Solutions to the Battle of the Forms

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1. Introduction

When dealing with commercial transactions in today's day and age, it is common practice for the parties involved to communicate with one another through the exchange of forms.[1] Generally it is the buyer who will initiate communication with the seller by sending to the seller an offer to purchase certain goods.[2] Once such offer is received, the seller will then reply by sending back to the buyer a form of acknowledgment.[3] Both the buyer and seller's forms will contain certain terms known as "basic terms" as well as "boilerplate terms".[4] Basic terms are the agreed-upon terms in the contract that describe the goods, their price, their quantity and the terms of their delivery.[5] Boilerplate terms, hereinafter referred to as standard terms, are the standard pre-printed terms that each party include in their forms and are the terms that are designed to be of most benefit to the party drafting them, ensuring that such party's interests are protected at all costs.[6] In almost all situations it is inevitable that the parties' standard terms are in conflict with each other.[7]

To illustrate by way of an example, if company A intends to purchase one ton of grain from company B, company A would, as a first step, send an offer to purchase form to company B indicating its intention to purchase the grain. This offer to purchase form will contain all of the agreed-upon basic terms, as mentioned above, such as the price of the grain and its quantity and quality. Company B would then reply to such offer to purchase by sending a form of acknowledgment back to company A, indicating its acceptance of the offer. This form of acknowledgement will contain the same basic terms included in the offer to purchase. Company A and B, or their respective lawyers, would have drafted standard terms designed to be of most benefit to themselves and would have included them on the same forms, commonly on the reverse face of the form. When the two companies each include contradictory standard terms, as is normally the case, what must then be determined is whether or not a contract exists and, if so, whose terms are then to govern the contract.

This situation of conflicting terms, commonly referred to as "the battle of the forms", becomes problematic in instances where the seller, subsequent to the sending of conflicting standard terms, performs in terms of the contract by delivering the goods and the buyer accepts delivery.[8] If subsequent to such performance a contractual dispute materializes, it must be determined whether or not a valid contract has in fact come into existence and, if affirmative, it must be determined whether it is to be the

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1 Stephens "On ending the battle of the forms: problems with solutions" 1991-1992 *Kentucky Law Journal* 815 815.
2 Stephens (n 1) 815.
3 Stephens (n 1) 815.
4 Stephens (n 1) 815.
5 Stephens (n 1) 815.
6 Stephens (n 1) 815.
7 Apsey "Battle of the forms" 1959 *Notre Dame Lawyer* 556 556.
8 Rühl "The battle of the forms: comparative and economic observations" 2003 *University of Pennsylvania Journal of International Economic Law* 189 189.

buyer's terms that are to govern the contract or the seller's, or whether neither of the parties' terms will govern fully.[9]

This essay seeks to journey into a comparative analysis of the three solutions to the battle of the forms dilemma, namely the "first-shot", "last-shot" and "knock-out" rules. These rules will be viewed from the perspective of various instruments, legislation and case law and their application will be observed from the position of the various countries that have adopted them. Following such discussion, the essay will venture into the criticism offered against such rules and will provide a conclusion on the best solution to be adopted in the future.

2. The possible solutions to the battle of the forms dilemma

In considering the problematic issue of the battle of the forms, courts are usually willing to answer the first question of whether or not a valid contract has come into existence in the affirmative.[10] This means that courts will generally be of the opinion that a valid contract does in fact exist where the parties exchange forms with a general intent to enter into and be bound by a transaction.[11] As per the second question regarding the content of the contract however, when deciding what terms are to make up the contract three main solutions have been offered.[12] Lord Denning, in the case of *Butler Machine Tool v Ex-Cell-O Corporation*[13], spoke of the possibility of the three solutions in three separate quotes which will be discussed below.[14]

First, the problem of conflicting standard terms may be tackled through application of the "last-shot rule": Lord Denning stated that "in some cases the battle is won by the man who fires the last shot. He is the man who puts forward the latest terms and conditions: and, if they are not objected to by the other party, he may be taken to have agreed to them".[15]

Secondly, the problem may be tackled through application of the "knock-out rule": Lord Denning stated that "there are yet other cases where the battle depends on the shots fired on both sides. There is a concluded contract but the forms vary. The terms and conditions of both parties are to be construed together. If they can be reconciled so as to give a harmonious result, all well and good. If differences are irreconcilable, so that they are mutually contradictory, then the conflicting terms may have to be scrapped and replaced by a reasonable implication".[16]

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9 Rühl (n 8) 189.

10 DiMatteo, Dhooge, Greene, Maurer and Pagnattaro "The interpretive turn in international sales law: an analysis of fifteen years of CISG jurisprudence" 2004 *Northwestern Journal of International Law & Business* 299 350.

11 DiMatteo, Dhooge, Greene, Maurer and Pagnattaro (n 10) 350.

12 Hondius and Mahe "The battle of forms: towards a uniform solution" 1998 *Journal of Contract Law* 268-269.

13 *Butler Machine Tool v Ex-Cell-O Corporation* [1979] 1 ALL ER 965 (CA).

14 Hondius and Mahe (n 12) 269.

15 *Butler Machine Tool v Ex-Cell-O Corporation* [1979] 1 ALL ER 965 (CA).

16 *Butler Machine Tool v Ex-Cell-O Corporation* [1979] 1 ALL ER 965 (CA).

Lastly, it is said that the problem of the conflicting standard terms may be solved through application of the "first-shot rule": Lord Denning stated that "in some cases, however, the battle is won by the man who gets the blow in first. If he offers to sell at a named price on the terms and conditions stated on the back and the buyer orders the goods purporting to accept the offer on an order form with his own different terms and conditions on the back, then, if the difference is so material that it would affect the price, the buyer ought not to be allowed to take advantage of the difference unless he draws it specifically to the attention of the seller".[17]

These three solutions and their application will be discussed below, commencing with a brief overview of the first-shot rule followed by an in-depth analysis of the last-shot and knock-out rules.

