thereby making a counteroffer, which was deemed accepted by the seller when its driver subsequently handed over the goods to the recipient.[28] In a later case, *Butler Machine Tool*,[29] the seller signed and returned a tear-off acknowledgment slip that was attached to the buyer's order form and thereby accepted the offer it represented.[30] More recently, the last-shot rule was reaffirmed in *Tekdata v Amphenol*,[31] *Trebor v ADT*,[32] and *Claxton v TXM*.[33]

However, even where the last-shot rule applies, acceptance of the final offer cannot be inferred from performance when there is *concrete evidence of a contrary intention*. See, for example, *Lidl v Hertford*[34] and *GHSP v AB Electronic*.[35] In those cases, both parties expressly and repeatedly refused to contract under the other party's standard terms, and the courts were therefore unable to attribute an implied acceptance to either party. The judges consequently ruled that no standard terms had been incorporated.

25 Burghard Piltz, *Standard Terms in UN-Contracts of Sale*, 8 Vindobona J. Int'l Com. L. & Arb. 233, 242 (2004).

26 This variant is sometimes also called the *common law approach*, *see* Jacobs, *supra* note 15, at 297; *see also* the discussion on English law in Morgan, *supra* note 4, at 14-27. The last-shot rule also applies in Scandinavian contract law, Kasper Steensgaard, Standardbetingelser i internationale kontrakter § 6 paras 27-39 (2010).

27 British Railroad Services v. Arthur v. Crutchley Ltd, [1968] 1 All ER 811 (CA).

28 *Id.* at 274, 281-82. Edwin Peel, Treitel on the Law of Contract 2-20 (13th ed. 2011); also comparatively François Vergne, *The 'Battle of the Forms' under the 1980 United Nations Convention on Contracts for the International Sale of Goods*, 33 Am. J. Comp. L. 233, 239-43 (1985); Burt A Leete, *Contract Formation under the United Nations Convention on Contracts for the International Sale of Goods and the Uniform Commerical Code: Pitfalls for the Unwary*, 6 Temp. Int'l & Comp. L. J. 193, 209-10 (1992); Gabriel, *supra* note 22, at 1055-56; Jacobs, *supra* note 15, at 297-307.

29 Butler Machine Tool Co Ltd v. Ex-Cell-O Corporation (England) Ltd, [1977] EWCA Civ 9, [1979] 1 WLR 401.

30 *Id.* at 403. In his ratio, *Lord Denning* questioned the last-shot rule, but applied it nonetheless; *Id.* at 404-5. Compare Peel, *supra* note 28, at para 2-021; and comparatively Vergne, *supra* note 28, at 241-43; Mehren, *Battle of the Forms*, *supra* note 15, at 272-74; Rühl, *supra* note 12, at 193-96. A similar reasoning was expressed by in Muirhead v. Industrial Tank Specialities Ltd, [1985] EWCA Civ 16, [1986] QB 507, 530 (Goff LJ): 'Strictly speaking, the [seller's] form of acknowledgement constituted a counter-offer, which was accepted when [the buyer] took delivery of the pumps delivered pursuant to the order placed on the [seller]'.

31 Tekdata Interconnections Ltd v. Amphenol Ltd, [2009] EWCA Civ 1209, [2010] 2 All ER (Comm) 302.

32 Trebor Bassett Holdings Ltd v. ADT Fire & Security Plc, [2011] EWHC 1936 (TCC), [2011] BLR 661 [152]-[157] (Coulson J); appeal on other grounds dismissed, Trebor Bassett Holdings Ltd v. ADT Fire & Security Plc, [2012] EWCA Civ 1158; *but see also*, however, the more flexible approach in J Murphy & Sons Ltd v. Johnston Precast Ltd (Formerly Johnston Pipes Ltd), [2008] EWHC 3024 (TCC) [80]-[89] (Coulson J).

33 Claxton Engineering Services Ltd v. TXM Olaj-És Gázkutató KFT, [2010] EWHC 2567 (Comm), [2011] 2 All ER (Comm) 38 [51]-[52] (Gloster J).

34 Lidl UK GmbH v. Hertford Foods Ltd, [2001] EWCA Civ 938 [19]-[25] (Chadwick LJ).

35 GHSP Inc v. AB Electronic Ltd, [2010] EWHC 1828 (Comm), [2011] 1 Lloyd's Rep 432 [35]-[38] (Burton J).

The last-shot rule is applicable under US *common law*.[36] It has lost most of its impact today, however, because most sales contracts are now governed by the UCC 2-207 (see section 3.2).[37]

It can be problematic, though, to infer acceptance of a counteroffer from the performance of the recipient. While active conduct provides a very strong basis for concluding that a party indeed wants to contract, it does not necessarily establish an intention to also accept the other party's standard terms. A performance act may, on the one hand, express assent to the terms in the counteroffer or it may, on the other hand, simply indicate that the party already considers itself bound by a valid complete contract and that it is simply fulfilling its obligations accordingly. The studies mentioned in section 2.1 confirm that businesses often regard agreement on the individually negotiated terms as a sufficient basis for performance, and then act under their perceived obligations.

Moreover, the mirror image principle presumes that the offeror read and understand all the terms of the purported acceptance. If, in practice, the recipient does not read the terms in the modified acceptance, it will not perceive it as a counteroffer and therefore cannot express assent to it. The act of performance is thus not necessarily conclusive evidence of that party's acceptance of the counteroffer. The basis for the last-shot solution may therefore be specious in the concrete case.[38]

3.3.2 Express Rule–Last Shot by Silence or Inaction

The other variant of the last-shot rule places the onus of rejecting a modified acceptance on the recipient. According to this variant, if a recipient who does not want to bound by the terms of a counteroffer remains silent, ie does not expressly object to its terms, those terms are, nevertheless, incorporated into the contract. While this variant avoids some of the problems associated with implied acceptances based on conduct, it requires a dedicated provision to give this effect to silence.[39]

36 Restatement (Second) of Contracts §§ 57, 59 (1981); Farnsworth, *supra* note 16, at § 3.21; Hunter, *supra* note 15, at § 4:23; Vergne, *supra* note 28, at 243; *e.g.* Poel v. Brunswick-Balke-Collender Co of New York, 111 N.E. 1098 (1916); critical John E Murray Jr, *The Standardized Agreement Phenomena in the Restatement (Second) of Contracts*, 67 Cornell Int'l L. J. 735, 744-761. (1981-82); *See also* on the mirror image principle Hunter, *supra* note 15, at §§ 4:11-3.

37 C Itoh & Co (America) Inc v. Jordan Intern Co, 552 F.2d 1228 (7th Cir. 1977); Litton Microwave Cooking Products v. Leviton Mfg Co, Inc, 15 F.3d 790, 794 (8th Cir. 1994); *but see also* the criticised Roto-Lith Ltd v. F P Bartlett & Co, 297 F.2d 497 (1st Cir. 1962); *see* Mehren, *Battle of the Forms*, *supra* note 15, at 280-81; Ved P. Nanda & David K .Pansius, Litigation of International Disputes in U.S. Courts § 12:28 (2nd ed. 2005); Eiselen & Bergenthal, *supra* note 15, at 232.

38 *See* Van Alstine, *supra* note 22, at 66-79.

39 Silence generally does not amount to an acceptance, *see generally* Schlesinger, *supra* note 8, at 131-40; Mehren *in* International Encyclopedia of Comparative Law, *supra* note 8, at para 34, some general exceptions to the principle are described from a comparative point of view in paras 35-7; *see also* Ernst Rabel, Das Recht des Warenskaufs: Eine rechtsvergleichende Darstellung Vol 1, 94-101 (1936); *see also* Art 18(1) CISG.

The most clearcut example of a silence-based last-shot provision was found in sections 33(2) and (3) of the Law on International Commercial Contracts[40] of the former German Democratic Republic. This section states that if both parties employ standard terms and conditions, the terms introduced last and uncontested will apply.[41]

A (very) limited silence-based last-shot rule is also found in Art 19(2) CISG, which provides that acceptances that alter the terms of the offer *immaterially*[42] will determine the contract unless the recipient objects, orally or in writing, without 'undue delay'.[43] In the CISG, purported acceptances that materially differ from their corresponding offers are considered rejections and, consequently, counteroffers, as prescribed in Art 19(1) (see section 4 below).

3.3.3 Assessment

Because the last-shot rule is the logical extension of the long-established mirror-image principle, it is the traditional solution to the battle of the forms. But nowadays, businesses often disregard the classic offer and acceptance formulae of contract law, and so the last-shot rule does not always conform with modern contracting practices.[44] If, for example, the parties reach an agreement through successive, point-for-point negotiations and/or jointly sign a document, it can be all but impossible to identify the individual offers and acceptances. And neither party can reasonably be said to have been the sole offeror of the entire agreement complex.[45]

As noted earlier, a weakness of the last-shot solution concerns the inference of acceptance from conduct. It can be problematic to infer an acceptance from conduct that does not unequivocally

40 Gesetz Über internationale Wirtschaftsverträge [GIW] [Law on International Commercial Contracts], Feb. 5, 1979.

41 *See* Rudolph *in* Gesetz über internationale Wirtschaftsverträge § 33 paras 8-12 (Dietrich Maskow & Hellmut Wagner, eds., 3rd ed. 1984).

42 Standard terms almost always contain provisions that regulate issues which are considered material in the sense of Art 19. The examples of material terms enumerated in Art 19(3) dovetail almost completely with those reported as 'most used' in a sociological survey of the use of standard terms in the Netherlands; Floor AJ Gras, Standaardkontrakten: Een rechtssociologische analyse 130 (1979).

43 Commentary on the Draft Convention on Contracts for the International Sale of Goods, prepared by the Secretariat (Mar. 14, 1979) UN Doc A/CONF 97/5 [hereinafter Secretariat Commentary] Art 17 paras 9-10. Article 19(2) was for example applied in Oberlandesgericht Koblenz [OLG][Higher Regional Court] Mar. 1, 2010, Neue Juristische Wochenschrift-Rechtssprechungs-Report [NJW-RR] 1004, 2010 (Ger.), in which an offer to sell an asphalt machine was only altered immaterially, when the prospective buyer in its acceptance had written 'non' on top of a proposal to add a mobile storage tank to the order–this could also have been seen as a separate offer, though; *see also* Landgericht Baden-Baden [LG][Regional Court] Aug. 14, 1991, CISG-Online No. 24, *available at* http://www.cisg-online.ch (last visited Aug. 15, 2015) [hereinafter CISG-Online].

44 *See supra* section 2.1.

45 *See also* Mehren, *Battle of the Forms*, *supra* note 15, at 270; Eiselen & Bergenthal, *supra* note 15, at 221-22.

express assent.[46] This concern is cured under the silence-based last-shot variant, but that rule requires an express legal basis, such as a dedicated rule, to ensure that silence can be construed as an acceptance.

