Battle of Forms in the Formation of International Commercial Contracts: An Assessment of their Comparative Merit

Siti Fairuz Binti Nor Azhar*

Abstract

In the communication process involved in the making of an international commercial contract like sale of goods contracts the parties exchanged their offer and acceptance/counter offer. Sometimes it is not clear on which communication (also called form) the parties based their transaction. In such a case if there arises a dispute between them, the court of law or arbitral tribunal will be a in a limbo as to which form will be taken as the basis of the contract and hence which law will apply to settle the dispute. Such a situation is called battle of forms. There have a few approaches to this issue followed by the court or tribunal. This paper is an attempt to determine their comparative merit.

Keywords: International commercial contracts, Formation of contract and Battle of forms

1. Introduction

"Battle of forms" happens when parties exchange standards forms of their own that seems to form a contract. Why is there a standard form of contract? Standard forms of contract are those contracts that have pre-printed general terms and conditions and its development is due to the expansion and increasing of the commercial transactions throughout the world. The purpose of the standard forms is to ease and simplify, fasten and conclude the commercial negotiations as soon as possible and reducing legal costs in contract drafting.

Although the purpose of the standard forms is to ease the businesses, however, the standard forms well-known flaw is that the forms may create a "battle of forms". In most cases, the forms contains contradictory terms and conditions. For example, the usual "battle of forms" will involve clauses such as indemnity, liability, limitation of liability, risks of loss, payment terms and payment of late interests, warranties, remedies, applicable law and arbitration.[1] Taken the business current landscape, most of the businesses does not really wait until the conclusion or completion of their contract and instead proceed with their business transactions, keeping fingers crossed that nothing wrong will happen. Although sometimes, the uneventful will happen that is a litigation suit due to breach of contract or non-performance of contract.

* In-house Legal Counsel, Honda Malaysia.

[1] Nguyen Trung Nam, Future of Harmonization and Unification in Contract Law Regarding "Battle of Forms", page 4, 2009

When there is a litigation that means that the standard forms or the concerned contract will be scrutinized by the court. Due to differences legal system, there are differences in the approach applied by the Common Law legal system and the Civil law legal system in confronting the "battle of form" issues.[2]

Basically there are four main approaches in determining contract in the event of the "battle of forms".[3] The four approaches namely are as follows:-

a) That there is no agreement between parties and therefore no contract;

b) There is a contract on the terms of the party which was first to propose its standard terms (also is known as "the first-shot" rule);

c) There is a contract on the terms of the party which was last to insists on its own standard terms (also is known as "the last-shot" rule); and

d) There is a contract on the individually negotiated terms and any conflicting standard terms are replaced by the background law, i.e. the rules which apply if parties have no specific provision in the contract (also known as the "knock-out" rule.

The following Section will have look at the approaches applied by the Common Law system and the Civil Law system in the "battle of form" problem.

2. Common Law and Civil Law Approaches to Battle of Forms

(a) Common Law System

(i) UK courts approach

Under the English Contract law, a contract is only formed when there is an express and unreserved acceptance by the offeree. This is called as the "mirror image rule". Any counter-offer or alteration to the offeror's terms will mean rejection of the offer and does not constitute an acceptance.

In ***Hyde v Wrench***[4], the principle is that the counter-offer will have the effect of destroying the original offer which cannot be accepted by the offeree. In this case, the Defendant had offered to sell his farm for one thousand pounds. The Plaintiff at first made a counter-offer of nine-hundred pounds and later agreed to pay the one thousand pounds. It was held however

[2] Nguyen Trung Nam, Future of Harmonization and Unification in Contract Law Regarding "Battle of Forms", 2009
[3] *Gerhard Dannemann*, LEX MERCATORIA:Essays on International Commercial Law in Honor of Francis Reynolds, page 3, LLP,2000
[4] [1840] EWHC Ch J90

that no contract was formed since there is a counter-offer with the effect of rejecting the original offer. Due to that counter-offer, the original offer is no longer available for him to accept.

With regards to the "battle of form" problem, the English courts applied the general rules of offer and acceptance (i.e. the mirror image rule). Therefore, based on the said rule, a contract will be formed when there is an acceptance that corresponds exactly to the offer. Any acceptance that is not in conformity with the offer is consider as a rejection and regarded as a counter-offer. However, under the English law, an acceptance can be through either acceptance explicitly by words or by conducts. So when a contract is accepted by a conduct, and there exists a conflict in the standard of forms, this is where the "last-shot" rule comes into the picture.