2.1. The first-shot rule as a solution to the battle of the forms

The first solution utilised to tackle the battle of the forms dilemma is the "first-shot rule". The first-shot rule is the rule that is applied in the Netherlands and operates as follows: if a buyer sends an offer to purchase form to a seller, containing its terms and conditions, and the seller then subsequently responds to such offer by sending back to the buyer an acknowledgment form containing terms and conditions that materially alter the offer, the offer and acceptance will undoubtedly contain conflicting standard terms and the second reference will have no effect. This means that the terms that are to govern the contract are the terms of the original offer, the party whom fired the first shot.[18] In terms of the illustration mentioned above, this would mean that the terms in company B's acceptance will have no effect, if they were to materially alter the original offer made by company A, and that therefore company A's terms, the terms of the party firing the first shot, would be the terms that are to govern the contract.

2.2. The last-shot rule as a solution to the battle of the forms

The next solution to be applied when tackling the dilemma known as the battle of the forms is the "last-shot rule". The last-shot rule, as traditionally applied under the common law, provides that a contract will only come into existence if the offer and acceptance correspond with each other.[19] This position is the product of the so called "mirror image rule".[20] The common law mirror image rule provides that the offeree's response must mirror or comply exactly with the offeror's original terms and must not add or omit any terms in order for such response to be regarded as an acceptance.[21] This means that, when a buyer sends its forms to the seller, containing its own standard terms, and the seller subsequently sends its forms containing conflicting

17 *Butler Machine Tool v Ex-Cell-O Corporation* [1979] 1 ALL ER 968 (CA).
18 Hondius *Towards a European Civil Code: Private Law in European Context* Series (2004) 438.
19 Rühl (n 8) 190.
20 Ryan *Essential Principles of Contract and Sales Law in the Northern Pacific: Federated States of Micronesia, the Republics of Palau and the Marshall Islands, and United States Territories* (2005) 37.
21 Ryan (n 20) 37.

standard terms back to the buyer, the seller does not accept the buyer's offer but instead rejects it and makes a counter offer.[22] In the illustration mentioned above, this would mean that if company B were to send conflicting standard terms back to company A, company B would be regarded as having rejected company A's original offer to purchase the grain and consequently is seen to have made a counter offer instead.

If the seller subsequently performs in terms of the contract by delivering the goods and the buyer accepts such delivery, the buyer through its conduct accepts the standard terms of the seller, making the seller the party whom fired the last shot.[23] The result is therefore the direct opposite of the first-shot rule in that the seller's terms, as the party firing the last shot, are the terms that are to govern the transaction. If company B delivers the ton of grain to company A, who in turn accepts delivery, company A will be accepting the standard terms of company B, making company B the party firing the last shot and therefore the company whose terms are to govern the contract.

2.2.1. The last-shot rule as a solution to the battle of the forms in terms of article 19 of the CISG

The United Nations Convention on Contracts for the International Sale of Goods, more commonly referred to as the CISG, is an instrument that was created in an attempt to unify and harmonise the law of international sales.[24] It aims to provide uniform rules to govern formation, performance and remedies for failure of contracts for the international sale of goods, within its jurisdictional scope.[25] Although the CISG does not house any specific provisions that deal with the battle of the forms directly, article 19 tackles the battle of the forms problem by providing solutions to those situations where the offeror and offerees terms are in conflict with each other.[26]

Paragraph 1 of article 19 provides that "A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter offer".[27] This first subdivision of article 19 therefore provides for the general rule, in that it states that where the offeree in his reply sends terms that are new or different to the offeror's terms, such reply is not regarded as an acceptance but rather a rejection of the offer and therefore a counter offer.[28] Paragraph one is therefore an adoption of the traditional mirror image rule.[29]

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22 Rühl (n 8) 191.
23 Rühl (n 8) 191.
24 Eiselen and Bergenthal "The battle of forms: a comparative analysis" 2006 *Comparative and International Law Journal of Southern Africa* 214 217.
25 Rosett "Critical reflections on the united nations convention on contracts for the international sale of goods" 1984 *Ohio State Law Journal* 265 265.
26 Moccia "The united nations convention on contracts for the international sale of goods and the battle of the forms" 1989 *Fordham International Law Journal* 649 656.
27 as described in article 19(1) of the CISG.
28 Moccia (n 26) 656.
29 DiMatteo, Dhooge, Greene, Maurer and Pagnattaro (n 10) 349.

Article 19(2),[30] however, contains an exception to the mirror image rule contained in article 19(1) by providing that, where the offeree's added or different terms do not materially alter the terms of the offer, such reply will be regarded as an acceptance of the offer, not a rejection and counter offer, unless the offeror objects.[31] If the offeror does not object, the terms of the contract will be the terms of the offer with the immaterial modifications of the offeree.[32] Paragraph 2 emphasises the fact that a valid contract will come into existence if the offeree sends back conflicting terms that are immaterial and that such terms will become part of the contract unless the buyer, within a reasonable time, expresses an objection them.[33] Paragraph 2 ensures that the parties are unable to escape from their contractual obligations where the conflicting standard terms are merely immaterial.[34]

Article 19(3)[35] provides a list of terms that are considered to materially alter the offeror's terms.[36] Included in this list are terms that relate 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.[37] This is a non-exhaustive list made clear by the wording "among other things", which suggests that the list is subject to further addition.[38]

The CISG further provides in article 18(3)[39] that parties may indicate acceptance through conduct.[40] To illustrate, a buyer by paying for the goods will be regarded as accepting the seller's counter offer and a seller, by delivering the goods will be accepting the buyer's counter offer.[41] When article 19 and 18(3) are read in conjunction with one another it can be seen that, in terms of article 19, when the offeror and offeree's terms are in conflict with one another, the offeree will be making a counter offer and, through application of article 18(3), such counter offer may be accepted through conduct indicating acceptance, making the party whom fired the

30 "However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance."
31 Moccia (n 26) 656.
32 Sambugaro "Incorporation of standard contract terms and the battle of forms under the 1980 Vienna Sales Convention (CISG)" 2009 *International Business Law Journal* 69 73.
33 DiMatteo, Dhooge, Greene, Maurer and Pagnattaro (n 10) 349.
34 DiMatteo, Dhooge, Greene, Maurer and Pagnattaro (n 10) 349.
35 "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."
36 Moccia (n 26) 656.
37 Moccia (n 26) 656.
38 DiMatteo, Dhooge, Greene, Maurer and Pagnattaro (n 10) 349.
39 "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 preceding paragraph."
40 Moccia (n 26) 657.
41 Moccia (n 26) 657.

