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### 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

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**ARTICLES**

**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**

**Kaia Wildner**

In business transactions, parties often exchange forms containing general terms and conditions. The purpose of this independent study is to analyze the treatment of the standard terms used in international transactions governed by the CISG - the United Nations Convention on Contracts for the International Sale of Goods (1980).<sup>1</sup> In particular, the German<sup>2</sup> approach to the battle of forms in international contract law, particularly

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<sup>1</sup> For information about the status of the member States, *see* CISG: Table of Contracting States, <http://cisgw3.law.pace.edu/cisg/countries/cntries.html> (last visited July 22, 2008).

<sup>2</sup> In Germany, the CISG has been transformed into national law and was enacted as a statute on January 1, 1991. It was published in the Federal Law Gazette. *See* Bekanntmachung über das Inkrafttreten des Übereinkommens der Vereinten Nationen über Verträge über den internationalen Warenkauf [Entry Into Force of United Nations Convention on the International Sale of Goods], Jan. 1, 1991, BGBl. II 1990 at 1477.

the decision of the German Federal Supreme Court of January 9, 2002,<sup>3</sup> is examined closely.

## I. THE SCOPE OF ART. 19 CISG

The CISG addresses two major aspects of international sales transactions: contract formation<sup>4</sup> and obligations of parties arising from a contract.<sup>5</sup>

The provisions on contract formation focus on the offer and the acceptance as the essential elements of a mutual agreement between the contracting parties. Art. 19 (1) CISG reflects the Mirror Image Rule,<sup>6</sup> according to which an offer can only be accepted by a response that exactly matches the terms of the offer. Art. 19 (1) CISG states that “a reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.”

Art. 19 (2) CISG creates an exception to the Mirror Image Rule for a response to an offer containing additional or different terms that do not materially alter the offer. Art. 19 (2) CISG provides that, “a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the offer, constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancies or dispatches a notice to that effect.”

Thus, a response that contains additional or different terms that materially alter the terms of the offer is not an acceptance, but rather is a rejection and a counter-offer.<sup>7</sup> The material

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<sup>3</sup> Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 9, 2002, Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHX] (F.R.G.), translated in <http://cisgw3.law.pace.edu/cases/020109g1.html> (last visited July 22, 2008).

<sup>4</sup> See Convention on Contracts for the International Sale of Goods, art. 14-24, Apr. 11, 1980 1489 U.N.T.S. 3, 19 I.L.M. 671 [hereinafter “CISG”].

<sup>5</sup> See *id.* at art. 30-88.

<sup>6</sup> See Maria del Pilar Perales Viscasillas, *Cross-References and Editorial Analysis: Article 19*, <http://cisgw3.law.pace.edu/cisg/text/cross/cross-19.html> (last visited July 22, 2008).

<sup>7</sup> See Burghard Piltz, *Standard Terms in UN-Contracts of Sale*, 8 VINDOBONA J. INT'L COM. L. & ARB. 233-44 (2004), available at <http://25.cisg.info/content/publikation.php?id=10> (last visited July 22, 2008).

terms included in that response only become part of a contract if the other party accepts that counter-offer.<sup>8</sup>

Art. 19 (3) identifies additional and different terms that are considered to alter the terms of an offer materially. These include terms relating to the price, payment, quality and quantity of the goods, the place and time of delivery, the extent of one party's liability to the other, and the settlement of disputes.

Art. 19 CISG, however, does not expressly address situations in which parties employ general terms and conditions.<sup>9</sup> The parties' boilerplate usually includes terms related to elements of the contract identified as material in Art. 19 (3) CISG. Basically, each party drafts the terms of his boilerplate in his own favor and for his benefit, with the consequence that the parties' general terms usually conflict. The exchange of forms containing non-matching standard terms is referred to as the "battle of forms."<sup>10</sup> Despite their conflicting standard terms, the parties involved in a battle of the forms often proceed to perform the sales transactions. The question then arises whether a valid contract was formed and, if so, what are its terms.<sup>11</sup>

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<sup>8</sup> See Christine Moccia, *The United Nations Convention on Contracts for the International Sale of Goods and the "Battle of Forms"*, 13 *FORDHAM INT'L L.J.* 649, 657 (1990).

<sup>9</sup> See Peter Schlechtriem, *Kollidierende Geschäftsbedingungen im internationalen Vertragsrecht [Battle of Forms in International Contract Law]*, in *FESTSCHRIFT FÜR ROLF HERBER ZUM 70. GEBURTSTAG* (English translation) (Martin Eimer trans., 1999), available at <http://cisgw3.law.pace.edu/cisg/biblio/slechtriem5.html> (last visited July 22, 2008).

<sup>10</sup> E. Allan Farnsworth, *Article 19*, in *BIANCA-BONELL COMMENTARY ON THE INTERNATIONAL SALES LAW* 175, 177 (1987), available at <http://cisgw3.law.pace.edu/cisg/biblio/farnsworth-bb19.html> (last visited July 22, 2008); Larry DiMatteo et. al., *The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence*, 24 *Nw. J. INT'L L. & BUS.* 299, 349 (2004); Perales Viscasillas, *Art. 19, Cross-References and Editorial Analysis*, *supra* note 6; *UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods*, Art. 19, UN Doc. A/CN.9/SER.C/DIGEST/CISG/19 (June 8, 2004), available at <http://cisgw3.law.pace.edu/cisg/text/anno-art-19.html> (follow "UNCITRAL's case law digest" hyperlink) (last visited July 22, 2008).

<sup>11</sup> Maria del Pilar Perales Viscasillas, *Battle of Forms and the Burden of Proof: An Analysis of BGH 9 January 2002*, 6 *VINDOBONA J. INT'L COM. L. & ARB.* 217, 217-228 (2002), available at <http://cisgw3.law.pace.edu/cisg/biblio/perales2.html> (last visited Apr. 15, 2008).

## II. CONFLICTING STANDARD TERMS – THE BATTLE OF THE FORMS

The battle of forms is one of the most controversial issues under the Convention.<sup>12</sup> There is disagreement among scholars and commentators about how the problem presented by the battle of forms is to be solved. There is no uniform adjudication among the member states,<sup>13</sup> but basically, three different views are represented on how this should be adjudicated: One is that a solution has to be found in domestic law; another opinion applies the Last Shot Doctrine; and a third opinion follows the Knock Out Rule.<sup>14</sup>

### 1) *Domestic law*

The first opinion takes the view that the CISG fails to provide an adequate solution. Since the issue concerns the validity of the contract, an answer is to be found in the domestic law of the parties involved, in accordance with Art. 4 (a) CISG.<sup>15</sup>

This approach is not very widespread, since the issue does not really address the validity of a contract, but is rather a question of contract formation. It is also rejected by most commentators because applying domestic law does not contribute to the purpose of the CISG, which is to create a uniform law. A further argument against this opinion is that the CISG itself provides a gap-filling mechanism. Art. 7 (2) CISG states that:

Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

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<sup>12</sup> André Janssen, *Kollidierende Allgemeine Geschäftsbedingungen in Internationalen Kaufrecht (CISG)* [Conflicting Standard Terms in International Contract Law], 16 WIRTSCHAFTSRECHTLICHE BLÄTTER 453, 454 (2002).