The application of the "last shot" rule in a contract where acceptance is through conduct is for example, when the buyer makes an offer that is rejected by the seller because the seller is referring to his own conditions. Subsequently the seller delivers the goods. Acceptance of the goods by the buyer amounts to an acceptance of the seller's counter-offer by conduct. Since the buyer accepted the seller's counter-offer, the seller's terms as the party who "fired the last shot" will prevail and govern the contract.[5]

In the case of ***B.R.S v. Arthur V Crutchley Ltd***[6], BRS delivered whisky to AC warehouse and BRS's driver gave AC a delivery note which contained BRS's conditions (the first shot). AC stamped the note "Received under AC's conditions" (second shot). Then the whisky was stolen and it was held that AC stamping the delivery note was a counter offer which was accepted by BRS handing over the whisky. The contract was made on AC's conditions which is the last shot.[7]

However the traditional offer and acceptance approach has its weakness and was criticized due to its "mechanical solution" rather than a meeting of the minds between the businesses. The last shot rule will encourage parties to keep sending their forms over each other in order to ensure that their terms prevail and eventually resources will be wasted and time consuming.

Lord Denning in the case of ***Butler Machine Tool Co., Ltd. V. Ex-Cell-O Corp (England) Ltd***[8] question the application of the "last shot" rule. First the facts of the case: wherein the plaintiff had offered to sell a machine tool to the defendant. The plaintiff made the offer through the plaintiff's standard form that allowed the plaintiff to increase the selling price from the price quoted to the price at the prevailing date of delivery. It was also provided that these terms should prevail over any terms and conditions in the buyers (defendant) order form, which does not have a price variation clause. The defendant's form included a tear-off section to be completed by the plaintiff (the buyer) and it states as follows, "we accept your order on the terms and conditions stated thereon." The plaintiff signed and returned the slip to the defendants.

[5] Giesela Ruhl, The Battle of the Forms : Comparative and Economic Observations, page 5
[6] (1968) 1 Llyods' Rep 271 CA
[7] Nguyen Trung Nam, Future of Harmonization and Unification in Contract Law Regarding "Battle of Forms", page 7, 2009
[8] 1 WLR 401, 404-05 (1979)

The machine tool was eventually constructed, but before the delivery, the plaintiff sought to invoke the price increase clause. The defendant however protested claiming that the contract of purchase of the machine tool has been concluded on their terms and conditions.

In this case, the Court of Appeal found decision in favor of the defendant. Except for Lord Denning, the others Court of Appeal judges stated that the counter-offer was expressly accepted by the plaintiff when they signed and returned the tear-off slip.

Lord Denning, although accepted the traditional approach, mentioned that the approach is out of date and suggest some modern views to the "battle of forms". Lord Denning suggested solving the "battle of forms" problem, the court should separate the question of formation of the contract from the question of its contents.[9]

With regards to the first question, Lord Denning proposed as follows:- *" to look at all the documents passing between the parties – and glean from them, or from the conduct of the parties – even though there may be differences between the forms and conditions printed on the back of them."* By applying this guideline, when it comes to the "battle of form" issue, there will be a contract which existed as soon as the last of the forms is send and received without any objection made.

With regards to the second question, Lord Denning suggested that depending on the circumstances of the case, the contract could be governed by the terms of the last forms send, or the terms of the first form send or the reconcilable terms of both forms with the irreconcilable terms being replaced by reasonable implication. In simple words, Lord Denning suggest three possible solutions which are as follows, the application of the traditional "last-shot" rule, the "first-shot" rule and finally the hybrid solution of harmonizing and reconciling the terms and conditions of both parties and replacing those irreconcilable differences.

However, the English courts still preferred to apply the traditional common law approach of offer and acceptance.

(ii) United States court approach

U.S is one of the countries that criticize the traditional common law approach and applied the "knock-out" rule when solving the "battle of forms" problems. The "knock-out" rule is not based on the normal common law rules of offer and acceptance. Instead under the "knock-out" rule, a contract will come into existence even if there is conflict on the offer and acceptance. The contract is govern by terms that are common in substances in both sets of forms and the differing terms knock each other out and are replaced with the default rules of the law.[10]

[9] Giesela Ruhl, The Battle of the Forms : Comparative and Economic Observations, page 6
[10] Giesela Ruhl, The Battle of the Forms : Comparative and Economic Observations, page 11

The United States Uniform Commercial Code (UCC) under section 2-207 has softened the "mirror image" rule and applied the "knock-out" rule. Under section 2-207 (1), an acknowledgment is treated as an acceptance unless it is specifically accepted upon its own terms. Section 2-207(3) goes on to mention that conduct by the parties will also amount to the formation of contract despite their contrary writings or even if there is no writings at all.