> A related concern relates to agency. For example, an employee who physically receives and signs for the goods or who issues the payment may not have the authority to conclude contracts on the company's behalf.[47] The question is often whether a company is bound if the concluding action is performed by a non-management employee. Such situations must be dealt with individually.

The last-shot rule has also been criticised for producing unbalanced outcomes. Both parties contribute to the legal uncertainty, but the last shot is an all-or-nothing approach that awards one party everything and the other party nothing.[48] Rather than accommodating the interests of both parties, the last-shot rule ensures one party's legal security and makes its legal position under the contract predictable. While the rule does give each party an equal the ability to protect its legal position by insisting on having the last shot, such insistence may lead to a counterproductive ping-pong-like exchange of correspondence (though it may also motivate the parties to address the standard terms expressly and thereby end the battle before the performances commence).[49] The last-shot rule may, consequently, produce arbitrary results, as it can be somewhat random which party makes the final offer before the contract is executed–although the seller's order confirmation often constitutes the final offer in practice.[50]

3.4 *'Knock Out'*

The knockout solution is based on a completely different approach to contract conclusion than the 'shot' rules. The knockout rule does not require *complete mirrored assent* as long as there is agreement on the essential contract terms (*essentialia negotii*) and both parties have an intention to contract (*animus contrahendi*). In essence, the approach holds that when the parties are convinced that a contract exists and perform it, this in itself should be recognized as an enforceable basis for contract formation under the law–notwithstanding any unresolved issues. The content of the contract is determined from the common core of the offers and acceptances exchanged during

46 *See supra* section 3.3.1; *see also* Mehren, *Battle of the Forms*, *supra* note 15, at 270-72; Eiselen & Bergenthal, *supra* note 15, at 222; Kaia Wildner, *Art. 19 CISG: The German Approach to the Battle of the Forms in International Contract Law: The Decision of the Federal Supreme Court of Germany of 9 January 2002*, 20 Pace Int'l L. Rev. 1, 6-7 (2008).

47 Jacobs, *supra* note 15, at 302-3.

48 *See* John O Honnold, Uniform Law for International Sales under the 1980 United Nations Convention para 170.3 (Harry M Flechtner ed., 4th ed. 2009).

49 *See* Schwenzer, Hachem & Kee, *supra* note 14, at para 12.28; Eiselen & Bergenthal, *supra* note 15, at 221; María 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*, 10 Pace Int'l L. Rev. 97, 118 and 148 (1998); Wildner, *supra* note 46, at 6-7.

50 *See also* Perales Viscasillas, *Battle of the Forms*, *supra* note 49, at 116-17.

the negotiations, which the parties are deemed to agree on, and the non-conforming and conflicting terms are 'knocked out'.

The knockout solution is therefore retroactive in nature.[51] Once the parties have concluded a contract, the legal nature of the documents that were exchanged during the negotiations are redefined. The previously obsolete counteroffers transform into generic expressions of intent that the courts use to determine the common core and extent of the parties' agreement.

Because the knockout rule sidesteps the mirror image principle, another basis for contract conclusion must be established. Two variants manifest when we look comparatively at the different implementations of the knockout rule. One variant is for the applicable law to stipulate a dedicated rule on how conflicting standard terms are to be reconciled. The other way is to apply an alternative approach to contract formation and then decide the content of the contract through interpretation. These two possibilities are presented in the following sections.

3.4.1 As an Express Rule

The prevailing trend in international contract law is to include an express knockout provision. This option is adopted in for example Art 2.1.22 UPICC,[52] Art 2:209(1) PECL,[53] Art 6:204 ACQP, Art II.-4:209(1) DCFR,[54] and Art 39 of the proposed CESL.[55] Although the wordings of the different rules vary, their core message is the same: A contract is recognised to have been concluded even though it contains conflicting standard terms as the rule knocks out the conflicting terms. These provisions eliminate any concerns over whether an offer was actually accepted or not and whether an enforceable contract was formed.

51 *See also* Ingeborg Schwenzer & Florian Mohs, *Old Habits Die Hard: Traditional Contract Formation in a Modern World*, 2006 Internationales Handelsrecht [IHR] 239, 244, who note that application of Art 19 is restricted to the negotiation phase. This would circumvent the effects of the provision and enable the application of a knockout rule once the contract has been executed.

52 Naudé *in* Commentary on the UNIDROIT Principles, *supra* note 12, at Art 2.1.22 paras 7-9, 14; Eiselen & Bergenthal, *supra* note 15, at 227-30.

53 Ole Lando & Hugh Beale (eds.), Principles of European Contract Law: Parts I and II, Art 2:209, cmnt C (2000); Mahé *in* The Principles of European Contract Law and Dutch Law, *supra* note 14, at 122-23; *see also* María del Pilar Perales Viscasillas, *Battle of the Forms, Modification of Contract, Commerical Letters of Confirmation: Comparison of the United Nations Convention on Contracts for the International Sale of Goods (CISG) with the Principles of European Contract Law (PECL)*, 14 Pace Int'l L. Rev. 153, 156-58 (2002).

54 Draft Common Frame of Reference (DCFR): Full Edition Art II.-4:209, cmnt C (Study Group on a European Civil Code, Research Group on the Existing EC Private Law (Acquis Group) eds., 2009).

55 Evelyne Terryn *in* Common European Sales Law (CESL): Commentary Art 39 paras 6-7 (Reiner Schulze ed., 2012); Caroline Harvey & Michael Schillig, *Conclusion of Contracts*, *in* The Common European Sales Law in Context: Interactions with English and German Law 284-86 (Gerhard Dannemann & Stefan Vogenauer eds., 2013).

Express knockout rules are also found in section 2-207(3) UCC (see section 3.2) and in section 2-207 of the 2003 proposal for a revision of Article 2 UCC, which did not gather sufficient support among the states and has now been withdrawn.[56]

3.4.2 Consensus as an Alternative Means of Contract Formation

The other variant of the knockout rules employs an alternative approach to contract formation. An example is the case of domestic German law. Historically, section 150(2) of the German Civil Code,[57] which expresses the mirror image principle, was considered to mandate a last-shot approach to the battle of the forms.[58] This position was challenged, however. And, in a 1973 landmark decision, the German Supreme Court, ruled that it would violate good faith ('*Treu und Glauben*') to negate a contract that the parties not only agreed existed but already had performed, even though the parties still disagreed on some terms.[59] After the decision, German courts do not resolve battles of the forms by trying to identify a decisive, final offer and its corresponding acceptance. Instead, the courts attempt to ascertain whether the parties had a mutual intention to contract.[60]

Under this approach, a 'meeting of the minds' is sufficient to conclude a contract. The approach is based on the *consensus principle*, which provides that the agreement of parties is the underlying basis for the creation of legally binding obligations.[61] The principle entails that nothing but an agreement is required for a contract to come into existence; it does not prescribe how that consensus must be reached. The 'offer and acceptance' model is, in principle, just one possible way of arriving at an agreement. By applying the consensus principle directly, German law circumvents

56 *E.g.* Nanda & Pansius, *supra* note 37, at § 12:18.

57 Bürgerliches Gesetzbuch [BGB][Civil Code], Aug. 18, 1896.

58 Ludwig Raiser, Das Recht der allgemeinen Geschäftsbedingungen 224-25 (first published 1935, photo. reprint 1961); Peter Schlechtriem, *The Battle of the Forms under German Law*, 23 Bus. Law. 655, 656-59 (1967-68); Werner Flume, Allgemeiner Teil des bürgerlichen Rechts: Das Rechtsgeschäft Vol II, 672-77 (3rd ed. 1979); Ernst A Kramer, *Battle of the Forms: Eine rechtsvergleichende Skizze mit Blick auf das Schweizerische Recht*, *in* Gauchs Welt: Recht, Vertragsrecht und Baurecht: Festschrift für Peter Gauch zum 65. Geburtstag 495-96 (Pierre Tercier et al., eds., 2004); Mehren, *Battle of the Forms*, *supra* note 15, at 290-94; Rühl, *supra* note 12, at 201-05; Horst Locher, Das Recht der allgemeinen Geschäftsbedingungen 54-55 (3rd ed. 1997); Eiselen & Bergenthal, *supra* note 15, at 236.

59 Bundesgerichtshof Sep. 26, 1973, 61 BGHZ 282; *see also* Oberlandesgericht Cologne Mar. 19, 1980, 1980 Der Betrieb [DB] 924; Mehren *in* International Encyclopedia of Comparative Law, *supra* note 8, at paras 175-6; Rühl, *supra* note 12, at 202-4; Eiselen & Bergenthal, *supra* note 15, at 236-39; Filippo Ranieri, Europäisches Obligationenrecht: Ein Handbuch mit Texten und Materialien 364-66 (3rd ed. 2009).

60 *E.g.* Schlosser *in* J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch: Recht der Schuldverhältnisse §§ 305-310; UKlaG (Recht der Allgemeinen Geschäftsbedingungen) (2013) § 305 BGB paras 205-9.

61 This principle is the basic foundation for the creation of volitional obligations in most legal systems–though the individual expressions vary, *see* Mehren *in* International Encyclopedia of Comparative Law, *supra* note 8, at paras 5-8, 31-61. One exception is Nordic contract law, in which the so-called *promise theory* holds offers to be binding one-sided promises in themselves, *see* Rabel, *supra* note 39, at 70-71.

the difficulties associated with the mirror image principle and disposes of the strict requirement of an unqualified acceptance.[62]

The content of the contract is subsequently determined by filling the gaps left by the knocked out terms with the relevant underlying rules, cf Sections 154(1), 155, and 306(2) BGB.[63]

> Austrian law contains a similar solution. The battle of the forms is also perceived as a question of contract formation through consensus. When the parties go through with the deal, they express that they do not want their disagreement to hinder their contract; the conflicting terms are removed while the remainder live on as the contract ('*die Restgültigskeitstheorie*').[64] In Swiss law, the prevailing opinion also appears to be knockout based on *consensus*.[65]

3.4.3 Assessment

The knockout rule appears more aligned with modern contracting practices as it reflects the parties' actual conduct during and after negotiations.[66] Contract conclusion follows either from an express provision or by an alternative means of contract formation. Establishing that a contract exists is largely a question of evidence and that is relatively unproblematic as long as there is a manifest *animus contrahendo* and an agreement on the *essentialia negotii*.[67] Determining the content of the contract, however, is less straightforward. Whether the knockout rule is worded negatively (by providing that conflicting terms be knocked out) or positively (by providing that the terms common in substance make up the content), it leaves the court with a relatively wide discretion in its subsumption of the facts, which can be understood and applied in more ways. That leaves room for uncertainty.

The first step in determining the content of the contract is to identify the overtly incompatible terms in the parties' standard terms and knock them out. This can often be done expeditiously, especially if the knockout rule provides that the terms common in substance are incorporated into the contract. It is less easy to do, however, with provisions on issues that are regulated in only one set of terms. Are they in or out? Standard terms are drafted to derogate from the underlying law, so a drafter's choice not to regulate an issue in standard terms can be interpreted either as an

62 *See* Flume, *supra* note 58, at 676-77.

