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# **“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**

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## **I. INTRODUCTION**

The United Nations Convention on Contracts for the International Sale of Goods, known as the Vienna Convention of 1980 (CISG),<sup>1</sup> is presently part of the law of approximately fifty countries.<sup>2</sup> This wide acceptance by nations with vastly differ-

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† This article was submitted to the Student Essay Contest of the Institute of International Commercial Law at the end of December 1995. Prior to the final decision in September 1997, the selected articles were given the opportunity to update the information originally submitted. Doctor in Law, 1996. University Carlos III of Madrid

<sup>1</sup> United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, U.N. Doc. A/CONF. 97/18, Annex I, reprinted in 19 I.L.M. 668 [hereinafter CISG].

<sup>2</sup> As of 14 September 1998, the Vienna Convention is part of the domestic law of 53 countries: Argentina, Australia, Austria, Belarus, Belgium, Bosnia-Herzegovina, Bulgaria, Burundi, Canada, Chile, China, Croatia, Cuba, Czech Republic, Denmark, Ecuador, Egypt, Estonia, Finland, France, Georgia, Germany, Greece, Guinea, Hungary, Iraq, Italy, Latvia, Lesotho, Lithuania, Luxembourg, Mexico, Republic of Moldova, Mongolia, Netherlands, New Zealand, Norway, Poland, Romania, Russian Federation, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Syria, Uganda, Ukraine, United States, Uzbekistan, Yugoslavia and Zambia. Ghana and Venezuela have signed it, but have not yet decided to ratify it. The Official Text is in United Nations Convention on Contracts for the International Sale of Goods (A/CONF.97/18, Annex I), p.178 et seq, and in United Nations Conference on Contracts for the International Sale of Goods, Vienna, Official Records (A/CONF.97/19). New York: United Nations, 1991. The works that led to

ent social, legal and economic systems demonstrates the considerable success obtained by the Convention. The reasons for the wide approval of this text are many. In relation to its predecessor - The Hague Conventions of 1964,<sup>3</sup> and specifically the Uniform Law on Formation of the Contracts (ULF), the Vienna Convention has emerged as a text with evident and substantial improvements. These changes were implemented largely in response to criticisms of the Hague texts.

During the CISG development process, many nations were represented. In contrast, only 62 nations participated in the Diplomatic Conference on the New Uniform Sales Law; 22 were

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the adoption of the Convention are summarized in: a) in the Official Records, where there is also a comment for each article of the previous Draft (1978 Draft) prepared by the UNCITRAL Secretariat: Commentary on the Draft Convention on Contracts for the International Sale of Goods, prepared by the Secretariat (A/CONF.97/5, in A/CONF.97/19, p.14 et seq); and b) the UNCITRAL Yearbooks (vol. 10.). CISG Articles to be cited as "Article" hereinafter.

<sup>3</sup> The move toward a uniform law of international trade began in April 1930 when UNIDROIT, or the Rome Institute, took the initiative of founding a Working Group in charge of the drafting of a Uniform Law on international sales. Two Drafts were prepared: one on the formation of international contracts by correspondence ("*Loi uniforme sur la formation des contrats internationaux par correspondance*"); the other related to the performance of the contract, which was drafted on the basis of the work of Professor Ernst Rabel, *DAS RECHT DES WARENKAUFS*, vol. I (1936), II (1958). The importance of Rabel's work is underlined by its use as the basis of the deliberations during the 1964 Hague Conference. See Ernst von Caemmerer, *Die Haager konferenz über die internationale Vereinheitlichung des Kaufrechts*, vom 2, bis 25, april 1964, 1965, vol. 29, p.101 et seq; see also Peter Schlechtriem, *Einheitliches UN-Kaufrecht*. Tübingen: J.C.B. Mohr, 1981, p.1 et seq; in regard to the last author, we will follow the English translation of his book: *UNIFORM SALES LAW, The UN-Convention on Contracts for the International Sale of Goods*, (1986). The work of UNIDROIT was interrupted during the Second World War, but it recommenced when an International Diplomatic Conference was convened in The Hague in 1951. In 1959 a Draft Uniform Law on Formation of International Sales Contracts was published; also published was a Draft Uniform Law on International Sales Contracts in 1956. In 1964, a new Diplomatic Conference was convened to work on the two Drafts. After three weeks of intensive work, two Conventions were adopted. One related to Uniform Law on International Sales Contract that incorporated as an annex a Uniform Law: Uniform Law on the International Sales (ULIS). The other related to the Formation of the Contracts and also incorporated a Uniform Law on that theme: Uniform Law on Formation of International Sales Contracts (ULF). The Hague Sales Convention entered into force 18 August 1972; The Hague Formation Convention on 23 August 1972. More recently, their value has become more limited because the 1980 Vienna Convention has successfully replaced these texts. According to Article 99(3) CISG: a state which ratifies, accepts, approves, or accedes to the CISG and is a party to either or both the Hague Conventions shall at the same time denounce either or both Hague Conventions.

European or other developed Western States, 11 socialist, 11 South-American, 7 African and 11 Asian countries.<sup>4</sup> Adopted by countries that account for over two-thirds of all world trade in goods, a wide spectrum of legal cultures has made the CISG the law of the land: from developing countries to the developed, from free market economies to countries with planned economies, and Civil as well as Common Law legal systems.

A complex text was achieved through the participation of countries with varying legal, economic and political systems. There was worldwide participation during the Diplomatic Conference that led to the development of the Vienna Convention. Hence, there was wide support for the ratification of the final text. The CISG has overcome, not without difficulties, many juridical obstacles encountered during the evolution of the text and in working toward the goal of universal application. It is on the triple plane, however, of Civil Law/Common Law conflict, economics (North-South conflict), and politics (East-West conflict), where the most difficult debates took place during the Vienna Diplomatic Conference.

The greatest obstacles arose during the technical-legal confrontations between Common Law countries and Civil Law countries.<sup>5</sup> Part II of the Convention, dedicated to the formation of the contract by offer and acceptance, is a typical place to find the practice of compromise between the Civil Law and Common Law systems. The meeting point of these systems is best described in an analysis of the formative problems of a contract. In the traditional analysis of two declarations of will, offer and acceptance, there are also conflict divergencies that seem, at

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<sup>4</sup> See Gyula Eorsi, *A Propos the Vienna Convention on Contracts for the International Sale of Goods*, 31 AM. J. COMP. L. 333, 335 n. 5 (1983), who adds that the most outstanding difference between ULIS and the CISG consists precisely in the considerable decrease of *rigor commercialis*, that was achieved due to the change in the composition of the participant countries.

During the 1964 Hague Diplomatic Conference the distribution of the participating States was as follows: developed (78.6%) and developing (10.7%), while during the 1980 Vienna Diplomatic Conference the distribution was: developed (35.5%) and developing (46.8%). See Gabrielle Brussel, *The 1980 United Nations Convention on Contracts for the International Sale of Goods: A legislative study of the North-South Debates*, 6 N.Y. INT'L L. REV. 53, 61 (1993).

<sup>5</sup> See Manuel Olivencia, *La Convención de las Naciones Unidas sobre los Contratos de Compraventa Internacional de Mercaderías: Antecedentes Históricos y Estado Actual* 201 REVISTA DE DERECHO MERCANTIL 377, 394 (1992).

first look, impossible to solve. In fact, Part II makes evident in many of its dispositions a compromise between States with different legal principles: open-price contracts (Articles 14(1) and 55 CISG);<sup>6</sup> revocability and irrevocability of the offer (Article 16 CISG);<sup>7</sup> counter-offers (Article 19 CISG);<sup>8</sup> and the receipt theory as the moment in which the declarations of will, including the conclusion of the contract, are effective (Articles 23 and 24 CISG).<sup>9</sup> These Articles show a balance, in most cases, between the different principles which form the basis of varying legal systems. This does not mean, however, that the formation rules of the Convention are a just a patchwork of varying provisions. The drafters did not merely appropriate Civil or Common law

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<sup>6</sup> Article 14(1) states: "A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price."

Article 55 states: "Where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned." *See id.* at art. 55.

<sup>7</sup> Article 16 indicates that: "1. Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance. 2. However, an offer cannot be revoked: (a) If it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or (b) If it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer."

<sup>8</sup> Conflict-compromise lines present throughout the Convention are said to be Civil Law v. Common Law, North-South, and East-West. *See* Eörsi, *supra* note 2, at 342 n. 4. Eörsi refers to the Article 19 conflict-compromise as East-West. A sharper delineation is provided by Farnsworth, who refers to Article 19 as a conflict-compromise between traditionalists and reformers. *See* E.A. Farnsworth, ARTICLE 19 in C.M. Bianca & M.J. Bonell, COMMENTARY ON THE INTERNATIONAL SALES LAW; THE 1980 VIENNA SALES CONVENTION 175 (1987). Article 19(1), with its mirror image rule, reflects the point of view of the traditionalists, while paragraph (2) corresponds to the desires of the reformers. The compromise, however, balances in favor of the traditionalists, thanks to the introduction of paragraph (3) of Article 19 CISG.

<sup>9</sup> Article 23: "A contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of this Convention."

Article 24: "For the purposes of this Part of the Convention, an offer, declaration of acceptance or any other indication of intention 'reaches' the addressee when it is made orally to him or delivered by any other means to him personally, to his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence."

rules or rules common to different legal systems. On the contrary, though the document shows some legal compromise, it nonetheless has emerged as its own unique system. It was formed to facilitate ease of international commercial interchange, based on the influence of developed trade practices and with the goal of permanent application. Ultimately, the Convention provides its own autonomous interpretation in accordance with the principles of uniformity, internationalism, and good faith.<sup>10</sup>

One of the most interesting problems in the study of Part II of the Convention is the conflict between clauses of general conditions exchanged by the parties. The Vienna Convention adopts a different solution than that contained in the law of the United States: Section 2-207 of the Uniform Commercial Code (UCC), and in the Principles of International Commercial Contracts formulated by the International Institute for the Unification of Private Law, known as UNIDROIT or the Rome Institute.<sup>11</sup>

The legal system of the United States, through its two most important recapitulations of contractual matters, perfectly reflects the tension between classical contractual law, represented by the Restatement and case law, and the criterion introduced by the UCC. The Restatement of Contracts is part of a series of Restatements of the Law created by the American Law Institute with the purpose of compiling general principles of the Common Law. Although the Restatements are not law, they possess great weight in doctrine and case law. After several modifications, the present text of the Restatement of Contracts, accompanied by commentaries and examples, was published in 1981.<sup>12</sup> Article 2 of the UCC, on the other hand, contains sales law sections that can be the object of amendments by individual

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<sup>10</sup> Article 7 (1): "In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade. 2. 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 the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law." See CISG, *supra* note 2, art. 7.

<sup>11</sup> International Institute for the Unification of Private Law, PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS, (Rome 1994) [hereinafter UNIDROIT Principles].

<sup>12</sup> RESTATEMENT (SECOND) OF CONTRACTS (1981).

states. The UCC has been adopted by all states, except Louisiana.<sup>13</sup> The UCC is accompanied by an Official Commentary,<sup>14</sup> as is the Restatement. As indicated, the Restatement has not been adopted by the states, but it nonetheless is of great significance. The importance of the CISG's entry into force in the United States (and generally in all the States that adopt it) is that the U.S. now has two codes related to sales contracts: Article 2 of the UCC and the CISG. The former applies generally to domestic sales contracts, whereas the latter applies to those international sales contracts that are within its scope of application (Articles 1 to 6 CISG).

The Principles of International Commercial Contracts prepared by UNIDROIT<sup>15</sup> have been compared with the American

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<sup>13</sup> However, effective January 1, 1995, Article 1943 Louisiana Civil Code ("An acceptance not in accordance with the terms of the offer is deemed to be a counteroffer") was superceded by new Articles 2601 and 2602 which closely follow section 2-207 UCC. See Stephan Kinsella, *Smashing the Broken Mirror: The Battle of the Forms, UCC 2-207, and Louisiana's Improvements*, 53 LA. L. REV. 1555-56 (1993). New Article 2601 reads as follows:

*Art. 2601. Additional terms in acceptance of offer to sell a movable.*

An expression of acceptance of an offer to sell a movable thing suffices to form a contract of sale if there is agreement on the thing and the price, even though the acceptance contains terms additional to, or different from, the terms of the offer, unless acceptance is made conditional on the offeror's acceptance of the additional or different terms. Where the acceptance is not so conditioned, the additional or different terms are regarded as proposals for modification and must be accepted by the offeror in order to become a part of the contract.

Between merchants, however, additional terms become part of the contract unless they alter the offer materially, or the offer expressly limits the acceptance to the terms of the offer, or the offeree is notified of the offeror's objection to the additional terms within a reasonable time, in all of which cases the additional terms do not become a part of the contract. Additional terms alter the offer materially when their nature is such that it must be presumed that the offeror would not have contracted on those terms. *Id.* at 1558.

New Article 2602 *Contract by Conduct of the Parties* indicates that:

A contract of sale of movables may be established by conduct of both parties that recognizes the existence of that contract even though the communications exchanged by them do not suffice to form a contract. In such a case the contract consists of those terms on which the communications of the parties agree, together with any applicable provisions of the supplementary law. *Id.* at 1559.

<sup>14</sup> See U.C.C. 1995 OFFICIAL TEXT, WITH COMMENTS.

<sup>15</sup> UNIDROIT work, which initially received the name of "Progressive Codification of International Trade Law" started in the early 1970's. The first session, which convened in 1974, was limited in scope and focused mainly on the general

Restatements.<sup>16</sup> They are a set of Principles whose objective is to provide a Uniform Code in matters related to international commercial contracts and were clearly inspired by the Vienna Sales Convention. The section of UNIDROIT dedicated to the Formation of International Contracts (Article 2), with the exception of some divergences, parallels the Vienna text. This means that the UNIDROIT Principles should be interpreted by taking into account the legislative history of the whole text of the Vienna Convention, without that being an obstacle for a reciprocal influence between them. In other words, the UNIDROIT Principles may be useful as a tool to interpret and integrate the Uniform Law.<sup>17</sup> One of the most interesting issues in the UNIDROIT Principles is its relationship to the Convention (since the Preamble states that the Principles may be used to interpret and supplement other international texts), particularly in those circumstances where both texts apply to a business transaction or when the CISG is silent on a specific issue which receives an express solution in the UNIDROIT Principles. This is the case for the issue of battle-of-the-forms.

The fact that the Convention does not have a specific rule addressing the battle-of-the forms issue, whereas the UNIDROIT Principles do, may suggest that the Convention

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part of contractual law of some contracts, among them, the sales contract. After several drafts, the final text was approved in 1994. It contains 109 Articles with 7 chapters; its objectives are several: to serve as a model for national and international legislators; to serve as well as a model of interpretation to the international instruments, among them, the Vienna Convention of 1980; to be useful as a guide for the drafting of contracts; and, finally, to create a sort of common principles for all legal systems.

<sup>16</sup> See Franco Ferrari, *Le Champ D'application Des "Principes Pour les Contrats Commerciaux Internationaux" Elaborés Par UNIDROIT*, 4 REVUE INTERNATIONALE DE DROIT COMPARÉ 985, 988 n. 4 (1995).

<sup>17</sup> This is one of the tasks the drafters of the Principles set forth in its Preamble. About this and other objectives of the Restatement, see the Preamble of the Principles (Purpose of the Principles): "They may be used to interpret or supplement international uniform law instruments." UNIDROIT, *supra* note 9. This is clearly the opinion of Ulrich Magnus, *Die allgemeinen Grundsätze im UN-Kaufrecht*, 59 Rabels Zeitschrift 469, 492 (1995); he indicates that the agreement between the Convention and the Principles it is not a surprise since the Vienna text may be considered the "godfather" of the Principles. See also Klaus Peter Berger, *Die UNIDROIT-Prinzipien für Internationale Handelsverträge* 94 Zeitschrift für Vergleichende Rechts-wissenschaft 217, 218 (1995). See generally del Pilar Perales Viscasillas, *UNIDROIT Principles of International Commercial Contracts: Sphere of Application and General Provisions*, 13 ARIZ. J. INT'L & COMP. L. 380 (1996).



does not provide an answer to this problem. A national judge or arbitrator might therefore be tempted to apply a solution, such as the one stated in Principles Article 2.22, in supplementation of the Convention.<sup>18</sup> This situation could occur if the tribunal is unaware of the objectives of the Convention and the legislative history of CISG Article 19 and thereby permit themselves to be influenced by the aversion to applying the *last-shot rule* by some Convention scholars.<sup>19</sup> It is important to point out that we are not dealing with a mere academic issue, since there is an increasing tendency among arbitrators and judges to resort to the UNIDROIT Principles,<sup>20</sup> even in cases of transactions which

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<sup>18</sup> Scholars have also supported this approach. See Alejandro Garro, *The Gap Filling Role of the UNIDROIT Principles in International Sale Law: Some Comments on the Interplay between the Principles and the CISG*, 68 TUL. L. REV. 1149, 1169 (1995) (considering the application of the Principles to the Convention acceptable).

<sup>19</sup> See Joseph Perillo, *UNIDROIT Principles of International Commercial Contracts: the black letter text and a review*, 63 FORDHAM L. REV. 288 (1994) (comparing CISG Article 19 with PICC Article 2.22: "The battle-of-the forms receives innovative and generally sound treatment in Principles").