<sup>13</sup> See Larry A. Di Matteo et al., *supra* note 10, at 349-57.

<sup>14</sup> Sasa Strmosljanin, *Einbeziehung Allgemeiner Geschäftsbedingungen im Geltungsbereich des UN-Kaufrechts*, 55-56 (Hochschule für Wirtschaft und Umwelt Nürtingen-Geislingen 2005) (in German), available at <http://opus.bs-zbw.de/fhnu/volltexte/2005/310/pdf/Diplomarbeit.pdf> (last visited Apr. 15, 2008).

<sup>15</sup> See Burghard Piltz, *Neue Entwicklungen im UN-Kaufrecht* [New Developments in the Vienna Sales Convention], NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 2056, 2060 (2003), available at [http://www.cisg-library.org/pdf/piltz\\_neue\\_entwicklungen\\_2003.pdf](http://www.cisg-library.org/pdf/piltz_neue_entwicklungen_2003.pdf) (last visited July 22, 2008).

Several general principles have been identified in an abstract manner by courts and commentators; one of them is the principle of party autonomy, derived from Art. 6 CISG.<sup>16</sup>

Therefore, it is necessary to check first whether there is a general principle underlying the CISG that provides an answer to the problem before taking recourse to the applicable domestic law.<sup>17</sup>

## 2) *Last Shot Doctrine*

The Last Shot Doctrine addresses the problem of the battle of forms by strictly following the rules of offer and acceptance. A reply to an offer by a form including boilerplate with material alterations is not an acceptance, but instead it is a rejection of the offer and a counter-offer, Art. 19 (1) and (3) CISG. If the other party again responds with a form containing material different or additional terms, the counter-offer is likewise rejected and constitutes a new offer itself. Offers are rejected and new counter-offers submitted back and forth, until one party finally begins to perform. The performance is considered an acceptance of the last submitted counter-offer.<sup>18</sup> The idea that performance constitutes acceptance of the last submitted counter-offer is supported by Art. 18 (1) CISG which provides that “a statement made by or other conduct of the offeree indicating assent to an offer is an acceptance.” Thus, performance by one party is deemed to be a consent to the last submitted offer.

According to the Last Shot Doctrine, a contract is formed at the moment one party begins to perform because performance is considered an acceptance of the last offer. The terms of the contract are the terms of the last submitted offer. This result is responsible for the name of the doctrine.<sup>19</sup> The last party who

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<sup>16</sup> See Peter Huber, *Some Introductory Remarks on the CISG*, INTERNATIONAL HANDELSRECHT, June 2006, at 228-38, available at <http://cisgw3.law.pace.edu/cisg/biblio/huber-07.html> (last visited July 22, 2008).

<sup>17</sup> See Moccia, *supra* note 8, at 662-63.

<sup>18</sup> See Maria del Pilar Perales Viscasillas, *Editorial Remarks*, in *Guide to Art. 19, Comparison with Principles of European Contract Law (PECL)*, <http://cisgw3.law.pace.edu/cisg/text/peclcomp19.html> (last visited July 22, 2008); Maria del Pilar Perales Viscasillas, “*Battle of the Forms*” Under the 1980 United Nations Convention on Contracts for the International Sale of Goods, 10 PACE INT’L L. REV. 97-155 (1998).

<sup>19</sup> See Piltz, *Standard Terms in UN-Contracts of Sale*, *supra* note 7, at 233-44.

submits an offer, or in other words, forwards a letter containing standard terms, fires the Last Shot, and wins the battle of forms. Only the terms of the party who last referred to his boilerplate become part of the contract. The terms of the other party are rejected and not part of the contract.

The Last Shot Doctrine does not strictly distinguish between the issue of contract formation and the issue of the terms of the contract. Both issues are simultaneously determined by the performance of one party. The performance is deemed an acceptance of the last submitted offer and results in the conclusion of the contract on the terms of that offer. The Last Shot Doctrine is followed by many commentators,<sup>20</sup> but it is not without critics.<sup>21</sup>

a) *Arguments for the Last Shot Doctrine*

One argument for the Last Shot Doctrine is that it tries to find a solution within the provisions of the CISG, by strictly following the rules of offer and acceptance. A response to an offer that does not exactly match the terms of the offer is a counter-offer according to Art. 19 (1) CISG, and performance by one party constitutes acceptance of the last submitted counter-offer, pursuant to Art. 18 (1) CISG. It is also argued that this doctrine produces uniformity and predictability concerning the actual terms of the contract, since the terms of the last offer always become part of the contract.<sup>22</sup>

b) *Arguments against the Last Shot Doctrine*

The Last Shot Doctrine has also been criticized as casuistic and unfair.<sup>23</sup> The Last Shot Doctrine imposes an implied duty

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<sup>20</sup> See Perales Viscasillas, *Editorial Remarks*, *supra* note 18; Perales Viscasillas, "Battle of the Forms," *supra* note 18; Piltz, *supra* note 7, at 233-44.

<sup>21</sup> See Peter Schlechtriem, *Article 19*, in COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) n. 20, (Peter Schlechtriem & Ingeborg H. Schwenzer eds., 2005); Joseph Lookofsky, *The 1980 United Nations Convention on Contracts for the International Sale of Goods*, in INTERNATIONAL ENCYCLOPEDIA OF LAWS, CONTRACTS 71-74 (2000), available at <http://cisgw3.law.pace.edu/cisg/biblio/loo19.html> (last visited July 22, 2008).

<sup>22</sup> See Piltz, *supra* note 7, at 233-44.

<sup>23</sup> See JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 182-92 (1999), available at <http://cisgw3.law.pace.edu/cisg/biblio/ho19.html> (last visited July 22, 2008); Strmosljanin, *supra* note 14, at 65.

on the offeror to object to additional or conflicting terms. The failure to object combined with performance result in what is deemed an implied consent to the terms of the last submitted offer. But parties are often not even aware of the fact that their standard terms are clashing. Therefore, the Last Shot Doctrine imposes on the performing party an unfair burden of an implied consent.<sup>24</sup> Another argument against the Last Shot Doctrine is that it is not always clear which party sent his terms last. This leads to immense difficulties in determining the terms of the contract. Sometimes one party or both parties' terms include a "defensive incorporation clause" which expressly rejects the terms of the other party and expressly excludes them from becoming part of the contract. In such situations, it takes much effort to assume an implied consent to the other party's terms from performance.<sup>25</sup>

### 3) *The Knock Out Rule*

The Knock Out Rule approaches the battle of forms as a gap-filling issue and finds a solution in the general principles of the Convention, particularly in the principle of party autonomy derived from Art. 6.<sup>26</sup> The Knock Out Rule strictly distinguishes between the issue of contract formation and the terms of the contract.<sup>27</sup> The Knock Out Rule gives much credit to the party's autonomy. If the parties perform, it is assumed that both parties acted on the assumption of a valid contract. The terms of the contract are those with which the parties substantially agree.<sup>28</sup> The conflicting terms cancel each other out and are replaced by the provisions of the Convention. Literally, conflicting terms knock each other out.<sup>29</sup>

Performance is considered as an implied agreement between the parties to conclude a contract without regard to offer and acceptance in abrogation of Art. 19 CISG, pursuant to Art.