63 Section 306 BGB was drafted with a consumer protective scope, but applies also to commercial contracts, § 310(1) BGB e.c.

64 Oberster Gerichtshof [OGH][Supreme Court] Jun. 7, 1990, 1991 Juristische Blätter [öJBl] 120 (Austria); *see also* Ranieri, *supra* note 59, at 366-67; Kramer, *supra* note 58, at 496-97.

65 Marc P Bührer, AGB-Kollisionen, 'the Battle of the Forms' und weitere Probleme beim Verweis auf Allgemeine Geschäftsbedingungen 55-56 (1987); Bücher *in* Basler Kommentar: Obligationenrecht I Art 1 OR, paras 66-9 (Heinrich Honsell, Nedim Peter Vogt & Wolfgang Wiegand eds., 4th ed. 2007); Kramer, *supra* note 58, at 503-6.

66 *See supra* section 2.1.

67 This is not the case, for example, if one party refuses to contract under other terms than its own.

implicit incorporation of the underlying rule, or, as a waiver of weighing in on the issue, which in practice amounts to an implied acceptance of the other party's term through silence. Which it is must be decided in each case.

Second, when the existence of the contract rests on the parties' 'will to contract', cancelling a term that one party considers essential does, in principle, jeopardize the entire contract by vitiating the *animus contrahendo*. This situation can arise if a party chooses to balance an unfavorable term with a favorable one in an effort to stay competitive. If a seller, for example, compensates for an exemption clause with a significant price rebate, and the former is knocked out by a conflicting provision in the buyer's terms (for example a guarantee), then the seller's low price and the default liability regime in the applicable law will apply. The resulting contract is one to which the seller would have never agreed to voluntarily. Essentially, this means that the parties may not attribute equal weight to all the individual provisions, so knocking out certain terms may create a paradoxical solution in which removing a certain conflicting term eliminates the consensus on which the contract is based.[68]

What remains is to fill the gaps resulting from the knockouts.[69] Does the underlying law apply exhaustively as a gap filler, or may implied or hypothetical terms be extrapolated from the contract and circumstances? The knockout is presumed to produce more balanced outcomes, but the underlying law does not always balance the interests of the parties. This is for example the case if the parties are pulling in the 'same direction' away from the law's (presumably balanced) position.[70] To illustrate: if free on board (FOB) and delivered duty paid (DDP) clauses knock each other out of a CISG contract, the risk will pass in accordance with Art 31(a) CISG, and that might be earlier than under both clauses. The buyer may therefore be better off with the seller's FOB clause.[71] The extent to which the knockout rule gives courts discretion to fill in the contract gaps through interpretation and, for example, to rule that the risk passes in accordance with the earliest possible time of the two clauses, is not regulated in the express rules mentioned in section 3.4.1.

> A similar issue may arise in relation to clauses that conform and conflict at the same time. Take for example arbitration clauses that name different venues–the conflicting venue nominations are knocked out, but does the underlying agreement to arbitrate survive? Compare for example *Lea Tai Textile v Manning Fabrics*,[72] in which the court knocked out both arbitration clauses under Section 2-207(2)(c) UCC, and *Lory Fabrics*

68 *E.g.* Naudé *in* Commentary on the UNIDROIT Principles, *supra* note 12, at Art 2.1.22 paras 8-9.

69 *See also* Schroeter *in* Commentary on the UN Convention on Contracts for the International Sale of Goods (CISG) Art 19 paras 38-51 (Ingeborg Schwenzer & Peter Schlechtriem eds., 3rd ed. 2010).

70 Ben-Shahar, *supra* note 12, at 355, notes that the background rules will often be significantly closer to the buyer's forms than to the seller's.

71 A similar situation may, for example, also arise in relation to shorter or longer notice periods and prices in fluctuating markets. This uncertainty is illustrated by an award from CIETAC, 25 May 2005, *available in English at* http://cisgw3.law.pace.edu/cases/050525c1.html (Zheng Xie & Jing Li) (last visited Aug. 15, 2015), although the case was decided already on the fact that in the case, no record of an agreement satisfied the applicable writing requirement.

72 Lea Tai Textile Co, Ltd v. Manning Fabrics, Inc, 411 F.Supp. 1404, 1406-7 (S.D.N.Y. 1975).

> *v Dress Rehearsal*,[73] in which the court found that only the issue of venue was conflicting and knocked that out, while the agreement to arbitrate survived because 'arbitration was clearly intended'.[74]

So, the knockout rule aligns more with modern contract practices and avoids the possibility of a specious implied acceptance. It may to produce a reasonable and balanced solution to legal uncertainties which both parties have created by failing to negotiate standard terms and conditions[75] It does, however, give rise to a number of issues that are not always adequately addressed in the applicable rules. Moreover, the approach sacrifices legal security and predictability of the shot solutions by giving courts a wide discretion over contract content. Under the knockout rule it can be all but impossible to determine the content of the contract before a court has had its say.

3.5 *Discussion: The Fundamental Differences Among the Solutions to the Battle of the Forms*

The last-shot solution and the knockout solution presented in this article appear at first glance to be distinguishable based on their outcomes. The shot rules incorporate a complete single set of terms, whereas the knock-out rule consolidates a set of 'common' terms. Nevertheless, upon closer inspection, it becomes apparent that the differences among them are more deeply rooted.

A good starting point for a comparison of the different solutions is perhaps found in the two questions that battles of the forms prompt: (1) has a contract been concluded, and if so (2) what is its content, that is, which party's terms apply, if any? Regardless of which solution is applied, the courts rule in favour of the the existence of a contract if the parties have exchanged performances. But, as explained earlier, the last-shot and knockout solutions operate with different understandings of contract formation; the concrete reasoning of the court is therefore determined by the solution being applied. These differences stand out, in particular, when we consider the two solutions based on the mirror image principle, namely 'last shot based on an implied acceptance'

73 Lory Fabrics, Inc v. Dress Rehearsal, Inc, 434 N.Y.S.2d 359, 362-63 (1980).

74 The efficacy of arbitration clauses is also dependent on Art II of the New York Convention, *e.g.* Oberlandesgericht Frankfurt Jun. 26, 2006, CISG-Online No. 1385, *available in English at* http://cisgw3.law.pace.edu/cases/060626g1.html (Jan Henning Berg and Daniel Nagel trans.) (last visited Aug. 15, 2015); *see also* Lando & Beale, *supra* note 53, at Art 2:209 cmnt C ill 2; J. Clark Kelso, *United Nations Convention on Contracts for the International Sale of Goods: Contract Formation and the Battle of the Forms*, 21 Colum. J. Transnat'l L. 529, 554-5 (1982-1983), who argues that the last-shot solution at least would ensure the agreement to arbitrate; Perales Viscasillas, *Battle of the Forms*, *supra* note 49, at 120, who argues that the difference in venue would be immaterial in the sense of Art 19(2) CISG; Goldberg, *supra* note 12, at 161, who notes that an agreement to arbitrate could be discernible from the record, that would, however, in some cases fall short of the requirements under Art II(1) of the New York Convention.

75 Mehren, *Battle of the Forms*, *supra* note 15, at 292; Naudé *in* Commentary on the UNIDROIT Principles, *supra* note 12, at Art 2.1.22 para 14. Both citing Oberlandesgericht Cologne Mar. 19, 1980, 1980 Der Betrieb [DB] 924, in which both parties were found to have lost their right to rely on their respective terms as neither party had sought to clarify the situation; *see also* Wildner, *supra* note 46, at 9-11.

and 'knock out through consensus'.[76] Both utilize the same facts to establish the existence of contract, but they do so for different reasons. An act of performance, for example, would under the last-shot rule constitute an implied acceptance, and under the knockout rule, the same act would operate as an expression of an intent to contract. This difference is a consequence of the different qualifications (characterizations) of the battle of the forms as a legal problem. Is the battle of the forms a question of offer and acceptance or a question of an alternative means of contract formation through consensus?

The qualification of the battle not only decides the means of contract conclusion to answer the first question, but also extends to the second question by establishing the basis for determining content. If the contract is concluded by an (implied) acceptance, the corresponding offer is adopted in full. This acceptance cannot later be redefined to be a generic expression of intent to contract on only some of the terms of the offer, and that rules out a knockout outcome. Accordingly, if the contract arises from mutual expressions of intent to contract, its content is decided by the extent of the parties' agreement. Consequently, neither set of terms can be wholly incorporated at the expense of the other as is the case under the last-shot rule.

Consequently, qualification, contract conclusion, and determination of the content of the contract are interrelated. The qualification of battle of the forms determines the approach to contract conclusion–whether the court will look for assent or consensus. In turn, the means of contract conclusion dictates how the content of the contract is determined. The two questions asked at the beginning of this article are therefore not independent from each other, as they rest on the same underlying premise–and that premise is impliedly decided by the court's approach to the problem.[77]

The qualification of the battle is in essence outcome-determinative. But how does one arrive at a qualification? That depends on the applicable law. And it appears from the foregoing analysis that when the mirror image principle applies, it points towards the last-shot rule, and that a separate basis, such as an express provision or another legal qualification, is required to reach another result.

76 *See supra* sections 3.3.1 and 3.4.2 respectively.
77 In fact, both these questions are answered simultaneously under the last-shot rule.

4 Battle of the Forms under the CISG

4.1 *An Unregulated Issue?*

I now turn to the battle of the forms under the CISG. The drafting history is not conclusive on what the CISG solution is, but it shows that the issue is governed by the Convention.[78] Delegates at the diplomatic conference at which the Convention was negotiated and finalized could not, however, agree on what the solution should be (and many wished the issue had been taken up earlier in the drafting process). A proposal to add a knockout solution to Article 19 was rejected by a small margin. Some delegates who opposed the proposal felt that it conflicted with basic contract law, and that Articles 19 CISG already provided a solution to the battle of forms.[79] Whereas this may suggest that Art 19 does indeed provide a last-shot solution, the drafting history arguably can also be read as showing that the drafters deliberately left the question open for the courts to decide.

The absence of a dedicated provision on the battle of forms in the CISG means that the courts have to apply the CISG general rules and principles. This does not, however, empower judges to choose whichever rule they are able to construct and find preferable. The Convention must be applied consistently in all the contracting states, cf Art 7(1); all courts must apply a *uniform* solution.

Developing a uniform solution based on the principles underlying an international code is difficult, however. National courts are sometimes prone to read autonomous international codes in the light of domestic principles, which often gives rise to varying solutions within the international regime.[80] The risk that domestic influences may gain traction is amplified when not only the text but also the underlying legal qualification determine the outcome–as is the case in the battle of the forms.[81] The potential for the spillover of domestic solutions into the CISG case law is addressed later in this section.

