The Battle of Forms: Towards a Uniform Solution

E H Hondius and Ch Mahé

1 Introduction

The problem of conflicting general conditions of contract is one of those questions which frequently give rise to discussions among both academics and practitioners. The problem does not appear to generate much litigation. But even if the contracting parties do not resort to litigation, they may be interested in the question which general conditions — if any — do apply.

In its most simple form, the problem arises when A sends B an offer with a reference to A's general conditions of sale and B accepts A's offer with a reference to B's general buying conditions. Both references are customarily printed on the letter paper used by A and B. The terms of the general conditions of A and B will often be at variance with one another.

The problem is exacerbated by the incorporation of terms purporting to make the general conditions of one party prevail over those of the other; hence the term 'battle of forms'.

In the absence of specific legislation, this problem is usually dealt with by the general law on formation of contract. Indeed, the law of various jurisdictions does contain solutions for the battle of the forms. These classical solutions are not always in line with present-day legal thinking. This also counts for the more specific solution which the Dutch Civil Code has adopted for the problem (see Section 2 of this article). The Uniform Commercial Code initially endorsed a classical approach to battle of forms dispute resolution, but this solution is now subject to criticism. French case law has developed a pragmatic solution since the beginning of this century (Section 3).

Since general conditions are often used in international trade, it would seem appropriate that the solution is sought on an international rather than a national level. Having taken a look at art 19 of the Vienna Sales Convention (Section 4), this article will examine how two new international instruments, UNIDROIT's Principles of International Commercial Contracts[1] and the Principles of European Contract Law of the Lando Commission[2] purport to develop a new rule, the 'knock out rule' (Section 5). This rule and its exceptions are then worked out in Sections 6–10, before some conclusions are arrived at in Section 12.

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1 Unidroit, Principles of International Commercial Contracts, Rome 1994 (also available in Dutch, French, German, Italian, Spanish and other languages). See M P Furmston (1996) 10 *JCL* 11-20 and Michael Joachim Bonell, *An International Restatement of Contract Law/The UNIDROIT Principles of International Commercial Contracts*, 2nd ed, Transnational Publishers, Irvington, New York, 1997.

2 *The European Principles of Contract Law*, 2nd edition completed, (to be published).

2 Classical Solutions: the Last Shot and First Blow Doctrines

Traditional legal thinking with regard to conflicting general conditions is exemplified by German law. When A refers to his general conditions and B in turn refers to his own, then B's answer is not an acceptance but a refusal of A's offer. Mere silence on the part of B does not constitute acceptance[3]. When A, however, acts upon the contract by accepting the commodities he ordered, there is a contract, on the basis of B's general conditions[4]. This is the 'Prinzip des letzten Wortes'.[5]

Although the last shot doctrine is perhaps the most widespread answer to the question of conflicting general conditions, it is not the only one. A famous case, which highlights the existence of an alternative solution is the English case *Butler Machine Tool Co Ltd v Ex-Cell-O Corporation (England) Ltd.* Here, Lord Denning observes the following:[6]

> 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. . . . 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.

The lower court judge had indeed applied the first blow doctrine, but Lord Denning in this case prefers the last shot theory. However, the first blow doctrine has gained some popularity in the Netherlands, where art 6:225 (3) of the (new) Civil Code reads:

> Where offer and acceptance refer to different general conditions, the second reference is without effect, unless it explicitly rejects the applicability of the general conditions as indicated in the first reference.

This begs the question what is the meaning of 'explicitly'.

3 A Third Approach: the Knock Out Theory

There is also another approach possible. It has already been suggested by Lord Denning in the *Butler* case:[7]

> 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.

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3 BGH Juristen Zeitung 1997, 602.
4 BGHZ 61, 282, 287.
5 Manfred Wolf, Norbert Horn, Walter F Lindacher, *AGB-Gesetz*, 3d ed, München, 1994, p 126.
6 [1979] 1 All ER 965 (CA).
7 [1979] 1 All ER 965 (CA).

In the United States, it has been suggested that the Uniform Commercial Code's s 2-207 (3) be amended to incorporate the knock out rule. Those terms on which the parties have reached agreement would constitute the contract. If those terms are crucial then there is a valid contract. Conflicting conditions would knock out one another; their place would be taken by the UCC and by commercial usages.[8]

As early as 1912, French case law also opted for the knock out theory.[9] In a case where A and B's general conditions appointed, in similar terms, two different courts, these provisions were struck through to let the general rule apply. The court gave the following argument for its decision:[10]

> A reference inserted by the seller in small print on his stationery which attributes jurisdication to the court of his domicile, may not be presumed to have been accepted by the buyer, when the buyer's stationery contains an identical clause in favour of the buyer's domicile.