<sup>20</sup> See Cour d'appel of Grenoble 23 October 1996 (France) (PACE) (UNILEX) as the first national decision that refers in its ruling to the UNIDROIT Principles. The Court refers to Article 6.1.6 of the UNIDROIT Principles and CISG Article 57.1(a) as adopting the same principles. The first arbitral award mentioning the UNIDROIT Principles judged a dispute between an Austrian seller and a German buyer. They have stated that in the relations between merchants it is normal that the seller, due to the payment delay, turns to the rate of interests of its own State; a solution that the tribunal says will be obtained from an application of Article 7.4.9 of the UNIDROIT Principles. See two arbitration decisions of the Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft-Wien, 15 June 1994, respectively (SCH-4366) and (SCH-4318) (Austria) (UNILEX, English translation) (PACE, English translation). See their text and the note prepared by PETER SCHLECHTRIEM, *RECHT DER INTERNATIONAL WIRTSCHAFT*, 1995, p. 590-94; see also the translation to Italian and the note by Alessandra Mari in *Diritto del Commercio Internazionale*, 1995, n. 19.2, p. 487-501. One must praise the UNIDROIT Principles for ruling on the rate of interests, a ruling that could not be obtained during the drafting of the Vienna Convention. The drafters of the Convention were unable to find a compromise acceptable to them. For this reason, rate of interest is an open question under the Convention; its solution is unclear: on the basis of the general principles of the Convention (Article 7(2) CISG) or, on the contrary, a matter that must be solved under the rules of the private international law. Finally, the first arbitral award that identified the UNIDROIT Principles with the principles on which the Convention is based is: ICC 8128/1995, (applying UNIDROIT Principles and the European Principles of Contract Law to determine the rate of interest). The Principles of European Contract Law, which should be approved soon in their final form, are the product of the work of the Commission on European Contract Law under the chairmanship of Professor Ole Lando. They are similar to the UNIDROIT Principle but its field of application, *rationae materiae*,

are silent about them.<sup>21</sup> In the context of the three texts considered: the CISG, the UCC, and the UNIDROIT Principles, this article analyzes the fact pattern that is the object of this present study: the battle of the forms.

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is broader (consumer contracts as well as commercial contracts). However, the concept internationally is narrower, since the European Principles are intended to apply within the scope of the European Union States. See Michael Joachim Bonnel, *The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law: Similar Rules for the Same Purposes*, 2 UNIF. L. REV. 229 (1996); and Katharina Boele-Woelki, *The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law: How to Apply Them to International Contracts*, 4 UNIF. L. REV. 652 (1996). See *infra* n. 21 for the method of citing case law.

<sup>21</sup> Presently, the best way of finding a case dealing with the CISG is through the computer.

- CISG W3 Database of the *Institute of International Commercial Law* of Pace University School of Law (White Plains-New York) <<http://www.cisg.law.pace.edu>>. Editors: Professors Albert H. Kritzer and Nicholas Triffin [hereinafter PACE].

- UNILEX (*International Case Law and Bibliography on the UN Convention on Contracts for the International Sale of Goods*) is published by Transnational Publishers, Inc. One Bridge Street, Irvington, New York 10533. Phone (914) 591-4288 (orders 800-914-8186). UNILEX is available in paper, CD-Rom, and disk. Director: Professor Michael-Joachim Bonell.

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- Freiburg University Database (*Rabel Website*) <<http://www.jura.uni-freiburg.de/ipr1/cisg>>. Director: Professor Peter Schlechtriem.

- CISG-France, Saarbrücken University <<http://www.jura.uni-sb.de/FB/LS/Witz>>. Director: Professor Claude Witz.

The way this author cites a case would be: name of the court, date, docket number, country, and the source either (PACE) or (UNILEX) or both. In relation with PACE, it has links to both Freiburg and CISG-France when they provide the full text of the case at hand, so I will not refer to them. PACE provides also the CLOUT abstracts, so therefore I will not refer to CLOUT either.

For those who prefer books, see MICHAEL WILL, *UNILEX, INTERNATIONAL SALES LAW UNDER CISG. The UN Convention on Contracts for the International Sale of Goods* (1980), *The First 222 or so Decisions*; *Schriftenreihe deutscher Jura-Studenten in Genf* 10, Genève: Unité de droit allemand, Faculté de droit, 1995; and CLAUDE WITZ, *Les premières applications jurisprudentielles du droit uniforme de la vente internationale* (Convention des Nations Unies du 11 avril 1980). Paris: LGDJ, 1995. For an English digest of the latter text, see Vivian G. Curran, *The Interpretative Challenge to Uniformity*, 15 J. of L & Com. 175 (1996).

For case law under ULF see Peter Schlechtriem and Ulrich Magnus, *Internationale Rechtsprechung zu EKG und EAG. En Gesellschaft für Rechtsvergleichung* (Hrsg.), Baden-Baden, Nomos, 1987. The cases cited in relation with the ULF come from the cited source.

## II. "BATTLE OF THE FORMS" METHODS OF FINDING A SOLUTION TO THE CONFLICT BETWEEN CLAUSES

There are two general categories of "battle-of-the-forms" transactions. One category, where thousands of transactions proceed satisfactorily despite unresolved conflicts in their terms<sup>22</sup> and alternatively, a dramatically smaller number of such transactions in which the conflict is resolved under an applicable legal regime.

Litigation of conflicts between clauses contained in forms that the parties exchange do not arise frequently;<sup>23</sup> however, when they do it can be very difficult to resolve.

The international legal community has not yet found a satisfactory way to decide what terms control in an agreement

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<sup>22</sup> Battle of the forms are associated with the use of general terms and conditions. This is common place. FRANS VAN DER VELDEN, *UNIFORM INTERNATIONAL SALES LAW AND BATTLE OF FORMS in UNIFICATION* 233 (Jean G Sauveplanne eds., 1984). Conflicts between forms are also commonplace. Such conflicts are inevitable when parties exchange purchase orders and acceptances, each with its own pre-printed terms and conditions, under circumstances such as the following:

(1) Each document bears on its face tailored attention to such matter as price, quantity and delivery.

(2) The "legal" terms and conditions are set forth, often in fine print, commonly on the reverse side; or in a separate attachment.

(3) The forms are processed by business persons whose salaries are more perfectly attuned to the volume of such transactions than to the contents of the "legal" terms and conditions.

In such an environment it is hardly surprising that more attention is paid by such persons to the contents of (1) than to the contents of (2). A consequence is less attention by such persons to conflicting liability/limitation-of-liability and other "legal" clauses that can accompany the transaction.

<sup>23</sup> Although this is an environment in which unresolved battle-of-the-forms issues are commonplace, two factors reduce the risk of litigation: first, the typical purchase and sale transaction is carried forward in a manner satisfactory to both parties, without regard to the "legal" clauses that accompany the transaction; second, where problems arise parties generally resolve them, often also without regard to the "legal" clauses that accompany the transaction. For example, in a study made over a period of 16 years by IBM Canada, it was found that on the basis of 250 different models of forms, about 18,000 annual sales contracts and about 27,000 purchase contracts —of a total of 90,000 sales and purchase transactions— there were no instances of conflicts of forms that led to litigation. See G. Murray, *A Corporate Counsel's Perspective of the "Battle of the Forms,"* *THE CANADIAN BUS. L.J.*, 1980, vol. 4, n. 13, p. 290-96. A typical business solution is a cost/risk analysis: the cost in man hours (man years in large volume business) of perfectly coordinating the exchanged documents versus the risk entailed by having a proportion of them pass through with "legal" terms that conflict. See *id.* This is a risk that can lead to varying degrees of uncertainty, depending on the legal regime applied: this is the subject of this analysis.

when a transaction is consummated on the basis of a routine exchange of inconsistent forms.<sup>24</sup>

The battle-of-the-forms problem may be solved in basically two ways that are dictated by the performance of the contract. Generally speaking, the two solutions include the application of either the classical pattern of two declarations of will (offer and acceptance), or the understanding of formation of a contract through its performance, even though the content of the contract is incomplete. The conflict between forms creates the question: Is there a contract, and what are its terms? There is an approach that requires perfect identity between the contents of two declarations of will. Strictly applied, this would lead to the non-existence of the contract. This approach should be rejected, however, especially where there are acts of performance that indicate acceptance to an offer, the *existence* of a contract, and its conclusion. One other alternative to resolve battle-of-the-forms issues is a good faith principle. This results in a neutral solution, preventing either party from gaining an advantage by being the first or the last to send a declaration of will.

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<sup>24</sup> See JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION, 228 (1991). The author refers to dissatisfaction with Section 2-207 UCC. For a comparison of the Vienna Convention and the UCC, see also his statement that "UCC 2-207 tried to go farther and, in effect, force through a marriage when the couple is quarreling at the altar. Personally I think the Convention's restraint is preferable." See also John O. Honnold, *The New Uniform Law for International Sales and the UCC: A Comparison*, Symposium on International Sale of Goods Convention, THE INTL. LAWYER, 1984, vol. 18, n 11, p. 26. Professor Honnold refers impliedly to the *last-shot rule*, but in the second edition of his text clearly rejects it: "*Last shot*" theories have been rightly criticized as *casuistic and unfair*. They do not reflect international consensus that justifies importing them into the Convention. See *id.* Later, Professor Honnold explains that if the contract performance shows its existence, but its terms are contradictory, the solution must be derived from applicable law of commercial sales, which provides solutions to gaps left in contracts. See *id.* The author applies the *knock-out rule*. See HONNOLD, UNIFORM LAW, n. 1170.3, p. 238-39. Professor Farnsworth, referring as well to the controversy in his country surrounding Section 2-207 UCC, indicates that the solution provided by the Convention is sensible but conservative. See E. Allan Farnsworth, *Formation of Contracts*, in N.M. GALSTON AND H. SMIT, INTERNATIONAL SALES: The United Nations Convention on Contracts for the International Sale of Goods, (1984) 3-17. See also J. Edward Murray, *An Essay on the Formation of Contracts and Related Matters Under the United Nations Convention on Contracts for the International Sale of Goods*, THE J. OF L. AND COM., 40 (1988); and Barry Nicholas, *The Vienna Convention on International Sales Law*, 15 L. QUART. REV. 217 (1989), in whose judgement, the Convention makes a very small contribution to solve the problem.

These two main approaches (offer and acceptance or performance) are based on opposite assumptions: that the parties read and understand the contents of each other's forms, or that pre-printed forms are not read. In the latter case, a contract could be deemed concluded by the existence of an agreement on the essential terms, even though there remain some terms which are contradictory. In this way, by the use of flexible standards, one avoids inconveniences caused by the *last-shot rule*, a rule that favors contractual terms of a party who acts last.

Few commentators of the Convention study the conflict of forms from the perspective of the legislative politic that it purports to protect.<sup>25</sup> This is important and would prevent, in some situations, searching for a solution to a conflict through the dispositions of some Codes, fundamentally to Section 2-207 UCC,<sup>26</sup> or the German legal practice.<sup>27</sup> Those texts have a dif-

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<sup>25</sup> By way of exception, see ALBERT KRITZER, INTERNATIONAL CONTRACT MANUAL, GUIDE TO PRACTICAL APPLICATIONS OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, 117 (1989), who states: "It was a battle between certainty and equity with the advocates of certainty winning out." See also Thomas J. McCarthy, *Ending the "Battle of the Forms;" a Symposium on the Revision of Section 2-207 of the Uniform Commercial Code*, 41 BUS. LAW. 1019, 1063 (1994), who assumes that: "Theoretically, the CISG and the UCC take opposite stances on what constitutes acceptance. The UCC adopts the theory that business people rarely read the boilerplate language on purchase forms and that both parties are relying on the existence of a contract despite their clashing forms. Because of this view, the UCC allows contract formation unless the responding offeree specifically states that there will be no contract until the original offeror expressly accepts the second set of terms." *Id.* The American Bar Association, in a publication related to CISG, recognized that: "Where exchanged forms do not match, application of the Convention will lead to fewer enforceable contracts because the terms of an acceptance must conform to those of the offer except where alterations are not material (Art.19). Although United States law is more flexible in these matters (UCC 2-207), in international trade where parties are dealing with each other at a distance, the Convention's greater conceptualism is arguably desirable because it will force parties to produce more evidence of a concluded agreement." KRITZER at 173 citing SUMMARY OF PRINCIPLE PROVISIONS OF THE CISG, THE CONVENTION FOR THE INTERNATIONAL SALE OF GOODS: A HANDBOOK OF BASIC MATERIALS, (Katherein & Magraw eds.) 1987.

<sup>26</sup> Section 2-207 UCC is based on the assumption that the merchants do not read and understand the terms contained on the forms exchanged between the parties. See John E. Murray, *The Chaos of the "Battle of the Forms:" Solutions*, 39 VAND. L. REV. 1307, 1373 (1986); see also Caroline Brown, *Restoring Peace in the Battle of the Forms: A framework for making Uniform Commercial Code Section 2-207 work*, 69 N.C. L. REV. 893, 902 (1991).

There are many who compare Article 19 CISG with Section 2-207 UCC, calling attention to malicious results that can be achieved under the former. See, for example, Michael Kabik, *Through the looking-glass: International Trade in the "won-*

ferent orientation than the Convention, which opted for the objective of achieving uniform application, certainty, and legal security. One should not ignore, however, the other option. It is not a solution to be ignored, although its rejection by the Convention was probably influenced, in large part, by the extensive criticism that Section 2-207 UCC has received. In our opinion, as explained in the accompanying analysis, there are more weighty reasons to support the solution adopted by the Vienna text. It is not to suggest that the other option is technically in-

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derland" of the United Nations Convention on Contracts for the International Sale of Goods, 9 INT'L TAX & BUS. LAW. 418 (1992); See also Carl Kelso, *The 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, 555 (1983), who indicates that the Convention, unlike the UCC, does not treat the parties equally; Patrick Thieffry, *Sale of Goods between French and U.S. Merchants: Choice of Law Considerations under the U.N. Convention on Contracts for the International Sale of Goods*, 22 INT'L LAW. 1025 (1988). Nevertheless, it is also said that Article 19 CISG is simpler and easier to apply than Section 2-207 UCC.

<sup>27</sup> For German law see § 150(2) BGB ("Eine Annahme unter Erweiterungen, Einschränkungen oder sonstigen Änderungen gilt als Ablehnung verbunden mit einem neuen Antrage"). This Article, a parallel of Article 19(1) CISG, led to the application of the *last-shot rule*. From this doctrine there was an evolution towards more flexible standards which applied §§ 154 and 155 BGB. For German law and the new orientations adopted by the courts see Salvador Durany Pich, *Sobre la necesidad de que la aceptación coincida en todo con la oferta: el espejo roto*, III ANUARIO DE DERECHO CIVIL, 1011, 1030 (1992).

Schlechtriem does not try to force the interpretation, although he notes the inconvenience of the solution adopted by the Convention: "It does not provide a special rule for the battle of the forms; similar proposals had not any support. Consequently, the problem of the collision of standards terms must be solved in accordance to Article 19 CISG. The application of the BGB solution. . . is not possible, because the Convention does not contain a regulation of the partial disagreement of the §§154 and 155 BGB." See PETER SCHLECHTRIEM, *ERGÄNZUNGEN, EINSCHRÄNKUNGEN UND SONSTIGE ÄNDERUNGEN ZUM ANGEBO*T, Ernst von Caemmerer & Peter Schlechtriem, *Kommentar zum Einheitlichen UN-Kaufrecht. Das Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf -CISG-* Kommentar (1995). The author also states that: "we are afraid of a results similar to the old case law in Germany that followed the last-shot rule." *Id.* This analysis elaborates on the views of German scholars and case law. See *id.* SCHLECHTRIEM, nevertheless, indicates that the consequences of the *last-shot rule* could be avoided when, from an interpretation of the parties' declarations or conduct in accordance with the usages and practices, the existence of agreement could at least be derived from the essential terms. See *id.* He also states that the parties prefer a conclusion of a contract that take this into account. See *id.* Besides, it could be deemed a resignation to their opposite general conditions (Art. 6 CISG), and therefore the contract may be deemed concluded under the rules of the Convention. See *id.*

correct or an option legally perverse;<sup>28</sup> on the contrary, it is adequate to protect the specific interests that a legal system seeks to preserve. It is a well accepted position, and moreover, a legal norm, that forms are often ignored. It is also valid, however, to support the opposite theory. Therefore, the Convention sought to encourage, by means of a legal disposition, the reading of the forms and the discussion of the contract clauses: purposes that the Vienna legislators clearly wanted to protect.

The accompanying analysis explores, in detail, the process used to solve battle-of-the-forms issues.

The first section reveals the methods used to introduce general conditions to the content of a contract (*infra* III). The next section surveys the principal criticisms of applying offer and acceptance rules to the battles-of-the-forms (*infra* IV). Section Five examines Sec. 2-207 UCC as an example of a legal regime which applies the control of contents to resolve the conflict between clauses (*infra* V.A), as well as the solution adopted by the UNIDROIT Principles (*infra* V.B). The final section studies the rules of the Vienna Convention (*infra* VI) and concludes with the solution regarded as most appropriate.

### III. GENERAL CONDITIONS AS PART OF THE CONTRACT

Although the Vienna Convention has no express rule on making general conditions a part of an agreement, guidance is provided in its rules on autonomy of the parties (Article 6), the determination of the intent of the parties (Article 8), and on the significance of usages and practices (Article 9).