78 *See* Eiselen & Bergenthal, *supra* note 15, at 218-19; María del Pilar Perales Viscasillas, *Contract Conclusion under CISG*, 16 J. L. & Com. 315, 341. (1996-97); Steensgaard, *supra* note 26, at § 6 para 73-119; Magnus *in* J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch: Recht der Schuldverhältnisse Wiener UN-Kaufrecht (CISG) (2012) Art 19 CISG para 20; Ferrari *in* UN Convention on Contracts for the International Sale of Goods (CISG): Commentary Art 19 para 14 (Stefan Kröll, Loukas Mistelis & María del Pilar Perales Viscasillas eds., 2011); Honnold, *supra* note 48, at 170.3-4.

79 *Official records, documents of the conference and summary records of the plenary meetings and of the meetings of the main committees*, UN Conference on Contracts for the International Sale of Goods (Vienna 10 March-11 April 1980, 1981) UN Doc A/CONF 97/19, 96 para 3(ix), 288-9.

80 This article does address the causes of the so-called *homeward trend*; *see, e.g.*, Ingeborg Schwenzer, *The Application of the CISG in Light of National Law* 2010 Internationales Handelsrecht [IHR] 45, 53-54; Harry M Flechtner, *The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and Other Challenges to the Uniformity Principle in Article 7(1)*, 17 J. L. & Com. 187 (1997-98); Franco Ferrari, *Homeward Trend: What, Why and Why Not* 2009 Internationales Handelsrecht [IHR] 8; Karen Halverson Cross, *Parol Evidence Under the CISG: The 'Homeward Trend' Reconsidered*, 68 Oh. St. L. J. 133 (2007).

81 *See supra* section 3.5.

4.2 *Fencing the Analysis: Distinguishing Actual From Seeming Battles*

CISG case law on the battle of the forms is scarce. The following analysis therefore focuses on case law from the United States and Germany, the countries that have produced more than the occasional case, and, thus, may reveal discernible tendencies.

The number of reported CISG battle of the forms cases is small, but nevertheless inflated. The term 'battle of the forms' denotes a specific legal problem that emerges when a contract is performed before the parties have resolved the issue of which standard terms apply. But it is sometimes used to describe any situation where two parties attempt to use standard terms–regardless of the underlying issue.[82]

The numbers are inflated because cases, in which the courts have ruled on whether a set of standard terms have been effectively incorporated into the contract or not, are wrongly labelled as 'battle of the forms' cases.[83] Although incorporation of standard terms cases may resemble battles, 'incorporation' is fundamentally a different legal problem. In these cases, the problem is whether the requirements for the incorporation of the standard terms into the contract are met in the concrete situation.[84]

82 *See* Schroeter *in* Commentary on the UN Convention, *supra* note 69, at Art 19 paras 33-4. Cases are not excluded from the analysis if the court itself categorizes the case as a battle of the forms. The value as precedent may suffer as a result of the mischaracterisation, but such cases can be factored in when identifying broader tendencies, as the court actually expresses how it would solve a battle.

83 The threshold for incorporation is determined pursuant to Arts 8, 14(1) on a case-by-base basis, Ulrich Magnus, *Incorporation of Standard Contract Terms under the CISG*, *in* Sharing International Commercial Law across National Boundaries: Festschrift for Albert H Kritzer on the Occasion of his Eightieth Birthday (Camilla B Andersen & Ulrich G Schroeter eds., 2008); Steensgaard, *supra* note 26, at § 8; Burghard Piltz, Internationales Kaufrecht: Das UN-Kaufrecht in praxisorientierter Darstellung 3-80 (2nd ed. 2008); Piltz, *Standard Terms in UN-Contracts of Sale*, *supra* note 25, at 233-39; Sieg Eiselen, *The Requirements for the Inclusion of Standard Terms in International Sales Contracts*, 14(1) Potchefstroom Elec. L. J. 2 (2011); *see also* CISG-AC Opinion No. 13, Inclusion of Standard Terms under the CISG, Rapporteur: Professor Sieg Eiselen, College of Law, University of South Africa, Pretoria, South Africa. Adopted by the CISG Advisory Council following its 17th meeting, in Villanova, Pennsylvania, USA, on 20 January 2013, Rules 2-7, *available at* http://www.cisgac.com/default.php?ipkCat=222&ifkCat=213&sid=222 (last visited Aug. 15, 2015) [hereinafter CISG-AC Opinion No. 13]; *e.g.* Oberlandesgericht Düsseldorf Mar. 23, 2011, CISG-Online No. 2218.

84 The battle of the forms may also be illusionary if both set of terms provide for the same solution. *See, e.g.*, Oberlandesgericht Cologne May 24, 2006, 2006 Internationales Handelsrecht [IHR] 147, *available in English at* http://cisgw3.law.pace.edu/cases/060524g1.html (Thomas Arntz and Todd Fox trans.) (last visited Aug. 15, 2015); on incorporation of INCOTERMS, Hanwha Corp v. Cedar Petrochemicals, Inc, 760 F.Supp.2d 426, 431 note 2 (S.D.N.Y. 2011).

> Generally speaking, to be capable of incorporation, standard terms must be included in the offer or the offer must contain a sufficiently clear reference to them.[85] The text of the terms must be reasonably available to the recipient.[86] The terms must be in the language of the negotiations, the contract, or in a language that is comprehensible to the recipient.[87] And the terms must be introduced prior to contract conclusion.[88]
>
> To illustrate: If a seller introduces its terms subsequent to the contract conclusion, and the buyer fails to make a sufficiently clear reference to its terms, then neither set of terms are capable of incorporation and no terms will therefore make it into the contract. This outcome does not follow from a battle of the forms knock-out of the terms, however, but is a result of the fact that neither party took proper care to meet the threshold for incorporation.[89]

To adopt a metaphor: If either party is firing blanks, it is not engaged in battle, but rather waiting to see if the other party hits. Ineffective attempts at incorporation during a (seeming) battle of the forms pre-empts the problems that would normally follow from the reciprocity of a battle. In these incorporation cases, a party has tried but failed to incorporate standard terms different from the

85 Cour d'appel Paris Dec. 13, 1995, 1997 II JCP G No 22772; Tribunale di Rovereto Nov. 21, 2007, CISG-Online No. 1590; Landgericht Hannover Apr. 21, 2009, CISG-Online No. 2298; Oberlandesgericht Zweibrücken Mar. 31, 1998, CISG-Online No. 481; partly reversing on other grounds Bundesgerichtshof Mar. 24, 1999, 1999 Neue Juristische Wochenschrift [NJW] 2440; requirement discussed in Amtsgericht [AG][Local Court] Nordhorn Jun. 14, 1994, CISG-Online No. 259; *see also* Hof Arnhem Apr. 27, 1999, 1999 Nederlands Internationaal Privaatrecht [NIPR] No 245.

86 Bundesgerichtshof Oct. 31, 2001, 2002 Neue Juristische Wochenschrift [NJW] 37, arguably constructing a duty to communicate the terms; Mansonville Plastics (BC) ltd v. Kurtz GmbH 2003 BCSC 1298, paras 71-72; Oberlandesgericht Munich Jan. 14, 2009, CISG-Online No. 2011; Oberlandesgericht Celle Jul. 24, 2009, 2010 Neue Juristische Wochenschrift-Rechtssprechungs-Report [NJW-RR] 136; Oberlandesgericht Jena Nov. 10, 2010, CISG-Online No. 2216, (choice of court clause, but decided under the CISG); appeal denied Bundesgerichtshof Jul. 5, 2011, VIII ZR 314/10, *available at* www.bundesgerichtshof.de; in favor of a more flexible individual approach under Art 8(2); Steensgaard, *supra* note 26, at § 8 paras 15-30; *compare* this with the more balanced approach in Oberlandesgericht Zweibrücken Mar. 31, 1998, CISG-Online No. 481; Landgericht Neubrandenburg Aug. 3, 2005, 2006 Internationales Handelsrecht [IHR] 26.

87 Landgericht Heilbronn Sep. 15, 1997, CISG-Online No. 562; Amtsgericht Kehl Oct. 6, 1995, 1996 Neue Juristische Wochenschrift-Rechtsprechungs-Report 565; command of language of the terms was held sufficient for incorporation in Oberlandesgericht Düsseldorf Apr. 21, 2004, 2005 Internationales Handelsrecht [IHR] 24; Chateau des Charmes Wines Ltd v. Sabaté USA Inc 2005 CarswellOnt 5271, para 12; conversely, in which an American buyer was bound by terms in Italian, MCC-Marble Ceramic Center v. Ceramica Nuova D'Agostino, 144 F.3d 1384, 1387-88 (11th Cir. 1998).

88 Cour d'appel Paris Dec. 13, 1995, 1997 II JCP G No 22772; Hof's-Hertogenbosch Oct. 16, 2002, *available in English at* http://cisgw3.law.pace.edu/cases/021016n1.html (Patrick Bout trans.) (last visited Aug. 15, 2015); Kantonsgericht Zug Dec. 11, 2003, 2005 Internationales Handelsrecht [IHR] 119; Chateau des Charmes Wines, Ltd v. Sabaté USA, Inc, 328 F.3d 528 (9th Cir. 2003); Landgericht Trier Jan. 8, 2004, 2004 Internationales Handelsrecht [IHR] 115; Rechtbank Arnhem Mar. 17, 2004, *available in English at* http://cisgw3.law.pace.edu/cases/040317n1.html (Vasiliki Mitria trans.) (last visited Aug. 15, 2015); Landgericht Neubrandenburg Aug. 3, 2005, 2006 Internationales Handelsrecht [IHR] 26; *see* Schroeter *in* Commentary on the UN Convention, *supra* note 69, at Art 19 para 40; Larry A DiMatteo et al., International Sales Law: A Critical Analysis of CISG Jurisprudence 74-5 (2005), on the scope of Art 19.

89 *See* Cour d'appel Paris Dec. 13, 1995, 1997 II JCP G No 22772; *see also* AG Kehl, 1996 NJW-RR 565.

offer. The failed incorporation attempt, of course, fails to express the complete mirrored assent required to conclude a contract and effectively operates as a rejection and a counteroffer. But the content of this counteroffer does not–as it would in a normal battle of the forms case–encompass the (different) standard terms it references. The situation is then not a battle between forms; it is a question of whether the terms that actually meet the threshold for incorporation have made it into the contract.

On the other hand, if a party introduces in the last communication before a contract is executed a previously unmentioned set of standard terms, the legal situation is somewhat comparable to a battle even if no competing standard terms exist. The problem is structurally identical to the battle of the forms cases: The parties perform the contract without having reached an agreement on the standard terms applicable to the contract. Consequently, the courts' approach in such cases may indicate the approach it would take in an actual the battle of the forms case.