French case law has later somewhat modified this rule.[11] When conflicting standard terms are not strictly contradictory as to their subject-matter and formulation, the provision which was stipulated most explicitly shall prevail. This approach has been characterised as the 'loudest shout' theory. Still, its practical impact has been debated when applied to standard terms aiming at the exclusive application of one party's general conditions.

4 International Solutions: the Vienna Sales Convention

General conditions of contract are frequently used in international commercial transactions. Therefore it would seem appropriate that international legal instruments, such as the Convention on the International Sale of Goods, contain rules to deal with the problem of conflicting general conditions.

Unfortunately, the Vienna Sales Convention does not provide us with a solution. In the absence of specific rules, the general part on formation will have to be applied. Article 19 reads:

> 1 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.
> 2 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

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8 A T Von Mehren, 'The "Battle of the Forms": A Comparative View' 38 *American Journal of Comparative Law* (1990) 286; M E Roszkowski, 'Ending the Battle of Forms: A Proposed Revision of UCC Section 2-207' 26 *Uniform Commercial Code Law Journal* 144, 155 (1993); M E Roszkowski, 'Revised Article 2 of the Uniform Commercial Code — Section By Section Comparison With the 1990 Official Text' 30 *Uniform Commercial Code Law Journal* 206–8 (1998); J Sperling, 'Battle of the forms: een vergelijking tussen Amerikaans en Nederlands recht', *Nederlands Tijdschrift voor Burgerlijk Recht* 1995, 10, 12.

9 This did not prevent lower courts deciding otherwise and applying the last shot theory, see eg Paris, 6 mai 1932 G P 1932 (2e sem) pp 298–9.

10 Req 24 juin 1912, D P I jurisprudence p 363; Req 5 février 1934, G P 1934 (1er sem) jurisprudence pp 638–9.

11 Civ 16 novembre 1961, D 1962 jurisprudence pp 420–1. See also Colmar 22 janvier 1932, G P 1932 (2e sem) jurisprudence p 300.

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 object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.
3 Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.

Application of this general rule leaves open two important questions: (i) do the other general conditions 'materially alter the terms of the offer' and is there a contract or not if they do, and (ii) if there is a contract, which general conditions prevail?[12]

5 The 'Knock Out' Rule of the Principles

It has been proposed that the rules on conflicting general conditions, which are contained in the Unidroit Principles be included in the Principles of European Contract Law, read as follows:

Unidroit Article 2.22

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.

There is also the Commission for European Contract Law, or the Lando Commission as it is better known.[13]

Article 2:209 European Principles

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

In the following paragraphs, the various elements of these various proposals will be discussed.

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12 See for criticism of Article 19: E A Farnsworth, in C M Biance, M J Bonell, *Commentary on the International Sales Law/The 1980 Vienna Sales Convention*, Milan 1987, pp 175–184; Karl H Neumayer, 'Das Wiener Kaufrecht bereinkommen und die sogenannte "Battle of Forms"' in *Festschrift Hans Giger*, Bern 1989, pp 501–26.

13 There is an abundance of articles on the work of this Commission — see among others O Lando, 'Is codification needed in Europe? Principles of European Contract Law and the Relationship to Dutch Law', 1 *European Review of Private Law* 157–170 (1993).

First, the scope of the proposed rule will be treated (Section 6). Next, the two questions to be decided will be addressed: is there a contract, and if yes, which — if any — general conditions do apply (Sections 7–8). Then an exception to the general rules of offer and acceptance will be discussed (Section 9), followed by a discussion of its application (Section 10). Finally, having given some thoughts to the status of the Principles (Section 11), some conclusions will be given (Section 12).

6 Scope of the Rule of the Principles

The rule of the Principles does not purport to cover all situations in which conflicting general conditions of contract are at stake. First, the rule only works when it has been established that either general conditions would have been applicable, were it not for the fact that the other party refers to his own general conditions. In other words: if A's general conditions would not have been deemed to be incorporated into the contract anyway, for instance, because A has not adequately drawn B's attention to A's conditions, the proposed rule does not come into operation.

Second, when the parties have agreed that the general conditions of either will govern their contract, this agreement prevails over the proposed rule. This may be the case when the parties have signed a document to be treated as the contract providing for the applicable standard term(s), and in previous correspondence one of the parties has referred to other general conditions of contract than those mentioned in the signed document.

This may be illustrated by the following example. A sends B a draft contract which provides that any dispute between the parties will be submitted to an arbitrator. The name of the arbitrator is left blank. B sends the draft back to A with his signature and the insertion of the name of an arbitrator. In this case the signed contract prevails over the earlier draft. The arbitration clause applies and the dispute should be submitted to the arbitrator named by B.[14]

These are not the only cases in which the rule should not apply. The rich case law offers other examples of situations where the ordinary rules on offer and acceptance should prevail.

