



**PACE UNIVERSITY, ELISABETH HAUB SCHOOL OF LAW
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CISG: THE “BATTLE OF THE FORMS”
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RELEVANT CISG PROVISIONS: CISG arts. 6-9, 14-19, 28, 29

I. GENERAL REMARKS

- Standard terms and boilerplate clauses are drafted by a business for *repeat future* use in commercial transactions – they are not “tailored” to a particular agreement. Should these terms be negotiated, they will no longer constitute standard terms for that particular transaction.
- Issues arising from the use of standard contract terms:
 - a. Incorporation of standardised terms into the agreement (CISG art. 8)
 - b. Validity of the incorporated standard terms (CISG arts. 4 and 7(2))
 - c. Use of conflicting standard terms (“Battle of the Forms”).

Example - Illustration

The Buyer (B) sends an order to the Seller (S) for the purchase of moveable tangible goods. This order is sent together with a copy of “B General Terms & Conditions.” In response to this order, S agrees to the order-offer of B by sending an “acceptance” letter together with a copy of “S General Terms & Conditions.” It is clear that both B and S intended to conclude a sale of goods contract. It is, also, clear that each party intended to conclude an agreement on the basis of her own standard contract terms.

Should the standard terms of the parties be identical, no issues would arise; the offer and the acceptance would be identical leading, thus, to the conclusion of the contract. However, if the standard terms differ from each other, two issues would, normally, arise: **i.** Have the parties reached an agreement? **ii.** Assuming the conclusion of an agreement, what are the terms of that agreement?

- This typical example of a “battle of the forms” scenario amplifies that:
 - The Buyer will, usually, approach the Seller for the purchase of goods;
 - Both parties used standard terms for the conclusion of the contract;
 - If a contract has already been concluded, the subsequent dispatch of standard terms raises only issues of contract modification, not contract formation.

Case-law

- ✓ United States, 10 September 2013, District Court [Pennsylvania] (*Roser Technologies, Inc. v. Carl Schreiber GmbH*), available at: <http://cisgw3.law.pace.edu/cases/130910u1.html>
- ✓ United States, 8 February 2011, Federal District Court [Maryland] (*CSS Antenna, Inc. v. Amphenol-Tuchel Electronics, GmbH*), available at: <http://cisgw3.law.pace.edu/cases/110208u1.html>
- ✓ Austria, 29 November 2005, Supreme Court, translation available at: <http://cisgw3.law.pace.edu/cases/051129a3.html>
- ✓ France, 13 December 1995, Appellate Court Paris (*ISEA Industrie v. Lu*), translation available at: <http://cisgw3.law.pace.edu/case/951213f1.html>

II. THE “BATTLE OF THE FORMS” IN LEGAL THEORY

Many approaches have been proposed to resolve the battle of the forms issue:

1. “Mirror-image” rule
2. “Last shot” rule
3. “First shot” rule
4. “Knock-out” rule
 - a. Classic “knock-out” rule
 - b. “Best shot” rule
 - c. “Reasonable shot” rule

1. The “Mirror-Image” Rule

- For the conclusion of a contract, the terms of the offer must be identical with the terms of the acceptance. Even the slightest deviation will amount to a rejection of the offer, and a simultaneous counter-offer (*cf.* notions of estoppel and the general principle of *non-venire contra factum proprium*).
- **Advantages:** The “mirror-image” rule fosters certainty with regard to the existence of a binding contract between the parties.

- **Disadvantages:** A rigid “mirror-image” rule induces bad faith conduct by the parties, particularly in the context of highly volatile markets, e.g. should the price of the goods increase, the Seller would prefer to reject the conclusion of the contract in order to sell the same goods for a higher price. Conversely, should the price decrease, the Buyer would prefer to acquire the same goods at a lower price. Furthermore, this approach would allow either party to argue for the non-formation of the contract, even after performance, or the procurement of rights to third parties.

2. The “Last Shot” Rule

- The set of contractual terms sent last in the exchange of standard terms will prevail.
- There are two possible scenarios under the “last shot” rule:
 - i. The applicable regime provides in a straightforward manner that the terms “fired” last will formulate the terms of the agreement (*see* CISG art. 19(2)); or
 - ii. The original offeror (or counter-offeror) accepts by conduct the counter-offer of the original offeree.
- Considering that the Buyer will, usually, be the first party to send her standard contract terms, the Seller will be in an advantageous position. The Buyer, instead, will have two options: **i.** reject the goods and deprive herself of the benefits of the contract, or **ii.** accept the goods under the terms of the Seller. In short, the Buyer will, always, be trapped in her own offer!
- The “last shot” approach has been criticised for this arbitrary precedence to the terms of the last-speaking party, and the complete disregard of the consensus principle.