Some cases are excluded from the following analysis because the outcome suffers from interference from parallel rules that operate with stricter requirements.[90] For example, the form requirements for forum selection agreements under Article 25 Bruxelles I Regulation (recast), for example, are stricter than the threshold for incorporation under the CISG.[91] So while incorporation of a clause may be successful under the CISG, its efficacy could be denied under the Regulation. Drawing a conclusion on the interpretation of the CISG from cases where such outside factors pay a role could lead to the wrong results.[92]

4.3 *Case Law From the United States of America*

The US courts have almost without exceptions applied the last-shot solution in CISG cases. In other words, US courts by tend to seek out the decisive, final offer and a corresponding, yet often implied, acceptance.

The earliest reported battle of the forms case from the US, *Filanto v Chilewich*,[93] concerned the applicability of an arbitration clause that one party had sought to incorporate through a reference to an external contract. The court identified the final counteroffer, which contained the reference to this external contract, and determined that the reveiving party's conduct indicated

90 *E.g.* Art 25 Bruxelles I Regulation (recast) on forum selection agreements, Art 17 Bruxelles Convention and their counterparts in the Lugano Conventions; *e.g.* Kantonsgericht Zug Dec. 11, 2003, 2005 Internationales Handelsrecht [IHR] 119. Comparable from requirements are also found in other rules on choice of jurisdiction and arbitration; *e.g.* Oberlandesgericht Frankfurt Jun. 26, 2006, CISG-Online No. 1385.

91 The courts will most likely apply the knockout rule under Art 25 Bruxelles I Regulation (recast), because there is no *written* agreement on jurisdiction, *see* Steensgaard, *supra* note 26, at § 11 para 128-9; Dannemann, *supra* note 1, at 210-5.

92 Consider for example Cour de cassation [Cass.][supreme court for judicial matters] 1re civ, Dec. 2, 1997, 1998 DS IR 20; Cour de cassation, 1re civ, Jul. 16, 1998, 3 Int'l Legal F. 86 (1998).

93 Filanto SpA v. Chilewich International Corp, 789 F.Supp 1229 (S.D.N.Y. 1992); *appeal dismissed* 984 F.2d 58 (2d Cir. 1993) [CISG not mentioned].

that it had accepted the offer.[94] In *Magellan v Salzgitter*,[95] the court dissolved the parties' negotiations to a string of offers and counteroffers and sought out the offer on the basis of which the contract was concluded. That was determined to be the offer that preceded the buyer's opening of a letter of credit, which action, in turn, constituted an acceptance by conduct.[96] In subsequent cases, the courts have also approached the problem as a question of offer and acceptance. These cases include *Norfolk v Power Source*,[97] *CSS Antenna v Amphenol-Tuchel*,[98] *Golden Valley v Centrisys*,[99] and *Belcher-Robinson v Linamar*.[100] Although only *Norfolk* concerned *conflicting* standard terms, the other cases concerned a comparable situation. In them, the parties had executed a perceived contract despite the fact that one party had introduced a set of standard terms in the final offer to which the other party had not explicitly assented.[101] In all these cases, the courts examined the correspondence between the parties in order to determine the decisive offer and establish acceptance by conduct–in other words, the courts applied a last-shot reasoning. None of the courts qualified the contract formation as anything but a question of offer and acceptance or mentioned any alternative means of contract formation as a possibility.

In the 2011 case, *Hanwha v Cedar Petrochemicals*,[102] it appears, at a first glance, that the court adopted a different approach. Faced with one choice of law clause pointing to New York law (and excluding the CISG) and another to Singapore law, the court knocked out both clauses. The legal basis for arriving at this result, however, appears to have been section 2-207 UCC, not the CISG. The court stated that '[c]aselaw interpreting analogous provisions of Article 2 [UCC] may also inform a court where the language of the relevant CISG provisions track that of the UCC', before it stated that the situation at hand is 'not unlike the one contemplated by UCC § 2-207(b)'. The

94 *Id.* at 1237-41, at 1238 the court even considered the recipient, in the light of the parties' course of dealing, to be under an obligation to object against uninvited terms in the offer. *See also* Gary Kenji Nakata, Filanto S.p.A. v. Chilewich Int'l Corp.*: Sounds of Silence Bellow Forth Under the CISG's International Battle of the Forms*, 7 Transnat'l Law. 141.

95 Magellan International Corporation v. Salzgitter Handel GmbH, 76 F.Supp.2d 919 (N.D.Ill. 1999).

96 *Id.* at 925: 'And at the very least, a jury could find consistently with Magellan's allegations that the required indication of complete (mirrored) assent occurred when Magellan issued its LC'.

97 Norfolk Southern Railway Company v. Power Source Supply, Inc, 66 UCC Rep.Serv.2d 680 (W.D.Pa. 2008).

98 CSS Antenna, Inc v. Amphenol-Tuchel Electronics, GMBH, 764 F.Supp.2d 745, 752-54 (D. Md. 2011). Incorporation of the seller's forum selection clause failed because the reference was worded so vaguely that it could not be expected of the buyer that it would understand it. *See also* Ann Morales Olazábal et al., *Global Sales Law: An Analysis of Recent CISG Precedents in U.S. Courts 2004-2012*, 67 Bus. Law. 1351, 1360-62 (2012).

99 Golden Valley Grape Juice and Wine, LLC v. Centrisys Corp, No. CV F 09-1424 LJO GSA, 2010 WL 347897 (E.D.Cal. Jan. 22, 2010), in which the acceptance by conduct of a jurisdiction clause was established.

100 Belcher-Robinson, LLC v. Linamar Corp, 699 F.Supp.2d 1329, 1336-38 (M.D.Ala. 2010). A jurisdiction clause had not been agreed to under Art 19(1) nor (2). *See also* Morales Olazábal et al., *supra* note 98, at 1362; PrimeWood, Inc v. Roxan GmbH & Co Veredelungen, No. A3-97-28, 1998 WL 1777501 (D.N.D. Feb. 19, 1998), in which a jurisdiction clause was not agreed upon under § 2-207 UCC, and the court stated, that the CISG would yield the same result; *compare also* Simar Shipping Limited v. Global Fishing, Inc., 540 Fed.Appx. 565, 566 (9th Cir. 2013).

101 Same approach was applied in Miami Valley Paper, LLC v. Lebbing Engineering & Consulting Gmbh, No. 1:05-CV-00702, 2009 WL 818618 (S.D.Ohio Mar. 26, 2009), in which a request for summary judgment was denied, as the court found that the contract could have been formed on three possible dates.

102 Hanwha Corp v. Cedar Petrochemicals, Inc, 760 F.Supp.2d 426 (S.D.N.Y. 2011).

court then cited a case on 2-207 UCC to support its decision.[103] Thus, the court's application of the knockout solution to this question appears to be heavily influenced by precedents in domestic law. On the merits of the case, however, the court faced another battle-like situation involving an exchange of counteroffers, to which it applied the CISG without citing domestic law. Here, the court performed a test to determine the decisive offer in accordance with the last-shot rule. As it could not determine that the complete mirrored assent required by Article 19 had occurred at any time, it found that the parties had not concluded a contract.[104] The court in *Hanwha* is, thus, not clear on either the legal basis or the solution; but the test the court used to rule on whether the contract was concluded does not appear to be influenced by the UCC and that points strongly towards the last-shot solution.

In the latest reported battle of the forms case from the fall of 2013, the District Court for the Western District of Pennsylvania read and understood the (German) case law as evidence that 'Article 19 embod[ies] a mirror image rule', and consquently arrived at a last-shot result.[105] However, as shown below, the courts in those German cases actually applied a knockout solution.

To conclude, the US courts have consistently applied the last-shot solution. In all the abovementioned cases, the courts have sought out the decisive offer and determined whether or not it had been accepted. Article 19 CISG is being applied as the natural rule in these situations–in all cases the consensual approach is not being mentioned, let alone applied.

4.4 *Case Law From Germany*

German case law, on the other hand, leans heavily towards the knockout solution. The positions taken by German courts were inconsistent until 2002. In 1992, the Appellate Court Hamm applied the last-shot solution, as did the Appellate Court Saarbrücken in 1993.[106] In 1995, District Court Kehl indicated obiter that two conflicting liability clauses should be knocked out; by executing the contract, the parties had either waived their respective standard terms or made an implicit derogation from Article 19. In any event, they had concluded a contract.[107] In 1998, the

103 *Id.* at 430-31.
104 *Id.* at 431-33.
105 Roser Technologies, Inc v. Carl Schreiber GmbH, No. 11cv302 ERIE, 2013 WL 4852314, at *4 (W.D.Pa. Sep. 10, 2013); *see also* VLM Food Trading International, Inc v. Illinois Trading Company et al, 748 F.3d 780, 785-87 (7th Cir. 2014).
106 Oberlandesgericht Hamm Sep. 22, 1992, CISG-Online No. 57; Oberlandesgericht Saarbrücken Jan. 13, 1993, CISG-Online No. 83.
107 Amtsgericht Kehl Oct. 6, 1995, 1996 Neue Juristische Wochenschrift-Rechtsprechungs-Report 565.

Appellate Court Munich found a clause prohibiting set-off in the seller's counteroffer to have been accepted by the buyer when it 'carr[ied] through with the contract'.[108]

The case law settled when Germany's Supreme Court argued in favor of and applied the knockout rule in 2002 in the so-called *powdered milk case*.[109] The case concerned the extent of a seller's liability for delivering defective milk powder.[110] The battle of the forms that ensued was somewhat peculiar, though, because the seller was seeking to invoke a favorable limitation clause in the buyer's terms![111] Moreover, the court applied both the knockout and the last-shot rules–or at least professed to do so.

The Supreme Court's first step in the case was to establish the existence of a contract. It affirmed the previous court's reasoning that the parties, by performing the contract, had expressed that they considered the differences between their terms to be immaterial in the sense of Art 19.[112] The facts show that the buyer had ordered the milk powder by telephone and that both sides had followed up on the phone conversations by sending letters of confirmation. But neither court explored in detail how and when the contract had been concluded.[113]

> Other courts have in comparable cases been prompted to examine the possibility that the parties concluded a full and binding contract during telephone conversations that precede an exchange of forms. The subsequent 'confirmations' will then constitute offers to change the already concluded contract and can therefore be disregarded unless

108 Oberlandesgericht Munich Mar. 11, 1998, 1999 Schweizerische Zeitschrift für internationales und europäisches Recht [SZIER] 199, *available in English at* http://cisgw3.law.pace.edu/cases/980311g1.html (Ruth M Janal trans.) (last visited Aug. 15, 2015). The court supported the conclusion with a reference to Rolf Herber & Beate Czerwenka, Internationales Kaufrecht: Kommentar zu dem Übereinkommen der Vereinten Nationen vom 11. April 1980 über Verträge über den internationalen Warenkauf Art 19 para 18 (1991), where the last-shot solution is dealt with.

109 *See* Bundesgerichtshof Jan. 9, 2002, 2002 Neue Juristische Wochenschrift [NJW] 1651, *available in English at* http://cisgw3.law.pace.edu/cases/020109g1.html (William M Barron and Birgit Kurtz trans.) (last visited Aug. 15, 2015).