7 The Existence of the Contract

The rule provided by both Principles deals with two questions. The first question is whether or not there is a contract. The rule suggests as a main solution that there is a contract. Although this may at first sight appear to be an exception to the general principles of offer and acceptance, the practical result is not much different from the application of these principles. Under these general principles, B's acceptance would be deemed (i) a rejection of A's offer and (ii) a counter offer. A contract will be deemed to be formed when A reacts not in writing but by executing the contract and thereby accepting B's counter offer. Under the rule of the Principles, this will also be the case. The one difference will be the case where the contract is not executed within a short time. In such case, application of the general principles would lead to the

14 (1877) 2 App Cas 666.

conclusion that there is no contract, whereas under the Principles there is a contract. Under the general principles, A will not be in any hurry to decide whether or not to execute the contract, whereas under the proposed rule he will have to inform B without undue delay that he does not intend to be bound.

Although the Unidroit and Lando Commission's Principles present strong similarities, they seem to differ on one point: the effect, on the existence of the contract, of a party's declared intention to contract only on its own standard form. Thereby, the party indeed rejects in advance the application of both parties' general conditions insofar as these are common in substance. According to the Unidroit Principles, this does not threaten the existence of the contract, whereas application of the Principles of the Lando Commission would lead to the opposite conclusion. The following case should illustrate this difference.

R orders from B specific equipment. Therefore he uses an order form. This form states among other non-standard provisions that he intends to contract on the sole basis of his 'standard terms for purchase' printed on the reverse side of the order form. B accepts this proposal by returning an acknowledgement of order to which his own standard terms are attached. Where the Unidroit Principles apply, R's non-standard provision would be understood as a rejection of the knock out rule set out in the first part of art 2.22. A contract would be concluded and only R's general conditions would apply to it — to the extent that B, in his turn, would not react without undue delay. The Lando Principles lead one to suppose that R's statement results in the non-existence of the contract (see art 2:209 al 2).

8 The Applicable General Conditions

The second question arises only when a contract is deemed to exist. The question then is: which general conditions prevail. Until recently, most jurisdictions would answer the question along the line of the following one: the acceptance by A of B's counter offer extends to B's general conditions. This 'last shot' theory is counterbalanced by the so-called 'first blow' theory sometimes found in case law and advocated in legal writing. Yet another approach is to find out first whether there is a conflict between the two sets of general conditions at all. It may be that A's general conditions contain valuable technical specifications of the goods or services to be supplied or performed by A. In such case, they may not be deemed to be at variance with the general conditions of B, which do not contain any clauses on this point. The rule set out in the Principles provides an opening for this theory by limiting the rule's second paragraph to conflicting general conditions to the extent that they are not common in substance.

Still, the principal solution of this second question, set out in the rule, is that the conflicting general conditions do not become part of the contract. The basic idea of this solution is that both A and B, by referring to their own general conditions, should be deemed not to accept tacitly the general conditions of the other party. A practical argument in favour of this solution, which has been applied in several jurisdictions for some time, is that it often seems rather coincidental which party last refers to his general conditions of contract.

Another example may illustrate this. P delivers a consignment of whisky to Q for storage in a warehouse. P's driver brings a delivery note purporting to incorporate P's conditions of carriage (first shot). The delivery note is rubber stamped by Q with the words 'received under Q's conditions' (second shot). The delivery note, thus converted into a receipt, is handed back to the driver who brings her load into the warehouse. Neither P's, nor Q's conditions apply.[15]

The terminology 'common in substance' includes identical terms in general conditions. It has not been considered necessary to mention identical terms explicitly. What is 'common in substance' will not always be easy to answer.

A case which may illustrate the problems is the following. A sends B a draft contract which provides that any dispute between the parties will be submitted to arbitration in London. B sends A a letter accepting the offer. In her letter B includes a clause submitting all disputes to arbitration in Stockholm. Although offer and acceptance have in common that they both refer to arbitration, yet the clauses concerned are not 'common in substance' and, accordingly, neither of the clauses will be applied. This is one point of view. Another, equally defensible point leads to the opposite result. It is that both clauses are common in substance and that it is up to a court to indicate the place of arbitration.

9 Exceptions to the Main Rules

Both the Unidroit Principles and the European Principles contain a way out as to the question whether or not a contract comes into existence. A party who does not wish to be bound as set out above, may indicate so either in advance, or later.

In the former case, this should be indicated explicitly and not by way of general conditions of contract. If it could be done by general conditions of contract, the first part of the proposed rule might in practice be eroded very easily.

In the latter case, such party should inform the other without undue delay. Here we see a difference with the application of the general principles of offer and acceptance under which there is no obligation for such party to inform the other party without undue delay.

