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DIFFERENT APPROACHES TO CONFLICTING STANDARD TERMS UNDER THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

Abstract

'Battle of the forms' is one of the unresolved legal problems to which different countries' courts have their own approach. There are three main approaches in the literature in respect of the 'battle of the forms': (i) domestic approach; (ii) last shot rule; (iii) knock-out rule. However, mainly the last shot and the knock-out rules are in competition with each other. While some courts of the contracting states to the United Nations Convention on Contracts for the International Sale of Goods (CISG or Convention)[1] apply the last shot rule referring to article 19 of the CISG, other contracting states' courts try to solve the 'battle of the forms' problem within the general principles of the Convention by applying the knock-out rule. In this article, the main pros and cons of those three approaches are discussed in order to find the most appropriate solution for the 'battle of the forms' problem. In the conclusion, it is supposed that courts must apply the knock-out rule while adjudicating in respect of the conflicting standard terms.

Annotasiya

Formların ziddiyyəti müxtəlif dövlətlərin məhkəmələrinin öz yanaşmaları olan, həll olunmamış hüquqi problemlərdən biridir. Formaların ziddiyətinə münasibətdə ədəbiyyatda üç əsas yanaşma mövcuddur: 1) yerli yanaşma 2) "last shot" qaydası 3) "knock-out" qaydası. Amma ən çox 2-ci və 3-cü yanaşmalar bir-biri ilə rəqabətdədirlər. Razılığa gələn dövlətlərin bəzi məhkəmələri Konvensiyaya onun 19-cu maddəsinə istinadən last shot qaydasını tətbiq edərkən, digər razılığa gələn dövlətlər knock-out qaydasını tətbiq etməklə konvensiyanın ümumi prinsipləri çərçivəsində formaların ziddiyyəti problemini həll etməyə çalışırlar. Məqalədə formaların ziddiyyəti probleminin ən uyğun həllinin tapılması məqsədilə bu üç yanaşmanın əsas əlverişli və əlverişsiz cəhətləri müzakirə olunmuşdur. Nəticədə, güman olunur ki, məhkəmələr ziddiyyətli standart şərtlərin həllində knock-out qaydasını tətbiq etməlidirlər.

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[1] UN Convention on Contracts for the International Sale of Goods (adopted 11 April 1980), 1489 UNTS 3, http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf (last visited March 10, 2016).

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INTRODUCTION

Today using standard forms of one of the parties to contracts for the international sales of goods to enter into contract is a common way.[2] Although the standard forms of the parties have an important role in a formation of contract, the CISG does not clearly deal with this issue.[3] Therefore, there is no uniformity in incorporation of the standard forms into the contract. Furthermore, as each party's standard form reflects its own interest, there are always discrepancies between the standard terms which are parts of the standard forms of the parties. Therefore, these non-matching standard terms create the 'battle of the forms' phenomenon in case of exchange of the standard forms.[4] In respect of the 'battle of the forms' courts are required to answer two questions; (i) Is there a valid contract between the parties? (ii) If yes, which terms of the standard forms are the parts of the contract?[5] As there is no uniform answer to these questions under the CISG, courts do not apply the same approach to solve arisen disputes.[6] Therefore,

[2] See Belkis Vural, *Formation of Contract According to the CISG*, 6 Ankara B. Rev. 125, p. 141 (2013); Christine Moccia, *The United Nations Convention on Contracts for the International Sale of Goods and the "Battle of the Forms"*, 13 Fordham Int'l L.J. 649, p. 658 (1989-1990); CISG Advisory Council Opinion No. 13, *Inclusion of Standard Terms under the CISG* (2013), http://www.cisg.law.pace.edu/cisg/CISG-AC-op13.html (last visited March 10, 2016).

[3] Vural, p. 141.

[4] See Kaia Wildner, *Art. 19 CISG: The German Approach to the Battle of the Forms in International Contract Law: The Decision of the Federal Supreme Court of Germany of 9 January 2002*, 20 Pace Int'l L. Rev. 1, p. 3 (2008); Edward Allan Farnsworth, in Cesare Massimo Bianca and Michael Joachim Bonell (eds.) Commentary on the International Sales Law: the 1980 Vienna Sales Convention 175-184, p. 177 (1987); Moccia, p. 659; Andrea Fejõs, *Formation of Contracts in International Transactions: The Issue of Battle of the Forms under the CISG and the UCC*, Electronic Library on International Commercial Law and the CISG (2006), http://www.cisg.law.pace.edu/cisg/biblio/fejos.html (last visited March 10, 2016).