We have for many years become accustomed to having certain general conditions as part of a contract through the application of INCOTERMS and UCP 500,<sup>29</sup> where incorporation by reference is usually practiced. New technology EDI (Electronic Data Interchange),<sup>30</sup> where incorporation by reference is usu-

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<sup>28</sup> This is how some authors regard the mirror image rule. The words of Professor Murray are clear enough, see Murray, *supra* note 24, at 1331, comparing the mirror image rule of the *Common Law* and Section 2-207(3) UCC: "The unjust result (referring to the last-shot rule) became a just result under 2-207 UCC." *Id.*

<sup>29</sup> INCOTERMS (International Commercial Terms) and the Uniform Rules on Documentary Credits.

<sup>30</sup> We are referring to a system that consists of the data interchange between computers in a format previously agreed to by the parties. It is the most modern way of communication. The use of a net that connects the computers is a normal

ally practiced adds to the importance of this subject.<sup>31</sup> In every

practice in the banking field. There have been many efforts by international and national organizations to achieve standardization in the use of the EDI messages. See Amelia H. Boss, *Electronic Data Interchange Agreements: Private Contracting Toward a Global Environment*, 13 N.W. J. INT'L L. 31 (1992); and Rob VanEsch, *Interchange Agreements*, 1 EDI L. REV. 3 (1994).

In the USA, since 1989, there has been a model of EDI for international transactions, developed by a task force of the American Bar Association. See *Model Electronic Data Interchange Agreement*, which has a comment prepared for *The Electronic Messaging Services Task Force, Subcommittee on Electronic Commercial Practices Uniform Commercial Code Committee Section of Business Law*; See Michael S. Baum & Amelia H. Boss, *The Commercial Use of Electronic Data Interchange- A Report and Model Trading Partner Agreement*, 45 BUS. LAW. 1645 (1990). This Article contains the text of the Agreement (ABA Agreement) and the comment (p.1718-49). Also, an EDI Agreement has been prepared by the "United Kingdom EDI Association," which in sixteen Articles regulates the more relevant questions connected with this modern way of communication. For the text of this agreement, see *EDI Association, Standard Electronic Data Interchange Agreement*, 6 COMPUTER L.J. 65 (1989).

In the international arena, we should mention the efforts of the United Nations Commission for Europe that has developed the standard UN/EDIFACT ("*Electronic Data Interchange for Administration, Commerce and Transport*"). In the field of the European Commission, since 1987 there is a program known as TEDIS "*Trade Electronic Data Interchange Systems*." Lastly, the International Chamber of Commerce has published the "*Uniform Rules for Conduct for International Trade Data by Teletransmission (UNCID)*."

<sup>31</sup> Especially important is the recent work of UNCITRAL: 1996 UNCITRAL Model Law on Electronic Commerce. For the reports on this work at the various sessions: See also Agustin Madrid Parra, *EDI (Electronic Data Interchange): Estado de la cuestión en UNCITRAL*. *Revista de Derecho Mercantil*, 115-149 (1993); and Agustin Madrid Parra, *Anterproyecto de la Ley Modelo sobre aspectos juridicos del intercambio electronico de datos* 2065 *Estudios de Derecho Mercantil en Homenaje al Professor Manuel Broseta Pont* Tomo II. (Valencia: Tirant lo blanch, 1995). Specifically, the Working Group on Electronic Data Interchange of UNCITRAL decided to take into account two proposals -from the ICC and The United Kingdom- concerning incorporation by reference of the standard clauses of a data message. See, respectively, in the Spanish text: "Propuesta del observador de la CCI", A/CN.9/WG.IV/WP.65, 6 enero 1995; and "la Propuesta del Reino Unido de Gran Bretaña e Irlanda del Norte," A/CN.9/WG.IV/WP.66, 23 enero 1995. Thanks to the interest aroused by those proposals, it was decided that the solutions, in relation to incorporation by reference, should be collected in the Draft Guide for the incorporation of the Model Law on EDI to domestic law, which is now being prepared. See the Spanish document: "Informe del Grupo de Trabajo sobre intercambio electrónico de datos acerca de la labor de su 291 período de sesiones," (Nueva York, 27 de febrero a 10 de marzo de 1995). A/CN.9/407, 16 marzo de 1995, pfo. 103.

The structure of a data message can aggravate the problem of the incorporation by reference of general conditions. We encounter situations in which a previous agreement exists and where the general conditions are collected (situations that ought not to present problems) and situations in which there was no previous agreement and no general conditions were previously collected. In this sense, see



case, the incorporation by reference must be express or implied; and where implied, it must be derived from usages or from practices established between the parties.<sup>32</sup> It is assumed that three ways exist to incorporate general conditions into the contract: 1) by an exchange between the parties (Articles 14(1) and 18(1) CISG),<sup>33</sup> that is to say, the conditions are recited in a form

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also LIEVE ELIAS, JACQUES GERARD AND GIEN KUO WANG, *LE DROIT DES OBLIGATIONS FACE AUX ECHANGES DE DONTES INFORMATISEES* 48, *Cashiers du Centre de Recherches Informatique et Droit*. (Paris: Facultés Universitaires Notre-Dame de la Prais de Namur, Story scientia, 1992). Article 3.1 of the Model of Electronic Data Interchange Trading Partner Agreement offers parties three options to regulate the content of the agreement.

<sup>32</sup> For this reason we agree completely with BURGHARD PILTZ, *UNKAUFRECHT*, IN VON WESTPHALEN. *HANDBUCH DES KAUFFVERTRAGSRECHT IN DEN EG-STAATEN* 23 (Verlag Köln: Dr. Otto Schmidt 1992); commentary 3 to Article 2.19 of the UNIDROIT Principles, and with MICHAEL JOACHIM BONELL, "POLICING" *THE CONTRACT AGAINST UNFAIRNESS UNDER THE UNIDROIT PRINCIPLES FOR INTERNATIONAL COMMERCIAL CONTRACTS* 255, (*Diritto del Commercio Internazionale* 1994).

Some scholars of the Convention — with whom we are in accord — consider that actual knowledge (however, when art. 9.2 comes into play, implied knowledge is sufficient) of the parties is essential (it would not be valid acceptance of the conditions by silence or inaction) in the interest of uniformity. See Ulrich Drobnig, *Standard Forms and General Conditions in International Trade; Dutch, German, and Uniform Law*, HAGUE-ZAGREB ESSAYS 4, ON THE LAW OF INTERNATIONAL TRADE, 123 (1983), who refers to the 1964 ULF. See also Peter Sarcevic, *Standards Forms and General Conditions*, HAGUE-ZAGREB ESSAYS 4, ON THE LAW OF INTERNATIONAL TRADE, 135, (1983) and Herbert Asam, *Aktuelle Fragen zur Anwendung des Kaufrechtsbereinkommens der Vereinten Nationen vom 10.4.80 im Deutsch-italienischen Rechtsverkehr seit 1.1.88*, *JAHRBUCH FÜR ITALIENISCHES RECHT* 18-19 (1990). This doctrine is also supported by Marinus Vroman, *Implementation of Treaties and use of Standard Terms in Dutch Law concerning the International Sale of Goods*, *SURVEY OF THE INTERNATIONAL SALE OF GOODS* 57 (Lafili, et al. eds.) (1986). It is considered, lastly, to be a question of validity, which must be left to the rules of the international private law, (see YVES DERAIS AND JACQUES GHESTIN, *LA CONVENTION DE VIENNE SUR LA VENTE INTERNATIONALE ET LES INCOTERMS 65* (1990)) or a pending unresolved question. See ELIZABETH STERN, *ERKLÄRUNGEN IM UNCITRAL-KAUFRECHT* 50 (1990).

The Spanish domestic doctrine equates the possibility of having conditions known and effective knowledge (See MANUEL ALBALADEJO, *DERECHO CIVIL*, TOMO I. INTRODUCCIÓN Y PARTE GENERAL, 413 (Barcelona: Bosch 11 ed.) (1991); and JAMIE SANTOS BRIZ, *DERECHO CIVIL, TEORÍA Y PRÁCTICA*, TOMO III. *DERECHO DE OBLIGACIONES, LA OBLIGACIÓN Y EL CONTRATO EN GENERAL, DERECHO DE DAÑOS* 279. (1973)), commenting on the express dispositions of the Italian Civil Code Articles 1341 and 1342; See also an excellent analysis of these dispositions by Gino Gorla, *Standard Conditions and Form Contracts in Italian Law*, 11 *AM. J. COMP. L.* 1 (1962).

<sup>33</sup> Article 18(1) states: "A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not itself

that serves as an offer or an acceptance or that is enclosed with either declaration; 2) by the practices or previous negotiations established between the parties (Articles 8(3) and 9(1) CISG);<sup>34</sup> a clear example is where a party sends a document in which general conditions are reproduced and later, in the offer or the acceptance, there is a suitable reference to them; 3) finally, there can be general conditions which reflect a usage of trade of the kind described in Article 9(2) CISG.<sup>35</sup>

In each case, the general conditions must be incorporated expressly (or impliedly, as stated before) and previously or at least at the time of the conclusion of the contract.<sup>36</sup>

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amount to an acceptance." See also Tribunal Commercial de Nivelles, 19 September 1995 (R.G. 1707/93) (Belgium) (PACE) (UNILEX).

<sup>34</sup> Paragraph 3 of Article 8 states: "In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties."

Article 9(1) provides: "The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves."

<sup>35</sup> Article 9(2) states: "The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned." See also Gerechtshof's Hertogenbosch, 24 April 1996 (456/95/He) (Netherlands) (PACE) (UNILEX).

<sup>36</sup> See Henning Stahl, *Standard Business Conditions in Germany under the Vienna Convention*, COMP. Y.B. INT'L BUS. 383, (1993); ROLF HERBER & BEATE CZERVENKA, *INTERNATIONALES KAUFRECHT*, Kommentar zu dem Übereinkommen der Vereinten Nationen vom 11 April 1980, über den internationalen Warenkauf 75 (1991); PETER SCHLECHTRIEM, *Begriff des Angebots*, in KOMMENTAR ZUM EINHEITLICHEN UN KAUFRECHT 138 (1995); and Walter A. Stoffel, *Formation du Contrat. In the 1980 Vienna Convention on the International Sale of Goods* 73. Lausanne Colloquium of November 19-20, 1984. (Institut Suisse de Droit Comparé (3), Zurich: Schulthess Polygraphischer) (1985).

It is interesting to observe that the following language was proposed during deliberations on the text of the CISG: "General conditions of sale referred to in the offer which are attached to it or known to the offeree or widely known in the international trade are considered to be a part of the contract if the offeree agrees they are to be applied. The terms of the contract prevail if they differ from the general conditions of sale." This proposal was rejected because the Convention Draft already had rules to determine the content of the contract. See IX Yearbook 1978 (A/CN.9/142), n1276-278, p.81. See also HONNOLD, *supra* note 22, at 299.

For a comparison with the ULF in regard to inclusion of general conditions in an invoice, see Hof den Haag, 25 January 1984 (Netherlands) (in appellation: Der Hoge Raad, 18 October 1985); for a ULF comparison relating to signature on a form as a conclusive acceptance, see LG Heidelberg, 30 January 1979 (0 4/78 kfHI) (Germany) and OLG Koblenz, 23 December 1983 (2 U 1186/83) (Germany).

#### IV. THE BATTLE OF THE FORMS SOLUTION IN ACCORDANCE WITH THE RULES OF OFFER AND ACCEPTANCE: OBJECTIONS TO THE LAST SHOT DOCTRINE

Following are two illustrative applications of the rules of offer and acceptance and the *last-shot doctrine*. First, buyer sends seller his form (offer to buy); seller replies with his form which contains material modifications (counter-offer); seller dispatches the goods which are received and accepted by buyer. This acceptance of goods is regarded as an acceptance by the buyer of the terms contained in seller's form. Second, seller makes an offer to sell by sending his own form; buyer replies with his form which contains material modifications (counter-offer); seller dispatches the goods. This dispatch of goods is regarded as an acceptance by the seller of the terms contained in buyer's form.

A question always present is whether the inclusion of general conditions in the reply to the offer is, by itself, a material modification.<sup>37</sup> Each case must be examined in the context of the transaction by comparison of the reply to the offer and the terms of the offer.<sup>38</sup>

A fundamental question is whether a valid conclusion of a contract can be assumed when the forms exchanged contain incompatible or contradictory terms. The answer, in accordance with the offer-acceptance pattern (*last-shot doctrine*), is clear: the contract is concluded, either when one party, by express declaration, accepts the form sent by the other party (an excep-

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<sup>37</sup> See STOFFEL, *supra* note 34, at 74, who indicates that generally an acceptance with different general conditions will be a counter-offer; See also BURGHARD PILTZ, INTERNATIONALES KAUFRECHT 98. (1980)(1993), KRITZER, *supra* note 23, at 182; and ULRICH VON HUBER, *Der Uncitral-Entwurf eines Übereinkommens über Internationale Warenkaufverträge*, RABELS ZEITSCHRIFT 444 (1979). To the same effect, see Landgericht (LG) Landshut, 14 June 1976 (hk o 135/75) (Germany), judging Article 7(1) ULF. But see Rechtbank Arnhem, 23 December 1982 (rolnr 1979/1761) (Netherlands), where the court has ruled that an offer by a Holland buyer is not materially modified when the Belgian seller accepts referring to his general conditions.

But see FRANZ BYDLINSKI, DAS ALLGEMEINES VERTRAGSRECHT, P. Doralt ed., Das Uncitral-Kaufrecht im Vergleich zum Österreichischen Recht, 72, (1985); and SCHLECHTRIEM, *supra* note 25, at 19.

<sup>38</sup> Often the situation is complicated by multiple, communications multiple exchanges by the cross of different communications and notifications (verbally or by writing). The problem is better confronted by starting with a simple situation.

tional case) or when there is a suitable act of performance by the recipient of the counter-offer in accordance with (Art.18(1) or (3))<sup>39</sup> read in conjunction with Art.19 CISG).<sup>40</sup>

<sup>39</sup> Article 18:

"(1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not itself amount to an acceptance.

(3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down in the preceeding paragraph."

<sup>40</sup> Analysis of the offer-acceptance-counter-offer pattern is provided by numerous commentators on the Convention. There are some differences in their opinions which will be indicated. See generally SCHLECHTRIEM, *supra* note 25, at 120. See also 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*, Studien zum vergleichenden und internationalen Recht-Comparative and International Law Studies, Band 24, Frankfurt am Main, Berlin, New York, Paris, and Wien: Peter Lang, 1994, p. 339-40; KARL NEUMAYER, *Das Wiener Kaufrechts-Übereinkommen und die sogenannte "battle of the forms,"* In *Freiheit und Zwang: rechtliche, wirtschaftliche und gesellschaftliche Aspekte. Festschrift zum 60. Geburtstag von Hans Giger*, Bern: Stämpfli, 512, 1989; KARL NEUMAYER AND CATHERINE MING, *Convention de Vienne sur les contrats de vente internationale de marchandises*. Lausanne: Ceditac, 184, 1993, who reject the "knock out" solution; MURRAY, *supra* note 22, at 38; VELDEN, *supra* note 20, at 236 *et seq*; KRITZER, *supra* note 23, at 117 *et seq*; TERRY KAN, "Standard Term Contracts," In *Singapore Conferences on International Business Law, Conference VI: Current Developments in International Transfers of Goods and Services* (9-11 September 1992). Organized by: Faculty of Law, National University of Singapore, p. 28 *et seq*; Paul c. Blodgett, *The U.N. Convention on the Sale of Goods and the "Battle of the Forms,"* THE COLORADO LAWYER, 1989, vol. 18, n. 13, p. 425 *et seq*; FRITZ ENDERLEIN AND DIETRICH MASKOW, *INTERNATIONAL SALES LAW: UNITED CONVENTION ON CONTRACTS ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS*, 101, (1992); BURT A. LEETE, *Contract Formation under the United Nations Convention on Contracts for the International Sale of Goods and the Uniform Commercial Code: Pitfalls for the Unwary*, Temple Intl. and Comp. L. J., 1992, vol.6, n12, pp.208-15; ROLAND LOEWE, *Internationales Kaufrecht*. Wien: Manz, 44, 1989; HERBER AND CZERWENKA, *supra* note 34, at 107, n. 118; JOSEPH M. LOOKOF-SKY, *THE 1980 UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS*, *International Encyclopedia of Laws*, 58 (1993); and John A. Spanogle, *The Arrival of International Private Law*, THE GEORGE WASHINGTON J. OF INTL. L. AND ECON., 513, n. 124-25, (1991). In studying non-conformity of the goods under the Convention and the UCC, Schlechtriem expresses concern over the application of the *last-shot* doctrine, because in his opinion, clauses limiting liability will be seldom known by the buyer until the dispute arises. PETER SCHLECHTRIEM, *Einheitliches Kaufrecht und Nationales Obligationenrecht*, Baden-Baden: Nomos, 312 *et seq*. (1987). Nevertheless, he thinks that the result could be

The *last shot method* of solving battle-of-the-forms issues has been subject to wide criticism, including the following:

- A) *It is an arbitrary solution because it tends to favor the last person who sends his form*

Application of the "offer-acceptance-counter-offer" *last shot* doctrine is criticized because it is said to favor the seller. Consider the following scenario: The buyer (offeror) sends his form (e.g., a purchaser order) to the seller (the offeree in this case) who responds with his own form (e.g., an acceptance form), which in all likelihood contains clauses that contradict stipulations in buyer's purchase order. These contradictory clauses are deemed accepted at the time buyer accepts the goods sent by the counter-offeror (the seller). Under this scenario, by applying the *last shot* doctrine, the contract is concluded by an act of performance (buyer's acceptance of the goods) and the terms that will control the content of the contract will be those of the counter-offer or the seller's form.<sup>41</sup>

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ameliorated, even though he indicates his doubts, by an strict interpretation of Article 35(2) CISG phrase: "Except where the parties have agreed otherwise." Id. The Secretariat Commentary to Article 17 of the Draft Convention of 1978 states: "*If the reply contains a material alteration, the reply would not constitute an acceptance but would constitute a counter-offer. If the original offeror responds to his reply by shipping the goods or paying the price, a contract may eventually be formed by notice to the original offeree of the shipment or payment. In such a case the terms of the contract would be those of the counter-offer, including the additional or different term.*" (A/CONF.97/19, n. 115, p. 24).