last shot, by making the counter offer, the party whose terms are to govern the contract.[42] The logic behind this is that the offeror has a duty to object to the new or additional terms and that if he fails to do so and subsequently performs, he will be giving his implied consent to the terms of the counter offer.[43]

It can be seen above that the last-shot rule has its support in article 19 of the CISG, however, the majority of commentators favour the knock-out rule instead.[44] Most commentators are of the belief that the last-shot rule applies article 19 of the CISG too literally and that, as a result, it leads to an arbitrary choice of one of the parties' standard terms over the other.[45] Conversely, as will be discussed in further detail below, the knock-out rule avoids the arbitrary selection of one of the parties' standard terms and instead reaches a compromise that is in conformity with the intention of the parties.[46]

2.2.2. The last-shot rule as applied under English domestic law

The last-shot rule constitutes the position as traditionally applied under English law.[47] In England, a contract will come into existence where there is an acceptance of an offer made.[48] What this means is, that where one of the parties to the transaction makes an offer, a contract will come into being at the moment the other party accepts the same.[49] An offer is an indication made by one of the parties and shows that he/she is willing and prepared to enter into a contractual relationship, on terms that are fixed, with the other.[50] The general idea is that the offeror must behave in such a way that his actions indicate that he is willing to contract with the offeree on certain terms.[51] Once such terms have been accepted by the offeree, a contract will be in existence.[52]

As seen above, English law deals with the battle of the forms cases with reference to the general rules of offer and acceptance, meaning that a contract will only come into

42 Moccia (n 26) 657-658.
43 DiMatteo, Dhooge, Greene, Maurer and Pagnattaro (n 10) 351.
44 CISG-AC Opinion No. 13, *Inclusion of Standard Terms under the CISG*, Rapporteur: Professor Sieg Eiselen, College of Law, University of South Africa, Pretoria, South Africa. Adopted by the CISG Advisory Council following its 17th meeting, in Villanova, Pennsylvania, USA, on 20 January 2013. see also Schroeter in Schlechtriem/Schwenzer Commentary Art 19 (2010) para 36-38.
45 CISG-AC Opinion No. 13, *Inclusion of Standard Terms under the CISG*, Rapporteur: Professor Sieg Eiselen, College of Law, University of South Africa, Pretoria, South Africa. Adopted by the CISG Advisory Council following its 17th meeting, in Villanova, Pennsylvania, USA, on 20 January 2013. see also Schroeter in Schlechtriem/Schwenzer Commentary Art 19 (2010) para 35.
46 CISG-AC Opinion No. 13, *Inclusion of Standard Terms under the CISG*, Rapporteur: Professor Sieg Eiselen, College of Law, University of South Africa, Pretoria, South Africa. Adopted by the CISG Advisory Council following its 17th meeting, in Villanova, Pennsylvania, USA, on 20 January 2013. see also Schroeter in Schlechtriem/Schwenzer Commentary Art 19 (2010) para 38.
47 Rühl (n 8) 191.
48 Thorpe and Bailey *Commercial Contracts: A Practical Guide to Deals, Contracts, Agreements and Promises* (1999) 38.
49 Thorpe and Bailey (n 48) 38.
50 Stone and Devenney *The Modern Law of Contract* (2015) 37.
51 Stone and Devenney (n 50) 37.
52 Stone and Devenney (n 50) 37.

being where the terms of offer and the terms of acceptance correspond with each other exactly.[53] The general rule under English law, the mirror image rule, therefore denotes that if the seller were to send back conflicting standard terms to the buyer, he is rejecting the original offer and making a counter offer.[54] The exceptions to this general rule are that, where the seller's conflicting standard terms are meaningless terms, terms implied by law, terms that are beneficial solely to buyer or terms that are merely suggestions, the seller's reply will function as an acceptance.[55] These exceptions, however, rarely find application, as the terms in question in the battle of the forms cases usually do not fall into one of these categories, meaning that the reply that contains conflicting terms will, in most cases, be a rejection and counter offer.[56]

The last-shot rule was applied in the English decision of *Butler Machine Tool v Ex-Cell-O Corporation.*[57] Ex-Cell-O Corporation, as the buyer, entered into a transaction with Butler Machine Tool, as the seller, for the purchase of a "double column plano-miller machine."[58] The seller, in its terms and conditions, included a clause that allowed for a price escalation.[59] Such clause had the effect of allowing an increase in the purchase price of the machine in the event that costs had to increase during the period of manufacture.[60] The buyer, in its general terms and conditions, did not have the same escalation clause.[61]

Lord Denning MR found that the lower court erred in its finding that the seller's terms and conditions should govern the transaction.[62] The lower court incorrectly based its decision on a clause in the seller's terms and conditions which stated that the seller's terms and conditions were to prevail over any of the buyer's terms and conditions.[63] Instead, on appeal the court gave a ruling in favour of the buyer, finding that because the buyer and seller's terms were conflicting, the buyer did not accept the seller's offer but instead rejected it and made a counter offer.[64] Such counter offer was then in turn accepted by the seller when the seller signed the confirmation of the order slip and mailed it back to the buyer.[65] The decision clearly illustrates the application of the last-shot rule because Ex-Cell-O Corporation fired the last shot by putting forth the latest terms and conditions.[66] Butler did not object to Ex-Cell-O Corporation's terms

53 Rühl (n 8) 191.
54 Rühl (n 8) 191.
55 Rühl (n 8) 192.
56 Rühl (n 8) 192.
57 *Butler Machine Tool v Ex-Cell-O Corporation* [1979] 1 ALL ER 965, [1979] 1 WLR 401.
58 Butler Machine Tool v Ex-Cell-O Corporation [1979] 1 ALL ER 965, [1979] 1 WLR 401.
59 Butler Machine Tool v Ex-Cell-O Corporation [1979] 1 ALL ER 965, [1979] 1 WLR 401.
60 *Butler Machine Tool v Ex-Cell-O Corporation* [1979] 1 ALL ER 965, [1979] 1 WLR 401.
61 *Butler Machine Tool v Ex-Cell-O Corporation* [1979] 1 ALL ER 965, [1979] 1 WLR 401.
62 *Butler Machine Tool v Ex-Cell-O Corporation* [1979] 1 ALL ER 968.
63 *Butler Machine Tool v Ex-Cell-O Corporation* [1979] 1 ALL ER 968.
64 Stemp "A comparative analysis of the battle of the forms: towards a uniform solution" 1998 *Journal of Contract Law* 243 257.
65 Stemp (n 56) 257.
66 Stemp (n 56) 257.