[5] See Vural, p. 143; Sieg Eiselen, Sebastian K. Bergenthal, *The Battle of Forms: A Comparative Analysis*, 39 Com. and Int'l L.J. S. Afr. 214, p. 216 (2006).

[6] See Larry A. DiMatteo *et al.*, *The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence*, 24 Nw. J. Int'l L. & Bus. 299, pp. 349-357 (2004).

there are different approaches being applied by the courts which deal with the 'battle of forms' problem.

Those different approaches to conflicting standard terms will be analyzed in this article in order to find the most appropriate approach among them in respect of a solution of the 'battle of the forms' phenomenon which must be applied by courts. The domestic approach (2.1), the last shot rule (2.2) and the knock-out rule (2.3) are examined in Part 2 of this article by indicating proponents' and opponents' views to each of those approaches, and the conclusion of the analysis of this article is reflected in Part 3.

I. DIFFERENT APPROACHES TO 'BATTLE OF THE FORMS'

It is difficult to solve the 'battle of the forms' dilemma within 'a single formula', because of 'the different situations of collision' and 'the various possible behaviors of the parties.'[7] Intention of courts inclines to find a valid contract between the parties where it is obvious that the parties have exchanged their standard forms and their will is to conclude a binding contract. In this situation, the more unpredictable issue relating to the courts' approach is the determination of the terms of the contract which is a main dispute arisen between the parties.[8] But basically, three different approaches[9] are applied on how the 'battle of the forms' should be adjudicated: (i) domestic approach; (ii) last shot rule; (iii) knock-out rule.

A. Domestic Approach

According to this approach, 'the 'battle of the forms' dispute has to be regarded as a validity issue.'[10] As under article 4(a) of the CISG envisages that the Convention is not concerned with the validity of the contract, it is considered by the proponents of this approach that the CISG does not provide an adequate solution to this problem. Therefore, the solution in respect of which standard terms should be incorporated into the contract shall be solved by the applicable domestic law.[11]

The domestic approach is not supported by the majority of scholars, 'since the issue does not really address the validity of a contract, but is rather a

[7] Peter Schlechtriem, *Kollidierende Geschäftsbedingungen im internationalen Vertragsrecht*, in Karl-Heinz Thume (ed.), Festschrift für Rolf Herber zum 70. Geburtstag 36-49 (1999), (Martin Eimer, translation, *Battle of the Forms in International Contract Law*, 2002), http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem5.html (last visited March 10, 2016).

[8] *Ibid*.

[9] This article is focused on three main approaches. The remained approaches such as the 'first shot' rule, etc. are not covered by this article.

[10] Eiselen, Bergenthal, p. 219.

[11] François Vergne, *The "Battle of the Forms" Under the United Nations Convention on Contracts for the International Sale of Goods*, 33 Am. J. Comp. L. 233, pp. 256-257 (1985).

question of contract formation.'[12] Furthermore, Christine Moccia argues that as 'there are ample solutions to the battle of the forms issue within the CISG, arguments that domestic law should apply are unpersuasive. The good faith requirement of article 7(1) of the CISG provides courts with a means to resolve battle of the forms cases in a manner that is equitable to both parties.'[13] A gap-filling mechanism providing by the CISG according to article 7(2) is another argument against this approach.[14] Additionally, the domestic approach is inconsistent with the main reason for the existence of the CISG, namely the unification of the sales law.[15] Taking all those arguments into consideration, it can be stated that courts are required to look to the general principles of the CISG first, before taking recourse to the domestic law.[16] Under these reasons, the domestic approach is not widespread and 'has also not been followed in any of the reported case law.'[17]

B. Last Shot Rule

According to article 19(1) of the CISG, 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. The traditional common law rule namely the 'mirror image' rule, which produces the last shot rule in order to answer to the 'battle of the forms' issue, is envisaged in that article. As a practical result of the 'mirror image' rule,[18] the last shot rule follows literally and strictly of the offer-acceptance rule which is stipulated in article 19(1) of the CISG.[19] Based on the rule established in that article, the last shot rule 'treats every statement made with reference to conflicting standard terms as a rejection of the earlier (counter-) offer, combined with a counteroffer.'[20] According to this rule, 'the contract is concluded on the terms of the final form used, without being objected by the other party.'[21] The Appellate Court Cologne in *Shock-cushioning seat case*[22] held that 'the interpretation of contracts

[12] Wildner, p. 4.