Therefore, contrary to the traditional common law rule, a contract may come into existence despite the fact that the acceptance was not in conformity with the offer. Under the section 2-207, the acceptance needs to meet only 2 requirements. First, the acceptance must be couched in "a definite and seasonable expression of acceptance" and secondly, it must not be "expressly made conditional on assent to the different terms."[11] If the acceptance fulfills these two requirements, the contract will be govern by the terms of the offeror.

In situation where there are additional terms contained in the acceptance, section 2-207 (2) of the UCC provides that the additional terms are proposals for addition to the contract if both parties are not merchants. But if both parties are businesses the additional terms will automatically become part of the contract.

With regards of the different terms contained in the acceptance, section 2-207 UCC is silent. Due to that, the US courts hold that the different terms cancel each other out and are replaced by the default rules of the UCC.

Although the majority of the courts and the academics in US support the application of the "knock-out" rule in the battle of forms issues, the wordings of the U.C.C has been subject to harsh criticism due to its poor drafting quality and confusing wording.[12] This can be seen in the case of ***Roto-Lith Ltd v F.P.Bartlett & Co***.[13] which was the first case reported under section 2-207 of the U.C.C. In this case, the buyer ordered a drum of glue from the seller, stating that it needed the glue for wet pack spinach bags. The seller, however acknowledge the order with a form that states "all goods sold without warranties, express or implied." The glue subsequently failed to function and the buyer claimed from the seller. The court however held that the acceptance by the seller is a counter-offer in which the buyer accepted when he paid. The critics criticized this case because the US court decision neglects the s.2-207 UCC and instead applied the classic "mirror image" rule.

(b) Civil Law System

(i) German court approach

[11] Giesela Ruhl, The Battle of the Forms : Comparative and Economic Observations, page 11
[12] Nguyen Trung Nam, Future of Harmonization and Unification in Contract Law Regarding "Battle of Forms", page 7, 2009
[13] 297 F2d 497 (1st Cir 1962)

Besides United States, the "knock-out" rule has also been the solution when it comes to solving the "battle of forms" issues.[14] However, before that time, the German courts applied the "last-shot" rule.

The basis of applying the "last-shot" rule was based on section 150 (2) of the German Civil Code, which provides that "an acceptance with modifications is a rejection of the offer coupled with a new offer." Hence, a contract will only exist when the offer and acceptance matched perfectly. Therefore, the party who makes the last offer will prevail.

Through the years, the German contract law developed from the traditional approach to the application of the "knock-out" rule approach in solving the "battle of forms" problem. The case of ***Bundesgerichtshof***[15] decision shows the shift from application of the "last-shot" rule to the "knock-out" rule. In this case, the buyer's form stated that any seller's deviation is not valid unless accepted in writing. The seller's confirmation form contains the standard terms which states the form not to be binding and excluded damages for late delivery. The higher court, while reversing the lower's court decision, held that the seller could not in good faith assume that the buyer silently accepted the terms in the seller's form. The seller also failed to make actual delivery upon the buyer's acceptance of its terms and thus the buyer's receipt of goods did not amount to acceptance of the seller's counter-offer. However as the parties conducted delivery and acceptance of goods, a contract was formed.

(ii) French court approach

In France, the "battle of forms" problem is solved by application of the "knock-out" rule. The French law resembles with the German law, however there is one difference with the German law, wherein the French courts even apply the "knock-out" rule where the standards terms do not contain a clause that expressly states that the contract is only subject to the party's own terms or that the other party's terms are rejected.[16] Whereas under Germany contract law, the parties must expressly state that they do not intend to be bound by terms than their own.

Although the French court prefers the usage of the "knock-out" rule, to be flexible, the French court also applied to the "last-shot" rule. The French court flexibility can be seen in one case[17], where the French Supreme Court decided that the contract was concluded under the buyer's terms. In that case, the seller made an offer under his standard terms which contained in bold and striking letters selection the forum clause. The forum clause chosen by the seller is the seller's domicile. The buyer accepted the offer referring to his own standards terms and contained a different forum clause. The buyer's clause was found at the back of the acceptance in fine print. The French Supreme Court found that the two forum clauses were in conflict and irreconcilable. Under the "knock-out" rule, both the clauses would knock each other out. However, the Court held that the seller's forum of choice prevail and becomes part of the

[14] Giesela Ruhl, The Battle of the Forms : Comparative and Economic Observations, page 13
[15] January 9, 2002 [VIII ZR 304/00]
[16] Giesela Ruhl, The Battle of the Forms : Comparative and Economic Observations, page 17
[17] Ibid, page 18

contract since it was written in bold and striking form, in contrast to the buyer's forum selection clause which was written only in fine print.