and conditions and therefore, by signing the confirmation of order slip, could be seen to have agreed to them, the result being that Ex-Cell-O Corporation's terms and conditions were to govern the transaction, barring the seller from invoking the escalation clause.[67]

2.2.3. Comparison of the last-shot rule in terms of the CISG and English domestic law

It can therefore be seen that the position under the CISG is similar to the position as followed in terms of English law, with the exception of one departure mentioned in paragraph two of article 19. The CISG in article 19(1) provides for the same approach as followed in England, namely that it treats a reply of the offeree that contains additional or different terms, that qualify or modify the original offer, as a rejection and counter offer and not as an acceptance.[68] The difference between the approach followed under English law and the CISG however, becomes evident in article 19(2) as it allows for a departure of the mirror image rule in situations where the offerees terms do not materially alter the terms of offer.[69] This is contrary to the traditional rules as followed under English law where in such a scenario, the acceptor's different or additional terms would be treated as a rejection and therefore be a counteroffer. The effect of article 19(2) is therefore that a valid contract would have come into being and that the terms of the contract will be that of the offeror, including the non-material additions of the offeree.

The departure from the mirror image rule in article 19(2) is, however, rendered futile due to the fact that the CISG provides that any additional or different terms concerning price, payment, quality and quantity of goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are seen to be terms that materially alter the terms of offer and therefore render such acceptance a rejection and counter offer.[70] This means that because subdivision 3 of article 19 is so wide, most conflicting standard terms will be considered to be material, meaning that the position will revert back to the approach followed under English law, where the offeree rejects the offeror's terms and consequently makes a counter offer, making the terms of the counter offer the terms of the contract.[71]

2.3. The knock-out rule as a solution to the battle of the forms

Another solution designed to tackle the problem known as the battle of the forms is the "knock-out rule". The knock-out rule is the approach that is most commonly used in Europe.[72] The assumption under this rule is that a contract will come into existence, even where there are conflicting standard terms that exist between the

67 Stemp (n 56) 257.
68 Huber and Mullis *The CISG: A New Textbook for Students and Practitioners* (2007) 89.
69 Huber and Mullis (n 68) 89.
70 Huber and Mullis (n 68) 89.
71 Huber and Mullis (n 68) 90.
72 Corterier "A peace plan for the battle of the forms" 2006 *International Trade and Business Law Review* 195 201.

parties.[73] This position is contrary to the position under the last-shot rule, as under the knock-out rule a contract is deemed to have come into existence irrespective of the conflicting standard terms. The rule operates by applying neither of the parties' standard terms fully.[74]

The problem however, is that although a valid contract is deemed to exist, the parties have conflicting standard terms, which means that the content of the contract must be determined.[75] How the contracts content is determined, is that all the corresponding standard terms of the parties will form the contract and will therefore be the terms that govern it, meaning that all the conflicting standard terms will be disregarded and therefore "knock" each other out.[76] The rule ensures that some form of happy medium is reached between the interests of the parties.[77]

It is clear that the knock-out rule does not operate under the general rules of offer and acceptance, as was seen above under the last-shot theory.[78] Under the knock-out rule, a contract is still formed even though the terms of offer and acceptance do not perfectly match.[79] The terms that are to govern the contract are a combination of the terms that are common between the parties, all those terms that are not, are knocked out and replaced with default rules of law.[80] In contrast to the last-shot rule under the CISG, even where the conflicting standard terms are deemed to be material in terms of article 19(3), courts prefer to find that a valid contract exists and therefore knock those materially conflicting terms out of the contract instead of finding that a valid contract does not exists.[81]

2.3.1. Application of the knock-out rule in terms of the Uniform Commercial Code and the law of the United States of America.

The United States of America solves the battle of the forms dilemma through application of the knock-out rule and therefore no longer applies the last-shot rule.[82] This is as a result of section 2-207 of the Uniform Commercial Code, more commonly referred to as the UCC.[83] Prior to the drafting of section 2-207 of the UCC, it was apparent that under the common law, when an offeree sent his form of acknowledgment back to the offeror, it was inevitable that it would contain standard terms that would conflict with the original offer and that as a result, no contract would

73 Rühl (n 8) 199.
74 Corterier (n 72) 201.
75 Corterier (n 72) 201.
76 Corterier (n 72) 201.
77 Corterier (n 72) 201.
78 Rühl (n 8) 188-199.
79 Rühl (n 8) 199.
80 Rühl (n 8)199.
81 DiMatteo, Dhooge, Greene, Maurer and Pagnattaro (n 10) 351.
82 Rühl (n 8) 199.
83 Rühl (n 8) 199.

come into existence.[84] What was further apparent was the fact that, even though no contract would exist, if the seller delivered the goods and the buyer accepted delivery, under the supposition that a valid contract did in fact exist, the buyer would be bound by the terms in the seller's counter offer.[85] Section 2-207, as a result, was therefore promulgated in response to the injustices caused by the mirror image and last-shot rules.[86]

As explained previously in this essay, when faced with a battle of the forms scenario it is pertinent to determine, first, whether a valid contract has come into existence and, secondly, if affirmative, which of the party's terms, if any, are to govern the contract. The UCC seeks to address these questions in section 2-207, paragraphs (1) to (3).[87] First, the question of whether or not a valid contract has come into existence, is answered in light of paragraphs (1) and (3) and, secondly, the question of whose or what terms are to govern the contract is answered in light of paragraphs (2) and in part, paragraph (3).[88]

Paragraph 1 of section 2-207[89] provides that a valid contract will come into existence, even in the event that the offeree sends back a form of acknowledgment containing conflicting standard terms, as long as it contains a "definite and seasonable (timely) expression of acceptance" or is a "written confirmation."[90] What this means is that the offeree's form of acknowledgment will function as an acceptance, not a rejection and counter offer, unless the offeree gives his acceptance on condition that the offeror agrees to his additional or different terms.[91] The first paragraph of section 2-207 did away with the strict mirror image rule, by treating the offeree's conflicting terms as an acceptance of the offer, not a rejection and counter offer, even though it did not "mirror" the original offer.[92]

Paragraph 2 of section 2-207[93] provides that the additional terms, sent back to the offeror by the offeree are to be interpreted as "proposals for addition to the contract"

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84 Stephens "Escape from the battle of the forms: keep it smile, stupid" 2007 *Lewis & Clark Law Review* 233 240.