For authors who stress the importance of solutions based on examination of the facts of each case and provide interpretative guides for the conduct of such examinations, see JEAN THIEFFRY AND CHANTAL GRANIER, *LA VENTA INTERNACIONAL*, Madrid: ICEX, 75, (1989); and MANUEL MEDINA DE LEMUS, *LA VENTA INTERNACIONAL DE MERADERIAS*, Madrid: Tecnos, 81, (1992).

<sup>41</sup> This objection to the *last-shot rule* is insistently repeated by its detractors, especially by U.S. authors, for whom this defect of the last-shot rule has been overcome by the more innovative rule of Section 2-207 UCC. See the critics of SAMUEL WILLISTON, *A TREATISE ON THE LAW OF CONTRACTS*, p. 133 et. seq. n. 16.17 (40 ed. 1990); Brown, *supra* note 24, at 901, and MURRAY, *supra* note 24, at 1331. See also J. EDWARD MURRAY, *ON CONTRACTS*, 163 (3rd ed. 1990). For U.S. scholars who have written on the Convention, see J. Edward Murray, "An Essay," *supra* note 22, at 39; See also Christine Moccia, *The United Nations Convention on Contracts for the International Sale of Goods and the "Battle of the Forms,"* *FORDHAM INTL. L. J.* 650, 657 and 659; See also PICH, *supra* note 25, at 1017-19. For Spanish scholars see Jesus Alfaro, *Las Condiciones Generales de la Contratación*, Madrid: Civitas, 278, 1991.

There are two aspects to the criticism of this result: a) the favored protection given to the party who sends its form last, ordinarily the seller; and b) the vulnerable position of the buyer; if the seller does not send the goods the contract will not be concluded, while if buyer accepts the goods, he will have impliedly accepted the terms contained in the seller's form.

B) *There can be bad faith ramifications*

Consider the intended sale and purchase of a commodity in a price-volatile market. Forms exchanged which are materially inconsistent because either a term is added to the offer or there is a limitation upon a term contained in the offer, results in an application of the *mirror-image rule* (Article 19(1) CISG) under circumstances in which the primary objective of the party applying this rule is to escape the consequences of a change in market conditions.<sup>42</sup>

C) *The results of the rule are too mechanistic and formal*

It has been said that the comparison between forms may produce in judges and arbitrators a kind of apathy in searching for solutions that may mitigate the rigidity of the *mirror image rule*. This criticism, however, is unfounded since case law illustrates that the opposite is true. Proof of this is found in the jurisprudential evolution of case law in countries such as France and Germany, as well as Spain. Although, initially, there was a rigid application of the rule, it has finally been relaxed sufficiently to allow a difference between material and non-material

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<sup>42</sup> This criticism of the Vienna Convention, as well as of domestic law, is unanimous among scholars who argue against the *last-shot rule*. See WILLISTON, *supra* note 39, at 134; and David Slawson, *The New Meaning of Contract: The Transformation of Contracts Law by Standard Forms*, 46 U. OF PITTS. L. REV. 58 (1984); and MURRAY, *supra* note 22, at 43, who indicates that the right to object to non-material alterations that is permitted by Article 19(2) CISG allows the offeror to escape from a contract when in fact the non-material alterations would not effect the contract or the offeror. For this reason, he concludes that Article 19 CISG is not only objectively absurd, but also creates contradictions in the Convention. See *id.*

Apart from rapid variations in price, there are also other circumstances in which it is possible to use Article 19 CISG in bad faith. See *id.*

terms.<sup>43</sup> This new direction of the *mirror-image rule* seems to be forgotten by its opponents.

D) *It favors the ping-pong effect*

A positive effect of the *last-shot rule* is it generally permits easy application in practice as a result of the willingness of both parties to recognize which declaration was the last one and, therefore, controls the contract terms. This, however, leads to a "ping-pong" type effect because each party, knowing the effect of the rule, can try, by all means, to have its form be the final form, thereby increasing the already burdensome volume of paper work that flows between the parties.

Such behavior -more appropriate in a tennis game than in real business- is anti-economical and places more of a premium on routines (matter of form) than business realities (matters of substance).

V. THE KNOCK-OUT RULE: SECTION 2-207 UCC AND ARTICLE 2.22 OF THE UNIDROIT PRINCIPLES

Section 2-207 UCC and Article 2.22 of the UNIDROIT Principles both try to solve the conflict between clauses based on the assumption that contract forms are not read by the parties. Both provisions attempt to overcome the inconvenience and the rigidity of the *mirror-image rule* and the *last-shot doctrine*.

Both provisions are regarded as having a neutral effect since both mandate that neither party can impose clauses that, being contradictory, have not been agreed upon. The UNIDROIT Principles and the U.C.C. adopt a *knock-out approach*, with the UCC's variant more difficult to understand and apply. Both the Principles and the UCC seek to enforce clauses in exchanged terms and conditions that do not contradict one another, as does the Vienna Convention. Where there are "material" differences, however, their approach differs from that of the Convention. For example, if the inspection clauses contained in buyer's and seller's terms and conditions are identical in almost all aspects, but contain a difference that is re-

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<sup>43</sup> In this sense, it has been said that the *mirror-image rule* exists only in text books: See Douglas Baird and Robert Wiesberg, *Rules, Standards, and the Battle of the Forms: A Reassessment of 2-207*, 68 VA L. REV. 1233, (1982).

garded as material, the intent of the Convention is to enforce either the buyer's version or the seller's version, whereas under the UCC and the Principles, the intent is to enforce neither. Under the Principles and the UCC, the conflicting terms of the seller's version and the buyer's version are *knocked-out*; and a new version of the clause is substituted as derived from the applicable governing law.

There are artificialities associated with both the *knock-out rule* and the *last-shot doctrine*. Because it does not enforce solely the *last-shot*, the *knock-out rule* is a neutral approach, but it can at times significantly undermine the intention of the parties and the bargain it is intended to strike.

1. *Notice of non-conformity example*

Assume a conflict between clauses: one states that the period to give notice for the lack of conformity of the goods is two months, the other indicates that the period is two months and fifteen days. When one applies the *knock-out rule*, the contradictory clauses cancel each other and the notice rule under a domestic regime is therefore substituted. Under many regimes the statutory notice period can be much shorter than the period provided in either of these clauses. For example, the Spanish Commercial Code provides for only a 4-day notice period (art. 336 Spanish Commercial Code, for apparent defects). Such an application of the "neutral" *knock-out rule* would seem to go against the will of both parties.

Under the Vienna Convention, the notice period recited in Article 39.1 is a "reasonable time." Even so, many courts have construed this narrowly.<sup>44</sup> Thus, even under a regime that calls for notice within it could lead to unfair results.

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<sup>44</sup> See LG München, 3 July 1989 (17 HKO 3726/89) (Germany) (PACE, English translation) (UNILEX): a notification of the lack of conformity of textiles made 8 days after delivery was made in a reasonable time; See also LG Stuttgart, 31 August 1989 (3 kfh O 97/89) (Germany) (PACE, English translation) (UNILEX): a notification made after 16 days after delivery of shoes was declared unreasonable; ICC n15713, 1989 (PACE) (UNILEX): a notification 8 days after the publication of the report of the inspection of goods by an independent enterprise was deemed reasonable; LG Aachen, 3 April 1990 (41 O 198/89) (Germany) (PACE) (UNILEX): notice of the lack of conformity of shoes made the day following of the reception and inspection of the goods was deemed reasonable; Rechtbank Dordrecht, 21 November 1990 (2762/1989) (Netherlands) (PACE) (UNILEX): notice of lack of conformity of textiles 15 months after delivery was unreasonable; Rechtbank



## 2. *Arbitration example*

Consider a case where the both parties agree to arbitration but each has a different arbitration clause, perhaps with discrepancies as to the place where the process will take place or other circumstances relative to the arbitration. In this case, it seems clear that from a strict application of the *knock-out rule*, the dispute would be tried before national courts.<sup>45</sup>

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Roermond, 19 December 1991 (900336) (Netherlands) (PACE) (UNILEX): it was deemed that the notice of the existence of maggots on cheese must be as short as possible notify to the seller, since it is a perishable good; Pretore della Giurisdizione di Locarno-Campagna, 27 April 1992 (n1652) (Switzerland) (PACE) (UNILEX): on the basis of the existence of an evident defect in the furniture sold, buyer had the obligation to inspect and give notice of the lack of conformity at the same time of the delivery; LG Berlin, 16 September 1992 (99 O 29/92) (Germany) (PACE) (UNILEX): two months after the delivery of the shoes was not reasonable. *See also* LG Berlin, 30 September 1992 (99 O 123/92) (Germany) (PACE) (UNILEX); Oberlandesgericht (OLG) Düsseldorf, 8 January 1993 (17 U 82/93) (Germany) (PACE, English translation) (UNILEX): notice 7 days after the delivery of fresh cucumbers was unreasonable; Rechtbank Roermond, 6 May 1993 (920150) (Netherlands) (PACE) (UNILEX): 3 months in a sales contract of electric machines was deemed unreasonable.

*But see* OLG Innsbruck, 1 June 1994 (4 R 161/94) (Austria) (PACE) (UNILEX): two months for notifying the lack of conformity of flowers was considered reasonable; Cour d'Appel de Grenoble, 13 September 1995 (France) (PACE) (UNILEX): a month for notifying the lack of conformity of cheese was considered reasonable; Amtsgericht Augsburg, 29 January 1996 (Germany) (PACE) (UNILEX): the period for notifying the lack of conformity in the case of seasonal goods is a month (in the case at hand were shoes) (on the contrary, it has been stated that for seasonal goods (in the given case: plastic), the reasonable period of time is 8 days: and OLG München, 8 February 1995 (Germany) (PACE) (UNILEX).

It is worth noting that some case law attempts to find a uniform solution (Article 7 CISG) by providing, as a compromise between diverse legal systems, that the reasonable period of time should be no more than a month. (OLG Stuttgart, 21 August 1995 (Germany) (PACE) (UNILEX)): since the buyer either knows of the defects or ought to have discovered them; Obergericht Kanton Luzern, 8 January 1997 (Switzerland) (PACE) (UNILEX)): because the delivery of the goods has occurred.

<sup>45</sup> This has happened in a case resolved by United States courts: *Lea Tai Textile Co. v. Manning Fabrics, Inc.*, 411 F.Supp. 1404 (S.D.N.Y. 1975). Manning's form indicated that the settlement of a dispute would be held in New York by the "American Arbitration Association" or by an arbitrator of the textile industry, whereas Lea Tai, in its form, specified that the arbitration would be conducted in accordance with the Civil Code of Hong Kong with each party choosing an arbitrator. *See id.* Applying Section 2-207 UCC, the court invalidated the clauses, forcing the parties to resolve their conflict before domestic courts. *See id.* Comparing this case with the Convention rules, KELSO, *supra* note 26, at 554, points out that the CISG would apply the *last-shot doctrine*, and consequently, the Lea Tai form would therefore be regarded as a counter-offer which was accepted by some act of performance by Manning. *See id.* However, the application of the rules in Part II

### 3. Pricing example

Assume goods are offered at a price lower than customary market prices, with the lower price arrived at because the goods are accompanied by a restricted warranty that is phrased differently in the parties' clauses. This is a case in which an application of the *knock-out rule* that invokes a statutory warranty can also change the character of the intended bargain. A neutral *knock-out rule* may seem to be fair when at times it is not.

These examples illustrate instances in which the *last-shot doctrine* -despite its apparent severity- can be preferable to the *knock-out rule*; in fact, the apparent severity of the former may do a better job of calling to the attention of the potentially aggrieved parties the importance of resolving, in advance, conflicts between competing clauses.

#### A) Section 2-207 UCC

In Common Law systems, there are major differences in the resolution of problems caused by discrepancies in conditions that accompany offers and replies. The English legal system follows the classic conception of the Common Law, whose bastion is the *mirror image rule*.<sup>46</sup> The United States legal system, on

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of the Convention would lead to another result if one took a restrictive interpretation of the terms listed in Article 19(3) CISG. In other words, an understanding of the term "settlement of disputes" is limited only to the variations which are directly related to the solution of disputes related to an arbitration or, to the contrary, an ordinary court. For this reason, judging this case under the norms of the Convention should lead to the following result: Lea Tai's form should not be considered a counter-offer because it does not vary the terms of the offer concerning the "settlement of disputes." But it could be deemed an acceptance with non-material variations of the terms of the offer relative to the place and the norms of procedure. In this sense, in accordance with Article 19(2) CISG, and taking into account that there was no objection by the offeror, the terms of the contract will be those of the offer with the modifications contained in the acceptance. In other words, there exists an arbitration clause, which assigns the place of arbitration as Hong-Kong. Therefore, the Rules of the Civil Code of Hong-Kong will be applied and there will be two arbitrators, one already been chosen by Manning, and one from the "American Arbitration Association" or from the textile industry. However, under either view, the result would be arbitration rather than litigation of the dispute.

<sup>46</sup> Applications have progressed from the traditional rigidity of the *mirror-image rule*. See *Hyde v. Wrench* (England) 49 E.R. 132 (1840) or the more modern approach of *Butler Machine Tool Co. Ltd. v. Ex-Cell-O Corporation* (England) Ltd 1All E.R. 965, 1 W.L.R. 401 (1979). Both decisions are cited in English and American commentaries. For the former see G. H. TREITEL, *THE LAW OF CONTRACT* 19 (8th ed. 1991); W. R. ANSON, *LAW OF CONTRACT* 33 (26th ed. 1984); See also the

the other hand, only partially follows the dictates of the *mirror image rule*.<sup>47</sup> Under the U.C.C., where there is a conflict between clauses contained in exchanged terms and conditions, the *mirror image rule* is displaced by the rule recited in Section 2-207 UCC.<sup>48</sup> This is a somewhat complicated provision, which creates some contradictions among the courts.<sup>49</sup> Its text is:

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analysis of these cases in Pitch, *supra* note 25, at 1025-29; and Rick Rawlings, *The Battle of Forms*, 42 MOD.L.REV. 715-21 (1979).

<sup>47</sup> One author, comparing the rules of the Convention on this subject with those of the UCC, states that the approach followed by the Convention is more similar to the inflexible rules of the *Restatement of Contracts* than the flexible criteria adopted by the UCC. See Peter Winship, *International Sales Contracts Under the 1980 Vienna Convention*, 17 UCC.L.J. 68(1984). Section 59 *Restatement (Second) of Contracts* is equivalent to Article 19(1) CISG; it adopts the principle of the exact identity in the offer and acceptance terms: "A reply to an offer which purports to accept it but is conditional on the offeror's assent to terms additional to or different from those offered is not an acceptance but is a counter-offer." RESTATEMENT(SECOND)OF CONTRACTS 59 (1995).

<sup>48</sup> Some believe that Section 2-207 UCC applies only when at least one of the parties uses a form. See Brown, *supra* note 24, at 899; others hold that section 2-207 applies to the formation of a contract in general. See Williston, *supra* note 39, at 188. In this way, it is held that the section was conceived to encompass the entire contract formation process. See John Utz, *More on the Battle of the Forms: The Treatment of "Different" Terms Under the Uniform Commercial Code*, UCC.L.J. 112 (1983). This idea appears to be supported by the legislative history of the section which, at least initially, was conceived to resolve the battle of the forms. See John D. Wladis, *UCC Section 2-207: The Drafting History: Ending the "Battle-of-the-Forms," A Symposium on the Revision of Section 2-207 of the Uniform Commercial Code*, 49 BUS. LAW. 1029 (1994). For the situation in Canada, see Morris G. Shanker, *Battle of the Forms: A Comparison and Critique of Canadian, American and Historical Common Law Perspectives*, 4 CAN. BUS. LAW. J. 263 (1980).

<sup>49</sup> In a very ironic way, Marianne M. Jennings, *The True Meaning of Relational Contracts: We Don't Care About the Mailbox Rule, Mirror Images, or Consideration Anymore - Are We Safe?* 73 DEN.U.L.REV. 8-9 (1995), points out the discrepancies among courts in interpreting section 2-207: "Some courts follow the Montessori playground philosophy of who hit first; that is, if there is a term in the offer (purchase order) and not in the acceptance, the term comes in as part of the contract. In states where courts follow this 'me first' Montessori philosophy, all merchants possess a strong desire to be an offeror. Other courts follow a 'huh-uh, no sir' philosophy and provide that conflicting terms or terms found in one form but not in the other, cancel each other out. Still, other courts follow the 'come back when you agree' philosophy. These courts get into the issue of conditional acceptance and from there, dive head-on into the intricacies of section 2-207 and the realization that section 2-207 applies to additional terms, not different terms. This brings us to another assemblage of courts that say, 'Look, if these folks can't agree and their dang forms conflict, toss everything out and rewrite the dang contract for them.'" *Id.*

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

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

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

- (a) the offer expressly limits acceptance to the terms of the offer;
- (b) they materially alter it; or
- (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act."