From the above we can see at a glance the different legal systems different ways in solving the "battle of forms" problems. In the Common law, the "battle of forms" problem is solved through the traditional system of offer and acceptance (the "mirror image" rule) and the application of the "last shot" rule. Both the application offers a mechanically arbitrary solution.[18] United States, German and the French court although favored the "knock-out" approach, also applied the "last-shot rule" but with some minor modifications i.e. not following the strict "mirror-image" rule.

In the meantime, the "knock-out" rule applied by the German and the French offers better solutions to solving the "battle of forms" problem, such as it offers a more neutral result if compared to the "last-shot" rule which causes ping-pong or sending over standard forms between parties, bad faith in opting out of the contract and "all or nothing" mechanical result.[19] Secondly the "knock-out" rule by the German and the French court is better suited for the business since it overlooks the differences on the terms and conditions in the contract and focus on the "deal is on" philosophy.

The application of the "knock-out" rule is favored now by most of the legal system since it's more effective than the "last-shot" rule, except for United Kingdom which prefers to apply the traditional approach.

Although the "knock-out" rule is preferred, there is still one problem that exists, wherein once the different or conflict clauses are knocked out, the "neutral result" offered by the background law or substantive law which will take control may not go in line with the intention of the parties to the disputed contract. For example, German contract law is different with the French contract law when it comes to warranty issues.

Thus the "battle of forms" rules approach only seeks to solve which terms and conditions prevail i.e. is it of the seller or the buyer and still at the end of the day, there will be a losing party. In the economic or businesses view point, solutions should provide a win-win situation and does this approach promote economic effectiveness and efficiencies to both parties? (I.e. the buyer and seller)

3. The Unification at the International Level and its Effectiveness

With the development of international trade and the liberalization and open market by almost economies worldwide, there is a call by the businesses to governments and international organizations to facilitate the smoothness of international commercial businesses by reducing

[18] Nguyen Trung Nam, Future of Harmonization and Unification in Contract Law Regarding "Battle of Forms", page 9, 2009
[19] ibid

international transactions resources costs and other trade and legal barriers. One of the ways is to create a uniform private commercial international law. The benefit of having a uniform private commercial international law will decrease the legal inherent risks in transacting business on an international scale and consequently will create more profitability in international trade.[20]

Great efforts were being made by international organization such as the World Trade Organization (WTO), United Nations Commission on International Commercial Trade Law (UNICITRAL), and International Institute for the Unification of Private Law (UNIDROIT) and other international organizations to create uniform private international laws. In relation with the "battle of forms" problem, academicians observed that the general conditions (the general terms such as Lex Mercatoria) are used often in international trade and therefore it is appropriate that issues pertaining to it are solved at the international level than at the national level.[21]

One of the advocates for the project for unifying the law of international trade, Mr. Earnst Rabel maintains that:

> the law should provide an infrastructure for standard form of contracts. By filling in the gaps, it would unify the mandatory law which could not be touched by the standard form contracts; it would suppress the differences in interpretation of standard form contracts due to different mentalities of various national legislators; it would be useful for the law of standard form contracts, it would influence arbitration and it would be useful as a general law, as opposed to the diversities of national legislation. [22]

Two international instruments will be discussed with relation to the "'battle of forms" problems which are the United Nations Convention on the International Sales of Goods (CISG) and the UNIDROIT Principles of International Commercial Contracts (UNIDROIT Principles). We will find out the underlying rule that is applied by these two instruments when solving the "battle of forms" problem and whether it's objective to provide a uniform solution is achievable.

(a) United Nations Convention on the International Sales of Goods (CISG)

CISG is a convention that was created by the United Nations Commission on International Trade Law. It was adopted by a diplomatic conference on 11 April 1980. The objective of CISG is to establish a comprehensive code of legal rules governing the formation of contracts for the international sale of goods, the obligations of buyer and seller and provide remedies for breach of contract and other aspects of the commercial contract. [23]

[20] Ibid, page 11
[21] Ibid, page 11
[22] Ibid, page 11
[23] United Nations Convention on Contracts for the International Sale of Goods

How does CISG solve the "battle of form" problem? What rule does it apply? Since CISG is a combination of the common and civil law of contract, we can see the combination of those rules in Article 19 CISG. Under Article 19 (1) CISG, the formation of a contract followed the general rules of offer and acceptance under the English law. However, Article 19 (2) CISG deviate or is slightly different from the strict "mirror-image" rule as per the traditional contract formation under the English law. Under Article 19 (2) CISG, a reply that purports to be an acceptance but that contains additional or different terms, is an acceptance notwithstanding the modification provided that it does not materially change the terms of the offer. Meanwhile Article 19 (3) CISG provides a list of matters that are materials to the contract.