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<sup>24</sup> See Janssen, *supra* note 12, 457.

<sup>25</sup> See Schlechtriem, *supra* note 21; Schlechtriem, *Battle of Forms in International Contract Law*, *supra* note 9, at 36-49.

<sup>26</sup> See Strmosljanin, *supra* note 14, at 55-56.

<sup>27</sup> See COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG), *supra* note 21, at 244-45.

<sup>28</sup> See Strmosljanin, *supra* note 14, at 55-56.

<sup>29</sup> See Pirales Viscasillas, *Cross-References and Editorial Analysis: Art. 19*, *supra* note 6.



6 CISG. The parties indicate by their conduct that they both want a contract concluded despite the fact that there is no agreement about all the terms of the contract, as Art. 19 CISG requires. A mutual agreement to deviate from the provisions of Arts. 14-24 CISG is permitted by Art. 6, and is also possible by implication from conduct. Such implied derogation is possible according to Art. 8 (1) CISG, which provides that conduct of a party is to be interpreted by his subjective intent as far as the other party knew or had reason to know about this intent.<sup>30</sup> If the subjective intent of a party is not identifiable,<sup>31</sup> Art. 8 (2) CISG provides a more objective analysis, and states that, "statements and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances."

However, an implied exclusion of Art. 19 CISG only demonstrates contract formation; it does not explain why the conflicting terms of the parties do or do not become part of the contract. Therefore, the performance of a contract by parties is also interpreted as an implied agreement not to insist on the inclusion of the parties' standard terms, and, where the parties' terms conflict, to replace them with the provision of the CISG. The terms of the contract are the terms of both parties as far as they are common in substance. The conflicting terms, however, knock each other out and are replaced by statutory provisions.<sup>32</sup>

The Knock Out Rule overrides the Mirror Image Rule reflected in Art. 19 (1) CISG and its exception provided for in Art. 19 (2), and assumes a contract conclusion despite conflicting material terms, but replaces them with the statutory provisions of the CISG.

a) *Arguments against the Knock Out Rule*

The Knock Out Rule is also heavily criticized, first because it deviates from Art. 19 CISG.<sup>33</sup> Another reason for criticism is

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<sup>30</sup> See Strmosljanin, *supra* note 14, at 55-56.

<sup>31</sup> See generally UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods, Art. 8, UN Doc. A/CN.9/SER.C/DIGEST/CISG/8 (June 8, 2004), available at <http://cisgw3.law.pace.edu/cisg/text/digest-art-08.html> (last visited July 22, 2008).

<sup>32</sup> See Strmosljanin, *supra* note 14, at 68-69.

<sup>33</sup> See Piltz, *supra* note 7.

that the Knock Out Rule was rejected by the majority of the Drafters of the Convention. In the course of drafting the Convention, the Belgian delegation submitted a proposal that addressed the problem of the battle of the forms directly. That proposal would have added a fourth paragraph to Art. 19 CISG, stating that if parties used general conditions, any conflicting terms in the forms would not become part of the contract. This proposal was rejected on the grounds that the issue needed further investigation and consideration.<sup>34</sup> Another argument against the Knock Out Rule is that it conflicts with the goal of Art. 7 CISG, which is to promote a uniform application of the rules of the CISG.<sup>35</sup>

b) *Arguments for the Knock Out Rule*

The fact that the Belgian proposal was rejected does not mean that the Knock Out Rule is an inappropriate solution. The reason for the rejection of the proposal was the need for further investigation and consideration of that issue. Therefore, the rejection did not address its substantive justification. The Knock Out Rule is in principal not excluded by the CISG and has its foundation in its general principles, particularly in the principle of party autonomy derived from Art. 6 CISG.<sup>36</sup>

The main argument for the Knock Out Rule is that it renders a more practical as well as a more balanced solution because it does not place one party in an unprivileged position.<sup>37</sup> It also makes the sometimes very difficult determination of the last submitted offer superfluous because, for the conclusion of a contract, there need not be an agreement about all the terms of the contract, but only about the “*essentialia negotii*.”

The criticism of the Knock Out Rule that it would not render a uniform application is also not persuasive. The Knock Out Rule leads to the result that the parties’ conflicting terms knock each other out and are replaced by the statutory provisions of the CISG. It leads to the result that the provisions of the Convention actually apply instead of the parties’ terms

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<sup>34</sup> See Moccia, *supra* note 8, at 651.

<sup>35</sup> See Piltz, *supra* note 7.

<sup>36</sup> *Id.* at 233-44.

<sup>37</sup> See Lookofsky, *supra* note 21.

which deviate from the provision of the CISG. This, thus, has the effect of a uniform application of the Convention.

### III. CONSIDERATION OF GERMAN LAW, THE UNIDROIT PRINCIPLES AND THE EUROPEAN PRINCIPLES WITH REGARD TO BATTLE OF THE FORMS

#### 1) *German law*

The German Civil Code contains a similar provision to the Mirror Image Rule reflected in Art. 19 (1) CISG. The German Civil Code provides in § 150 (2) that an acceptance with modifications is a rejection of the offer, combined with a new offer.<sup>38</sup>

Section 151 of the German Civil Code states that an acceptance does not need to be communicated if communication is not expected according to common usage. In other words, acceptance by conduct, especially by performance, is possible.

In its early decisions, the German Federal Supreme Court followed the Last Shot Doctrine to resolve the problem of conflicting standard terms.<sup>39</sup> A contract was concluded by the performance of the contract. The performance was considered as an acceptance of the counter-offer,<sup>40</sup> including all its standard terms.

But since the 1970s, the German Federal Supreme Court has no longer held on to the Last Shot Doctrine, but has followed the Knock Out Rule.<sup>41</sup> The reason for giving up the Last Shot Doctrine and adopting the Knock Out Rule was that in situations in which one or both parties used a "defensive incorporation clause," or a "general rejection clause," which expressly rejected the other party's terms, performance of one party could

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<sup>38</sup> The German Civil Code contains in §§ 305-310 provisions concerning the inclusion of standard terms and conditions. Those provisions concern the inclusion against consumers, but do not address the problem of conflicting standard terms between merchants. That issue is solved according to the general provisions on contract formation. See Bürgerliches Gesetzbuch [BGB] [Civil Code], Aug. 18, 1896, Reichsgesetzblatt [RGBl] 195, as amended, §§ 305-10.

<sup>39</sup> BGH, 01/19/1951, BB 1951, 456; BGH, 02/12/1952, BB 1952, 238; BGH, 03/14/1964, NJW 1963, 1248; BGH 10/06/1971, DB 1971, 2106; BGH 09/26/1973, DB 1973, 2136.

<sup>40</sup> The other situation in which a party prevails with his terms is in the use of standard terms in a commercial confirmation letter, which has the effect that the contract is formed with the content as presented in the confirmation letter, unless the other party promptly objects.