[13] Moccia, p. 675.

[14] Wildner, p. 4.

[15] See Vural, p. 143; Eiselen, Bergenthal, p. 220; Wildner, p. 4.

[16] Moccia, p. 674; Wildner, p. 5.

[17] Eiselen, Bergenthal, p. 220.

[18] See Martin Davies and David V. Snyder, International Transactions in Goods: Global Sales in Comparative Context, p. 119 (2014); Fejõs, para. I7.

See Wildner, p. 5; Ulrich Magnus, *Last Shot vs. Knock Out - Still Battle over the Battle of Forms under the CISG*, in Ross Cranston *et al.* (eds.), Commercial Law Challenges in the 21st Century; Jan Hellner in memoriam 185-200, p. 191 (2007).

[20] Andre Corterier, *A Peace Plan for the Battle of the Forms*, 10 Int'l Trade & Bus. L. Rev. 195, p. 197 (2006).

[21] Peter Huber, *Standard Terms under the CISG*, 13 Vindobona Journal of International Commercial Law & Arbitration 123, p. 129 (2009).

[22] *Shock-cushioning seat case* [2006] 16 U 25/06, http://cisgw3.law.pace.edu/cases/060524g1.html (last visited March 10, 2016).

with conflicting terms leads to the application of … the so-called "last shot doctrine" … according to which the governing terms are those which were exchanged last.'[23] If a party fails to object to the last offered terms or performs, then courts interpret this action or performance as an assent to the last sent terms under article 18(1) of the CISG.[24] For example, the U.S. District Court (Illinois) in *Magellan International v. Salzgitter Handel*[25] case held that exchanges of offers and counteroffers after Magellan's purchase orders which were offers and Salzgitter's response with price changes which was a counteroffer put to an end with issuing the letter of credit by Magellan which constituted a performance. As a result of the application of the last shot rule, the last submitted standard form becomes a part of the contract and the party who sent the last form becomes a winner of the 'battle of forms'.[26]

The proponents of this approach refer to the legislative concept by stating that this approach produces uniformity and legal certainty on terms of the contract, because the terms stipulated in the last offer become a part of the contract.[27] Additionally, it is also argued that the last shot approach tries to find a solution within the CISG by referring to articles 19(1) and 18(1) of the CISG.[28]

There are some arguments against the last shot approach. Firstly, it is argued that this approach supports arbitrary solutions. Thus, it is unpredictable that which party will begin to exercise its obligations without mentioning to its own standard terms and bow to other party's standard terms.[29] In addition, it is argued that this rule results in a 'ping-pong' effect.[30] Thus, each party intends to continue correspondence by referring its standard terms until the other party gives it up and starts to perform.[31] As 'it would be a difficult task to decide when the final curtain for such objections falls,'[32] this rule would not response to business realities. Furthermore, it is unrealistic

[23] Ibid.

[24] DiMatteo *et al.*, pp. 353-354.

[25] *Magellan International v. Salzgitter Handel* [1999] 99 C 5153, http://www.cisg.law.pace.edu/cases/991207u1.html (last visited March 10, 2016).

[26] See Wildner, p. 6; Davies and Snyder, p. 120; Maria del Pilar Perales Viscasillas, *Battle of the Forms, Modification of Contract, Commercial Letters of Confirmation: Comparison of the United Nations Convention on Contracts for the International Sale of Goods (CISG) with the Principles of European Contract Law (PECL)*, 14 Pace International Law Review 153, p. 157 (2002).

[27] See Maria del Pilar Perales Viscasillas, *"Battle of the Forms" Under the 1980 United Nations Convention on Contracts for the International Sale of Goods*, 10 Pace Int'l L. Rev. 97, pp. 97-155 (1998); Burghard Piltz, *Standard Terms in UN-Contracts of Sale*, 8 Journal of International Commercial Law & Arbitration 233, pp. 233-244 (2004).