85 Stephens (n 84) 240.

86 Stephens (n 84) 240.

87 Lipman "On winning the battle of the forms: an analysis of section 2-207 of the Uniform Commercial Code" 1969 *Business Lawyer* 789 791.

88 Lipman (n 87) 791.

89 (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.

90 Lipman (n 87) 793.

91 Sukurs "Harmonizing the battle of the forms: a comparison of the United States, Canada, and the United Nations Convention on Contracts for the International Sale of Goods" 2001 *Vanderbilt Journal of Transnational Law* 1481 1489.

92 Stephens (n 84) 242.

93 (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.

and that, if the contract is between merchants, these "proposals" are to become part of the contract unless they would materially alter it.[94] This exception however is rarely effective, as in most cases courts nearly always find that the offeree's terms, in his form of acknowledgment, materially alter the offer unless those terms would, in any event, be read into the contract because of trade usage or course of dealing.[95] It can be seen that paragraph 2 draws a distinction between situations where the parties are merchants as well as those situations where one or neither of the parties are merchants.[96]

First, if the contract is between non-merchants, persons who do not deal in the specific goods involved in the ordinary course of business, the additional terms in the offeree's acceptance are treated merely as proposals and "fall out", making the terms of the contract the terms of the offer.[97] This means that, because of this so called "fall out rule", the first-shot rule comes into play.[98] As a result of the first-shot rule the seller's terms, as the terms of the party firing the first shot, are the terms that are to govern the contract.[99] Secondly, if the contract is between merchants, persons who deal in the specific goods involved in the ordinary course of business, the additional terms in the offeree's acceptance become part of the contract, thereby applying the last-shot rule, unless the offer expressly limits acceptance to the terms of the offer, the terms materially alter the offer or the offeror objects to the additional terms.[100]

Paragraph three of section 2-207[101] deals with instances where the parties complete a transaction, even though no contract has been formed between them through their writings.[102] In other words, in terms of section 2-207(1) there has been no "definite and seasonable expression of acceptance" or "written confirmation" by the offeree or there has been a "definite and seasonable expression of acceptance" but the response is made "conditional on assent to the additional or different terms".[103] In such instances, there will be a contract through conduct and such contract will be governed by the terms upon which the party's forms are in agreement, disregarding all the conflicting terms and replacing them with default rules of the Uniform Commercial Code.[104]

2.3.2. The knock-out rule as applied in Germany and France

94 Sukurs (n 91) 1489.
95 Sukurs (n 91) 1489.
96 Stephens (n 84) 245.
97 Stephens (n 84) 245.
98 Stephens (n 84) 245.
99 Hondius (n 18) 438.
100 Stephens (n 84) 250.
101 (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.
102 Stephens (n 84) 251.
103 Stephens (n 84) 252.
104 Sukurs (n 91) 1489-1490.

Germany has, since the 1980's, abandoned the last-shot rule as applied under the German Civil Code in terms of section 150(2), and currently applies the knock-out rule.[105] German case law illustrating the use of the knock-out rule is found in a decision of the court of appeals in Cologne.[106] The case centred on the inclusion of a forum selection clause housed in the terms of one of the parties.[107] The court found that a contract did in fact exist but however further found that, if a party were to accept delivery but insist that its terms were to govern the contract or reject the terms of the other party, such "acceptance" could not amount to an acceptance of the other parties terms.[108] The content of the contract was determined by applying all the terms that were consistent between the parties and all those that were not, were to be replaced by the default rules of law.[109] Although the knock-out rule is henceforth the solution that is applied when tackling the battle of the forms dilemma in Germany, the last-shot rule has not been completely discarded.[110] Situations where the parties do not insist that their terms govern the contract or where they do not reject the other party's terms will be governed by the last-shot rule.[111] These cases, however, are rare, as in most contracts in Germany it is standard procedure for parties to included clauses insisting that their terms are to govern the contract or terms that seek to reject the other party's terms, thereby reverting back to the knock-out rule.[112]

Under French law, the problems arising under the battle of the forms cases are resolved through applying the knock-out rule in a similar fashion to its application under German law, with the exception of one departure.[113] French courts will apply the knock-out rule irrespective of any clauses included by the parties insisting that their terms are to govern the contract or that they reject the other parties terms.[114] The rationale behind this is that French courts believe that, the mere fact that a party refers to its own terms is sufficient enough to hold that the party insists on its own terms governing or rejects the other party's terms.[115]

2.4. Provisions in the UNIDROIT Principles of International Commercial Contracts in respect of the Battle of the Forms

UNIDROIT is an intergovernmental organisation designed to regulate international commercial contracts.[116] It contributes to the foundations of the legal framework of international trade and uniform law.[117] The duty of UNIDROIT is to harmonise and co-

105 Rühl (n 8) 201.
106 *OLG Köln BB* (1980) 1237,1240 as referred to by Rühl (n 8) 203.
107 Rühl (n 8) 203.
108 Rühl (n 8) 203.
109 Rühl (n 8) 203.
110 Rühl (n 8) 204.
111 Rühl (n 8) 204.
112 Rühl (n 8) 205.
113 Rühl (n 8) 205.
114 Rühl (n 8) 205.
115 Rühl (n 8) 205.
116 Heidemann *Methodology of Uniform Contract Law: The UNIDROIT Principles in International Legal Doctrine and Practice* (2007) 2-3.
117 Heidemann (n 116) 3.

ordinate private law originating from various sources and to draft uniform private law rules for adoption by its member states or other interested parties.[118] International uniform law instruments such as the CISG base their drafts on suggestions made by UNIDROIT.[119] The UNIDROIT Principles of International Commercial Contracts, referred to mostly as the UPICC, are one of the several sets of international uniform private law rules prepared by UNIDROIT.[120] The UPICC are principles aimed at providing a uniform code to matters related to international commercial contracts.[121]