<sup>41</sup> See Schlechtriem, *Battle of Forms*, *supra* note 9, § I.

not be considered as consent to the other party's standard terms. The Court, however, decided that the parties' continuous reference to their own terms and conditions despite performance of the contract does not lead to a situation where one party with his terms prevails. The Court pointed out that a "rejection clause" has the effect of preventing the other party's terms from becoming part of the contract, but that such a clause does not have the effect of imposing one party's terms upon the other party.<sup>42</sup>

The performance of both parties is interpreted, according to § 154 (1) German Civil Code, as an agreement to all "*essentialia negotii*," or dickered terms that the parties considered necessary for a contract formation. It is assumed that a contract is formed with all the terms the parties agreed upon. The conflicting terms, however, are replaced by statutory provisions.<sup>43</sup>

## 2) *The UNIDROIT Principles*

The UNIDROIT Principles directly address the problem of conflicting standard terms in Art. 2.22, which provides:

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

## 3) *The Principles of European Contract Law*

The Principles of European Contract Law (PECL) also follow the Knock Out Rule for conflicting standard terms. PECL Art. 2:209 [Conflicting General Conditions] provides in subsection (1) that "if the parties have reached agreement except that the offer and acceptance refer to conflicting general conditions of contract, a contract is nonetheless formed. The general conditions form part of the contract to the extent that they are common in substance." Subsection (2) provides that "however, no contract is formed if one party: (a) has indicated in advance, ex-

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<sup>42</sup> BGH NJW, 1985, 1389; BGH BB 1991, 1732.

<sup>43</sup> See Schlechtriem, *Battle of Forms*, *supra* note 9.

explicitly, and not by general conditions, that it does not intend to be bound by a contract on the basis of paragraph (1); or (b) without delay, informs the other party that it does not intend to be bound by such a contract.” Subsection (3) then defines general conditions. The Principles of European Contract Law also reflect the Knock Out Rule.

#### 4) *Conclusion*

In Germany, the problem of the battle of forms is governed by the Knock Out Rule. However, as already stated, applying domestic law is not an appropriate solution for controversies that are subject to the CISG.<sup>44</sup>

The UNIDROIT Principles (1994) and the European Principles of Contract Law (1998) are both bodies of rules that deal with international contract law.<sup>45</sup> But they are not, as the CISG, limited to sales contracts. Both principles provide that they may be used to interpret or supplement international uniform law instruments,<sup>46</sup> and may provide a solution to an issue where the applicable rules of law are silent.<sup>47</sup>

Art. 7 (2) CISG provides that questions that are not expressly settled by the Convention are to be settled in conformity with its general principles, or in absence of those, in conformity with the rules of private international law.

The UNIDROIT Principles and the Principles of European Contract Law were drafted after the Convention. However, both Principles were inspired by the Vienna Convention of Sales.<sup>48</sup> It also needs to be pointed out that the UNIDROIT as well as the European Principles are not a “new” body of comprehensive rules and regulations. Rather, they are a summarization of existing principles, and they are based on the principles of the

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<sup>44</sup> See Huber, *supra* note 16, at 229.

<sup>45</sup> See Perales Viscasillas, “*Battle of the Forms*,” *supra* note 18, at n. 20.

<sup>46</sup> See UNIDROIT Principles of International Commercial Contracts (1994), Preamble, available at <http://www.jus.uio.no/lm/unidroit.contract.principles.1994/doc.html> (last visited July 22, 2008).

<sup>47</sup> See Principles of European Contract Law (1998), art. 1.101(4), available at <http://www.jus.uio.no/lm/eu.contract.principles.1998/doc.html> (last visited July 22, 2008).

<sup>48</sup> See Observations on the Use of the Principles of European Contract Law as an Aid to CISG Research, <http://cisgw3.law.pace.edu/cisg/text/peclcomp.html> (last visited July 22, 2008).

CISG. Thus, the UNIDROIT Principles as well as the PECL can generally be used as tools, aiding in the interpretation of the CISG.<sup>49</sup>

However, the provisions of the UNIDROIT Principles and the PECL guide the solution of the battle of forms for contracts subject to the CISG only if there is a gap in the CISG.

As already stated, Art. 19 CISG does not expressly address the issue of the battle of forms. However, the issue of the battle of forms was discussed during the course of drafting the CISG, and it was not considered as necessary to provide a subsection that expressly dealt with this problem. The drafters were absolutely aware of the issue of conflicting terms, but considered the existing provisions as sufficient to find a solution for the battle of forms.<sup>50</sup>

Therefore, it cannot be assumed that there is a gap in the CISG with regard to the battle of forms. Rather, the provisions of the CISG are sufficient to solve the problem of the battle of forms.

Because there is no gap, the provisions in the UNIDROIT Principles and the Principles of European Contract Law cannot be used as a tool to find an appropriate solution for the battle of forms in international sales contracts.

#### IV. GERMAN APPROACH TO BATTLE OF THE FORMS IN INTERNATIONAL CONTRACT LAW: THE DECISION OF THE FEDERAL SUPREME COURT OF GERMANY OF 9 JANUARY 2002<sup>51</sup>

The German Federal Supreme Court recently handed down an innovative decision on the battle of forms in international contract law. The analysis of the German approach to the battle of forms under the CISG primarily focuses on the decision of the German Federal Supreme Court of January 9, 2002.

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<sup>49</sup> See Strmosljanin, *supra* note 14, at 55-56.

<sup>50</sup> See Perales Viscasillas, "Battle of the Forms," *supra* note 18.

<sup>51</sup> See Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 9, 2002. Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ], available at <http://cisgw3.law.pace.edu/cases/020109g1.html>.

1) *Facts*

The Plaintiff (Buyer)<sup>52</sup> traded in dairy products and was located in the Netherlands. The Defendant (Seller)<sup>53</sup> was a dairy company headquartered in Germany. In the first half of 1998, due to a number of contracts, Buyer purchased from Seller a total of 2,557.5 tons of powdered milk. The orders were made by phone, and their contents were subsequently put on record by written confirmations by one or the other party.

Defendant (Seller)'s "delivery confirmations" contained in the bottom line the following text:<sup>54</sup>

All sales are exclusively subject to our general terms and conditions. Conflicting statutory provisions or conflicting general terms and conditions of the buyer are explicitly rejected and are not part of the contract.

Plaintiff's (Buyer) general terms and conditions provided in No. 8 "samples and complaints": "Seller's liability for suffered damages (and/or for future damages) is limited to the amount invoiced for delivered goods, without prejudice to seller's potential obligation to refund the paid purchase price, or a part thereof."

Seller's general terms and conditions contained clauses relating to warranty and complaints, but they did not include clauses relating to Seller's liability, or to the exclusion of the provisions of the CISG. Buyer resold 7.5 tons of the powdered milk to a Dutch company and 2,550 tons to an Algerian company. Seller packaged and delivered the powdered milk. Buyer inspected the delivered powdered milk randomly, but could not find any defects. Buyer then re-palletized the powdered milk in the harbor of Antwerp and shipped the goods to Algeria, as far as the powdered milk was sold to the Algerian Company.

After an Algerian subsidiary processed the powdered milk, some of the manufactured fresh milk had a rancid taste. The Algerian subsidiary complained to Buyer about the delivered

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<sup>52</sup> The presentation of the involved parties is simplified for this illustration.

<sup>53</sup> The presentation of the involved parties is simplified for this illustration.