110 Bundesgerichtshof Jan. 9, 2002, 2002 Neue Juristische Wochenschrift [NJW] 1651.

111 This should not, in a legal sense, affect the extent of consensus or who sent the last shot.

112 Oberlandesgericht Dresden Oct. 23, 2000, CISG-Online No. 1935; *see also* AG Kehl, 1996 NJW-RR 565; Oberlandesgericht Düsseldorf Jul. 25, 2003, CISG-Online No. 919, *available in English at* http://cisgw3.law.pace.edu/cases/030725g1.html (Mariel Dimsey trans.) (last visited Aug. 15, 2015).

113 See the presentation of facts in the decision of the previous instance, OLG Dresden, CISG-Online No. 1935.

they are independently accepted.[114] From the presentation of facts, this could have been relevant for the Supreme Court to examine.[115]

After establishing the existence of a contract, the Supreme Court went on to determine its content. It stated: 'According to the (probably) prevailing opinion, partially diverging general [standard] terms and conditions become an integral part of a contract (only) insofar as they do not contradict each other; the statutory provisions apply to the rest'.[116] The court found that the buyer's standard limitation of liability clause, which capped the amount of damages the seller would pay, conflicted with a 'rejection clause' in the seller's terms that functioned to exclude the buyer's terms.[117] The liability regime was, accordingly, knocked out. The court further stated that the seller should not be allowed to rely only on the favorable terms in the buyer's standard conditions while rejecting the disadvantageous terms. The resulting gap was filled by dispositive statutory provisions.[118]

Although the Supreme Court decided the case using the knockout rule, it also professed to test the facts under the last-shot rule. But instead of identifying the decisive offer and acceptance, as the rule requires, the court stated that it would be contrary to *good faith* under Art 7(1) CISG to allow the seller to cherry-pick individual terms from the buyer's terms–'even insofar as it served its Terms and Conditions last'.[119] This reasoning is not persuasive, however, because the court's opinion did not conform with the premise underlying the last-shot solution, namely that the contract is established by an offer and a corresponding acceptance.[120] The last-shot solution results the incorporation of all terms in the decisive offer–and that does not involve picking favorable provisions from the previously rejected terms, nor does it in itself violate *good faith*.

114 *See, e.g.*, Chateau des Charmes Wines, Ltd v. Sabaté USA, Inc, 328 F.3d 528, 531 (9th Cir. 2003); which was followed in C9 Ventures v. SVC-West, LP, 202 Cal.App.4th 1483, 1501-2 (2012); Solae, LLC v. Hershey Canada, Inc, 557 F.Supp.2d 452 (D.Del. 2008); cited obiter Comerica Bank v. Whitehall Specialties, Inc, 352 F.Supp.2d 1077, 1082-83 (C.D.Cal. 2004); *see also* Travelers Property Cas v. Saint-Gobain Technical, 474 F.Supp.2d 1075, 1083 (D.Minn. 2007) (no summary judgement as an oral contract may have been formed before the exchange of purchase orders and invoices); BTC-USA Corporation v. Novacare, No. 07-3998 ADM/JSM, 2008 WL 2465814, at *4 (D.Minn. Jun. 16, 2008) (acceptance by initialing the subsequent terms). The doctrine of *Kaufmännishes Bestätigungsschreiben* and similar principles are not recognized under the CISG and will need a separate legal basis to apply.

115 *Compare* Wildner, *supra* note 46, at 18.

116 Bundesgerichtshof Jan. 9, 2002, 2002 Neue Juristische Wochenschrift [NJW] 1651, at para II.1.b.

117 The buyer had used the general trade terms of the Dutch dairy trade association, which presumably strike a general balance between the interests of the average buyers and sellers within the industry. The seller's rejection clause stated: 'We sell exclusively pursuant to our general terms and conditions. Contrary statutory conditions or contrary general terms and conditions of the buyer are expressly not acknowledged and are therefore not part of the contract'. Given this compelling wording, it could have been relevant to consider the clause's impact on the formation as well as its content. *See* on rejection clauses, Steensgaard, *supra* note 26, at § 14; *see also* Wildner, *supra* note 46, at 20-25; María del Pilar Perales Viscasillas, *Battle of the Forms and Burden of Proof: An Analysis of BGH 9 January 2002*, 6 Vindobona J. Int'l Com. L. & Arb. 217, 224 (2002).

118 Bundesgerichtshof, 2002 NJW 1651, *see* quote *supra* at note 116. This result was reached, however, by citing only German doctrine and may be an example of the homeward trend.

119 *Id.*

120 Critical also Wildner, *supra* note 46, at 18-9 and 23-6.

Schlechtriem, nevertheless, wrote about the case: 'Despite some opaque arguments and sentences, the core message of the Supreme Court of Germany is clear: Conflicting standard forms are entirely invalid and are replaced by CISG provisions, while the contract as such stays valid'.[121]

Except for one later decision in 2002 in which the Appellate Court Koblenz employed a last-shot approach, the knockout solution has been applied consistently in later cases.[122] In a 2003 case, the Appellate Court Düsseldorf expressed that knockout is the preferred solution; however, it also purported to apply the last-shot rule, which it, unconvincingly, found to produce the same result.[123] A few years later, the Appellate Court Cologne was faced with conflicting jurisdiction clauses.[124] The court found the battle to be illusionary as both the seemingly conflicting clauses in fact conferred jurisdiction to the courts at the seller's place of business. The forum selection court would therefore be effective under both the knockout rule and the last-shot rule, regardless of which approach was applicable. The court did not address how to solve the battle of the forms in general, and although it stated preference for the knockout rule, it did keep the door open for both solutions.[125] Later that year, the Appellate Court Frankfurt applied the consensus principle as an alternative means of contract formation; and Art 19(2) CISG to deny incorporation of an

121 Peter Schlechtriem, *Kollidierende Geschäftsbedingungen im internationalen Vertragsrecht: Festgabe für Rolf Herber*, *in* Transport- und Vertriebsrecht 2000: Festgabe für Rolf Herber (Karl-Heinz Thume ed., 1999) note 16a (added in the English edition), *available at*, http://cisgw3.law.pace.edu/cisg/biblio/schlechtriem5.html (Martin Eimer trans.) (last visited Aug. 15, 2015).

122 Oberlandesgericht Koblenz Oct. 4, 2002, CISG-Online No. 716, but the reasoning is unclear, as the court cited both the buyer's silence under Art 19(2) and payment of the purchase price as decisive factors. It appears that the court may have construed the buyer's payment to express that it considered the difference to be immaterial in the sense of Art 19(2), and its silence to be decisive under this provision. *Compare also* Oberlandesgericht Hamburg Oct. 11, 2010, CISG-Online No. 2449, in which the factual circumstances showed that an agreement had not been reached.

123 Oberlandesgericht Düsseldorf Jul. 25, 2003, CISG-Online No. 919: '[U]pon receipt of the [Seller]'s first invoice, the [Buyer] could consequently no longer assume that the [Seller] had consented to the [Buyer]'s contradictory jurisdiction clause'. This reasoning suggests that the court reached its result more on the basis of a perceived practice to contract on the seller's terms, in accordance with Art 9, than the last-shot solution. Previously rejected offers do not under the last-shot rule affect the possible acceptance of superseding counteroffers, and nor do subsequent invoices.

124 Oberlandesgericht [OLG] Cologne May 24, 2006, 2006 Internationales Handelsrecht [IHR] 147.

125 *See also* Shroeter *in* Commentary on the UN Convention, *supra* note 69, at Art 19 para 35 note 119. OLG Cologne, 2006 IHR, at 147: 'Pursuant to the provisions of the CISG . . . the interpretation of contracts with conflicting terms leads to the application of at least those provisions which do not differ. Beyond this [German: "andernfalls"], the so-called "last-shot doctrine" applies, according to which the governing terms are those which were exchanged last . . . Here, both alternatives lead to the result that the parties validly concluded a choice of forum agreement'. *See also supra* section 4.2 on the concerns regarding battles on choice of court clauses; in this instance, however, the court expressly applied the CISG to the question.

arbitration clause found in one of the parties' standard terms.[126] In 2011, the Appellate Court Stuttgart applied the knockout solution to conflicting delivery clauses.[127]

In conclusion, the German position today favours the knockout rule. Since 2002, only one court has applied the last-shot.[128] The use of the last-shot rule in other cases appears to be more of an effort to legitimize the results already reached under the knockout rule than to actually apply the last-shot rule. This is apparent from the fact that none of the courts performed the test of identifying the decisive offer and acceptance, but based their decicions on broader considerations, such as good faith and parties' expectations.[129]

4.5 *Comparative Analysis*

The foregoing analysis reveals that US courts subscribe to the last-shot solution, whereas German courts show a strong tendency towards the knockout solution. This dichotomy disrupts the uniformity within the CISG regime. The differences extend beyond the outcome of individual cases, as the courts rely on different qualifications of the issue to arrive at these different results.[130] Because the courts almost always take the qualification of a legal issue for granted, they seldom explain in detail why its understanding is appropriate and should apply. Nevertheless, the approach the court takes in the concrete case reveals the underlying understanding of the legal problem.

The few US cases in which the legal foundation for the last-shot has been addressed have considered the last-shot, as noted earlier, to be an extension of the mirror image principle. In *Filanto v Chilewich*, the court stated that '[Art 19] reverses the rule of Uniform Commercial Code § 2-207, and reverts to the common law rule . . . '[131] This resonated with the court in *Magellan v Salzgitter*, in which it declared: 'Art. 19(1) . . . reflects the common law's "mirror image" rule that the UCC

126 Oberlandesgericht Frankfurt Jun. 26, 2006, CISG-Online No. 1385: 'However, the apparent corresponding dissent does not hinder the validity of the contract under the notion of § 306 BGB as long as the parties moved on to execute the contract amicably'. But even though the court cited the BGB it relied primarily on CISG sources to arrive at this result.

127 Oberlandesgericht Stuttgart Apr. 18, 2011, 2012 Internationales Handelsrecht [IHR] 38. *See also supra* section 4.2 on the possible interference from competing rules; in this case the New York Convention.

128 *See* Oberlandesgericht Koblenz Oct. 4, 2002, CISG-Online No. 716.

129 Bundesgerichtshof [BGH] Jan. 9, 2002, 2002 Neue Juristische Wochenschrift [NJW] 1651; Oberlandesgericht Düsseldorf Jul. 25, 2003, CISG-Online No. 919. When the existence of a contract is already determined through the parties' common intention, it becomes almost impossible to revert and start over with a loyal test of the last shot. That would require the contract to have been formed through a corresponding pair of offer and acceptance, which goes against the previous findings. This is probably why the courts base their last-shot tests on considerations other than the implied acceptance.

130 *See supra* section 3.5.