[28] Wildner, p. 6.

[29] Eiselen, Bergenthal, p. 221.

[30] Viscasillas, *supra*, n. 28, p. 97.

[31] Eiselen, Bergenthal, p. 221.

[32] Huber, p. 130.

from the aspect of the day-to-day business activities of the parties that they investigate all the correspondence under pressure of the last shot rule.[33] Additionally, the rule 'imposes an implied duty on the offeror to object to additional or conflicting terms. The failure to object combined with performance result in what is deemed an implied consent to the terms of the last submitted offer.'[34] But in many cases the parties to the contract are not even aware of the non-matching standard terms existed between their standard forms. Therefore, this approach unfairly imposes a burden on a party who performs its obligations while it releases the other from the unfavourable clauses based on 'a single fact: being the last in the battle of the forms.'[35] Sometimes even it is not clear who is the sender of the last form. Or 'sometimes one party or both parties' terms include a "defensive incorporation clause" which expressly rejects the terms of the other party and expressly excludes them from becoming part of the contract.'[36] In such cases, it is more difficult for courts to determine the terms of the contract.

Taking all arguments which are against the last shot approach into consideration, it can be stated that this approach is not adequate in case of dispute arisen from the battle of forms.[37]

C. Knock-out Rule

According to the knock-out rule, the 'battle of the forms' is considered as one of the gaps of the CISG and to find a solution to this problem by referring to the general principles of the Convention would be a rational way. As this approach takes the parties' autonomy into consideration which is stipulated in article 6 of the CISG, it requires the courts 'find the actual or deemed consensus of the parties based on their negotiations in respect of the essential elements of the transaction.'[38] It is argued that the parties' agreement on the *essentialia negotii* and the performance of their contractual obligations by them should be considered as an implied deviation from the strict application of article 19 of the CISG relating to offer-acceptance rule and also as a waiver of the inclusion of their conflicting standard terms.[39] Thus, firstly, the parties' performance is deemed as an implied exclusion of article 19 of the CISG, as under article 6 of the CISG, the parties may exclude the application of this Convention, derogate from, or vary the effect of any of its provisions. Secondly, the exclusion of article 19 of the CISG, which requires the agreement on all terms of the contract for the conclusion of the contract, supports an

[33] Eiselen, Bergenthal, p. 221.
[34] Wildner, p. 7.
[35] Fejõs, para. I7.
[36] Wildner, p. 7.
[37] Vural, p. 144.
[38] Eiselen, Bergenthal, p. 224.
[39] See Wildner, p. 7; Eiselen, Bergenthal, pp. 224-225; Viscasillas, p. 157.

assumption that there is a valid contract despite the fact that there is no consensus between them in respect of the incorporation of their standard terms into the contract.[40] Therefore, the performance is also considered as a tacit consensus not to insist on the incorporation of the standard terms, and in case of conflict between those terms, to replace them residual statutory law, namely the CISG.[41] In other words, the conflicting standard terms knock each other out and the provisions of the CISG are applied instead of them. This approach has been applied by different countries' courts. For example, the Federal Supreme Court of Germany confirmed this approach in *Powdered milk case*[42] by stating that 'the parties have indicated by the execution of the contract that they did not consider the lack of an agreement between the mutual conditions of contract as essential within the meaning of Art. 19 CISG … partially diverging general terms and conditions become an integral part of a contract (only) insofar as they do not contradict each other; the statutory provisions apply to the rest ...'[43] However, the Court held that the 'conflicting standard forms [terms] are entirely invalid and are replaced by the CISG provisions ...'[44] Furthermore, the *Cour de Cassation* in France also applied the knock-out rule in *Les Verreries de Saint Gobain, SA v. Martinswerk GmbH*[45] by determining jurisdiction instead of invalidating the contract based on difference of the material terms which would have been in consistence with article 19(3) of the CISG.[46]

Although the above-mentioned situation appears where both parties perform their contractual duties, the knock-out rule can be applicable to cases where only one of the parties starts its performance. In this situation, as it is not relevant to apply article 6 of the CISG, because of the non-existence of an implied consensus between the parties due to the lack of consent of one of the parties, it is argued that the principle of good faith envisaged in article 7(1) of the CISG precludes the non-performing party to deny the conclusion of the contract by relying on its standard terms as well as the performing party to object against the other party's standards terms by relying on its standard terms.[47]

The knock-out approach is also criticized by some reasons. Professor Burghard Piltz states the following criticism against this approach:

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[40] See Huber, p. 130; Wildner, p. 8; Eiselen, Bergenthal, p. 225.