In the "battle of forms" problem, if a contract is said to be formed by virtue of Article 19 (2) CISG, what is then the solution if the terms under the forms is in conflict and the conflict are material to the contract? In this situation, scholars argue generally Article 19 (2) will be able to solve the "battle of form" problem by applying the "last-shot" rule wherein the contract in dispute will be governed by the terms of the counter-offer.[24]

However, that is not the case. One of the problems faced by CISG in solving "battle of forms" problem is the divergent interpretation by the different courts. This is due to the member states that rectify CISG adopting CISG model into the states domestic law and modelling CISG to suit the member states domestic law. Of course there are many positive effects by adopting CISG in the states domestic law, however, one of the negative effects of doing so, is that CISG is interpreted differently from each member states courts and eventually, the objective of CISG to provide a uniform solution to the "battle of forms" problem is hampered.

The divergent interpretation of Article 19 CISG can be seen for example, in the **United States** case of ***Magellan International Corporation v Salzgitter Handel GMBH***[25], the court had applied the strict "mirror-image" rule and the "last-shot" rule in order to solve the "battle of form" problem in this case. The brief facts of the case are as follows where Magellan, a United States distributor had entered into a negotiations and agreed with a German trade ie Salzgitter. The contract was on the purchase of steel bars. Salzgitter however, made a counter-offer to Magellan by asking Magellan to modify the letter of credit issued for payment but Magellan refused to do so. Hence, Salzgitter threatened not to perform its contractual obligations. Nevertheless a dispute arose and the court held that CISG was the law governing the dispute. The court held that there was a contract as Magellan's order amounted to an offer whereas Salzgitter's purported acceptance which laid down some price adjustment are to be considered as a counter-offer. The contract was concluded when Magellan accepted the counter-offer by issuing the letter of credit.

However, in the **German** courts, the approach taken by the German courts when solving the "battle of forms" problem through CISG is different whereby the German court prefers to

[24] Nguyen Trung Nam, Future of Harmonization and Unification in Contract Law Regarding "Battle of Forms", page 15, 2009
[25] United States District Court for the Northern District of Illinois, Eastern Division

apply the "knock-out" rule.[26] This can be illustrated from the case of involving the sale of a Knitwear by an Italian seller to a German buyer. The parties had concluded a contract on essential terms but each relied on its standards terms which contained a conflicting choice of law clause. Under Article 19 (1) CISG, strictly there is no contract concluded. The German court however held that a contract was formed as the parties have started performance which showed their intention to be bound by it including the terms which have the common substance that they had already agree upon. Meanwhile the conflicting term i.e. the choice of law clause is excluded as they have knocked each other out.

The French court and the Australia courts also prefer to apply the "knock-out" rule when interpreting Article 19 CISG in the "battle of forms" problem.

Besides the different interpretation given on Article 19 CISG by the different courts, there is also another problem that have limited CISG application and influence in the international sales and harmonization of the "battle of forms", which is under Article 6, Article 92 and Article 93 CISG.[27]

Article 6, 92 and 93 CISG allows member states to opt out i.e.to contract out of CISG. By opting out of the application of the CISG, the contracting parties will resort to apply their domestic law which will have the potential of getting back to square one when it comes to the "battle of forms" problem.

Eventually, the obvious implication of the divergent interpretation by the different courts and opting out options given to member states and parties will eventually defeat the objective of CISG to create a uniform set of commercial laws at the international level.

(b) UNIDRIOT Principles of International Commercial Contracts

In 1971, the Governing Council decided to elaborate further on the international commercial custom (for example the model clauses and contracts) that was based on the current trade practices.[28]

Hence, a small steering Committee i.e. Prof. Renee David, Clive M. Schmittoff & Tudor Popescu representing the Civil Law, Common Law & Socialist system was set up for feasibility study.

In 1980:- a special Working Group was constituted to draft the various chapters of the Principles. The working group included representatives of all the major legal systems of the world, and composed of leading experts in the field of contract and international trade law.

[26] Nguyen Trung Nam, Future of Harmonization and Unification in Contract Law Regarding "Battle of Forms", page 16, 2009
[27] United Nations International Convention Sales of Goods, 1980.
[28] UNIDROIT Principles of International Commercial Contracts 2010

The objective of the UNIDROIT Principles[29]:-

i. To establish a balanced set of rules designed for use throughout the world irrespective the legal traditions and the economic and political conditions of the countries in which they are to be applied; and

ii. To ensure fairness in international commercial relations by emphasizing the principles of good faith and fair dealing.