UCC 2-207 has not provided the panacea it was intended to bring. One commentator has stated as follows: "After nearly 40 years of experience with the section, the only thing clear about the section is that it remains unclear . . . a section that raises as many questions as it answers."<sup>50</sup> Another commentator stated: "The section has become an enigma;" "There should be no doubt that 'chaos' is an accurate characterization of the state of law in the 'battle of the forms' arena."<sup>51</sup> Its defects derive "partly because of the numerous situations it was designed to address and the many more it has been used to address, and partly because of a judicial reluctance to apply the statute too literally."<sup>52</sup>

It is a widely accepted view that the *mirror image rule* brings more positive effects than the rule established by Section 2-207 UCC.<sup>53</sup> Against this background, it is not surprising that

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<sup>50</sup> Williston, *supra* note 39, at 141-42; and 1 E. ALLAN FARNSWORTH, ON CONTRACTS, 262 (1990).

<sup>51</sup> See Brown, *supra* note 24, at 894; See also Murray, *supra* note 24, at 1308.

<sup>52</sup> Williston, *supra* note 39, at 142.

<sup>53</sup> Baird and Weisberg, *supra* note 41, at 1222; See also David Vaver, "Battle of the Forms: A Comment on Professor's Shanker's View, 4 CAN. BUS. LAW. J. 282 (1980).

the delegates to the Vienna Diplomatic Conference were reluctant to have the CISG pattern its approach after the UCC.<sup>54</sup> It is also not a surprise that Section 2-207 UCC is one of the main scapegoats of the serious consideration that is being given to revisions to Article 2 UCC.<sup>55</sup>

### 1. *Analysis of Section 2-207 UCC*

Section 2-207 UCC seeks to have parties avoid escaping obligations due to incompatibility of the terms and conditions they exchange. What is considered a counter-offer under the Vienna Convention as well as most other legal regimes is often treated as an acceptance under the dictates of Section 2-207 UCC. However, in spite of the flexibility of this section, it is not so innovative as to allow the contract to be formed without the existence of the basic element of agreement under all legal systems. This basic element is the objective manifestation of mutual assent that is translated into agreement of the parties on the essential terms, which in the United States is a sufficient description of the goods and quantity. When an agreement on these elements exists, the contract is concluded. If the forms are inconsistent in other respects, the *knock-out rule* will be applied; coinciding clauses of the forms will become part of the contract, contradictory clauses are knocked out; and knocked-out terms are supplied by the governing applicable law. The vision which the UCC follows is that buyers and sellers do not read with suffi-

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<sup>54</sup> Murray, *supra* note 22, at 40; See also Andre H. Friedman, *The U.N. Convention on Contracts for the International Sale of Goods*, Digest of Commercial Laws of the World, 15 (1988).

<sup>55</sup> *The National Conference of Commissioners on Uniform State Laws*, which governed the revision of Article 2 UCC, has focused its forces on re-writing Section 2-207 on the basis of two drafts which are examined by Thomas J. McCarthy, *An Introduction: The Commercial Irrelevancy of the "Battle of the Forms," In Ending the "Battle of the Forms," A Symposium on the Revision of Section 2-207 of the Uniform Commercial Code*. 49 BUS. LAW. 1019-28 (1994); See also Mark E. Roszkowski and John D. Wladis, *Revised U.C.C. Section 2-207: Analysis and Recommendations. Ending the "Battle of the Forms," A Symposium on the Revision of Section 2-207 of the Uniform Commercial Code*. 49 BUS. LAW. 1065-80 (1994). See also Daniel Ostas and Frank Darr, *Redrafting U.C.C. Section 2-207: An Economic Prescription for the Battle of the Forms*, 76 DENV. U. L. REV., 419-26 (1996). These authors examine section 2-207 UCC from an economic point of view. See *id.* In their opinion, the future version of section 2-207 UCC must address the following issues: a) respect for individual autonomy; b) reducing transaction costs; and c) providing legal stability 410-15. See *id.*

cient attention the boilerplate clauses of the forms they receive.<sup>56</sup> The UCC responds to this problem by "knocking-out" such clauses when they contradict one another.

With the objective of overcoming the *last-shot doctrine* and, in the process, changing the traditional balance of power between the offeror and the offeree, where the offeror is the master of his offer,<sup>57</sup> the drafters of Section 2-207 UCC regulated three situations. First, conditional acceptances; second, written confirmations which have an additional term; and, finally, the battle-of-the-forms. This regulatory scheme answers the questions of whether a contract exists and, if so, what are its terms. The UCC approach divorces the formation of the contract from questions relating to its terms, once the basic requirements for the existence of a contract has been satisfied.

## 2) *Rules to determine the existence of the contract*

Subsection (1) of Section 2-207 UCC regulates questions concerning the existence of the contract. It provides the general rule that a definitive and seasonable expression of acceptance concludes the contract, even though it contains terms that are additional or different from the terms offered. The contract is formed, in this way, avoiding the *mirror-image rule* (under its mandate a reply with additional or different terms will not be considered an acceptance, but rather a counter-offer). Moreover, the corollary to the *mirror-image rule*, the *last-shot doctrine* is inverted, setting in place a type of *first-shot doctrine*, to achieve the neutral composition of the contract, it is often modified using subsection (3), as a way of escape.<sup>58</sup>

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<sup>56</sup> See *id.* See also Ostas and Darr, *supra* note 53, at 413. "[T]he current 2-207 creates a perverse incentive to carefully read and consider the fine print on each and every invoice or purchase order received." *Id.*

<sup>57</sup> Brown, *supra* note 24, at 897, 904. One of the objectives of Section 2-207 UCC is to refute the *mirror-image rule*. See *id.* What she does not say, however, is that under the *last-shot doctrine*, the offeror is the master of his offer. See *id.* This is because the acceptance, which introduces material modifications, will no longer be an acceptance, but a new offer, whose terms can be incorporated into the contract by acts of performance which express an intention to accept. See Official Comments 4 and 5, Section 2-207, UCC; See also Murray, *supra* note 24, at 1360. He believes that the principal objective of the section is to avoid "oppression and the unfair surprise." *Id.*

<sup>58</sup> The manner in which this has been handled by the courts has been questioned by R.W. Duesenberg, *Contract Creation: The Continuing Struggle with Additional and Different Terms under Uniform Commercial Code Section 2-207*, 34

This general rule comes with an exception,<sup>59</sup> provided for in the language after the comma in subsection (1). By this proviso, a reply to an offer that contains additional or different terms will not be deemed an acceptance if the reply has been expressly made conditional upon assent to these additional or different terms by the offeror. The effect of such a declaration is to invert the general rule initiated by the section and return to the traditional rule that regards such a reply as a counter-offer.

This exception has created problems of interpretation particularly where the language used by the offeree may not be sufficiently clear. One of the first cases which addressed this issue was *Roto-Lith, Ltd v. F.P. Barlett & Co.*<sup>60</sup> In this case, the court ruled that the reply to the offer modified it so materially that it was considered a counter-offer. This ruling has been sharply criticized by virtually every commentator to consider it. It is said that the *Roto-Lith* case followed the dictates of the traditional rule without being able to assimilate the new approach of Section 2-207 UCC. For this reason, one commentator<sup>61</sup> objects to Article 19 CISG as it follows this *Roto-Lith* doctrine, which U.S. courts have since abandoned. Subsequent U.S. decisions indicate that for the acceptance to be clearly and expressly made conditional, it is best to track the language of the statute.<sup>62</sup>

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BUS.LAW. 1484 (1979). See also Ostas and Leete, *supra* note 25, at 381-82, for the German solution -contradictory terms are changed by usages- which seems preferable.

<sup>59</sup> See Murray, *supra* note 39, at 172; See also Pitch, *supra* note 25, at 1043 and Ostas and Darr *supra* note 53, at 406. The difficulty with section 2-207 (1) UCC lies in distinguishing a "definite expression of acceptance" from an "expressly conditional acceptance." *Id.*

<sup>60</sup> See *Roto-Lith, Ltd v. F.P. Barlett & Co.*, 297 F.2d 497 (1st Cir.1962) [hereinafter *Roto-Lith*]; see also Murray, *supra* note 24, at 1330.

<sup>61</sup> See Murray, *supra* note 22, at 41.

<sup>62</sup> "Viewing the Subsection (1) provision within the context of the rest of the rest of that Subsection and within the policies of 2-207 (1) itself, we believe that it is intended to apply only to an acceptance which clearly reveals that the offeree is unwilling to proceed with the transaction unless he is assured of the offeror's assent to the additional or different terms therein." Williston, *supra* note 39, at 239-40, citing *Dorton v. Collins & Aikman Corp.*, 453 F.2d 1161(6th Cir. 1972), where the reply to the offer was: "my acceptance is subject to all of the terms and conditions contained within the front and reverse side of it, including the arbitration clause." The court ruled that this does not satisfy the requirements of Section 2-207 (1) UCC. See *id.*

There are three circumstances in which a definitive declaration of acceptance will not be deemed to exist. The contract will not be considered concluded under Section 2-207(1) UCC if the reply to the offer is expressly and clearly made conditional on assent by the offeror, when the reply may be considered to alter the offer in a material way;<sup>63</sup> or when the reply does not recognize the intention to conclude a contract in conformity with Section 2-204 UCC.<sup>64</sup> Section 2-207 (2) addresses the subject of "additional terms" contained in the reply and when such terms become part of the contract. Section 2-207(2) recognizes contracts established by acts of performance and concludes with the UCC's rendition of the *knock-out rule*: "[Where] the writings of the parties do not otherwise establish a contract . . . the terms of the particular contract consist of those terms on which the writings of the parties agree together with any supplementary terms incorporated under other provisions of this Act."<sup>65</sup>

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For a clause held to conform to the statutory text, see *C.Itoh & Co. v. Jordan Int'l. Co.*, 552 F.2d 1228 (7th Cir.1977), where the reply to the offer by Jordan, which introduced an arbitration clause, was as follows: "the acceptance by the seller . . . is expressly made conditional on assent to the additional or different terms below indicated and to the preprinted on the reverse side of the document. If these terms and conditions are not acceptable, the buyer should notify it at once." *Id.* The court held that this reply satisfied the requirements of Section 2-207 (1) UCC, but that the contract could not be deemed concluded according to the dictates of the subsection. *See id.* This is because the buyer (Itoh) had not assented to the seller's terms; nevertheless, the existence of the contract was recognized according to subsection 3 (*knock-out rule*): the terms of the contract were derived from the common terms and the supplementary terms taken from the UCC, excluding the arbitration clause. *See id.* For further comments on U.S. law, see Williston, *supra* note 39, at 153; Brown, *supra* note 24, at 917; JOHN D. CALAMARI AND JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* 105 (3d ed. 1987); Murray, *supra* note 24, at 1330, who summarizes the U.S. doctrine; and Pitch, *supra* note 22, at 1044. One author has sought to examine the Itoh case under the rules of the Convention; this analysis gives a different result: Itoh sends his offer to Jordan, who answers with the clause mentioned above, which includes an arbitration clause. This is a counter-offer because it introduces a term that materially modifies the offer (Arts.19(1) and 19(3) CISG). There is a subsequent acceptance of the goods by Itoh, who accepts the terms of Jordan's counter-offer, therefore the arbitration clause is deemed to be part of the contract. *See id.*

<sup>63</sup> This process, sometimes referred to as "*dickered terms*," includes a description of goods, price, quantity and delivery terms.

<sup>64</sup> *See* CALAMARI AND PERILLO, *supra* note 60, at 108, who, nevertheless, report the existence of opposite case law.

<sup>65</sup> Murray, *supra* note 39, at 174; JAMES J. WHITE AND ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE*, 42 (3d. ed. 1995). WHITE regards the application of the *knock-out rule* as appropriate, since the supplementary rules of the UCC,



The section 2-207(3) UCC *knock-out rule* appears to apply only when the contract could not be deemed concluded in accordance with subsection (1). This section provides that when contract conclusion cannot be derived from the forms exchanged, but there is subsequent conduct by the parties such as acts of performance, this will lead to the conclusion that the contract exists.

Where it is determined that the contract has been concluded, the next fundamental question is what are its terms? The division of questions over the conclusion of the contract and the contents of the contract building from the term's agreement is a logical consequence of the UCC's desire to overcome the inconvenience of the *mirror-image rule* and the *last-shot doctrine*. Since it is useless to regard a reply to an offer with discrepancies as an acceptance without determining the contents of the resulting contract, it is necessary to discuss two UCC subsections which follow UCC 2-207(1).

### 3. *Rules to determine the terms of the contract*

#### a) When the contract has been concluded in accordance with Section 2-207 (1) UCC

When the contract has been concluded in accordance with subsection (1) of Section 2-207 UCC, subsection (2),<sup>66</sup> provides us with rules for incorporating in the contract "additional" terms contained in the reply to an offer. Additional terms are to be regarded as proposals for additions to the contract which, subject to three exceptions, automatically become part of the contract in a transaction between merchants. Subsection (2) is one of the most difficult parts of section 2-207 UCC to understand, and has aroused much controversy.<sup>67</sup> Subject to subsec-

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which are qualified as neutral, will control. *See id.* SUMMERS, however, points out that this solution is contrary to the *common law*, which recognizes acceptance by conduct. *See id.*

<sup>66</sup> *See* Baird and Weisberg, *supra* note 41, at 1244. This subsection was originally written to regulate the conflicting terms of written confirmations and not to regulate the battle of the forms. *See id.* For this reason, the authors state this subsection has generated much conflict. *See id.*

<sup>67</sup> *See* Ostas and Darr, *supra* note 53, at 405-6. The authors point out that: "Unfortunately, section 2-207(2) contains at least two major difficulties. First, the subsection gives a strong preference to offerors. A second problem with section 2-207(2) arises from its silence regarding 'differing' terms." *Id.*

tion (2), subsection (1) considers as acceptances declarations with additional or different terms.<sup>68</sup> Subsection (2), however, only refers to additional terms, raising questions as to the regulation of an acceptance which has terms different from those contained in the offer. Whether or not this omission was deliberate is uncertain.<sup>69</sup> The Official Comment on this section seems to support both views. Comment 3 points in one direction, while Comment 6 points in another direction, as it neglects to refer to different terms. Faced with this situation, scholars have developed conflicting theories that are indistinctly supported by the case law: a) to include different terms in the regulation of subsection (2), so they will become part of the contract; or b) to opt for the opposite solution and, as a result, different terms will not be regulated by subsection (2). There then arises the question of the regulation of such terms. Professors White and Summers disagree with one another. White, relying on Official Comment 6 applies subsection (3) (knock-out-rule). Professor Summers, on the other hand, holds that Comment 6 refers exclusively to written confirmations. In Summer's opinion, different terms in an acceptance are excluded from the contract;<sup>70</sup> therefore, the offeror's terms prevail.

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<sup>68</sup> See CALAMARI & PERILLO, *supra* note 60, at 104. This distinction between additional and different terms is difficult to illustrate, as an offeror may include in his offer not only express terms, but also implied terms. Some subscribe to the point of view that an added term in the acceptance should be considered as additional; *But see* SUMMERS & WHITE, *supra* note 63, at 36. SUMMERS understands that the implied terms must be treated as different. *See id.*; Murray, *supra* note 24, at 1361-1362, agrees with SUMMERS. He adds an exception concerning exclusion of terms by the offer. *See* Brown, *supra* note 24, at 932, who indicates that the comparison between the terms of the forms must be made only by reference to the express terms of the offer; otherwise, it would be impossible to determine the offeror's intention.

<sup>69</sup> *See* Wladis, *supra* note 46, at 1050. The legislative history of the section is clear: in subsection (a) the drafters rejected the regulation of different terms. *See id.* *See also* Baird and Weisberg, *supra* note 41, at 1240; Duesenberg *supra* note 56, at 1483; and Brown, *supra* note 24, at 930. *But see* Murray, *supra* note 24, at 1358, 1364; Murray, *supra* note 22, at 178; and Utz, *supra* note 46, at 105. Utz explains the discrepancy stating: "the present Code contains a critical printer's omission." *Id.*

<sup>70</sup> *See* WHITE AND SUMMERS, *supra* note 63, at 34-35; *See also* Murray, *supra* note 24, at 1354. For support of Professor Summer's view, *see* CALAMARI AND PERILLO, *supra* note 60, at 104-5. *See also* Official Comments 3 and 6 of Section 2-207 U.C.C. 69-70.

An analysis of subsections (1) and (2) of Section 2-207 reveals that there are rules for situations; (1) when the offeree includes in his declaration is an acceptance; and (2) between merchants require that additional (or different) terms be deemed part of the contract by mere silence. This conclusion is derived from the fact that subsection (2)(c) indicates that the notification of an objection to the inclusion of such terms prevents their automatic incorporation to the contract. Therefore, *a contrario*, the mere silence of the offeror means an automatic acceptance.