<sup>54</sup> It can be inferred from the facts that the delivery confirmations of Seller did not include any other terms and conditions. Apparently, Seller's prior writings/confirmations included Seller's general standard terms and condition to which Seller referred to in its delivery confirmations. See BGH Jan. 9, 2002, *supra* note 51.

powdered milk, and Buyer informed Seller. During settlement negotiations before the suit was filed, Seller's legal representative confirmed the variation in quality of the powdered milk and pointed out that Seller was willing to rescind the contract. Seller's legal representative also emphasized that the contractual relationship was subject to Seller's terms and conditions as mentioned in the Seller's delivery confirmations.

The Dutch company also complained about the delivery of 7.5 tons because of a sour taste of the powdered milk and claimed damages in the amount of 29.265 Dutch Florin. Buyer compensated the Dutch company in that amount. The parties disagreed about when the cause for the rancid taste arose, particularly whether or not it was after the passing of the risk of loss. On September 1, 1998, Buyer filed suit against Seller claiming damages in an amount of \$189,150.36. Buyer alleged that Seller was liable according to the CISG because Seller's general terms and conditions did not contain an exclusion clause with regard to the CISG. Seller initially asserted that its standard terms abrogated the provisions of the CISG, and that German law applied.<sup>55</sup>

After the proceedings commenced, it became clear that the contract and the question of Seller's liability was governed by the CISG, since Seller's terms did not include a clause that abrogated the provisions of the CISG. Seller then realized that Buyer's terms were actually more favorable to it because they limited Seller's liability to the amount invoiced for the delivered goods. Seller then argued that his liability was limited according to Buyer's standard terms, but Buyer objected, and asserted that Seller was liable according to the provisions of the CISG.

## 2) *Procedural history*

The Trial Court dismissed the claim. Buyer appealed. The Appellate Court, after hearing an expert's opinion about the cause of the defect,<sup>56</sup> granted Buyer damages in an amount of

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<sup>55</sup> According to German law, the seller is only liable for damages if a certain quality of the goods is guaranteed. The German provisions would have placed Seller in a better legal position because they were more favorable to Seller than the provisions of the CISG.

<sup>56</sup> In Germany, it used to be that the Appellate Court was another trial court. A review included the new findings of fact, and a hearing of new and old evidence



\$633,742.45 and dismissed the case with regard to the remaining amount. Seller appealed and moved to dismiss the entire claim.

### 3) *Issue*

The issue in this case was the question of the battle of forms, particularly whether Buyer's term that limited Seller's liability became part of the contract.<sup>57</sup>

### 4) *Holding*

The Federal Supreme Court reversed and remanded the case to the Appellate Court for a new trial and decision.

### 5) *Reasoning*<sup>58</sup>

The Federal Supreme Court held that the provisions of the CISG for damages were not abrogated for Buyer's claims by Buyer's general terms and conditions, which limited Seller's liability to the amount of the purchase price of delivered goods.

The Court stated that the conflicting standard terms of Buyer and Seller did not lead to a failure of contract formation because of a lack of consensus, pursuant to Art. 19 (1) and (3) CISG, and held that there was no "dissent". The Federal Supreme Court concluded that the parties considered the lack of agreement between the conflicting standard terms not as essential as they indicated by performing the contract. The Court further confirmed that the liability provisions in Buyer's general terms that were favorable to Seller were not applicable because of Seller's general "rejection clause."

The Federal Supreme Court pointed out that there is disagreement between commentators about the extent to which conflicting standard terms become part of a contract. According to the Knock Out Rule, which the Court described as the majority

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was possible. However, the Judicial Modernization Act of 01/01/2002 limited a review at the Appellate Court to errors of law.

<sup>57</sup> Another important issue in this case was the question of the passing of the risk of loss and the burden of proof with regard to the time the defect of the powdered milk arose. See BGH Jan. 9, 2002, *supra* note 51. This paper, however, only addresses the issue of the battle of forms and is not concerned with the issue of the burden of proof.

<sup>58</sup> The illustration of the Court's reasoning is not the official UNCITRAL translation.

opinion, conflicting standard terms only become part of a contract as far as they are common in substance; the remaining terms are replaced by statutory provisions.

The Court held that the decision whether or not there is inconsistency between standard terms that prevents the terms from becoming part of the contract does not depend upon a comparison of single terms, but upon a consideration of all relevant terms and conditions. The limited “rejection clause” in Seller’s terms could not alone be compared with Buyer’s term that limited Seller’s liability.

The Court further stated that it cannot be assumed that Buyer intended its balanced standard terms, as far as they are unfavorable compared to the statutory terms, to be used against Buyer, but not to be allowed to make use of the terms favorable to Buyer. On the other hand, the Court continued, it is obvious that Seller did not want any unfavorable clauses in Buyer’s standard terms to be used against Seller.

The Court then addressed the Last Shot Doctrine, which the Court referred to as the alternative opinion, and concluded that the Last Shot Doctrine leads to the same result. The Court referred to the principle of good faith (Art. 7 (1) CISG), according to which Seller could not assume that the question whether or not the parties’ general standard terms are in conflict could be answered for each clause separately, with the result that only the other party’s terms that are favorable to Seller are part of the contract. The Court pointed out that this must be true even if Seller was the last one who referred to its terms.

## V. ANALYSIS

### 1) *The Court’s ruling: Two essential statements*

There are two essential statements the Federal Supreme Court made in its decision with regard to the battle of forms. The first one was that the parties’ conflicting standard terms do not lead to a failure of contract formation because of lack of agreement. Both parties indicated by their performance that they considered the lack of agreement about all the parties’ terms not essential.

The second statement of the Court was that the determination whether or not terms and conditions are in conflict is not to

be decided by comparing single clauses, but by considering all relevant clauses. With this statement, the Court tried to avoid an unbalanced situation in which a party would be allowed to pick only those terms from the opposing party's standard terms which it found more favorable than statutory terms, while rejecting all terms that it found more unfavorable than the statutory provisions. In other words, the Court decided that a party must be able to use both its favorable as well as its unfavorable terms and conditions against another party. In this case, the Court did not allow Seller to avail itself of Buyer's clause of limited liability, because Seller expressed in its "rejection clause" that all terms of the Buyer are rejected and subsequently that must apply to all terms, both those that are favorable and those that are unfavorable to Seller.

## 2) *Assumption of a valid contract*

From the facts given, it is not clear whether or not the parties formed an oral contract by phone, or whether Buyer's orders by phone merely were offers that were accepted by seller's written confirmations. The role of Buyer's written confirmations of the orders is also unclear. The Court only states that orders by phone were put on record by written confirmations by either party. The Court did not attach much importance to the analysis of the contract formation between the parties, or whether there was one contract, or whether there were several contracts.

In addressing the issue of the contract formation, the Court did not distinguish between the two competing theories, but decided upfront that there was a valid contract, before turning to the Last Shot Doctrine and the Knock Out Rule to determine the terms of the contract.

There is no doubt that both theories, the Last Shot Doctrine as well as the Knock Out Rule, assume a contract formation when both parties, as in this case, perform. However, the two competing theories not only lead to different results with regard to the terms of the contract, they also differ in their analysis of contract formation. The Last Shot Doctrine requires agreement upon all terms of the contract and focuses on the terms of the last submitted counter-offer. Performance is deemed agreement to the terms of the last submitted counter-offer, and results in

contract formation. Once a contract is formed, there are no more conflicting terms. The Last Shot Doctrine requires identification of the last submitted counter-offer not only for the determination of the terms of the contract, but also to analyze the contract formation. The Knock Out Rule, however, strictly distinguishes between the issue of contract formation (which focuses on the principle of party autonomy according to Art. 6 CISG in deviation of Art. 19 CISG), and the issue of the terms of a contract (terms of both parties as far as they are common in substance, otherwise they are replaced by statutory provisions). The Knock Out Rule does not require agreement about all terms of the contract for contract formation. It is sufficient when the parties agree upon the “dickered” terms. Thus, the analysis of the contract formation is different according to which theory is followed.