10 Application of the Proposed Rule

The 'battle of forms' will not be abated by the provisions set out in the Principles. Nor will the proposed rule provide a ready answer to the many questions raised in this context. Its most obvious drawbacks are (i) that they distinguish general conditions of contract from other terms and conditions, and (ii) that they introduce new distinctions, such as 'common in substance'. Yet, it may be estimated that the rules should provide a principle, which is more in accordance with both present commercial thinking and with prevailing ideas of good faith.

11 Status of the Principles

Before coming to some concluding remarks, the question should be raised as to the relevance of the Unidroit Principles and the European Principles.

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15 [1968] 1 All ER 811.

Neither have the status of an International Convention. They rather appear to be private initiatives. That is not quite the case. UNIDROIT is an intergovernmental organisation. The Lando Commission has been supported financially by the European Commission and a resolution of the European Parliament specifically asks the European Commission to set up a European Civil Code and to support the Lando Commission's activities. In legal writing, there now is support for the idea that the Principles may be the precursor of a lex mercatoria. In practice, the Principles have already been applied by arbitrators and been used by draftspersons of new legislation in Central and Eastern Europe.

12 Conclusion

The case of the conflicting general conditions is one which often raises questions. The problem usually arises when two companies have entered into a contract and the commercial departments of the companies have been in charge of its formation. Traditionally, courts have developed several theories to deal with this problem. Both the 'last shot' and 'first blow' doctrines are based on a mechanical theory of formation of contract. Although they may in some cases be appropriate, especially when one of the general conditions has clear precedence over the other, a better solution is provided by the Principles.

Select Bibliography[16]

J Adams, 'The Battle of Forms' (1983) *Journal of Business Law* 297–302.
C M Bianca, M J Bonell, *Commentary on the International Sales Law/The 1980 Vienna Sales Convention*, Giuffrè, Milan, 1987, pp 175–194 (E A Farnsworth).
A Boggiano, *International Standard Contracts: the Price of Fairness*, Kluwer, Dordrecht, 1991, pp 67–71.
F Delbarre, C Lavabre, 'La confrontation conditions générales de vente, conditions générales d'achat' *Revue Juridique de Droit des Affaires*, No 5, 1994, pp 380–6.
F De Ly, 'Formulierenstrijd en totstandkoming van contracten' 50 *Rechtskundig Weekblad* 1313–34 (1987).
F De Ly, J L Burggraaf, 'Battle of forms en internationale contracten', in B Wessels, T H M van Wechem (eds), *Contracteren in de internationale praktijk*, Kluwer, Deventer, 1994, 47–72.
U Drobnig, *Allgemeine Geschäftsbedingungen im internationalen Handelsverkehr*, Festschrift F A Mann, München 1977, 600–6.
H Gaudemet-Tallon, 'Le nouveau droit international privé européen des contrats', *Revue trimestrielle de droit européen* 1981, 271–4.
J Ghestin, B Desché, *Traité des contrats/La vente*, LGDJ, Paris, 1990, p 280.
E Jacobs, 'The Battle of the Forms: Standard Term Contracts in Comparative Perspective' (1985) 34 *ICLQ* 313.

16 Several hundred law review articles have dealt with conflicting general conditions of contract; this Bibliography lists only those publications which have been closely consulted in preparing this paper.

Ch Mahé, 'Conflit de conditions generales: Quelle tactique adopter' in *Molengrafica*, Koninklijke Vermande, Lelystad, 1997, 85–138.
A T von Mehren, *The Formation of Contract, International Encyclopedia of Comparative Law*, vol VII, 1992, Ch 9, pp 86–106.
M and M J Mousseron, 'Le droit français nouveau de la transparence tarifaire', *Conditions générales — Factures*, LITEC, Paris, 1993, Nos 97–107.
R Rawlings, 'The Battle of the Forms' (1979) 42 *Modern Law Review* 715–21.
P Schlechtriem, 'Die Kollision von Standardbedingungen beim Vertragsschluss' in *Festschrift Eduard Wahl*, Winter, Heidelberg, 1973.
J Sperling, 'Battle of the forms: een vergelijking tussen Amerikaans en Nederlands recht' *Nederlands Tijdschrift voor Burgerlijk Recht* 1995, 10–13.
F Vergne, 'The "Battle of the Forms" Under the 1980 United Nations Convention on Contracts for the International Sale of Goods', 33 *American Journal of Comparative Law* 233–58 (1985).
J White and R S Summers, *The Uniform Commercial Code*, St Paul, Minn, 1995, pp 5–25.
J D Wladis, 'UCC section 2-207: The Drafting History', *Business Lawyer*, 1994, vol 49(3), 1029–52.
Manfred Wolf, Norbert Horn, Walter F Lindacher, *AGB-Gesetz*, 3d ed., München 1994.