131 Filanto SpA v. Chilewich International Corp, 789 F.Supp 1229, 1238 (S.D.N.Y. 1992); *see* also Keith A. Rowley *in* Modern Law of Contracts, *supra* note 15, at § 23:16.

has rejected'.[132] These statements are evidence that the battle is understood in the offer and acceptance frame. The reasoning appears to be that in the absence of a rule to direct otherwise, such as section 2-207 UCC, the mirror image principle, as it is known in common law, will lead to the last-shot rule.[133] When faced with a battle of the forms, the first step for a US court is therefore to identify the decisive offer and its acceptance; a US court does not even consider the possibility that a contract could have been formed through consensus.

The basis for the knockout solution applied in Germany was most thoroughly addressed in the 2002 Supreme Court decision in the *powdered milk case*. The court found the contract to have come into existence as '. . . the parties have indicated by the execution of the contract that they did not consider the lack of an agreement between the mutual conditions of contract as essential within the meaning of Art. 19 CISG'.[134] The reason being that when contract formation is not prevented by Art 19(1), but allowed under Art 19(2), the parties may conclude a binding contract on the terms on which they agree–even though they may not have expressed complete mirrored assent. This argument rests on a flawed application of Art 19(2), however, because this provision not only addresses contract formation, but simultaneously determines the content of the contract in accordance with the terms of the counteroffer. Article 19(2) expressly states that the terms of the counteroffer prevail unless the recipient objects; it does not leave room for excluding certain terms, as would be the case in a subsequent knockout. The primary precedent for the German position, the 2002 Supreme Court ruling, appears to qualify the battle as a question of (partial) consensus, but it struggles to make that fit with the wording of the Convention. Later case law shows that German courts attempt to establish a mutual intention to contract–and go out of their way to disregard the offer and acceptance.

All in all, it appears that the US and German courts operate with different qualifications of the battle as a legal problem, and that this has led to split positions within the Convention regime. One possible cause may be found in the spillover effect from the each country's domestic solutions, which seem to dovetail with the corresponding positions under the Convention.[135] Some US courts recognize and apply in CISG cases what they call the 'common law mirror image principle', which suggests that they read the Convention in light of the domestic law, at least to some extent.[136] The German courts, on the other hand, approach the battle as a question of

132 Magellan International Corporation v. Salzgitter Handel GmbH, 76 F.Supp.2d 919, 925 (N.D.Ill. 1999); *see also* Miami Valley Paper, LLC v. Lebbing Engineering & Consulting Gmbh, No. 1:05-CV-00702, 2009 WL 818618, at * 4 (S.D.Ohio Mar. 26, 2009) ('[T]he CISG applies the common law concept of mirror image'); Supermicro Computer Inc v. Digitechnic, SA, 145 F.Supp.2d 1147, 1151 (N.D.Cal. 2001) ('[T]he CISG requires a "mirror-image" approach to contract formation').

133 *See supra* section 3.3.1.

134 BGH, 2002 NJW, at para II.1.a; *see also* Oberlandesgericht Düsseldorf Jul. 25, 2003, CISG-Online No. 919, at para II.3.a.aa.bbb.: 'The latter follows from the fact that, in the case of a partial contradiction between the standard business terms respectively referred to by the contractual parties, a failure to conclude the contract within the meaning of Art. 19(1) and (3) CISG due to a lack of a meeting of the minds can only be assumed if the parties would have regarded the lack of consensus as fundamental'; Oberlandesgericht Cologne May 25, 2012, CISG-Online No. 2388.

135 *See supra* sections 3.3.1 and 3.4.2.

136 *See also* Lawrence, *supra* note 15, at § 2-207:52.

(partial) consensus but have not expressly addressed the underlying qualification. Nevertheless, because lawyers and judges in Germany have been trained to understand the battle as a question of consensus per their domestic contract law, they may have a natural inclination to approach the problem in the same way in an international context.[137] Thus, the split legal position may be a result of the homeward trend.

Another possible cause for the split legal position may be that the German courts are more susceptible to the voice from the doctrine than their American counterparts. Not only is there a very strong academic preference for the knockout rule, German courts are also accustomed to reinterpreting written law. The now century-old German Civil Code, for example, has continuously had to be adapted to meet the changes in the society. The CISG, on the other hand, does not exist within a confined homogenous jurisdiction with an overarching authority to ensure alignment, so it is doubtful whether such domestic practices of fundamental reinterpretations can simply be transposed to the Convention.

5 Discussion and conclusion

5.1 *The Solution Under the CISG–de lege lata*

This article has shown that at least two legal positions with respect to the battle of the forms have developed within the Convention regime. This is probably to be expected. It is difficult to develop and maintain a uniform solution among all courts when the case law already is inconsistent and the legislative history is inconclusive.[138] However, Article 7(1) CISG not only requires a uniform application but also prescribes that the Convention has to be applied autonomously and in *good faith*. It does not offer advice on interpretation in practice, and the primary approach is therefore a literal interpretation in accordance with the *normal understanding*.[139]

The natural starting point when looking for a solution to the battle of the forms in the Convention is Art 19, which expresses the 'generally accepted rule that a purported acceptance which adds to, limits or otherwise modifies an offer is a rejection of the offer and constitutes a counteroffer'–that is the mirror image principle.[140] In fact, Art 19 contains two last-shot rules that are distinguished by the degree of divergence between the terms of offer and the acceptance.[141] Purported acceptances that only differ immaterially from the offer are governed by Art 19(2), which

137 Especially because the wordings of Art 19 and § 150 BGB are comparable, so it may appear as if the legal basis is the same.

138 *See supra* section 4.1.

139 *See* Sieg Eiselen, *Literal Interpretation: The Meaning of the Words*, *in* CISG Methodology (André Janssen & Olaf Meyer eds., 2009) 61-89; Magnus *in* Staudinger, *supra* note 78, at Art 7 paras 30-7; Perales Viscasillas *in* UN Convention on Contracts for the International Sale of Goods, *supra* note 78, at Art 7 paras 33-4, with references; *see also* the principle in Art 31 in the Vienna Convention on the Law of Treaties 1969.

140 *Report of the Working Group on the International Sales of Goods on the work of its Eight session*, VIII UNCITRAL Y.B. 73 (1977), 82 para 107; *see also* Secretariat Commentary, Art 17 para 2.

141 *See supra* sections 3.3.1 and 3.3.2.

provides a silence-based last-shot rule. Article 19(1) applies to all other situations and lays out a last-shot rule based on an implied acceptance.[142] Such assent could be for example inferred from the seller shipping the goods or the buyer paying the purchase price.[143]

Nevertheless, if *consensus* is allowed to manifest in ways other than an exchange of offer and acceptance, the battle may also be resolved by knocking out the conflicting terms. The basis for a knockout rule can arguably be founded either directly in an alternative means of contract formation, in an implied derogation of Art 19, in a perception that a 'battle of the forms' is not governed by Art 19 but must be decided by the parties' *consensus* as an underlying principle,[144] by moving the moment of contract conclusion to the point in time at which the parties agreed on the essential terms and disregarding subsequent terms,[145] or by considering the differences to be immaterial in the sense of Art 19 when the parties execute the contract nevertheless.[146] These solutions are more or less obvious possibilities, but the court could in any of these cases arguably find that a contract has been formed even though the parties have not agreed on any standard terms. The content can then be determined by the extent of the parties' agreement, with the conflicting terms knocked out.

142 Acceptance through conduct is recognised under Art 18(1). Article 18(3) is often cited, mistakenly, as the basis for implied acceptances, but it has a different scope, which is to allow the parties to dispose of the necessity to *communicate* the acceptance as required under Art 18(2). *See, e.g.*, Oberster Gerichtshof Dec. 13, 2012, CISG-Online No. 2438.

143 *See, e.g.*, Oberlandesgericht Saarbrücken Jan. 13, 1993, CISG-Online No. 83; Magellan International Corporation v. Salzgitter Handel GmbH, 76 F.Supp.2d 919 (N.D.Ill. 1999); Landgericht Bamberg Apr. 13, 2005, CISG-Online No. 1402; Oberlandesgericht Bamberg Oct. 18, 2005, CISG-Online No. 1403, contract formation not considered in appeal, Oberster Gerichtshof Aug. 31, 2005, 2006 Internationales Handelsrecht [IHR] 31; Oberlandesgericht Dresden Nov. 10, 2006, CISG-Online No. 1625; Norfolk Southern Railway Company v. Power Source Supply, Inc, 66 UCC Rep.Serv.2d 680 (W.D.Pa. 2008); *see also* Nanda & Pansius, *supra* note 37, at § 12:16; Restatement (Second) of Contracts, § 19(1); *see comparatively* Mehren *in* International Encyclopedia of Comparative Law, *supra* note 8, at paras 33-7.

144 This is less convincing, as there is nothing in the Convention to suggest that modifying acceptances are excluded from Art 19 just because they are on different standard terms. Such an argument makes sense, when the battle of the forms is specially regulated in the law–but only because the drafters of the law have defined it to be a special problem.

145 Nanda & Pansius, *supra* note 37, at §§ 12:19-28; *compare also* André Corterier, *A Peace Plan for the Battle of the Forms*, 10 Int'l Trade & Bus. L. Rev. 195 (2006).

146 *See* Stefan Kröll & Rudolf Hennecke, *Kollidierende Allgemeine Geschäftsbedingungen in internationalen Kaufverträgen*, 2001 Recht der Internationalen Wirtschaft [RIW] 736, 742-43; Schroeter *in* Commentary on the UN Convention, *supra* note 69, at Art 19 paras 41-6; Verena Ventsch & Peter Kluth, *Die Einbeziehung von Allgemeinen Geschäftsbedingungen im Rahmen des UN-Kaufrechts*, 2003 Internationales Handelsrecht [IHR] 61, 62-64; Jana Hammerschmidt, Kollision Allgemeiner Geschäftsbedingungen im Geltungsbereich des UN-Kaufrechts 110, 86-90 (2004); Jörg Schultheiß, Allgemeine Geschäftsbedingungen im UN-Kaufrecht: Eine vergleichende Analyse des Einheitsrechts mit dem Recht Deutschlands, Österreichs, der Schweiz, Frankreichs und der USA 173-77 (2004); Schwenzer, Hachem & Kee, *supra* note 14, at para 12.33, who all argue that the knockout rule can be deduced from Art 8; see Magnus *in* Staudinger, *supra* note 78, at Art 19 CISG para 24-5, who relies on an implied derogation of Art 19 through Art 6; see also Van Alstine, *supra* note 22, at 93-97, who argues on the primacy of 'party autonomy'; similarly Eiselen & Bergenthal, *supra* note 15, at 224-27; Wildner, *supra* note 46, at 7-8; *see also* Van Alstine, *supra* note 22, at 72-77.

In consequence, both the last-shot and knockout solutions arguably conform with the Convention regime, or at the very least are defendable as such.[147] But only one solution can exist under Art 7(1), and the uniform solution should not only be defendable, after constructive effort has been made to reach it, but also follow from a natural interpretation of the Convention.