The UPICC has a strong relationship with the CISG which is made clear in its preamble which states that the UPICC may be used to interpret and supplement other international uniform law instruments. This means that, where both the CISG and the UPICC make provisions regarding a particular issue, or, where the CISG is silent on a specific issue that the UPICC provides for, the UPICC may be applied.[122] What this means is that, because the battle of the forms cases are not specifically dealt with under the CISG, it may be solved through the application of article 2.22 of the UPICC, as article 2.22 provides a specific solution to the problem of the battle of the forms.[123]

Article 2.22[124] of the UPICC attempts to solve the battle of the forms dilemma by assuming that standard terms, contained in the forms exchanged between the parties, have not actually been read by the parties.[125] This assumption ensures that the strict mirror image rule and last-shot rule are done away with.[126] Where the parties refer to their standard terms, automatically, by mechanically exchanging order forms and acknowledgment of order forms, with their standard terms merely being pre-printed on the reverse side, they would, in most instances, be unaware that there is a conflict between their standard terms.[127] In such instances, parties cannot question the existence of the contract or even attempt to insist on the application of the last terms sent or referred to.[128] It is clear that article 2.22, as is the case in section 2-207 of the UCC, attempts to tackle the battle of the forms through application of the knock-out rule.[129] The effect of applying this neutral solution

118 Heidemann (n 116) 3.
119 Heidemann (n 116) 3.
120 Heidemann (n 116) 3.
121 Perales Viscasillas "Battle of the forms under the 1980 United Nations Convention on Contracts for the International Sale of Goods: a comparison with section 2-207 UCC and the UNIDROIT Principles" 1998 *Pace International Law Review* 97 103.
122 Perales Viscasillas (n 121) 103.
123 Perales Viscasillas (n 121) 104.
124 "Where both parties use standard terms and reach agreement except on those terms, a contract is concluded on the basis of the agreed terms and of any standard terms which are common in substance unless one party clearly indicates in advance, or later and without undue delay informs the other party, that it does not intend to be bound by such a contract."
125 Perales Viscasillas (n 121) 118.
126 Perales Viscasillas (n 121) 118.
127 Bonell *The UNIDROIT Principles in Practice: Case law and Bibliography on the UNIDROIT Principles of International Commercial Contracts* (2006) 156.
128 Bonell (n 127) 156-157.
129 Perales Viscasillas (n 121) 118.

afforded in article 2.22 is that only the agreed upon terms between the parties will form the contract, eliminating the conflicting standard terms.[130]

When answering the question of whether or not a valid contract exists, article 2.22 of the UPICC provides that both parties are required to exchange forms.[131] If both parties do in fact exchange forms, then according to article 2.19, along with the rest of chapter 2, it is further required that there must be an agreement, at least on the essential terms of the contract.[132] Article 2.22 provides further that either party may then immediately after or before the conclusion of the contract indicate its intention not to be bound by the contract.[133] From this it can be deduced that, the fact that the parties to the transaction have agreed to the essential terms of the contract means that a contract will come into existence regardless of the conflicting standard terms.

When answering the question as to what the content of the contract is, article 2.22 provides that all the agreed upon essential terms of the contract will form the contract, along with all those standard terms that are common in substance and therefore equally satisfy the interests of both parties.[134] All the terms that are contradictory or, although not contradictory, materially alter the terms of offer or acceptance, are thus excluded and are therefore knocked out through application of the knock-out rule.[135] If the standard terms do not materially alter the terms of offer or acceptance, article 2.11 provides that such terms will form part of the contract.[136]

Parties can choose to have their transaction governed by the UPICC, thereby submitting to have their agreement subject to the knock-out rule, however, most states do not accept a choice of the UPICC as the UPICC are regarded as being "soft law".[137] The exception to this is where parties agree to have any future disputes resolved through arbitration proceedings, and include a clause in their contract to such effect, as most arbitral tribunals will accept a choice of the UPICC to govern the transaction.[138]

3. Criticism of the mentioned solutions

The commonality between the UPICC, the UCC and the CISG, is that they all try to enforce terms exchanged between the parties that conform to one another and that are therefore not contradictory.[139] The difference however becomes apparent where such terms are in fact contradictory, as the CISG, as well as English domestic law, will apply the last-shot rule and would therefore apply either the seller or buyer's

130 Perales Viscasillas (n 121) 132.
131 Perales Viscasillas (n 121) 133.
132 Perales Viscasillas (n 121) 133.
133 Perales Viscasillas (n 121) 133-134.
134 Perales Viscasillas (n 121) 134.
135 Perales Viscasillas (n 121) 134.
136 Perales Viscasillas (n 121) 134.
137 Vogenauer "Unification of general contract law in Africa: The case of the UNIDROIT Principles of International Commercial Contracts" 2011 *European Journal of Law Reform* 435 438.
138 Vogenauer (n 138) 438.
139 Perales Viscasillas (n 121) 118.

terms in total, whereas the UPICC and the UCC apply the knock-out rule and would apply neither party's conflicting terms and knock them out, replacing them with the default rules of the governing law.[140]

Various criticisms on the last-shot rule, as applied under English domestic law and article 19 of the CISG, as well as the knock-out rule in section 2-207 of the UCC, have been offered and will now be discussed in further detail below.

3.1. Criticism of the last-shot rule

The first point of criticism offered against the last-shot rule is that it favours the party, usually the seller, who cunningly refers to his standard terms last.[141] This is what has been referred to as an arbitrary solution, as it is not possible to foretell which one of the parties will eventually perform in terms of the contract instead of referring to its own standard terms once more, thereby rejecting the other party's previous offer and consequently make a counter offer.[142] If the seller is said to be in in a favourable position, this would suggest that that the buyer, on the other hand, is in the less favourable or more vulnerable position.[143] This vulnerability is the result of the fact that, if the seller does not perform in terms of the contract, no contract would have been concluded and if the seller performs its contractual obligations by delivering the goods and the buyer accepts such delivery, the contract would as a result come into existence and be governed by the terms of the seller.[144]

Secondly, the "ping-pong effect" suggests that the parties know that the best way to ensure that their terms will be elected as the terms to govern the transaction is to be the party who sends the latest terms and conditions.[145] What this means, then, is that parties will keep on referring to their own standard terms in the hope that the other contracting party will eventually submit and perform its contractual obligation.[146] The conduct of the parties, by playing this so called game of ping pong, increases the amount of paperwork exchanged between the parties.[147]