[41] Wildner, p. 8.

[42] *Powdered milk case* [2002] VIII ZR 304/00, http://cisgw3.law.pace.edu/cases/020109g1.html (last visited March 10, 2016).

[43] Ibid., para. II 1.

[44] Schlechtriem, pp. 36-49.

[45] *Les Verreries de Saint Gobain, SA v. Martinswerk GmbH* [1998] J 96-11.984, http://cisgw3.law.pace.edu/cases/980716f1.html (last visited March 10, 2016).

[46] DiMatteo *et al.*, p. 353.

[47] Magnus, p. 196.

> *'The application of the knock-out-rule conflicts with the goal of Art. 7 CISG to promote a uniform application of the rules of the CISG in contracting states and therefore has no chance of success internationally. On the other hand, there is no reason to distance oneself completely from the mechanism of Art. 19 CISG … since the flexibility to find solutions that comes with this approach leads to unacceptable legal uncertainty in practice.'*[48]

Furthermore, it is argued that this rule was rejected by the drafters of the Convention when the Belgian delegation proposed this rule to enter as the fourth paragraph of article 19 of the CISG in order to address the 'battle of the forms' problem.[49]

As a response to the mentioned criticism, firstly, it is argued that the rejection of the Belgian proposal was not based on the inappropriateness of the knock-out rule. The reason was the need for further investigation for that proposal. As it was impossible to investigate this proposal within the time limit of the drafting process, the delegations could not sufficiently pay attention to this proposal and rejected it. Therefore, that rejection does not mean that this approach was not considered as an appropriate approach by the drafters.[50] Additionally, this approach is covered by the principles of the CISG, particularly the principle of party autonomy. The suitability of this approach is supported by business dealings of the parties too.[51] This rule applies more practical as well as a more balanced solution by not referring to only one party's terms. Thus, the parties' consensus about the *essentialia negotii* is sufficient for the conclusion of the contract.[52] Additionally, as the application of this rule results in knocking the parties' standard terms and replacing them with the CISG provisions, it 'has the effect of a uniform application of the Convention.'[53]

Finally, the knock-out rule is also applied by other international tools for solution of the 'battle of the forms' problem. Thus, this rule is the guiding principle of the UNIDROIT Principles of International Commercial Contracts (Art. 2.1.22), the Principles of European Contract Law (Art. 2:209) and the Draft Common Frame of Reference (Art. II.4: 209).[54] Such wide use of the knock-out rule shows one more time that this rule is the most appropriate rule solving the problem of the conflicting standards terms.

[48] Piltz, pp. 233-244.
[49] Moccia, p. 661.
[50] Wildner, p. 9.
[51] Eiselen, Bergenthal, p. 226.
[52] Wildner, p. 9.
[53] *Ibid*. 10.
[54] Huber, p. 131.

CONCLUSION

As the 'battle of the forms' problem is not clearly resolved by the CISG, each of the discussed three approaches to conflicting standard terms proposes different solution to it. Although each of them has its own proponents, it is important to apply one of them to all cases in order to provide a uniformity of the application of the Convention. That's why it is necessary to find the most appropriate approach to the conflicting standard terms and apply it to all disputes arising from the conflict of standard terms.

As seen from the above-mentioned analysis, the knock-out rule is supported by the majority of scholars and cases, because of its advantages such as a conformity with the intention of business parties, balanced and fair approach, supportive approach to the contract validity issue, and providing uniform application of the Convention by referring to its provisions in case of knocked-out terms. Therefore, as (i) the application of the domestic approach is inconsistence with the main reason for the existence of the CISG, namely the unification of the sales law, and (ii) the application of the last shot rule makes the results difficult for the parties to foresee and also its application is random and unfair, although its consistency with article 19 of the CISG, also taking the advantages of the knock-out rule into consideration, it can be stated that the most appropriate approach among these three approaches in respect of a solution of the 'battle of the forms' phenomenon is the knock-out rule. That's why courts must apply the knock-out rule while adjudicating in respect of the conflicting standard terms.