Applying the literal understanding is all the more important in an diverse setting such as under a Convention with contracting states spread out over the world. And the comparative analysis in section 3 suggests that the normal understanding of the battle of the forms under such circumstances as offered by the CISG–the mirror image principle and no express provision to deal with the battle for the forms–leads to the *last-shot rule*.[148] There are more reasons for this:

Firstly, the drafters of the Convention made a conscious effort to avoid terms and concepts from domestic laws but nevertheless chose to include the established and well-known mirror image principle.[149] It would therefore be reasonable to conclude that they actually intended the mirror image principle to apply.[150] We know that a proposed knockout provision was rejected at the conference in Vienna. Whether that was because the proposal was unacceptable or because it was premature, at the end of the day, there is no knockout rule in the CISG.[151] This starting point is

147 *See* Piltz, *Standard Terms in UN-Contracts of Sale*, *supra* note 25, at 240-41: 'The . . . knock-out-rule . . . is principally not excluded by the CISG. It does require a considerable constructive effort, though, since the theory was rejected when the CISG was being discussed at the conference in Vienna'. *Contra* Nanda & Pansius, *supra* note 37, at § 12:20.

148 Likewise Ferrari *in* UN Convention on Contracts for the International Sale of Goods, *supra* note 78, at Art 19 para 15; Ferrari *in* Münchener Kommentar zum Handelsgesetzbuch (2013) Art 19 paras 14-5; Farnsworth, *supra* note 16, at § 3.21; Gillette & Walt, *supra* note 16, at 85-91; Piltz, Internationales Kaufrecht, *supra* note 83, at paras 3-107-13; Piltz, *Standard Terms in UN-Contracts of Sale*, *supra* note 25, at 239-42; Katharina S Ludwig, Der Vertragsschluß nach UN-Kaufrecht im Spannungsverhältnis von Common Law und Civil Law: Dargestellt auf der Grundlage der Rechtsordnungen Englands und Deutschlands 339-40 (1994); Perales Viscasillas, *Battle of the Forms*, *supra* note 49, at 144-49; Perales Viscasillas, *Contract Conclusion*, *supra* note 78, at 340-42; Perales Viscasillas, *Battle of the Forms, Modification of Contract, Commerical Letters of Confirmation*, *supra* note 53, at 156-58; Rühl, *supra* note 12, at 196-98; *But see* references in note 146; Schwenzer & Mohs, *supra* note 51, at 244; Honnold, *supra* note 48, at 170.3-4; wanting to apply PECL or UPICC, Fejós, *supra* note 22, at 127-28.

149 *See* quote *supra* at note 140. *See also* Honnold, *supra* note 48, at Art 7 para 87; Bonell *in* Commentary on the International Sales Law para 2.2.2 (Cesare Massimo Bianca & Michael Joachim Bonell eds. 1987) on the drafting choices.

150 *See also* the case law on the mirror image principle in CISG's predecessor, ULIS, *see* Perales Viscasillas, *Battle of the Forms and Burden of Proof*, *supra* note 117, at 222 note 11; Magnus *in* Staudinger, *supra* note 78, at Art 19 CISG para 23.

151 *See supra* section 4.2; *see also* Piltz, *Standard Terms in UN-Contracts of Sale*, *supra* note 25, at 240-41.

emphasized in the early doctrine following the diplomatic conference, which shows that the last-shot rule was generally accepted as the applicable solution.[152]

Secondly, there are no clear indications in the Convention itself to suggest that the mirror image principle, and consequently the last-shot solution, should *not* apply, and that must carry an almost decisive weight. There is no evidence in the Convention or the drafting history that standard terms were seen to pose a special problem that must be resolved outside the general mirror image principle, or that the battle should be qualified as anything but a string of counteroffers. Under the CISG, standard terms and conditions constitute part of an offer, the acceptance of which has to be assessed under the general rules.

Because the last shot is the most globally prevalent solution, the average businessman is likely to understand the battle of the forms as a question of offer and acceptance.[153] Once he identifies Art 19 CISG and ascertains that there are no indications to the contrary, he will be likely to search for and eventually find or dismiss an (implied) acceptance of the decisive offer. This businessman is unlikely to give a second thought to other possible means of contract formation, especially if he or she is unfamiliar with the 'German solution'.[154]

> The principle underlying Art 9(2) CISG–that parties are not bound by usages that they could not reasonably be aware of–could also be relevant in this case.[155] The mirror image principle is widely recognised as leading to the last-shot rule, so giving it the almost polar opposite legal effects, as is the consequence of the German solution, should therefore require a firmer basis.[156]

Moreover, the drafters of newer international codes on contract law have included a knockout provision to make that approach applicable. The absence of such a provision in the CISG could be taken as evidence of that the unaltered mirror image principle in Art 19 should apply in full.[157]

152 Kelso, *supra* note 74, at 553-55; Leete, *supra* note 28, at 214; Farnsworth *in* Commentary on the International Sales Law, *supra* note 149, at Art 19 paras 2.5 and 2.8; Ludwig, *supra* note 148, at 427; implied by Gyula Eörsi, *Problems of Unifying Law on the Formation of Contracts for the International Sale of Goods*, 27 Am. Jur. Comp. L. 311, 322-23 (1979); Gabriel, *supra* note 22, at 1057-58; more reluctant Frans van der Velden, *Uniform International Sales Law and the Battle of Forms: contributions en l'honneur de Jean Georges Sauveplanne*, *in* Unification et le droit comparé dans la théorie et la pratique: contributions en l'honneur de Jean Georges Sauveplanne (E. H. Hondius, G. J. W. Steenhoff & F. J. A. van der Velden eds., 1984).

153 *See* Schwenzer, Hachem & Kee, *supra* note 14, at para 12.28.

154 *See supra* section 3.4.2.

155 *See also* the similar principle in Regulation 593/2008, of the European Parliament and of the Council of 17 june 2008 on the law applicable to contractual obligations (Rome I), 2008 O.J. (L 177/6), Art 10(2).

156 Differently Wildner, *supra* note 46, at 9-10, who argues that application of the Convention rules (as the result of a knockout of conflicting terms) instead of the parties' terms would ensure uniformity. But extending the scope of the Convention does not equate uniformity, when there is no agreement as to when it should happen.

157 *See infra* section 3.3.1.

In conclusion, the normal understanding of the wording of the Convention suggests the last-shot rule should apply, as it is the logical extension of the mirror image principle that is expressed in Art 19. There are not yet sufficient reasons to make a persuasive case that the knockout solution would be a 'more normal' understanding. None of the possible explanations above can obviously displace the mirror image principle, and neither doctrine nor case law unanimously supports such displacement.

5.2 *–de lege ferenda*

The last-shot rule is not the ideal solution to the battle of the forms, though, and a majority of scholars seem to favor simply applying the knockout solution.[158] The question is then whether the knockout solution should be applied on the existing basis.[159]

> A recent example of scholars advocating knockout is 'Opinion No 13' from the self-proclaimed 'CISG Advisory Council'.[160] The group states that '[i]t would seem that the knock-out rule is favoured by the majority of commentators and the case law although there is support of the last-shot rule', and it concludes[161] that '[t]he knock-out approach will apply to a battle of the forms situation'.[162] But there is no such agreement on the knockout solution in case law, as the analysis in this article has shown. Moreover, academic popularity should not be an overruling factor in determining the applicable law.[163]

The primary consideration in the assessment must be to accommodate the purpose of the Convention; the interests of the users, that is the businesses whose contracts are subject to the CISG. For the CISG to be an attractive option for those businesses and their advisors, the legal position and consequences of applying the Convention must be clear. As US Supreme Court Justice Antonin Scalia once wrote: 'There are times when even a bad rule is better than no rule at all'–and this may be one of the those times.[164] When parallel legal positions develop, as has happened with the

158 See references in note 146.

159 As for example Magnus *in* Staudinger, *supra* note 78, at Art 19 CISG para 24.

160 *See* CISG-AC Opinion No. 13, *supra* note 83; on the value of the group's opinions as legal source Rolf Herber, *Eine neue Institution: Der CISG Advisory Council* 2003 Internationales Handelsrecht [IHR] 200, 201; *see also* more enthusiastically: Joshua D. H. Karton & Lorraine de Germiniy, *Battle of the Forms under the Convention on Contracts for the International Sale of Goods (CISG): A Uniform Solution?*, 13 Vindobona J. Int'l Com. L. & Arb. 71, 80-83 in particular (2009).

161 The distribution of votes on Rule 10 has oddly enough been omitted from the tallies in CISG-AC Opinion No. 13, *supra* note 83, at note 2.

162 *Id.* at paras 10.6 and 8.

163 The conclusion is based almost exclusively on the German cases presented above CISG-AC Opinion No. 13, *supra* note 83, at para 10.7. One decision from the Cour de cassation, 1re civ, Jul. 16, 1998, 3 Int'l Legal F. 86 (1998), is also cited, but is ambiguous on the solution to battle of the forms under the CISG at best, as it concerns conflicting jurisdiction clauses under the Art 17 Bruxelles Convention and furthermore bases the principle of consensus on Art 1134 French Code Civil.

164 Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1179 (1989); *see also* Honnold, *supra* note 48, at para 170.4, in fine.

battle of the forms, it lends force to the arguments that speak in favor of derogating from and excluding the application of the Convention. When the purpose of the Convention is to provide a framework for international trade, that must take priority over academic popularity. The current situation almost resembles a legal version of 'the tragedy of the commons'. The (well-meaning) efforts to advocate for the knockout rule, in essence, do the Convention a disservice as they create confusion and give potential 'users' understandable incentives to opt out.

As a practical matter, there is no overarching authority within the Convention regime, so who can claim the political legitimacy to decide which circumstances warrant a new legal position or what the new 'correct' reinterpretation should be? Can a reinterpretation be justified when there is disagreement on an issue? For example, virtually all scholars agree that the definition of 'writing' in Art 13 CISG should be extended to include certain electronic communications,[165] but a similar consensus does not exist on how to resolve the battle of the forms. Moreover, there is no effective vehicle for communicating a new interpretation to the 'users'. Full penetration of a new approach would take time–leaving the legal position uncertain in the interim.

As such, agreement on a uniform last-shot rule is preferable to the current confusion. The knockout rule may in many ways be a better rule, and it should be considered as an option in international contract law. But the way to introduce it is through a revision of Part II of the CISG–and not through the discrepant application seen today.[166]

165 *E.g.* Magnus *in* Staudinger, *supra* note 78, at Art 13 CISG para 5.

166 *Proposal by Switzerland on possible future work by UNCITRAL in the area of international contract law*, UN Doc A/CN.9/758 (May 8, 2012), *see e.g.* Annex section VI. A revision would also allow the uncertainties and concerns voiced *supra* in section 3.4.3. related to this solution to be addressed.