The above rules are subject to two exceptions:

1) *when the offer expressly limits acceptance to its terms.* The reply to an offer conditioned upon acceptance of all its terms (subsection (1)) and the offer conditioned upon its total acceptance (subsection (2) (a)) are not treated the same. In the first case, the acceptance conditioned in that way is deemed a counter-offer. Where courts are reluctant to put this under the scheme of the *last-shot rule* -the counter-offer is accepted by acts of performance and the terms of the contract will be those of the last declaration. They usually turn to the *knock-out rule* regulated by subsection (3). In the second case, the additional (or different) terms of the acceptance are not incorporated in the contract, so the contract is composed of the terms of the offer, unless the offeror expressly assents to inclusion of the additional (or different) terms proposed by the offeree.

2) *additional (or different) terms that materially<sup>71</sup> alter the offer.* The terms are not deemed incorporated in the contract,<sup>72</sup> and vice versa, if the terms are considered non-material, they become part of the contract. In contrast with Article 19.3 CISG, which contains a useful guide to delimit what is a material change of the offer's terms, the UCC says nothing on this subject. A result has been abundant litigation, in spite of Official Comment 4, which indicates that an alteration is material if in-

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<sup>71</sup> See Wladis, *supra* note 46, at 1049. The words unreasonably and reasonably are also used in comments 4 and 5 to describe the clauses that materially alter or do not alter the offer. It is important to note that it is not the materiality of the term, but the materiality of the alteration wrought by it, that is the standard of Section 2-207 (2)(b); compare with Brown, *supra* note 24, at 933, who understands that the substantiality must refer to the contract and not to the offer.

<sup>72</sup> See Baird and Weisberg, *supra* note 41, at 933, discussing the dramatic change in the traditional rules of offer and acceptance.

corporated without express awareness by the other party resulting in surprise or hardship for him. Some examples are a clause negating such standard warranties of merchantability, and those requiring a shorter period for complaints than usual. Comment 5 points out as well examples of material alterations: a clause setting forth and perhaps enlarging slightly upon the seller's exemption from liability due to supervening clauses beyond his control, and so on.<sup>73</sup>

b) When the contract is not concluded in accordance with section 2-207 (1) UCC

In all the circumstances in which, in accordance to subsection (1), the contract is not concluded, but there is some kind of conduct (generally acts of performance of the contract) that indicate its existence, the last subsection comes into play. Subsection (3) examines the hypothesis in which the exchanged forms - the writings of the parties- do not establish the contract, but the contract is established by their conduct. Applying the *knock-out rule*, the contract is composed of the terms from which one can derive a common will, and terms determined in reference to the rules contained in other provisions of the UCC.

B) *The UNIDROIT Principles*

In general, the formation provisions of the UNIDROIT Principles take as a model Part II of the 1980 Vienna Sales Convention. However, the Principles approach to the battle-of-the forms is different from that of the Convention. Article 2.22 states that:

Where both parties use standard terms and reach agreement except on those terms, a contract is concluded on the basis of the

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<sup>73</sup> See Official Comments 4 and 5 to section 2-207 UCC: Uniform Commercial Code 69. Other clauses that usually are deemed to materially alter the elements of the offer are: arbitration clauses; clauses that foresee the lawyers fee; clauses that alter the quantity term in a requirement or output contract, and so on. See also WHITE AND SUMMERS, *supra* note 63, at 33. They seem to understand that terms which materially alter those of the offer are not only those that refer to the price, quality, quantity, and delivery terms, but also those usually incorporated at the back of documents which are not discussed. See *id.* See also Williston, *supra* note 39, at 205. Despite of the help in interpretation provided by Comments 4 and 5, it is pointed out that they may not be applied and interpreted literally as is usually done by the courts.

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.<sup>74</sup>

UNIDROIT Principles art. 2.11 entitled "Modified Acceptance" corresponds to CISG art. 19(1) and (3). However, the UNIDROIT Principles do not apply to the battle-of-the-forms scenario. In this regard, the drafters considered that the application of Principles art. 2.11 would lead to the application of the last-shot rule. This shows that the norms of the UNIDROIT Principles, Chapter 2, could be used, but the drafters chose to elect another regulation. In fact, the drafters recognize the possible application of the last-shot-rule when parties clearly indicate that the adoption of their standard terms is an essential condition for the conclusion of the contract, but not if the parties have made a mechanical reference to the standard terms, unaware of the conflict between their respective standard terms.<sup>75</sup>

The Principles start from the presumption that forms are not read, and it is not appropriate to build into the contract terms not agreed upon. Principles art. 2.22 seeks to foster the objectives of UCC § 2-207 and overcome *last shot theories* by attempting to formulate a neutral solution where only the terms agreed upon form the contract, and conflicting terms are eliminated. Therefore, the UNIDROIT adopted a *knock-out rule*.<sup>76</sup>

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<sup>74</sup> CISG Article 2.209 (Conflicting General Conditions) Principles of European Contract Law indicates that: "(1) If the parties have reached agreement except that the offer and acceptance refer to conflicting general conditions of contract, a contract is nonetheless formed. The general conditions form part of the contract to the extent that they are common in substance. (2) However, no contract is formed (a) if one party has indicated in advance, explicitly, and not by way of general conditions, that he does not intend to be bound by a contract on the basis of paragraph 1; or (b) if later on, one party, without undue delay, informs the other party that he does not intend to be bound by such contract. (3) General conditions of contract are the terms which have been formulated in advance for an indefinite number of contracts of a certain nature." *Id.*

<sup>75</sup> See UNIDROIT art. 2.22 cmts. 2 and 3.

<sup>76</sup> To help understand this effect, the following illustration is given: "A orders a machine from B indicating the type of machine, the price and terms of payment, and the date and place of delivery. A uses an order form with its 'General Conditions of Purchase' printed on the reverse side. B accepts by sending an acknowledgment of order form on the reverse side of which appear its own 'General Conditions of Sale.' When A subsequently seeks to withdraw from the deal it claims that no contract was ever concluded as there was no agreement as to which set of standard terms should apply. Since, however, the parties have agreed on the essential terms

Principles art. 2.22, and other provisions, regulate the two basic questions affecting the battle of the forms, "Is the contract concluded?" And if so, "What are the terms?"

1) *Rules to determine the conclusion of the contract*

The rule recited in Principles art. 2.22 applies to an exchange of forms between the parties.<sup>77</sup> If only one of the parties uses a form, this rule will not be applied because art. 2.22 clearly restricts its application to the situation in which "*both parties use standard terms*." According to art. 2.19,<sup>78</sup> the general rules on formation of the contract will become applicable, as well as those rules dedicated specifically to standard clauses, except Principles art. 2.22. There must also be differences between some or all of the standard terms exchanged by the parties and an agreement on at least the essential terms of the contract. The need for agreement on at least the essential terms is derived from Principles art. 2.19 and the rest of Chapter 2, which leads to the straight application of art. 2.2 which, as a parallel to CISG art. 14(1), demands the intention of the offeror to be bound in case of acceptance and that offers be sufficiently definite. In every case, if the indicated conditions are satisfied, the contract is deemed to be concluded.

One result of the application of the Principles is, by virtue of a presumption that the parties have agreed on the essential terms, that existing discrepancies around some standard terms may be rebutted. The parties may exercise either of the two options. First, one party clearly<sup>79</sup> communicates, after the conclusion of the contract, without undue delay, his intention not to be bound to the contract (right to an immediate avoidance of the contract). Second, before the conclusion of the contract, one of

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*of the contract, a contract has been concluded on those terms of the contract and on any standard terms which are common in substance.*" UNIDROIT art. 2.22 cmt. 3.

<sup>77</sup> "Standard terms" are defined as: "provisions which are prepared in advance for general and repeated use by one party and which are actually used without negotiation with the other party." UNIDROIT art.2.19(2)

<sup>78</sup> UNIDROIT art. 2.19 indicates that: "Where one party or both parties use standard terms in concluding a contract, the general rules on formation apply, subject to UNIDROIT arts. 2.20-2.22." *Id.*

<sup>79</sup> In relation to what should be understood by "clearly," UNIDROIT art. 2.22 cmt. 3, indicates that: "the inclusion of a clause of this kind in the standard terms themselves will not normally be sufficient since what is necessary is a specific declaration by the party concerned in its offer or acceptance." *Id.*

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

2) *Rules for determining the content of the contract*

Agreed upon essential terms become part of the contract. Where there are standard terms which are common in substance, these terms become part of the contract. Common in substance includes clauses which in their essential aspects, either by content or by finality, may be considered as equally satisfying the interests of both parties. Where there is disagreement about some clauses, the knock-out rule is applied, thus canceling contradictory clauses and excluding those, which even though are not contradictory, alter the terms of the offer or acceptance. Where there are no material alterations, UNIDROIT Principles art. 2.11 will apply. The acceptance which contains non-material variations is deemed part of the contract. Variations that materially alter the offer may be deemed mutually excluded in accordance with Principles art. 2.22. In case of conflict between a standard term and a term which is not standard, the latter prevails (Principles art. 2.21)<sup>80</sup>

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<sup>80</sup> See Cour d'appel de Grenoble, 24 January 1996 (France). There, the contract contained a liability clause which incorporated the carrier's standard conditions of sale. This clause limited the carrier's liability to \$50.00 per shipment. According to the Court, "while every single page of the contract bore the signature of both parties, the general terms, printed in miniscule lettering, had been neither signed nor initialed by the client, and that as a consequence, it was not possible to establish that it was aware of these terms at the time of signing the contract." *Id.* The Court concluded that the general terms clause limiting liability to a nominal sum so low as to constitute virtually no compensation at all, ran counter to the principle of acceptance of liability spelled out in the contract. *See id.* The Court held that "there was a principle, in international trade law, that 'in the event of incompatibility between a standard clause and a non-standard clause, the latter prevails (UNIDROIT art. 2.21)' and that 'if contract terms are unclear, an interpretation against the party that supplied them is preferred (UNIDROIT art. 4.6).'" *Id.* The conclusion was clear: the general term was invalid. *See id.* See also the abstract in English and French in 1 UNIFORM LAW REVIEW 180 (1997).

as the most likely reflection of the intention of the parties.<sup>81</sup> Standard terms whose content<sup>82</sup> or language, whether material or formal,<sup>83</sup> are of such a character that the other party could not reasonably have expected them, do not become part of the contract (Principles art.2.20, *Surprising Terms*).<sup>84</sup> Criteria of interpretation are provided in the second paragraph of this article. To determine whether a term is of such a character content, language and presentation shall be considered. There is no general rule under the Principles permitting a court to strike an unconscionable contract term.<sup>85</sup> Finally, the interpretation of standard terms does not follow the general rule set forth in the Principles art. 4.1 which regards the interpretation of the intention of the parties (similar to CISG art. 8(1) and (2)). The standard terms will be interpreted, considering their special nature and purpose, in accordance with the reasonable expectations of the average users of standard terms and conditions.<sup>86</sup>

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<sup>81</sup> See Principles of European Contract Law, art. 5.104 -Preference to Negotiated Terms- which establishes that "Terms which have been individually negotiated take preference over those which are not." *Id.*

<sup>82</sup> UNIDROIT art. 2.20 cmt. 2 indicates that "regard must be had on the one hand to the terms which are commonly to be found in standard terms generally used in the trade sector concerned, and on the other to the individual negotiations between the parties." *Id.*

<sup>83</sup> It is noted that "Other reasons for a particular term contained in standard terms being surprising to the adhering party may be the language in which it is couched, which may be obscure, or the way in which it is presented typographically, for instance in minute print." UNIDROIT art. 2.20 cmt. 3. It is also noted that "regard is to be had not so much to the formulation or presentation commonly used in the type of standard terms involved, but more to the professional skill and experience of persons of the same kind as the adhering party." *Id.* Lastly, the foreign language of the clause could result in surprise to the party who does not fully understand the language and who could not appreciate all the implications. *See id.*

<sup>84</sup> Similar to this Article, Principles of European Contract Law art. 2.104 -Not Individually Negotiated Terms- states that: "(1) Contract terms which have not been individually negotiated may be invoked against a party who did not know of them only if the party invoking them took reasonable steps to bring them to the other party's attention before or when the contract was concluded. (2) Terms are not brought appropriately to a party's attention by a mere reference to them in a signed contract document." *Id.*

<sup>85</sup> See UNIDROIT art. 7.1(6) cmt. 1 - Exemption clause. However, UNIDROIT arts. 3.10 and 7.1(6) indicate that an exemption clause may not be invoked if it would be grossly unfair to do so.

<sup>86</sup> See UNIDROIT art. 4.1 cmt. 4 (Intention of the parties).



## VI. THE SOLUTION TO THE BATTLE-OF-THE-FORMS UNDER THE RULES OF THE VIENNA SALES CONVENTION

Several interpretative approaches have been applied to the Vienna Sales Convention, which clearly destroy the principle of uniform application of the rules of the Convention. These theories include that the Convention simply does not apply to the battle-of-the-forms, the application of general principles of the Convention in lieu of its specific provisions, the implicit exclusion of CISG art. 19, and the partial application of CISG art. 19. Finally, this article will analyze the rules of Part II of the Convention and the manner in which these rules fit the conflict of standard terms. It is an accepted view that the Convention rules are thorough enough to solve the battle-of-the-forms conflict. The battle-of-the-forms is the central focus of this article because it is one of the most controversial aspects of CISG art. 19. It is controversial because its application to the classical situations, where an offer and an acceptance are not contained in forms, is not in doubt.

The text of CISG art. 19<sup>87</sup> is as follows:

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;<sup>88</sup>

(2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not

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<sup>87</sup> Principles of European Contract Law, art. 2:208 -Modified Acceptance-states that: "(1) A reply by the offeree which states or implies additional or different terms which would materially alter the terms of the offer is a rejection and a new offer. (2) A reply which gives a definite assent to an offer operates as an acceptance even if it states or implies terms additional to or different from the terms offered, provided the additional or different terms do not materially alter the terms of the offer. The additional or different terms then become part of the contract. (3) However, such a reply will be treated as a rejection of the offer if: (a) the offer expressly limits acceptance to the terms of the offer; or (b) the offeror objects to the additional or different terms without delay; or (c) the offeree makes his acceptance conditional upon the offeror's assent to the additional or different terms, and the assent does not reach the offeree within a reasonable time." *Id.*

<sup>88</sup> BGB § 150.2 Eine Annahme unter Erweiterungen, Einschränkungen oder sonstigen Änderungen gilt als Ablehnung verbunden mit einem neuen Antrage. However, in the German Civil Code, there is no difference between material modifications and non-material ones, even though the case law has succeeded in relaxing the norm. In Austrian law, following the German example, it is indicated that an acceptance with modification is also a counter offer. *See STERN, supra* note 30, at 47; and BYDLINSKI, *supra* note 35, at 71.

materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance;<sup>89</sup>

(3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.<sup>90</sup>

According to CISG art. 19(1), the reply to an offer which does not match exactly with the terms of the offer is a rejection and constitutes a counter offer. This paragraph states the traditional principle known as the *mirror image rule*. CISG art. 19(2) seeks to relax the rule recited in CISG art. 19(1). It carves out from the CISG art. 19(1) rule additional or different terms which do not materially alter the terms of the offer. The dividing line between a material and a non-material alteration is of great importance because only the latter constitutes an acceptance. Nevertheless, it can sometimes be difficult to draw the line, despite the CISG art. 19(3) list of examples. This list is non-comprehensive because it contains the expression "among other things" reinforced by the phrase "are considered to alter the terms of the offer materially."<sup>91</sup>

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<sup>89</sup> See UNIDROIT art. 2.11 (2) (Modified acceptance) and ULF art. 7 (1964).

<sup>90</sup> The UNIDROIT has no article similar to CISG art. 19(3). However, the UNIDROIT comments reach the same result by enumerating the terms listed in CISG art. 19.3, and thus consider them as material.

<sup>91</sup> There are judicial decisions on the materiality of the alteration contained in the reply to the offer:

See LG Baden-Baden, 14 August 1991 (Germany) (UNILEX), published in *Recht der Internationalen Wirtschaft*, 1992, p. 62-63: A clause that states that the notice of defects are valid only if made within 30 days after the date of the invoice is not a material alteration of the offer;

-OLG Hamm, 22 September 1992 (Germany) (UNILEX): considering a material alteration a counter offer relating to the packaging of bacon (the offer stated "in Säcken" while the counter-offer said "losen");

-LG Giessen, 22 December 1992, affirmed by OLG Frankfurt am Main, 4 March 1994 (Germany) (UNILEX). In this case, the court considered additions and variations in the acceptance related to the payment (the addressee replied, insisting on advance payment or the opening of a letter of credit), as well as the change in the quality offered. For a similar view relating to payment terms under the ULF, see OLG Hamm, 21 March 1979 (Germany);

### A) *The exclusion of the rules of Part II of the CISG*

Some commentators believe that the battle-of-the-forms problem is not solved by the rules of the Convention and, therefore, the regulation of the battle-of-the-forms must be found in the applicable domestic law.<sup>92</sup> This article asserts that the conflict between terms is regulated by the norms dedicated to the offer and acceptance in the Vienna Convention. The forms ex-

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-*Cámara Nacional de adelacions en lo Comercial*, 14 October 1993 (Argentina) (UNILEX), judging a forum selection clause;

-*Cour de Cassation*, 4 January 1995 (France) (UNILEX), commented on by Claude Witz, *Le premier arrêt de la Cour de cassation confronté à la Convention de Vienne sur la vente internationale de marchandises*.-*Note sous Cass.* 1re civ., 4 Jan. 1995, RECUEIL DALLOZ SIREY 289 (1995); and Tomás Vazquez Lepinette, *La Conservación de las Mercancías en la Compraventa Internacional: Primera Jurisprudencia*, REVISTA GENERAL DE DERECHO 3437 (1996). In this case, the order stated a future revision of the price in case of a decrease in market prices, while the seller's reply stated a future revision according to both an increase and decrease in market price. The seller was not able to confirm the order with regard to some of the items. *See id.* The Appellate Court held that the reply by the seller did not materially alter the terms of the offer. *See id.* This statement was confirmed by the Supreme Court. *See id.*

*See also* OLG München, 8 February 1995 (Germany) (UNILEX): the reply (delivery July, August, September, October) to an offer (delivery between July and the 15th August) is a counter offer; OLG Hamm, 6 April 1978 (Germany); OLG Hamm, 7 December 1978 (Germany); and OLG Hamm, 17 December 1981 (Germany) for the ULF.