With regards to the "battle of form" problem solving, the UNIDROIT Principles have adopted the "knock-out" rule and this can be seen under Article 2.22.[30] Article 2.22 UNIDROIT Principles provides that where both parties uses standard terms and reach an agreement except on those conflict terms, a contract is formed and on the basis of the agreed terms, unless one party clearly indicates without undue delay that it does not intend to be bound by such a contract. This shows that the UNIDROIT Principles is more relaxed than CISG when it comes to contract formation.

The only set-back pertaining to the UNIDRIOT Principles in international disputes on the "battle of forms" problem is that firstly, the UNIDROIT Principles does not provide solution on how to fill the gaps in the contract caused by elimination of the differing terms as Article 2.19 is silent. While secondly, although it is said that the UNIDROIT Principles are also to be used as a tool to fill in the gaps left by CISG, it is yet to be proven successful. This is because both of the two international instruments adopt different solutions in the "battle of forms" problems, where it can be seen that CISG generally adopted the "last-shot" rule and also depends on each member states interpretation while the UNIDROIT Principles adopted the "knock-out" rule.[31]

In the meantime, the UNIDROIT Principles, although it's being drafted to reflect the concepts of contract law from different legal system, it does not however have a legal binding effect. In other words it does not have a treaty or convention effect.

The international commercial and sales transaction is expanding day by day and is increasing with the states especially the developing states adopting and implementing trade liberalization and entering into free trade agreements. Then there are also the on-line sales transactions.

Does the rules i.e. the "last-shot" rules and the "knock-out" rules (whether interpreted through domestic law or through CISG or the UNIDROIT Principles) provide an effective and economic solution for businesses?

4. Comparative Efficiency of the Competing Approaches

[29] Ibid
[30] Giesela Ruhl, The Battle of the Forms : Comparative and Economic Observations, page 19
[31] Nguyen Trung Nam, Future of Harmonization and Unification in Contract Law Regarding "Battle of Forms", page 18, 2009

One of the perspective that we should also consider is whether the rules i.e. the "last-shot" rules or the "knock-out" rules promotes economic efficiency. Were the rules able to provide solution acceptable from the economic viewpoint? Efficiency happens when there is a balance, so basically with regards to the seller and buyer different terms and conditions, efficiency happens when both terms create a win-win situation and not one party losing out to another.

Below section will highlight whether the "last-shot" rules or the "knock-out" rules provides an efficient solution from the economic view point:-

(a) The "Last-Shot" Rule

To re-cap, the application of the "last-shot" rule to the "battle of forms" problem, is the terms that will govern the forms or contract will be the last party that fired the last shot or the last party that issued out the terms.

As Lord Denning observed in the case of ***Butler Machine Tool Co., Ltd. V. Ex-Cell-O Corp (England) Ltd***[32], the contract in dispute might be governed by the terms of the last form, and the terms of the first form sent or the reconcilable terms if both forms. Does the application of the "last-shot" rule provide a win-win situation for both parties?

From the above, some critics argued that the solutions are too mechanical[33]:-

i. It does not encourage mutual agreements between parties;

ii. The solution does not provide a win-win situation to the businesses and it which it allows a winner takes all approach (for example, it ignore the business expectation);

iii. It does not appreciate the intentions of the businesses i.e. the meeting of mind between the merchants;

iv. Waste of resources and incurs high transaction costs;

v. Waste valuable time wherein it encourages parties to over-flooded each other with standard forms and keep sending over to ensure that the last party terms will prevail; and

vi. Allowing a party to contract out or opt out the contract in bad faith (for example, it favors denial of the existence of a contract until performance takes place).

[32] 1 WLR 401, 404-05 (1979)

[33] Nguyen Trung Nam, Future of Harmonization and Unification in Contract Law Regarding "Battle of Forms", page 6, 2009 & Giesela Ruhl, The Battle of the Forms : Comparative and Economic Observations, page 22

To elaborate why the last shot rule does not promote economic efficiency, for example under the first point i.e. not encouraging mutual agreements between parties. From the economic viewpoint, a contract should have terms that are mutually agreed between parties so that it can maximize the welfares of both parties.

By applying the "last-shot" application, a contract will only be formed if the acceptance is in conforming to the offer. If there is any counter-offer, the contract is not formed although parties might have agreed on other terms and wants to be contractually bound. Because of that, parties cannot move on until there is performance and delivery.