3. The “First Shot” Rule

- The standard terms of the offeror will prevail over the “accepting terms” of the offeree.
- The offeree will have two options: **i.** reject the offer and relinquish the benefits under the contract, or **ii.** clearly reject the offer and make a separate new offer to the original offeror, referring to her own standard terms. Hence, the onus of “clearing up” the matter is put on the offeree.

4. The “Knock-Out” Rule

- The “knock-out” rule builds on the premise that the *accidentalia negotii* are of secondary importance compared to the *essentialia negotii* of the contract.
- This rule amplifies the intent of the parties to enter into a binding agreement, as it distinguishes the formation of the contract from its contents.
- Three variations of the “knock-out” rule may be distinguished:
 - i. **The classic “knock-out” rule:** The conflicting standard terms will be mutually neutralised; the remaining gaps will be filled by the default rules of the applicable law.
 - ii. **The “best shot” rule:** The standard terms of the parties will be compared, and the set of terms striking the best balance of rights and obligations of both contracting parties will be incorporated in its entirety into the sales agreement. It is clear that this approach focuses on the substance of the terms rather than the sequence of their submission, incentivising the parties to consider the interests of their counter-contracting party.
 - iii. **The “reasonable shot” rule:** This approach provides for an issue-by-issue selection of the best standard terms. Similarly to the “best shot” rule, it focuses on the substance of the terms, albeit it provides for a combination of the optimal, but not-necessarily-balanced as a whole, standard terms.

III. THE “BATTLE OF THE FORMS” & THE CISG

- Since the battle of the forms issue pertains to the formation of the sales contract, it, *prima facie*, falls within the regulatory scope of the CISG (CISG art. 4). However, absent a special rule on the use of standard contract terms, the most important question is how disputes arising from the use of standard terms by both parties should be resolved under the CISG.
- Three theories have prevailed in the CISG scholarly writings and jurisprudence on this issue:
 - 1. The issue is not governed by the CISG (CISG art. 4);
 - 2. The issue falls within the regulatory scope of the Convention, but, absent a special rule, it should be resolved in conformity with the general principles of the Convention (CISG art. 7(2));

3. The issue falls within the regulatory scope of the CISG, and should be resolved by virtue of the general rule enshrined in CISG art. 19.

1. **The “battle of the forms” is not governed by the CISG**

- This position is founded on the failure to reach an agreement during the negotiations of the CISG, as well as on a broad interpretation of “validity” issues under CISG art. 4.

2. **Absent a special rule, the “battle of the forms” should be resolved
in conformity with the general principles of the CISG**

- Absent a special rule on this issue, the battle of the forms should be resolved in conformity with the general principles of the Convention (CISG art. 7(2)).
- The general principles of good faith and consensus mandate the preservation of the contract, because the fundamental elements of a sales contract have been agreed upon by the parties. All non-agreed issues will be governed by the default rules of the CISG and, all issues falling outside the scope of the Convention will be resolved pursuant to the relevant rules of the applicable law.
- Essentially, this approach favours the application of the “knock-out” rule.

3. **The “battle of the forms” should be resolved pursuant to
the general rules of CISG art. 19**

- i. **“Classic” Approach**

- CISG art. 19 distinguishes between “material” and “immaterial” deviations from the terms of the offer.
- Should the deviating terms be “material,” the “mirror-image” rule of CISG art. 19(1) will preclude the conclusion of the contract, because the offer and the acceptance will not be identical.

- Should the deviating terms be “immaterial,” the “last shot” rule of CISG art. 19(2) will affirm the conclusion of the contract as envisaged by the offeree. However, if the original offeror objects to the conclusion of the contract on the offeree’s terms, the “mirror-image” rule of CISG art. 19(1) will be reinstated.

Case-law

CISG art. 19(1)

- ✓ United States, 18 January 2011, Federal District Court [New York] (*Hanwha Corporation v. Cedar petrochemicals, Inc.*), available at: <http://cisgw3.law.pace.edu/cases/110118u1.html>
- ✓ Italy, 21 November 2007, District Court Rovereto (*Takap B.V. v. Europlay S.r.l.*), translation available at: <http://cisgw3.law.pace.edu/cases/071121i3.html>
- ✓ France, 16 July 1998, Supreme Court (*Les Verreries de Saint Gobain v. Martinswerk*), translation available at: <http://cisgw3.law.pace.edu/cases/980716f1.html>
- ✓ Germany, 11 March 1998, Appellate Court München (*Cashmere sweaters case*), translation available at: <http://cisgw3.law.pace.edu/cases/980311g1.html>
- ✓ United States, 14 April 1992, Federal District Court [New York] (*Filanto v. Chilewich*), available at: <http://cisgw3.law.pace.edu/cases/920414u1.html>