The Court, however, did not distinguish between the two theories with regard to contract formation. It was essential for the Court that according to the parties’ correspondence, powdered milk was delivered by Buyer and accepted by Buyer. That conduct was sufficient for the Court to assume an agreement between the parties upon the “*essentialia negotii*” or dickered terms. The Court concluded that both parties indicated by performing the contract that they considered the “dissent” of their standard terms not as essential for the formation of the contract. With this assumption the Court gives credit to the parties’ autonomy, as it pays respect to the parties’ intention as the masters of the contract. This reasoning of the Court is actually an application of the principles of the Knock Out Rule, however, without expressly referring to it.

It is not clear whether the Court in deciding the issue of the contract formation upfront, already followed the Knock Out Rule, or whether the Court was influenced by German domestic law. In German domestic law, the approach to the problem of the battle of forms conforms to the Knock Out Rule. The question of the contract formation is answered first, before the question of the terms of the contract is answered. The German Civil Code provides in § 154 (1) a rule of interpretation that is referred to as “dissent,” which provides that “a contract is not formed if parties of a contract did not reach a consensus on all terms upon which at least according to one party an agreement

should have been reached.” However, this rule of interpretation is overridden if both parties, despite a lack of agreement, still want to be bound by the contract. This is the assumption upon which a valid contract is based if there are conflicting standard terms,<sup>59</sup> but the parties nevertheless perform.

When referring in its reasoning expressly to the “dissent” of the conflicting standard terms which the parties did not consider as an obstacle for the formation of the contract, the Court expressly used the terminology of the German Civil Code. Thus, the reasoning of the Court suggests applying the rule of German Civil Code § 154 (1) and overriding it according to the parties’ conduct.

However, even if the Court’s reasoning was influenced by German domestic law, the fact that the question of contract formation is determined independently from the question of the terms of the contract, complies with the principles of the Knock Out Rule, and is therefore justifiable under the CISG.

### 3) *The Court’s application of the Knock Out Rule*

After clarifying the issue of contract formation upfront, the Court then turned to the controversy of the Knock Out Rule and the Last Shot Doctrine to determine the terms of the contract. The Court stated that, according to the Knock Out Rule, which the Court referred to as the majority opinion, the terms of both parties become part of the contract as far as they are common in substance; conflicting terms are replaced by the provisions of the CISG. One would expect that the next step of the Court would then be a determination of the terms in conflict. However, the Court did not directly address the question whether the parties’ terms were actually conflicting.

The parties’ standard terms that were competing were the “general rejection clause” in Seller’s delivery confirmation and Buyer’s condition in No. 8 which limited Seller’s liability to the amount invoiced for delivered goods. What made this case peculiar was that Buyer’s standard terms were actually more favorable to the Seller.

The Court pointed out that the decision of whether or not terms are in conflict cannot be determined by comparing single

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<sup>59</sup> See Schlechtriem, *Battle of the Forms*, *supra* note 9, at § IV.

clauses, but that all relevant clauses must be considered. The Court then continued to say that a party who is using a “rejection clause” should not be allowed to pick only those terms that are more favorable, while rejecting all other terms that weaken its legal position. With this reasoning, the Court did not answer the question of whether the terms were in conflict. The Court only stated that a party who is using a “rejection clause” is barred from picking only the favorable terms of the other party’s boilerplate.

The Court also did not address the scope of a “general rejection clause,” and the Court did not give an analysis of the reasons why Seller’s “rejection clause” had the effect that all the terms of the other party are rejected, the unfavorable ones as well as the favorable ones.

There are two possible readings of a party’s “general rejection” or “defensive incorporation” clause. One possible reading is that even if the boilerplate of the party using the rejection clause is silent on a specific issue (such as seller’s terms were with regard to its liability) and the other party addresses this issue in its terms directly, there is still a conflict between the terms. It is assumed that the party who is using the “rejection clause” and whose terms are otherwise silent implicitly refers to the provisions of the CISG. If the other party’s terms deviate from the provisions of the CISG, there is a clash.<sup>60</sup>

Another possible reading is that a party’s “rejection clause” is to be interpreted as a “limited” rejection clause. The only effect of the clause should be that all unfavorable clauses are rejected, but that this would not affect those terms of the other party that are more favorable than the provisions of the CISG.<sup>61</sup> The purpose of a “rejection clause” is primarily to protect that party from the other party’s unfavorable terms, but not to exclude the establishment of a better legal position.

With the statement that a party is not allowed to pick only terms which it finds favorable, the Court implicitly rejected the second possible reading of a “rejection clause.” However, the only reasoning given by the Court is that any other result was not the assumed intention of the parties.

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<sup>60</sup> See Schlechtriem, *Article 19*, *supra* note 21, at 215.

<sup>61</sup> This was the Seller’s argument.

The Court's reasoning suggests the situation of a *venire contra factum proprium*.<sup>62</sup> *Venire contra factum proprium* means "non-conformity with prior conduct." A *venire contra factum proprium* is a special case of a violation of the good faith principle in the German domestic law of obligations.<sup>63</sup> The situation of a *venire contra factum proprium* applies within a contractual relationship, and bars a party from the exercise of legal rights if that party created a factual situation which the other party relied upon, and also had reason to rely upon. It means that if a party indicated his approval or disapproval with a certain situation, that party is later barred from asserting the opposite.

Applied to this case, *venire contra factum proprium* means that a party who objected to the other party's terms is not allowed to argue that, despite this objection, the other party's terms that are more favorable to him than statutory provisions nevertheless apply. A "rejection clause" has the effect that *all* of the other party's terms are rejected, and that a party using such a clause is barred from picking only the "good ones" from the other party's boiler plate, while rejecting the "bad ones." In other words, a party against whom such a "rejection clause" is used, can rely on the consequence of a complete exclusion of his terms.

The Court does not expressly refer to the good faith principle in its reasoning while applying the Knock Out Rule. However, while applying the Last Shot Doctrine, the Court expressly refers to the principle of good faith, and cites Art. 7 (1) CISG. The Court states that according to the good faith principle, Seller could not assume that only the Buyer's favorable terms remain valid. The Court used the same reasoning for the Knock Out Rule, and that confirms the fact that the Court, while applying the Knock Out Rule, was actually influenced by the principle of good faith. Thus, the Court primarily based its reasoning upon the good faith principle.

The CISG mentions the principle of good faith in Art. 7 (1), which states that "in the interpretation of this Convention, re-

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<sup>62</sup> Wilhelm-Albrecht Achilles, *Comment to the decision of the German Federal Supreme Court of January 9, 2002, (BGH Report) 267-68, 267 (2002)*.