Another second example is that application of the "last-shot" rule does not promote low transaction costs. The exchanging of the forms over and over again provides incentives to the parties to keep sending the forms because they know that if their forms are the last one, their favorable terms will govern the contract and possibly the said terms are not efficient for the other party. For instance, about assignment of risks, maybe the risks before delivery should be with the seller since the seller can prevent the risk at a lower cost than the buyer, but if risks are assigned to the buyer before delivery, then there is no maximize of joint profit between parties.

As mentioned by **Ronald Coase**[34]in his article, ***The Problem of Social Costs***, he wrote:- *"that an efficient allocation of resources will result from private bargaining regardless of the initial assignment of rights if transaction costs are zero or low. It is therefore the economic function of contract law to promote voluntary exchange by keeping transactions costs as low as possible."*

(b) The "Knock-Out" Rule:-

The "knock-out" rule however does not have so much of economic disadvantage unlike the "last-shot" rule. This is because it provides that a contract will still come into existence although the offer and acceptance does not match each other. As long as parties indicate that they want to be contractually bound, the contract exists.
However the "knock-out" rule once it is being applied will create a neutral situation, which the default rules of the law will apply.[35] The default rules might not provide the most efficient solution to the problem, for example both parties' standard terms contains a clause providing notice in case of non-conformity of goods; one clause states that the notice has to be given two months while the other provides that notices to give is two months and fifteen days. Under the "knock-out" rule, the contradictory clauses knock each other and are replaced by the default rules of the applicable law. Some national law provides that a notice period is less than two months, wherein the application of the default rules in the contract is against the will of both parties.

[34] Giesela Ruhl, The Battle of the Forms : Comparative and Economic Observations, page 24
[35] Ibid, page 31

To conclude, the "last-shot" rule does not really promote economic efficiency for both parties while the "knock-out" rule partly promotes economic efficiency for both parties, for example, it does not encourage extensive exchange of documents.

If that is the situation, is there any other rule or approach that can promote economic efficiency when it comes to solving "battle of forms" problems.

5. **An Alternative Approach**

There is an alternative solution that is proposed by Victor Goldberg[36] known as the "best-shot" rule. Under the proposed rule, a contract comes into existence even if the offer and acceptance does not match. If the parties actually want to be contractually bound, a contract is formed. In determining the contract terms when it comes to the solving of the "battle of forms" problems, the court will choose the standard form that has the most efficient terms based on its overall efficiency. The court cannot concoct its own reasonable compromise and devise a third option, instead the court must choose one of the two forms. This approach resembles the final-offer arbitration that is often used in labor bargaining to determine salaries, in which the judge must consider which position which is close to the ideal solution.

To make it possible, the parties need incentives to draft terms that is less serving to the drafter. The terms should be drafted to bring joint benefits to the businesses. Under the proposed rule, the process taken by the judge to determine which of the forms has reasonable terms, the court will break down the terms into different matters such as warranties, remedies and forum selection. The "best shot" or also known as the "reasonable shot" is different from the "knock-out" rule, wherein the "knock-out" rule knocks out the contradicting terms and is replaced with the background law whereas under the "best-shot" rule by selecting issue-by-issue procedure, the contract will be governed with the combination of the different terms from both parties that has the most efficient terms.

Since the "best-shot" rule will be able to reduce the potential of rejection of proposed terms by parties and it also encourages the court to choose terms that is reasonable and efficient to both parties, this will be an incentive for parties to draft terms that is not one-sided and bring joint benefits for the parties. Meanwhile, a term is said to bring efficiency to parties when the drafted terms is able to increase the overall-value of the transaction or whether the terms brings a cost-saving effect to the parties.[37]

To illustrate the application of the "best-shot" rule, we can try hypothetically to apply in "duration of warranty" terms. In the case of **Northrop Corp. v. Litronic Industries**, the forms both parties disagreed were over duration of the warranty for the warranty boards. The seller's form provides warranty for three months whereas the buyer form contained warranty with no limit. The buyer first inspected the goods after six months, and upon discovering the defects, the

[36] Omri Ben Shahar, An Ex-Ante View of the Battle of the Forms : Inducing parties to draft reasonable terms, page 3
[37] Ibid, page 16

buyer rejected the goods and sought remedies. The court knocked out the discrepancies warranty terms and filled the gap with a warranty for a "reasonable time." The court in this case did not have to designate a specific duration as the most reasonable time, it merely decides that the six months it took the buyer to invoke the warranty is reasonable and thus the buyer won.