*See* OLG Frankfurt am Main, 31 March 1995 (Germany) (UNILEX), which declared that a contract was not concluded, since the offer stated the quality of the glass ("Fiolax"), while the purported acceptance stated ("Duran") and there was no subsequent conduct of the parties showing the existence of the contract. *See id.*

<sup>92</sup> *See* von HUBER, *supra* note 35, at 413, who, referring to Article 17 of the 1978 Draft Convention, thinks that it is a question of validity, so its regulation must be decided by the applicable domestic law through the application of CISG art. 4. Nevertheless, he indicates that if only one of the parties uses general conditions, its validity will be regulated by the Convention rules. *See id.* *See also* Francois Dessemontet, *La Convention des Nations Unies du 11 Aril 1980 sur les Cntrats de Vente Internationale de Marchandises*, in LES CONTRATS DE VENTE INTERNATIONALE DE MARCHANDISES 56 (F. Dessemontet, ed., 1991); Monique Jametti Greiner, *Der Vertragsabschluss*, in DAS UNCITRAL-KAUFRECHT IM VERGLEICH ZUM OSTERREICHISCHEN RECHT. WIEN: MANZ 46 (P. Doralt, coord., 1985); HOLGER MULLER & HANS- HERRMAN OTTO, ALLGEMEINE GESCHÄFTSBEDINGUNGEN IM INTERNATIONALEN WIRTSCHAFTSVERKEHR 40 (1994); Beverly M. Carl, *Contratos Internacionales: la Compraventa de Mercaderías entre Empresas de Países con Distintos Sistemas Jurídicos*, 34 REVISTA DE LA FACULTAD DE CIENCIAS JURÍDICAS Y POLÍTICAS, UNIVERSIDAD CENTRAL DE VENEZUELA 341 (1989), who points out that a good solution may be the one contained in section UCC §2-207 (3). *See also* PICH, *supra* note 25, at 1089, who believes there is a gap filling when a contradiction between clauses exists, and although he explains the two main solutions to this problem, he does not choose one.

changed, although long and preprinted, are offers, acceptances and counter offers<sup>93</sup> and the legislative history of CISG art. 19 leads to the same conclusion. During the task of revising the rules on formation contained in the ULF, it was proposed that a new paragraph be added to ULF art. 7 which attempts to find an acceptable solution to the contradiction between clauses.

In spite of the complicated writing of this proposal, it was considered that it dealt with a practical problem and provided an acceptable solution. However, the Working Group decided to reject the proposed paragraph because if an acceptance contained any material alterations to an offer, it should constitute a rejection of that offer, whether those material alterations were in the printed or in the non-printed terms of the acceptance.<sup>94</sup> Because the view that all the clauses of a contract should have the same value, the proposal was rejected. Therefore, the conflict between terms should not be solved by giving preference to written terms over printed terms. Instead, the conflict should be solved with the general rule of ULF art. 7, which requires a material agreement between the terms of the offer and the acceptance.

In the last stage of the legislative process of the Convention, during the Vienna Diplomatic Conference, the Belgian delegation proposed to add a new paragraph to Article 17 of the 1978 Draft Convention (subsequently CISG art. 19). The text of the proposal sought to explicitly regulate the content of the contract when a battle-of-the-forms exists. The text of the proposal, which was ultimately rejected, is as follows: "When the offeror and the offeree have expressly (or implicitly) referred in the course of negotiations to general conditions the terms of

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<sup>93</sup> See Oberster Gerichtshof, 6 February 1996 (Austria) (UNILEX), indicating that since the CISG does not have any express rule dealing with general conditions, the formation rules apply. Also, the negotiations and the practices established between the parties must be taken into account. See also OLG Hamm, 18 October 1982 (Germany): applying the ULF formation rules to determine the inclusion of general conditions to the contract. See also PERILLO, *supra* note 17, at 289, who believes the formation rules are not useful to solve battle-of-the forms problems.

<sup>94</sup> See generally, UNCITRAL Yearbook, vol.VIII, p. 82. See also HONNOLD, *supra* note 22, at 284.

which are mutually exclusive the conflict clauses should be considered not to form an integral part of the contract.”<sup>95</sup>

The delegates seemed to agree that the proposal could not be discussed during such an advanced stage of the text at the Draft Convention. Additionally, some representatives strongly opposed the amendment, asserting that it was contrary to the law of contracts. Additionally, they believed the question was solved by the text of the Draft Convention.<sup>96</sup> This amendment proposed by Belgium does not mean, as some scholars state, that the battle-of-the-forms is a gap in the Convention. On the contrary, it shows that a different solution to the one in CISG art. 19 was proposed, without success. From the legislative history, one can readily conclude that the battle-of-the-forms is regulated by the Vienna Convention rules on formation. It is difficult to solve the question of its regulation through CISG art. 19 or, as one sector of scholars believes, by applying the general principles of the CISG or even indicating that an implied exclusion of Article 19 is produced. The final result of the last two positions is the establishment of control over contents of a contract. These viewpoints, however, are not in keeping with the application of uniform norms as a central objective of the Convention.

B) *The application of the general principles of the Convention*

The legislative history of CISG art. 19 indicates that the battle-of-the-forms is regulated under the offer and acceptance norms recited in the Vienna text. Therefore, there is no justification for turning the legislative history upside down and arguing that the battle-of-the-forms is a gap in the Convention, only to be solved by the application of the general principles on which the Convention is based (CISG art.7). Even so, there are scholars who feel uncomfortable with the rule of CISG art. 19 because they think that it is not appropriate to decide an issue involving a battle-of-forms but, at the same time, they think it

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<sup>95</sup> Official Records (A/CONF.97/C.1/SR.10, in A/CONF.97/19 at 288-289. Some authors take advantage of this rejection to place the battle-of-the-forms outside the scope of the Convention. See Jan Hellner, *The Vienna Convention and Standard Form Contracts*, INTERNATIONAL SALES OF GOODS 342 (1986).

<sup>96</sup> See Official Records (A/CONF.97/C.1/SR.10, in A/CONF.97/19, pfs.90-92, pp288-289.

is undesirable to abandon the question to domestic law (fundamentally because it will go against the objective of uniform application of the Vienna text (CISG art.7)). These scholars have well based theories that support the thesis that it is a gap. They assert that this gap is solved by applying the general principles of the Convention (CISG art.7). Under this reasoning, a problem that receives an express solution and that leads to a high degree of certainty in the law, is fabricated and becomes absurd.

One of these theories is based on the invalidity of acts of performance as an acceptance (CISG art. 18) when there is a battle-of-the-forms. In that circumstance, it is said a valid acceptance cannot exist, and the contract is not concluded under the scope of the Convention.<sup>97</sup> Proceeding from this premise, any battle-of-the-forms is said to be solved by the application of the general principles of the Convention (CISG art.7). The general principles which are taken out of Part II of the Convention include the necessity of a definitive and sufficient agreement, that, in conformity with CISG art. 14, consists of an intention to be bound in case of acceptance, as well as an agreement over the terms of goods, price, and quantity. When these terms are present in a battle-of-the-forms scenario, it is asserted that a valid contract, although incomplete, will exist. In order to furnish any missing elements of the contract, the general principles expressly mentioned in CISG art. 7 are asserted. The resulting contract will include the common terms from both set of forms, and any terms in conflict will be supplied as the court deems appropriate. In addition, all the circumstances of the case, the

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<sup>97</sup> See VAN DER VELDEN, *supra* note 22, at 241 and Moccia, *supra* note 39, at 667. Another commentator finds it difficult to evaluate the acts of performance as acts of acceptance when there is a battle of the forms. See Mario Frigo, *L'Efficacia delle Condizioni Generali di Contratto alla luce delle Convenzioni di Roma e di Vienna del 1980*, 537 DIRITTO DEL COMMERCIO INTERNAZIONALE, (1993). See also Louis DelDuca and Patrick DelDuca, *Practice Under the Convention on International Sale of Goods (CISG): A Primer for Attorneys and International Traders (Part II)*, 29 UNIFORM COMMERCIAL CODE L. J. 122 (1996), who state that the CISG does not give any answer where there is a battle-of-the-forms conflict and a subsequent performance of the contract. Therefore, the general principles of the CISG and private international law must be looked at to resolve such questions.

parties' interest, and the media, will be taken into consideration.<sup>98</sup>

The foundation upon which this theory is based however, is not solid because Part II of the Convention contains express norms which can be applied. To apply the general principles of the Convention, there must be a matter that is regulated by the Convention, but not expressly settled in the Convention (CISG art.7(2)).

C) *The implicit exclusion of Article 19 CISG*

Other scholars,<sup>99</sup> unsatisfied with the result reached following the rules of the Convention, particularly CISG art. 19, have attempted to construct an original, but artificial, theory to do away with the contradiction of terms. If the parties have agreed on essential terms and have performed the contract in spite of the existence of contradictions between terms, then there is a tacit derogation of CISG art. 19. In the opinion of these scholars, the contract performance is the determining factor from which they draw the following conclusions: a) the implied derogation of CISG art. 19; b) the performance of a valid contract; and c) the exclusion of the contract content from the contradictory clauses. The only one believed to be correct is the second one: the performance of a valid contract. The other two appear to magically complete the thesis they wish to support.

In the first place, the contract performance by the recipient of the counter-offer indicates objective, subjective, and reasonable assent to an offer. There is no reason to support a tacit

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<sup>98</sup> See VAN DER VELDEN, *supra* note 20, at 243; See also Moccia, *supra* note 39, at 667. Other authors simply indicate that the general principles of the CISG contained in Part II are applied. See LOUIS DELDUCA and E. GUTTMAN, *Problems and Materials on Sales Under the Uniform Commercial Code and the Convention on International Sale of Goods*, COMMERCIAL TRANSACTIONS, VOL. 2, 176 (1993). Others say that the battle-of-the forms is a gap in the Convention, because the Belgian proposal was rejected during the Diplomatic Conference. See HELLNER, *supra* note 93, at 342; and Drobnig, *supra* note 30, at 126 (indicating that the solution does not give an answer to the problems, without mentioning the Belgian proposal).

<sup>99</sup> See generally STAHL, *supra* note 34, at 381; and LUDWIG, *supra* note 38, at 412, who, although in favor of the application of the last-shot rule, thinks the tacit derogation of Article 19 is possible when it could be derived from an usage of trade of CISG art. 9. See also this thesis as adopted by Amtsgericht Kehl, 6 October 1995 (Germany) (UNILEX).

derogation from CISG art. 19. In the second place, even assuming that the last shot rule does not apply, this result is unfounded. Following the same reasoning, it could be deemed that the first shot rule or some other rule applies.

D) *The partial application of Article 19 of the CISG*

In contrast to most of the doctrinal thesis that defend either an integral application, or a total exclusion of the rules of the Convention, specifically Article 19, there is also a thesis that suggests a partial application of Article 19 to solve the conflict of the battle-of-the-forms.

Some authors, among them Professor Diez-Picazo, understand that the two basic questions to be answered when there is a battle-of-the-forms are: Is there a contract? And if so, What is its content? They believe consideration of these two questions require separate regulations. CISG art. 19 is typically applied to situations where there are no acts of performance by the parties. If there is performance, however, these authors believe the problem is not one of formation, but one concerning the determination of the content of the contract (which does not turn on formation norms). To determine which terms will remain to create the content of the contract, they propose a solution very similar to the one adopted by subsection (3) of Section 2-207 UCC (*knock-out rule*). In this way, the contract is built on common terms, as well as those supplied by the dispositive law, general principles of contract interpretation and, in particular, business usages and good faith.<sup>100</sup>

This partial application of the Convention rules is said to respond to the difficulty of applying the Vienna rules when, after the acts of performance by the parties, the contract is deemed not to be concluded under Articles 18 and 19 of the Convention. It is understood that Article 18(3) of the CISG ignores the existence of situations where there is acceptance by conduct (of the type described in Section 2-207 (3) UCC). Those who

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<sup>100</sup> See Luis Diez-Picazo, "Condiciones Generales de la Contratación y Cláusulas Abusivas," In *Encuentros sobre Derecho Iberoamericano, Derecho Privado*, Fundación BBV, 1995, p.8; and Una nueva doctrina general del contrato? *Anuario de Derecho Civil*, 1993, tomo XLVI, fasc.IV, p.1716; See also Bernard Audit, *La Vente Internationale de marchandises (Convention des Nations-Unies du 11 Avril 1980)*. Droit des Affaires, Paris: L.G.D.J., 1990, p.70. See also PICH, *supra* note 25, at 1083.



subscribe to the partial application of Article 19 conclude that if you want to escape this labyrinth, then domestic law must be applied. An acceptable alternative solution is the one contained in Section 2-207 (3) UCC.<sup>101</sup> However, this division in the application of the Convention rules has no justification. The rules of the Convention -and only these rules- provide comprehensive regulation of the formative scheme of the contract and the traditional declarations of will in the form of offer and acceptance. The exchange of forms is regulated in its entirety by the Convention, as will be examined next.

E) *The search for uniformity: Articles 18 and 19 CISG*

Examination of two solutions to the problem represented by contradiction of forms -the application of rules on offer and acceptance, or content control- we see that neither is entirely perfect. The Convention's rules, which center around Articles 18 and 19 are reviewed below.

1) *Rules to determine the conclusion of the contract*

With the objectives of certainty and security in contracting, the Vienna drafters decided to apply rules of offer and acceptance along with acts of performance to solve the issue of the battle-of-the forms.

a) If the offeror-buyer sends to the offeree-seller a purchase form as a way to manifest his offer and in response receives a separate form from the seller, usually neither form is signed. This conflict of forms materially alters the offer and the purported acceptance is really a rejection under Art. 19(1) and 19(3) of the CISG. This rejection could be considered a counter-offer capable of acceptance only if it satisfies the essential elements of Article 14(1) of the CISG. In this situation, if the seller (new offeror) sends the goods, the reception and acceptance by the buyer -who does not raise objections- may be deemed an objective manifestation of acceptance of the counter-offer that con-

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<sup>101</sup> A slight variation of this thesis is one which understands that Article 19(2) may be applied when there is a non-material modification, with domestic law applied when there is a material modification: See HELLNER, *supra* note 93, at 341-42 and 351 *et seq.*, who, nevertheless, finally indicates that it is preferable that the battle of forms no be regulated by the Convention, supporting his opinion by reference to the rejected Belgian proposal.

cludes the contract in accordance with the terms of the counter-offer.<sup>102</sup>

b) If the offeror-seller sends his form and the buyer adds to the reply terms that materially modify it, this is a counter-offer and a rejection of the original offer, similar to the previous hypothesis. If, subsequently, the seller decides to send the goods, this act is an indication of assent to the counter-offer of the buyer. This indication of assent, in order to comply with the requirements of "reaching" of the Convention, must reach the offeror (art. 18(1) in relation to 24 CISG). This requirement may be satisfied by the arrival of the goods or a notice informing of the dispatch of the goods. When the offer, practices established between the parties, or usages indicate that the seller is not required to communicate the acceptance, the sending of the goods concludes the contract (art. 18.3 CISG).<sup>103</sup>

The legislative history of Article 19 CISG documents its applicability to situations in which there are conflicts between clauses contained in the purchase and sale forms. When there is an exchange of forms, their terms must be compared to determine if there are variations which may be deemed material. Article 19 of the CISG does not apply to exchanges of forms when there is no departure in the reply to the offer. In this case, the only articles of the Convention that will play a role will be Arti-

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<sup>102</sup> See CISG art. 18.1. Many Vienna scholars agree that the Convention applies the *last-shot-rule*. NEUMAYER could not be more explicit -even though he dedicates a significant part of his article to questioning the advantages and disadvantages of different solutions- and indicates that the *knock-out rule* does not find support in the Convention. See NEUMAYER, *supra* note 38, at 524. See also HERBER AND CZERWENKA, *supra* note 34, at 107.

HONNOLD thinks that two theories, with opposite consequences, might be advanced: 1) When seller received no acceptance to the counter-offer, he accepted the initial offer by shipping the goods; 2) Buyer, by receiving and accepting the goods, accepted Seller's counter-offer. See HONNOLD, *supra* note 22, at 195. The first theory, however, is contrary to the Vienna Convention because a reply to an offer with material alterations is a rejection and a new offer (art.19(1) and (3), in relation with Article 17), should make it impossible to revive an original offer. See the criticism of Professor Honnold's position by Moccia, *supra* note 41, at 673-674. Some authors do not analyze the problem by taking into account the acts of performance, but in a theoretic plane of exchange of forms they indicate that contradictions of forms are always material, so the contract is not concluded. See NEUMAYER AND MING, *supra* note 34, at 185-86.