CISG art. 19(2)

- ✓ Germany, 14 August 1991, District Court Baden-Baden (*Wall tiles case*), translation available at: <http://cisgw3.law.pace.edu/cases/910814g1.html>

ii. “Modern” Approach

- It has been maintained in both theory and case-law that, notwithstanding the use of conflicting standard terms, the parties intended to conclude a sales agreement. This indicates an implicit agreement to derogate from the rules of CISG art. 19 by virtue of CISG art. 6. This implicit agreement leaves an “internal gap” to be filled in conformity with the general

principles of the Convention, and, as a result, the issue will be resolved under the “knock-out” rule.

Case-law

- ✓ Germany, 6 October 1995, Lower Court Kehl (*Knitwear case*), translation available at: <http://cisgw3.law.pace.edu/cases/951006g1.html>
- ✓ Austria, 7 June 1990, Supreme Court (*Furniture case*), translation available at: <http://cisgw3.law.pace.edu/cases/900607a3.html>

For a mixed approach (knock-out rule & last shot rule), see:

- ✓ Germany, 24 May 2006, Appellate Court Köln (*Shock-cushioning seat case*), translation available at: <http://cisgw3.law.pace.edu/cases/060524g1.html>
- ✓ Germany, 9 January 2002, Supreme Court (*Powdered milk case*), translation available at: <http://cisgw3.law.pace.edu/cases/020109g1.html>

IV. COMPARATIVE LAW REMARKS

➤ **UNIDROIT Convention relating to a Uniform Law on the International Sale of Goods (ULIS, 1964)**

- ULIS Anx. I, art. 7 – Predecessor of CISG art. 19 (with the exception of the novel list of CISG art. 19(3))

➤ **UNIDROIT Principles of International Commercial Contracts (UPICC, 2016)**

- The general rule of contract formation enshrined in UPICC art. 2.1.11 is almost identical to CISG art. 19, albeit without the novel list of CISG art. 19(3).
- UPICC 2.1.22 enshrines a special rule on the “battle of the forms” issue providing for the “knock-out” rule.

➤ **Principles of European Contract Law (PECL, 2002)**

- The general rule of contract formation enshrined in PECL art. 2:208 is almost identical to CISG art. 19, albeit without the novel list of CISG art. 19(3).
- PECL art. 2:209 enshrines a special rule on the “battle of the forms” issue providing for the “knock-out” rule.
- Cf. PECL art. 2:209(2)(a) prohibiting “defensive incorporation clauses.”

➤ **Draft Common Frame of Reference (DCFR, 2008)**

- The general rule of contract formation enshrined in DCFR art. II. 4:208 is almost identical to CISG art. 19, albeit without the novel list of CISG art. 19(3).
- DCFR art. II. 4:209 enshrines a special rule on the “battle of the forms” issue providing for the “knock-out” rule.
- Cf. DCFR art. II. 4:209(a) prohibiting “defensive incorporation clauses.”

➤ **Draft EU Regulation on a Common European Sales Law (CESL, 2011)**

- The general rule of contract formation enshrined in CESL art. 38 is almost identical to CISG art. 19.
- CESL Annex I, art. 39 enshrines a special rule on the “battle of the forms” issue providing for the “knock-out” rule.
- Cf. CESL Annex I, art. 39(2)(a) prohibiting “defensive incorporation clauses.”