However under the "best-shot" rule, the court would have likely reached a different solution. The court will not need to designate duration for the warranty. The court would only need to determine which of the two terms is more reasonable based on the facts of the case. By comparing the efficiency of the warranty terms, the most reasonable warranty terms will be the warranty for three months as it is unreasonable if the warranty is unlimited and for a life-time.[38]

The "best-shot" rule if properly worked will be able to reduce transaction costs,[39]for example there will be less exchange of forms between parties and less wastage on useful resources such as time.

6. Conclusion

In the foregoing, this paper first identifies how the different legal systems throughout the world deal with the issue of "battle of the forms." It discusses about the different rules i.e. the "last-shot" rules and the "knock-out" rules applied and interpreted by the different legal frameworks i.e. under the common law system and the civil law system. The application of the two rules was displayed through interpreting the domestic law which shows the non-uniformity of the interpretation of the two rules. From an international business viewpoint, the non-uniformity creates unnecessary hardship and wastage of resources and valuable time. Second, it discusses steps taken to unify and harmonize the differences of the approach at the international level. It focuses on two international instruments that were introduced to harmonize the formation and workings of an international commercial contract for the purpose of facilitating the difficulties faced by the businesses. It also highlights the application of the two rules through the lens of the CISG and the UNIDROIT Principles and the problems faced by the two international instruments in solving the "battle of forms" problems. Then, it attempts to determine which of the two rules i.e. the "last-shot" rules or the "knock-out" rules can promote economic efficiency for businesses. The last section provides an alternative solution to the two rules, which termed as the "best shot" rule or "reasonable shot" rule.

As seen above, the "knock-out" rule is more preferred approach in the civil law system such as German and French. American courts also prefer to use the "knock-out" rule. On the other hand, U.K. courts still prefer with the application of the "last-shot rules." The "knock-out" rule is preferred due to its flexibility. It recognizes the formation of a contract although the offer and acceptance do not conform to each other. However, the problem associated with both rules

[38] Ibid, page 18

[39] Giesela Ruhl, The Battle of the Forms : Comparative and Economic Observations, page 35

(knock-out and last-shot rules) they are interpreted through domestic law. As such neither of them can bring uniformity at the international level since the national systems are different.

At the same time, the international instruments, namely CISG and UNIDROIT Principles, which seem to have taken the knock-out approach, have not met the expectation of international legal harmony in this respect either due to their divergent interpretations given by the different courts in the different legal jurisdictions. The divergence also take place due to "an opt-out" provision i.e. Article 19 (1) of CISG and the non-binding effect of the UNIDROIT Principles.

However from the economic viewpoint, does the application of the two rules promote efficiency for the parties? Based on the discussion in section three, the "last-shot" rules is not able to promote efficiency for seller and buyer and from the economic viewpoint, it does not encourage the creation of a mutual agreement which leads to high transactions costs. A high cost does not give a positive impact to businesses.

Meanwhile, the "knock-out" rule does promote partial efficiency for the seller and buyer in which it does not encourage extensive exchange of standard forms. The only setback is that once the contradicting terms have been knocked out, there will be a neutral situation and the background law of the contract will comes into the picture. The argument here is that sometimes, the background law of the contract does not meet the intention of the contracting parties, hence there is no win-win solution accorded to the parties.

To overcome the issue of non-efficiency, there is an alternative rule that is proposed which is known as the "best-shot" rule. Although it is hypothetical and not really implemented by the courts, it is argued that the application of the rule will bring economic efficiency for the seller and buyer. The "best-shot" rule will require the court not to replace the conflicting terms but to choose which of the conflicting terms provides a reasonable solution to the issue at hand. With this incentive, parties will draft the terms of their standard forms more reasonably and more favorable to the other party.

However, the above "best-shot" rule has yet to be tested on its effectiveness. Between the "last-shot" rule and the "knock-out" rule, in my opinion, the "knock-out" rule is better at promoting economic efficiency for parties because it saves a lot of time and hassle for businesses to recognize a contract.

I would like to suggest that in order to avoid the application of the background law of the contract to set in, the ideal approach is for parties to use the standard forms provided by the international organizations such as the standard forms provided by the International Chamber of Commerce or the standard forms by the United Nations Commission on International Trade Law (UNICITRAL). In addition to also insert the international arbitration clause which will give the right for the international arbitration bodies to arbitrate the "battle of forms" problem. The international arbitrators will surely give an international interpretation on the "knock-out" rule which I believe will bring economic efficiency to both the seller and the buyer. For example, when solving the "battle of forms" problem through the application of CISG, to give the CISG

interpretation as provided under Article 7 of CISG i.e. an international interpretation and not through domestic interpretation technique.