<sup>63</sup> See Bürgerliches Gesetzbuch [BGB] [Civil Code] Aug. 18, 1896, Reichsgesetzblatt [RGBl] 195, as amended § 242.

gard is to be had to . . . the observance of good faith in international trade.” However, the Convention does not give a definition of “good faith.” The meaning and application of the good faith principle in the CISG is probably the most controversial issue under the Convention.<sup>64</sup>

The reference to the principle of good faith in Chapter II - General Provisions - of the CISG, and the emphasis on good faith in international trade, lead to the conclusion that the observance of good faith only concerns the interpretation of the Convention, but not the parties’ contractual relationship.<sup>65</sup> But good faith can be considered as a general principle of the Convention and may influence the interpretation of the intent of the parties, according to Art. 8 CISG. The international character of the Convention, however, bars applying interpretations inherent to domestic understandings and judicial interpretation of good faith.<sup>66</sup> The fact that the Court quoted Art. 7 (1) CISG while mentioning the good faith principle, leads to the conclusion that the Court was influenced in its decision by its domestic understanding of the good faith principle. Even if so, the “result” that a rejection clause has the effect that all other party’s conflicting terms do not become part of the contract, is consistent with the Knock Out Rule under the CISG.

The first possible reading of a party’s general “rejection clause” has the effect that if the party’s boilerplate is otherwise silent with regard to a specific issue, there is still a conflict between the terms if the other party deviates from the provisions of the CISG.<sup>67</sup> It is assumed that the party whose boilerplate is silent implicitly refers to the provisions of the CISG. If the other party’s terms deviate from the provision of the CISG, no matter if the terms are better or worse for the other party, there is a conflict. The consequence is that the conflicting terms knock each other out and do not become part of the contract; instead the provisions of the CISG apply. According to this rationale, no

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<sup>64</sup> Benedict C. Sheehy, *Good Faith in the CISG: The Interpretation Problems of Article 7*, in REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) 2005-2006 153, 154 (PACE INT’L L. REV. ed., 2007).

<sup>65</sup> See Peter Schlechtriem, *Article 7*, in COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) n. 7 (Peter Schlechtriem & Ingeborg H. Schwenzer eds., 2005).

<sup>66</sup> See *id.*

<sup>67</sup> See Schlechtriem, *Article 19*, *supra* note 21, at n. 19.



reference to the principle of good faith would have been necessary. The fact that there was an inconsistency in the parties' terms concerning Seller's liability alone led to the result that neither of the parties' terms applied, and that they were replaced by the provisions of the CISG.

The Court, with its reference to the good faith principle, implicitly rejected the second reading of a "rejection clause," according to which a "rejection clause" has the effect that only the unfavorable terms of the other party's boilerplate, but not the more favorable ones, are rejected. The Court, however, did not expressly adopt the first possible reading of the rejection clause which would nevertheless have led to the same result, in a consistent application of the Knock Out Rule.

It is also possible to extend this rationale. The Knock Out Rule gives much credit to the parties' autonomy, with the parties being the masters of the contract. Generally, the parties are eligible, even after contract formation, to agree upon one party's terms if the parties reach a mutual agreement. In this case, however, there was no mutual agreement between the parties about the inclusion of Buyer's terms. After the dispute arose, the Buyer expressly objected to the application of its terms, which favored the Seller.

The legal justification of the Knock Out Rule implies that both parties do not insist upon the inclusion of their conflicting terms, but are willing to replace them with the provisions of the CISG. This means that the contract is formed on the "default" terms provided by the CISG. If one party, after the conclusion of the contract, wants to agree to the other party's terms, this conduct should be characterized as an offer to modify the existing contract. A modification of a contract requires the other party's agreement according to Art. 29 CISG. If the other party does not agree, the contract is not modified.

In this case, the terms of the parties were conflicting because Seller's terms were silent concerning remedies, but Buyer's terms deviated from the CISG remedy provisions. The consequence was that Buyer's terms did not become part of the contract, and the issue of Seller's liability was subject to the provisions of the CISG. Seller's allegation that Buyer's terms apply can be interpreted as a subsequent adoption of Buyer's terms. However, a contract, subject to the provisions of the

CISG, was already formed. Thus, Seller's subsequent consent to Buyer's term was an offer to modify the existing contract. But Buyer did not agree. Therefore, the offer to modify the contract was not successful. The existing contract with the provisions of the CISG remained valid.

Therefore, it can be stated that in its reasoning, the Court in its application of the Knock Out Rule was influenced by the German good faith principle. However, the "result" is nevertheless consistent with the principles of the Knock Out Rule, and is therefore justifiable under the CISG.

#### 4) *The Court's application of the Last Shot Doctrine*

After the Court's statements about the Knock Out Rule, the Court turned to the Last Shot Doctrine and concluded that even if the Last Shot Doctrine applied, the result would be the same.

In German judicial decisions with regard to the CISG, there is a tendency to analyze both proposed solutions to the battle of forms. There is no indication that commentators, or judges in the member States favor one of the solutions. Courts are generally reluctant to adopt one of the theories.<sup>68</sup> Despite the German Federal Supreme Court's reference to the Knock Out Rule as the majority opinion, the Court tried to avoid deciding only in favor of one theory, but also to justify its result under the Last Shot Doctrine. However, the Court's attempt to invoke the Last Shot Doctrine was not successful.

The Court stated that, according to the principle of good faith (Art. 7 (1) CISG), Seller could not assume that the question whether or not the parties' terms are in conflict could be answered for each clause separately, with the result that only the favorable terms for Seller would remain valid, even if Seller was the last to refer to its terms.

The Court based this reasoning expressly on the principle of good faith without defining and explaining the rules the Last Shot Doctrine follows. As already stated, the good faith principle applies under German law and there is no good faith principle that is required to be observed by parties to a contractual

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<sup>68</sup> See Oberlandesgericht [OLG] [Köln Appellate Court], May 24, 2006, (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/060524g1.html> (last visited July 22, 2008).

relationship that is subject to the provisions of the CISG.<sup>69</sup> The same applies of course to the Court's reasoning with regard to the Last Shot Doctrine.

But independent from the fact that German law influenced the Court, the Court ignored the principles of the Last Shot Doctrine. The Last Shot Doctrine strictly follows the rules of offer and acceptance, and performance of one party is deemed consent to the last submitted offer. The act of performance determines the conclusion of the contract and at the same time, also determines the terms of the contract.

The Court decided upfront that the parties concluded a contract despite the fact that there were conflicting standard terms, and applied the principles of the Knock Out Rule in deciding the issue of contract formation; it thus flouted the principles of the Last Shot Doctrine. The Court referred to the controversy of the two competing theories only with regard to the content of the contract. However, not only the terms of the contract, but also the analysis of contract formation is different according to which theory is followed. This was the Court's first strike in applying the Last Shot Doctrine.

The Court's second strike in applying the Last Shot Doctrine was the assumption that a determination of conflicting terms was necessary. However, the effect of the Last Shot Doctrine is that only the terms of one party become part of the contract. The other party's terms are rejected. That has the effect that there are no conflicting terms in the contract. The Court ignored this result of the Last Shot Doctrine.

Despite the Court's efforts, its statements concerning the Last Shot Doctrine are not persuasive and not justified under the CISG. Therefore, the criticism which the Court has received for its decision about the Last Shot Doctrine<sup>70</sup> is well deserved.