V. INDICATIVE BIBLIOGRAPHY

- **CISG Advisory Council**, *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. Available at: <http://www.cisgac.com/cisgac-opinion-no13/>
- **Cesare Massimo Bianca & Michael Joachim Bonell**, COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION, Giuffrè, 1987.
- **Michael G. Bridge**, THE INTERNATIONAL SALE OF GOODS (Third Edition), Oxford University Press, 2013.
- **Gerhard Dannemann**, *The “Battle of the Forms” and the Conflict of Laws*, in LEX MERCATORIA: ESSAYS ON INTERNATIONAL COMMERCIAL LAW IN HONOUR OF FRANCIS REYNOLDS 199 (Francis D. Rose ed.), LLP, 2000.
- **Louis F. Del Duca**, *Implementation of Contract Formation statute of Frauds, Parol Evidence, and Battle of Forms CISG provisions in Civil and Common Law countries*, 25 J. L. & Com. 133, 2005-2006.
- **Fritz Enderlein & Dietrich Maskow**, INTERNATIONAL SALES LAW, Oceana Publications, 1992.
- **Franco Ferrari**, *Article 19*, in UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) 279 (Stefan Kröll, Loukas Mistelis, & Pilar Perales Viscasillas eds.), Hart Publishing, 2011.
- **Franco Ferrari & Marco Torsello**, INTERNATIONAL SALES LAW – CISG: IN A NUTSHELL, West Academic, 2014.
- **Franco Ferrari, Harry Flechtner, & Ronald A. Brand**, THE DRAFT UNCITRAL DIGEST AND BEYOND: CASES, ANALYSIS AND UNRESOLVED ISSUES IN THE U.N. SALES CONVENTION, Sellier. European Law Publishers, 2004.
- **Clayton P. Gillette & Steven D. Walt**, THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS: PRACTICE AND THEORY (Second Edition), Cambridge University Press, 2016.
- **John O. Honnold & Harry M. Flechtner**, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION (Fourth Edition), Kluwer Law International, 2009.
- **Peter Huber & Alastair Mullis**, THE CISG: A NEW TEXTBOOK FOR STUDENTS AND PRACTITIONERS, Sellier. European Law Publishers, 2007.
- **Sonja A. Kruisinga**, *Incorporation of Standard Terms According to the CISG and the CESL: Will These Competing Instruments Enhance Legal Certainty in Cross-Border Sales Transactions?*, 24 EUR. BUS. LAW REV. 341 (2013).
- **Joseph M. Lookofsky**, UNDERSTANDING THE CONTRACTS FOR INTERNATIONAL SALE OF GOODS: GUIDE TO THE 1980 UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (Fourth Edition), Kluwer Law International, 2012.
- **Joseph Lookofsky**, CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG), Wolters Kluwer Law & Business, 2012.
- **Ulrich Magnus**, *Last Shot vs. Knock Out – Still Battle over the Battle of Forms Under the CISG*, in COMMERCIAL LAW CHALLENGES IN THE 21ST CENTURY, JAN HELLNER IN MEMORIAM 185 (Ross Cranston, Jan Ramberg & Jacob Ziegler eds.), Stockholm Center for Commercial Law Juridiska Institutionen, 2007.
- **Joseph F. Morrissey & Jack M. Graves**, INTERNATIONAL SALES LAW AND ARBITRATION: PROBLEMS, CASES AND COMMENTARY, Kluwer Law International, 2008.
- **Pilar Perales Viscasillas**, *CISG Articles 14 Through 24*, in Drafting Contracts Under the CISG 295 (Harry M. Flechtner, Ronald A. Brand, & Mark S. Walter eds.), Oxford University Press, 2008.
- **Pilar Perales Viscasillas**, *Acceptance with Modifications: Remarks on the Manner in which the Principles of European Contract Law may be Used to Interpret or Supplement Art. 19 of the CISG*, in AN INTERNATIONAL APPROACH TO THE INTERPRETATION OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (1980) AS UNIFORM SALES LAW 316 (John Felemegas ed.), Cambridge University Press, 2007.
- **Pilar Perales Viscasillas**, *Battle of the Forms and Burden of Proof: An Analysis of BGH 9 January 2002*, 6 V.J. 217 (2002).
- **Pilar 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*, 10 Pace Int’l L. Rev. 97 (1998).
- **Giesela Rühl**, *The Battle of the Forms: Comparative and Economic Observations*, 24 U. Pa. J. Int’l Econ. L. 189 (2003).
- **Ulrich G. Schroeter**, *Article 19*, in SCHLECHTRIEM & SCHWENZER COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) (Fourth Edition) (Ingeborg Schwenzer ed.), Oxford University Press, 2016.

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S. LOIZOU – THE “BATTLE OF THE FORMS”

- **Ingeborg Schwenzer, Christiana Fountoulakis, & Mariel Dimsey**, *INTERNATIONAL SALES LAW*, (Second Edition), Hart Publishing, 2012.
- **Michael P. van Alstine**, *Consensus, Dissensus, and Contractual Obligation through the Prism of Uniform International Sales Law*, 37 Va. J. Int'l L. 1 (1996-1997).
- **Arthur Taylor von Mehren**, *The “Battle of the Forms”: A Comparative View*, 38 Am. J. Comp. L. 265 (1990).
- **François Vergne**, *The “Battle of the Forms” Under the 1980 United Nations Convention on Contracts for the International Sale of Goods*, 33 Am. J. Comp. L., 233, 1985.