A third point of criticism is that, under the advice given to them by their lawyers, businesses attempt to standardise their operations through the use of standard terms and, often enough, if not always, the parties do not give any consideration to these standard terms.[148] The forms exchanged between the parties merely house these standard terms as a matter of course and flow between the parties without any attention being paid to them.[149] This unawareness of the content of the standard

140 Perales Viscasillas (n 121) 118-119.
141 Eiselen and Bergenthal (n 24) 221.
142 Eiselen and Bergenthal (n 24) 221.
143 Perales Viscasillas (n 121) 117.
144 Perales Viscasillas (n 121) 117.
145 Eiselen and Bergenthal (n 24) 221.
146 Eiselen and Bergenthal (n 24) 221.
147 Perales Viscasillas (n 121) 118.
148 Eiselen and Bergenthal (n 24) 221.
149 Eiselen and Bergenthal (n 24) 222.

terms being exchanged between the parties' is a point of critique that can be offered against the first-shot and knock-out rules as well.

A fourth, listed, point of criticism, is that, in terms article 18(1) of the CISG,[150] the last-shot rule provides that a buyer is assumed to have accepted the seller's counter offer by accepting the seller's delivery of the goods.[151] This however, seems to be based on an inaccurate interpretation of article 18(1) as the article requires that the buyer indicate acceptance through its conduct and that, therefore, silence on the part of the buyer is insufficient to show that it has accepted the counter offer, including the standard terms that it may not have been aware existed in the first place.[152] By applying the subjective criterion in article 8(1) of the CISG[153] or the objective criterion in article 8(2),[154] it is clear that the conduct of the buyer cannot be interpreted as an acceptance of the seller's counter offer including its standard terms.[155]

3.2. Criticism of the knock-out rule

The UPICC in article 2.22 as well as the UCC in section 2-207 attempt to solve the battle of the forms problem through application of the knock-out rule, with provisions in the UCC being more difficult to interpret and apply, as will be discussed later on in this essay.[156] Under the UPICC and the UCC, the conflicting terms are knocked out and replaced with a new version of the term derived from the applicable governing law.[157] Criticism against the knock-out rule, as will be explained through illustrations below, is that it can sometimes undermine the intention of the parties and the bargain it is intended to strike.[158]

For example, say that both of the parties have conflicting clauses, both providing for a notice period for the lack of conformity of the goods.[159] The seller provides that such notice period is two months whereas the buyer provides that the notice period is two months and fifteen days.[160] By applying the knock-out rule, the notice period clauses are deemed to be contradictory and are therefore knocked out, irrespective of the fact that there is a difference of only 15 days, and are consequently replaced

150 "A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance."
151 Eiselen and Bergenthal (n 24) 22.
152 Eiselen and Bergenthal (n 24) 222.
153 "For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was."
154 "If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances."
155 Eiselen and Bergenthal (n 24) 222.
156 Perales Viscasillas (n 121) 118.
157 Perales Viscasillas (n 121) 119.
158 Perales Viscasillas (n 121) 119.
159 Perales Viscasillas (n 121) 119.
160 Perales Viscasillas (n 121) 119.

by the governing law which could have a much shorter period or even longer, meaning that the true intention of the parties has not been upheld.[161]

Another example could be found in situations where both parties agree that their future disputes are to be dealt with through arbitration proceedings and include clauses to this effect in their forms. Where such arbitration clauses are in conflict with each other, in the sense that each party provides for a different place of arbitration, strict application of the knock-out rule could amount in the dispute being tried before national courts as opposed to an arbitral tribunal.[162] This would again result in the party's true intention not being upheld.

3.2.1. Criticism of the knock-out rule in the light of section 2-207(1) of the UCC

As has been discussed above, section 2-207 did away with the strict mirror image rule by treating a response that is a "definite or seasonable expression of acceptance" as an acceptance, not a counter offer, even where it contains additional or different terms to the original offer.[163] When, however, can such response be viewed as a definite or seasonable expression of acceptance? Section 2-207 fails to provide guidance as to whether an objective or subjective criteria should be utilised to determine the answer to such question.[164] If the objective standard is to be applied, it needs to be determined whether or not the reasonable person, in the position of the offeror, would believe the offeree's response to be a definite or seasonable expression of acceptance.[165] If the subjective criterion is applied, what needs to be determined is whether or not the offeree intended for its response to be a definite or seasonable expression of acceptance, or, whether or not the offeror viewed the offeree's response in the same light.[166]

Another point of criticism, on this same point, is the question of how much a response can differ from the original offer and still be regarded as a definite or seasonable expression of acceptance.[167] Section 2-207 makes it clear that the offeree's response can materially alter the original offer and still be regarded as a definite or seasonable expression of acceptance.[168] Stephens is of the opinion, however, that it is ludicrous to view a response, which materially alters the original offer, as a definite and seasonable expression of acceptance. He believes that, by implication, it makes more sense to view such response as a rejection of the original offer as opposed to a definite and seasonable expression of acceptance.[169]

161 Perales Viscasillas (n 121) 119.
162 Perales Viscasillas (n 121) 120.
163 Stephens (n 84) 242.
164 Stephens (n 84) 242.
165 Stephens (n 84) 242-243.
166 Stephens (n 84) 242-243.
167 Stephens (n 84) 243.
168 Stephens (n 84) 243.
169 Stephens (n 84) 243.