<sup>103</sup> See Pilar Perales Viscasillas, *Contract Conclusion Under CISG*, 16 J. OF L. AND COMMERCE 315, (Issue 2) 1997.

cles 14(1) and 18(1) CISG. The rules applicable to most exchanges of forms are:

When the form, sent as a reply to an offer form contains additional or different terms that materially alter the offer, it cannot be deemed an acceptance by mandate of Article 19(1). Such a reply is a rejection and a counter-offer; it is a new offer that must be accepted to conclude the contract. Frequently, there will be acts of performance which under the norms of the Convention, can be regarded as acts of acceptance.

The critics or detractors of this understanding undermine the meaning of the Convention when they conclude that the acts of performance cannot be considered as an assent to the terms of the counter-offer form.<sup>104</sup>

The indication of assent to the offer, in the cases cited here, derive from the realization of an act -sending or acceptance of the goods- from which the Convention infers an act of will. The Convention under Article 18(1) (*A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance*) places both indications of assent in the same position. Unlike acceptances by oral or written declarations of will, acceptance by performance yields two results: the sale contract is concluded and, simultaneously, the contract enters the execution phase. The consent, necessary for the contract's formation, is normally manifested in such cases by the sending of the goods

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<sup>104</sup> See VELDEN, *supra* note 20, at 241. He takes the position that mere acts of performance cannot be deemed an acceptance of these terms. *See id.* In his view, for this to happen, the offeror must be aware of the contradictions between the two sets of forms, and that such awareness can be demonstrated. *See id.* For example, when he makes acts of performance in conformity with the conditions of their counterpart and, at the same time, in disconformity with his own. *See id.* This thesis is confusing; we cannot understand how an act of execution (acceptance of the goods or payment of the price) can show conformity with, for example, an arbitration clause in the counter-offer and, at the same time, indicate a rejection of his previous requirement that disputes be submitted to the courts. *See id.* *See also* Stoffel, *supra* note 34, at 75. He states that the conditions which must be met for an acceptance by acts of performance in accordance with Article 18(3) CISG are doubtfully satisfied when there is a battle of the forms followed by acts of performance. *See id.* He would solve the battle-of-forms problem by applying the applicable substantive law. *See id.*

*See* Walter F.VonPetzinger, "Battle of Forms" und Allgemeine Geschäftsbedingungen im amerikanischen Recht. *Recht der Internationalen Wirtschaftrecht*, 1988, p.679; and see HERBER AND CZERWENKA, *supra* note 34, at 106, for authors who understand that such an acceptance is in conformity with Article 18 CISG.

by the seller or the reception of the goods by the buyer - acts that coincide with the commencement of performance or the total performance of the sales contract.

It seems clear that these are acts which can show individual will, without being concerned with recognition of discrepancies in the forms. It is not accepted opinion that the Vienna Convention protects carelessness in not reading the forms. The Vienna text mandates that acts of performance made in a conclusive way are sufficient to demonstrate assent to a previous declaration of will and to conclude the contract. If there is a counter-offer followed by an act of performance by the addressee, the contract is deemed concluded because this situation is objectively understood as an act of acceptance.<sup>105</sup>

## 2) *Rules to determine the content of the contract*

a) When the reply form could be deemed as an acceptance because it does not depart materially from the offer, then, in conformity with Article 19(2) CISG, the terms of the contract will be those of the offer, as well as those contained in a reply that "contains additional or different terms which do not materially alter the terms of the offer. The offeror, however, has an opportunity to prevent the incorporation in the contract of such additional or different non-material terms by objecting to them "without undue delay."

b) When the reply to an offer form has additional or different terms that materially alter the offer, it will be regarded as a rejection and a counter-offer. Such a counter-offer may be accepted by acts of performance. Where there is such a counter-offer and acceptance by acts of performance, in the classic sense

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<sup>105</sup> For case law under the CISG applying the rules of formation of a contract (offer and acceptance) to determine the inclusion of general conditions at the back of the forms, see OLG Saarbrücken, 13 January 1993 (Germany) (PACE) (UNILEX); Cour d'Appel of Paris, 13 December 1995 (France) (PACE) (UNILEX); and Amtsgericht Kehl, 10 June 1995 (Germany) (PACE) (UNILEX).

The following cases, judged under the Hague Formation Law, have applied the *last-shot-rule* to battle-of-the-forms disputes: LG Landshut, 14 July 1976 (HK O 135/75) (Germany); OLG Hamm, 18 October 1982 (2 W 29/82) (Germany); HOF S-Gravenhage, 25 March 1983 (Netherlands); LG Bielefeld, 5 June 1987 (12 O 122/86) (Germany). See also the comment LG Bielefeld by I. Schewnzer, "*The-Battle-of-the-Forms*" und das EAG, IPrax, 1988, n. 14, p. 212-14, and the abstracts at 229-30.

of Articles 14 and 18 CISG, the terms of the contract will be those of the counter-offer.

### 3) *Some conclusions*

Examining the method of determination of contract terms by applying a *knock-out rule*, whereby common terms are added to the contract and contradictory terms excluded, reveals there is merit to a rule which draws the contents of the contract from the terms of one party in conjunction with acceptance by performance. While far from perfect, there are more advantages to this approach than many detractors of the *mirror-image rule* and *last-shot rule* acknowledge.

The principle of mutual identity between the terms of the offer and the acceptance has an undeniable virtue: the *mirror image* and *last-shot rule* provide a certainty and legal security for the parties which is reinforced by the special configuration of paragraphs (1) and (3) of Article 19, which list elements that materially alter the offer. Although this solution is rigid, in addition to legal certainty, it provides adequate protection to the parties in the majority of cases<sup>106</sup> and permits enterprises to more accurately plan their standardized transactions. From the standpoint of certainty, a mere comparison between the purchase and sale forms is sufficient to enable courts and parties to determine the concordance or discordance of the forms. Additionally, the manner in which enterprises have satisfactorily planned their standardized transactions in the face of such rules is well recorded.<sup>107</sup>

Also, the Convention's rule is not rigid in all respects. There are opportunities in the Convention to temper unduly harsh results in appropriate cases. For example, domestic unconscionability doctrines can enter the equation via CISG art. 4 (a), or similar results can be achieved through use of the Convention as "yardstick for the validity of clauses that the parties

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<sup>106</sup> This is acknowledged by authors such as Vergne, *supra* note 25, at 254, who is not a supporter of the Article 19 rule. He points out that the solution of Article 19 is simpler and easier to apply than Section 2-207 UCC. See also Ugo Draetta, *La Battle of Forms nella prassi del commercio internazionale*, RIVISTA DI DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE, 326, n. 12, 1986 (a supporter of the *last-shot rule*).

<sup>107</sup> See Murray, *supra* note 21, at 291.

have not really agreed upon but that one has imposed upon the other through the use of standard terms . . ."<sup>108</sup>

# VII. THE VIENNA CONVENTION RULES, SECTION 2-207 UCC AND THE UNIDROIT PRINCIPLES: A COMPARISON

Solutions to battle-of-the-forms scenarios are summarized under three legal regimes: the UCC, the CISG, and the UNIDROIT Principles. For this purpose, we use fact patterns provided by Professors White and Summers in their evaluation of the UCC.<sup>109</sup>

## A. *Exchange of forms with terms that do not modify the offer materially*

a) *Scenario one.* The seller sends to the buyer an offer. Seller's form provides that the goods are to be packed in safe bags. The buyer decides to accept the offer sending his own form, and it is received without any objection by the offeror. Buyer's form states that the goods are to be packed in new bags. A few days later, the market price of the goods drops dramatically; the bargain is no longer attractive to the buyer.

b) *Solution according to Section 2-207 UCC.* If, as it seems, there was a definite and seasonable acceptance and the clause included in the acceptance is not regarded as a material alteration to the offer, the contract will be concluded and the terms of the agreement will be determined depending on the thesis adopted: a) if the different terms are included in subsection (2) of section 2-207 UCC, the goods are to be packed in new bags; b) if one chooses the opposite solution: b.1) for Professor White, we apply the *knock out rule*; b.2) for Professor Summers, the different terms of the acceptance are excluded; consequently,

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<sup>108</sup> See OLG Hamm, 29 April 1982 (Germany), published in IPrax, 1983, p. 231 (ULIS). See also PETER SCHLECHTRIEM, THE SELLER'S OBLIGATIONS UNDER THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS IN INTERNATIONAL SALES, THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, 6-6, (1984), citing the ULIS case.

<sup>109</sup> See WHITE AND SUMMERS, *supra* note 63, at 28-52. They study 8 cases that will be analyzed in this section in both in their basic structure, and, in order to have a better understanding, with some variation in fact pattern. This section will also conclude with a comparative diagram where the results reached can be fully understood and appreciated.

the terms of the offer prevail, which means that safe bags must be used.

*c) Solution according to the Vienna Convention.* Here too, we assume that the reference to "new bags" in the reply does not materially alter the terms of the offer ("safe bags"). The contract is concluded; its terms are those of the offer, except its packing clause which is replaced by the packing clause contained in the acceptance: packing in new bags (CISG art.19 (2)).

*d) Solution according to the UNIDROIT Principles.* A strict application of Article 2.22 of the Principles leads to the application of the *knock-out rule* and cancellation of the different clauses. However, since the remainder of the rules on formation of contracts also apply, Article 2.11, parallel to CISG art. 19, will come into play and the solution is the same as under the Convention.

*B. Exchange of forms with terms that materially modify the offer*

*a) Scenario two.* The exchanged forms are identical except that the reply contains a clause calling for the arbitration of disputes.

*b) Solution according to Section 2-207 UCC.* Pursuant to UCC 2-207(2) UCC, the contract is concluded, since there is a definitive and seasonable expression of acceptance. The arbitration clause is an additional term that materially alters the offer. Therefore, in accordance with UCC 2-207(2), it is not incorporated in the contract.

*c) Solution according to the Vienna Convention.* The contract is not concluded because there is a material alteration (art. 19(3)). This converts the reply to a rejection and a counter-offer (art. 19(1)). There will be no contract unless there is further manifestation of some type of acceptance.

*d) Solution according to the UNIDROIT Principles.* The contract is concluded excluding the arbitration clause (art. 2.22).

C. *An exchange of forms with contradictory terms followed by the performance:*

a) *Scenario three.* The buyer's offer is accompanied by a form that contains an arbitration clause. The seller's acceptance is accompanied by a form in which he indicates that disputes will not be decided by arbitration. The seller delivers the goods and the buyer receives and pays for them. A dispute arises. Must it be resolved before an arbitrator?

b) *Solution according to Section 2-207 UCC.* If it is assured that there is a definite and seasonable expression of acceptance (subsection (1)) and that the contract is concluded, to determine the content of the contract we proceed to subsection (2). Professor White, relying on Comment 6, will apply subsection (3). The result is that the contradictory clauses "knock-out" one another; the parties will not be required to resolve their dispute by arbitration. Professor Summers, on the contrary, does not believe that Comment 6 is applicable to the exchange of forms. It is his view that "different terms" will not bring Section 2-207 UCC into play, because it only refers to additional terms. The terms of the offer will control the content of the contract and the parties will resolve their dispute before an arbitrator.

c) *Solution according to the Vienna Convention.* The buyer's form is an offer -assuming it contains the elements required by Article 14 CISG. The seller's reply form is not regarded as an acceptance, since it introduces a term "arbitration" which materially alters the terms of the offer. In accordance with Article 19(1) and (3) CISG, the seller's reply must be regarded as a rejection of the offer or a counter-offer. This counter-offer is accepted by the buyer at the reception of the goods (CISG art. 18(1)). The arbitration clause is not included in the content of the contract.

d) *Solution according to the UNIDROIT Principles.* In conformity with article 2.22, the contract does not include the arbitration clause.



D. *Term included in the offer but not in the acceptance following the performance*

a) *Scenario four*: Exactly as specified in the previous hypothesis, except that the seller's form says nothing with regard to the settlement of disputes.

b) *Solution according to Section 2-207 UCC*. It is deemed that the seller who does not add any term accepts the terms contained in the buyer's form.

c) *Solution according to the Vienna Convention*. Since the acceptor-seller has given an answer to the offer that does not include additions, limitations, or modifications, the contract is concluded when the seller's form is received by the offeror. It is composed of the terms of the offer, including the buyer's arbitration clause (CISG arts.14 and 18.2 in relation to articles 23 and 24).

d) *Solution according to the UNIDROIT Principles*. It can be said that there is no agreement with respect to the arbitration clause proposed by the offeror, since the offeree responded with his own form which contains nothing in relation to the resolution of the disputes. In accordance with Article 2.22, the arbitration clause will not become part of the content.

E. *Term added in the acceptance but not in the offer followed by the performance*

a) *Scenario five*. This is the opposite of the previous hypothesis, in other words, the buyer sends an offer that is silent about the resolution of the disputes and receives as a reply the seller's form in which he adds an arbitration clause.

b) *Solution according to Section 2-207 UCC*. In accordance with Section 2-207 (1), the seller's form will be treated as an acceptance. To determine the terms of the contract, one must refer to subsection (2). An additional term, such as an arbitration clause, would usually be regarded as a material alteration, therefore the arbitration clause will not be incorporated into the contract.

c) *Solution according to the Vienna Convention*. The reply of the seller is clearly a counter-offer because it adds a term that alters materially the offer (CISG arts.19(1) and 19(3)). This

counter-offer is accepted by the buyer by accepting the goods; the arbitration clause is therefore applicable.

*d) Solution according to the UNIDROIT Principles.* The seller's arbitration clause would be excluded from the content of the contract in accordance with article 2.22.

F. *Term added in the acceptance along with a "defensive clause"*

*a) Scenario six.* Exactly the same as the previous hypothesis except that in his reply to the buyer's offer, the seller has stated that the contract may only be concluded on the basis of seller's terms.

*b) Solution according to Section 2-207 UCC.* There can be several solutions under this Section: If the phrase is considered an expressly conditioned acceptance, seller's reply is regarded as a counter-offer. The result is clear where there is an express statement of acceptance by the buyer but, as often happens, the buyer simply accepts the goods. This raises a question: Is this an acceptance of the term introduced in the seller's form? Many UCC courts answer that it is not. Instead, they apply the *knock out rule* and the arbitration clause is not considered part of the contract. A similar result would apply should seller's conditional phrase be regarded as unclear.

*c) Solution according to the Vienna Convention.* The same as indicated in the previous hypothesis. The condition imposed by the offeree simply confirms that which article 19(1) already states.

*d) Solution according to the UNIDROIT Principles.* According to the Principles, the solution will turn on two factors: first, whether seller's conditional intent is clear; second, whether seller's intent is expressed in a standard clause or a non-standard. A non-standard clause will prevail over a standard clause (CISG art.2.21). This is a case in which the *knock-out rule* of the Principles will not apply.

G. *The offeror includes a "defensive clause" and the acceptor adds an arbitration clause*

*a) Scenario seven.* The offeror-buyer is silent on the subject of arbitration but insists that only his terms may be considered

a part of the contract. The seller-offeree accepts, adding an arbitration clause.

*b) Solution according to Section 2-207 UCC.* The UCC's solution depends on the interpretation given to the requirement of the offeror. If we construe it as conditioning the existence of the contract to the acceptance of the offeror's terms, any other element introduced by the offeree does not become part of the contract; the terms of the offer control the content of the contract. If the interpretation does not lead to this result, the two first subsections of section 2-207 will not apply; Instead, subsection (3) applies where the offeror/offeree exchange is followed by performance. Nevertheless, the solution will be the same; the contract will not include the arbitration clause.

*c) Solution according to the Vienna Convention.* If it is clear that the offeror insists that all his terms must be accepted by the offeree-seller, an offeree's reply containing a material term not mentioned by the offeror must be considered a rejection of the offer, as well as a counter-offer (CISG art.19(1) and (3)). The counter-offer may be accepted by an act of performance, such as reception of the goods (CISG art.18).

*d) Solution according to the UNIDROIT Principles.* The solution is exactly the same as under the previous hypothesis, with the difference that the terms of the contract will be the those of the offer; therefore, the arbitration clause will not be incorporated in the contract.

#### H. *Exchange of documents different from the forms*

*a) Scenario eight.* This section refers to cases where the existence of the contract is unclear but there have been previous negotiations.

*b) Solution according to Section 2-207 UCC.* Until there is performance of contractual duties of the parties, an agreement, or an exchange of documents that so indicates; the existence of a contract cannot be affirmed. Conversely, if there is no evidence of the writings by the parties, but there are acts of performance, Section 2-207 (3) will not be applicable because it presupposes writings between the parties. In any case, Section 2-204 UCC and the implied terms of Article 2 UCC will be applicable.

*c) Solution according to the Vienna Convention.* If there is no identifiable sequence of declarations of will in the form of offer and acceptance, but there is performance, nothing prevents the application of the general principles of the Convention; the contract will be concluded.

*d) Solution according to the UNIDROIT Principles.* The contract is understood to be concluded as indicated by the behavior of the parties as relevant proof of its existence (CISG art. 2.1).