## 5) Conclusion

There is no doubt that the decision of the Federal Supreme Court of January 9, 2002 was influenced by the German princi-

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<sup>69</sup> See Perales Viscasillas, *supra* note 11, at 217-28.

<sup>70</sup> See *id.*; Schlechtriem, *Battle of the Forms*, *supra* note 9, at n. 16a ; Schlechtriem, *Article 19*, *supra* note 21, at n. 70.

ple of good faith. It can also not be denied that the reasoning of the decision has some weakness.

The holding of the Court, however, is nevertheless consistent with the principles of the Knock Out Rule, and is therefore justified under the CISG.

There is no agreement among commentators about the scope of the decision of the German Federal Supreme Court of January 9, 2002. Some commentators are not sure what to do with it;<sup>71</sup> others say that the Court's decision was neutral with regard to which solution prevails;<sup>72</sup> and others say that it was a ground breaking decision for the Knock Out Rule as the prevailing theory.<sup>73</sup> However, it remains to be seen how the other member States will respond to that decision<sup>74</sup> and how the literature will view it. In some comments, however, the German decision has not received a warm welcome, and voices in favor of the Last Shot Doctrine are still strong<sup>75</sup>.

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<sup>71</sup> See Perales Viscasillas, *Battle of the Forms*, *supra* note 11, at 217-28.

<sup>72</sup> See Edoardo Ferrante, *Battle of Forms and the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG)*, *A Note on the BGH (German Supreme Court) Decision of 9 January 2002*, *REVIEW DE DRIOT UNIFORME*, 975, 979 (2003-04).

<sup>73</sup> See Ulrich Magnus, *Das Un-Kaufrecht – Aktuelle Entwicklungen und Rechtsprechungspraxis*, *ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT (ZEuP)* 533-41 (2002).

<sup>74</sup> The Appellate Court (Oberlandesgericht) Frankfurt am Main followed the Federal Supreme Court in its decision of June 26, 2006 and concluded that conflicting terms do not lead to a failure of contract formation, and that a rejection clause has the effect that not only the conflicting terms, but also the additional terms of the other party do not become part of the contract. See Oberlandesgericht [OLG] [Frankfurt Appellate Court] June 26, 2006, (F.R.G.), available at <http://www.cisg-online.ch/cisg/urteile/1385.pdf> (last visited July 22, 2008), English translation available at <http://cisgw3.law.pace.edu/cases/060626g1.html> (last visited July 22, 2008). However, the Appellate Court Koblenz in its decision of October 4, 2002, and the Appellate Court Düsseldorf in its decision of April 21, 2004, follow the Last Shot Doctrine without even mentioning the Knock Out Rule. See Oberlandesgericht [OLG] [Koblenz Appellate Court] Oct. 4, 2001, available at <http://cisgw3.law.pace.edu/cases/021004g1.html> (last visited July 22, 2008); Oberlandesgericht [OLG] [Düsseldorf Appellate Court] Apr. 21, 2004, available at <http://cisgw3.law.pace.edu/cases/040421g3.html> (last visited July 22, 2008).

<sup>75</sup> See Perales Viscasillas, *Battle of Forms*, *supra* note 11 at 217-28.

## VI. GENERAL COMMENTS ON THE CONTROVERSY ABOUT THE BATTLE OF FORMS

The decision of the German Federal Supreme Court demonstrates that the Knock Out Rule renders a more practicable solution to the problem of the battle of the forms than does the Last Shot Doctrine because the Knock Out Rule allows consideration of the question of contract formation independently from the issue of the terms of the contract.

The situation on which the Court's decision was based is a classic example of the fact that the parties are not always aware of their standard terms. The Seller initially assumed that its terms abrogated the provisions of the CISG, and the Buyer was probably not aware that its terms actually placed the Seller in a better legal position. Buyer's terms were probably composed a long time ago, and were primarily meant to apply to a contractual relationship with the Buyer in the position as reseller. Buyer did not pay attention to the fact that in the contractual relationship with Seller, Buyer was in the position of the purchaser. Parties, however, are usually merchants and not lawyers. Merchants want to do business, and therefore, they do not pay as much attention to boilerplates as lawyers would.

Parties usually negotiate commercial transactions. But if they agree upon the price, the goods, the delivery, and the payment, the parties generally assume that they have "a deal," without regard to any general terms and conditions. That assumption is exactly the one upon which the Knock Out Rule is based, and reflects the actual handling of the situation by the parties according to their presumptions and expectations. Many transactions are carried out without any relevance of standard terms and conditions. The parties' boilerplates usually only become relevant if there is a breach of warranty or a breach of contract. The parties then start to take an interest in the provisions of their boilerplates, as well as to wonder about the terms of the contract.

The solution of the Last Shot Doctrine, however, requires an agreement between the parties about all terms of the contract. This could lead to peculiar results in reality. In situations, in which parties have a business relationship, but conclude several contracts by exchanging forms (as in the case of the decision of the German Court, but presumably without rejection

clause), each contract is concluded, at least by performance, to the terms of the last submitted offer. This leads to the result that several contracts between parties of a business relationship are concluded with different contents, depending on the terms of the last submitted offer. If it turns out that the quality of the delivered goods does not meet contractual expectations, the question of a breach of warranty would have to be answered for each contract separately and differently. The buyer might then be allowed to claim damages for some deliveries, but not for others. In other words, the solution of the Last Shot Doctrine would not allow a uniform approach to the issue of the breach of warranty, but require addressing the issue separately for each contract. This result is definitely not desirable. Additional difficulties could arise in determining which offer was the last one to be submitted for each contract. Hence, the necessity of a strict analysis of contract formation, which the Last Shot Doctrine requires, would create many difficulties, while not providing practical solutions.

Another difficulty in applying the Last Shot Doctrine is in situations in which one party, or both parties use a “general rejection clause.” In those circumstances, it would require a great deal of effort to imply consent because the “rejection clause” expressly objects to the other party’s terms.

Another argument for the Knock Out Rule as the “better” solution derives from the consideration of the UNIDROIT Principles and the European Principles. Those principles can in fact not be used as tools in finding an appropriate solution for the battle of forms under the CISG. However, the approach of the UNIDROIT Principles and the Principles of European Contract Law may be used as support for the existing arguments in favor of the Knock Out Rule. Both principles address the problem of conflicting standard terms and provide a solution conforming to the Knock Out Rule. The fact that both principles were based on the Vienna Sales Convention shows that the solution of the Knock Out Rule is basically approved. The fact that both Principles expressly solve the problem of conflicting terms according to the Knock Out Rule underlines the argument that the Knock Out Rule indeed provides an appropriate solution.

The Knock Out Rule also promotes a uniform application of the CISG. The fact that conflicting terms are replaced by the

provisions of the CISG leads to an actual application of the provisions of the CISG to the parties' contractual relationship. According to the Last Shot Doctrine, however, the terms of one party become part of the contract. In most cases, these terms deviate from the provisions of the CISG.

In conclusion, the Knock Out Rule has the better arguments for being an appropriate solution to the battle of forms. It not only provides a better approach to factual situations, but also renders a more practical result than the Last Shot Doctrine. However, the controversy is deadlocked, and it would be bold to assert that the problem is now solved.