Section 2-207 provides that a response, in addition to being a definite and seasonable expression of acceptance, may function as an acceptance if it is a "written confirmation".[170] Stephens is of the opinion that a confirmation cannot function as an acceptance, it can only confirm that a contract has already been concluded and that, therefore, there has already been an offer and an acceptance.[171] Stephens states further, that, by definition, a confirmation can only confirm that which has already been agreed upon, meaning that a "confirmation" which states terms additional to or different to the original offer cannot be viewed as a confirmation.[172]

As seen above, section 2-207(1) states that a reply that is a definite and seasonable expression of acceptance will operate as an acceptance. However, the section further provides for an exception to this general rule in that it states that the acceptance cannot be expressly made "conditional on assent to the additional or different terms".[173] Stephens is of the opinion that an acceptance that is expressly made conditional on assent to the additional or different terms cannot be viewed as an acceptance but instead a rejection and counter offer.[174]

3.2.2. Criticism of the knock-out rule in the light of section 2-207(2) of the UCC

Section 2-207(2) provides that, in situations in which one or neither of the parties are merchants, the additional terms in the offeree's acceptance are treated as proposals for addition and therefore do not form part of the contract, making the terms of the contract the terms of the offer.[175] This means that, the arbitrary solution known as the last-shot rule, which was done away with by section 2-207(1), is now replaced with the arbitrary solution known as the first-shot rule.[176] If the contract is between merchants however, the additional terms of the offeree shall be the terms that are to govern the contract, suggesting a revival of the arbitrary last-shot rule.[177]

Section 2-207(2) provides exceptions to this rule by stating that, if the contract is between merchants and the additional terms in the acceptance, amongst other things, materially alter the offer, they will not become part of the contract.[178] What is not clear, however, is which terms are considered to materially alter the offer.[179] Comment 4 to article 2-207 unsuccessfully attempts to answer this question through application of the "surprise" or "hardship" criterion.[180] If the surprise or hardship criterion is applied, then virtually every additional term in the acceptance would be deemed material due to the fact that, first, they would surprise the offeror in the

170 Stephens (n 84) 243.
171 Stephens (n 84) 243.
172 Stephens (n 84) 243.
173 Stephens (n 84) 243.
174 Stephens (n 84) 244.
175 Stephens (n 84) 245.
176 Stephens (n 84) 245.
177 Stephens (n 84) 246.
178 Stephens (n 84) 246.
179 Stephens (n 84) 246.
180 Stephens (n 84) 246.

sense that the offeree's standard terms are generally not known to the offeror, and secondly, they are aimed at providing a benefit to the party drafting them, meaning that the standard terms of the offeree would benefit the offeree and redound to the detriment of the offeror.[181]

4. Conclusion

It can therefore be concluded that a battle of the forms situation exists at the occurrence of an inevitable event, namely an event in which the standard terms in the buyer's and seller's forms contradict one another. In order to determine who wins this so called "battle", one needs to determine, first, whether a contract has in fact come into existence, and, secondly, if the answer to the first question is in the affirmative, one needs to determine what the content of the said contract will be. In other words, upon confirmation of the existence of a valid contract, it needs to be determined whether the buyer's or seller's terms are to govern the contract or whether some form of blend of terms, arrived at by viewing the corresponding terms stated for by each party, will govern. In finding a victor to the battle, three main solutions have been applied, namely the first-shot, last-shot and knock-out rules.

The first-shot rule was mentioned, briefly, as the solution applied to the battle of the forms cases in the Netherlands. It was seen that the first-shot rule operates by giving no effect to the second reference of the offeree where the offeree sends terms back to the offeror that materially alter the original offer.

It was then seen that through application of the prevailing solution under the CISG and under English domestic law, the last-shot rule provided that a contract would exist if the offer and acceptance mirrored each other exactly. If the offer and acceptance did not mirror each other, the offeree's response functioned as a rejection and counter offer and not as an acceptance. It was further seen that, where the parties' performed their contractual obligations, irrespective of the fact that the offer and acceptance did not match exactly, a contract would nevertheless be regarded as having being concluded on the terms of the party firing the last shot, usually the seller. Article 19 of the CISG and English domestic law seem to follow a similar stance towards solving the battle of the forms cases, however, article 19(2) allows for a departure of the mirror image rule in those situations where the additional or different terms are not deemed to be material. The exception in article 19(2) is, however, useless in the sense that it hardly finds application due to the wide scope of article 19(3).

It was then seen that the knock-out rule was the solution applied under the law of Germany and France and, in the USA, through section 2-207 of the UCC; it is also the solution under the UPICC. Through application of the knock-out rule, the existence of conflicting standard terms is not enough to render a contract non-existent, meaning that the mirror image rule finds no application. When the parties'

181 Stephens (n 84) 246.

standard terms are in conflict with one another, a contract will nevertheless be concluded and will be so concluded on the agreed-upon essential terms along with all the terms that corresponded with one another, knocking out all of the conflicting standard terms. The knock-out rule, however, finds no application in section 2-207(2) of the UCC, in instances where the contract concluded is between merchants or in instances where the contract is concluded between non merchants. In such instances, the last-shot and first-shot rules will be applied respectively.

I am of the opinion, that the ideal solution that should be utilised in the future, when faced with a battle of the forms scenario, is none other than the knock-out rule. The knock-out rule does not operate under the general rules of offer and acceptance and therefore recognises the existence of a valid contract irrespective of the parties' standard terms being in conflict. Under the knock-out rule, if the parties' have reached an agreement on the *essentialia negotii*, it is sufficient enough for a valid contract to be deemed to exist. Conversely, through strict application of the mirror image rule, if the parties' standard terms are in conflict with each other and therefore do not mirror each other perfectly, no contract is deemed to exist. To believe that it is possible, in today's commercial environment, to have an offer and acceptance match perfectly with one another seems to be nothing more than a fallacy. It is because of this tendency of conflicting standard terms, that most contracts are deemed to not exist where the mirror image rule is applied. I am of the belief that the true intention of the parties is upheld through application of the knock-out rule, reason being that if the parties to a transaction have the intention to enter into and be bound by a contract, differing standard terms should not prevent them from achieving such.

I am also of the opinion that the knock-out rule offers a more objective stance when determining the content of the contract. Through application of the knock-out rule, both parties have an equal say in determining the terms that are to govern the contract. The terms of the contract are all the agreed-upon *essentialia negotii* as well as the standard terms that correspond with one another, leaving the terms that are contradictory being knocked out. This solution offers a more equal approach and ensures that some form of happy medium is reached between the interests of the parties. Conversely, if the first-shot rule were to be applied, the terms of the party whom managed to fire the first shot will be the terms that are to govern the contract, or, if the last-shot rule were to be applied, the terms of the party firing the last shot will be applied. It seems arbitrary to allow one party to have the upper hand over the other merely because that party managed to fire the first or last shot. It can therefore be concluded that, in the opinion of the current author, as per reasoning mentioned above, the most desirable approach to be adopted in the future is none other than the knock-out rule.

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