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Battle of Forms under the Contract Act, 1872: A Case for Adopting the Knock-out Rule

Dalia Pervin*

Abstract: *In commercial transactions, the merchants not only exchange terms of contract that are essential in negotiation, like quantity, price, date of delivery, etc., they also exchange 'standard' or 'boilerplate terms' in pre-printed forms to conclude the contract. A battle of forms arises when the buyers and sellers exchange conflicting standard terms between them, yet they proceed with the performance based on what they construe to be the contract terms. However, these discrepancies, though they appear innocuous at the beginning, often turn out to be the bone of contention as soon as the dispute arises. The pivotal questions before the court in a battle of forms dispute appear to be primarily the following: (1) Whether a contract is formed? (2) If yes, whose terms shall govern it? Put more precisely, what are its terms?' The traditional rules of contract formation usually favours the 'mirror image rule' and its derivative 'last shot doctrine'. However, both approaches lose their practicality since modern transactions are mostly conducted without paying attention to what is written in the standardised forms. This article delves into the comparison between the two major doctrines used to resolve these questions and suggests a 'knock-out' approach where the conflicting terms are eliminated and substituted with gap-filling provisions. On analysing the laws and jurisprudence developed in several countries adopting the intention-oriented view, it explains why such an approach serves the business purpose better while keeping the parties out of the battle of forms. Finally, it examines the limitations in the current framework of the Contract Act, 1872 and recommends amendment of the same to make it compatible in incorporating the 'knock-out' rule to accommodate the global trends of commercial negotiations and contract formation.*

Keywords: *battle of forms, knock-out rule, last-shot rule, standard terms, boilerplate terms, dickered terms, offer and acceptance.*

Introduction

Traditionally, under the Contract Act, 1872, explaining the formation of a contract is dealt with by sections 2(b) and 7(a), which corresponds to the common law doctrine of 'mirror image rule'. In essence, the rule states that acceptance

* Professor, Department of Law, University of Dhaka, The author acknowledges the assistance of Khalid Khan, a student of 4th Year, LL.B.(Hons.), Department of Law, University of Dhaka.

must correspond absolutely to the offer, just like a mirror creates an exact image of the person standing before it. This is usually coupled with the resultant 'last-shot rule', which determines whose terms shall prevail in the contract that has formed. As the name suggests, this doctrine views the terms in the last offer as the governing terms of the resulting contract. However, this rule becomes particularly prejudicial against the party who has expended a substantial amount only to find out there was no contract at all. The businessmen do not treat the standard terms[1] in the same way as the terms on which they dicker[2], as most merchants are not interested in seeing what is written in the fine-printed forms on the back of the deed.[3] Moreover, the last-shot rule encourages continuous exchange of forms in the hope of having the last shot,[4] which makes business transactions lengthy and tedious.

In this context, this article analyses how the battle of forms is dealt with under the Contract Act, 1872 and suggests replacing the current model of analysing battle of forms with the 'knock-out' approach as a solution to the issues. The knock-out rule involves the formation of the contract based on the intention of the parties to be bound by it. It works by eliminating conflicting terms suggested by the parties and filling the gaps with default rules or statutory terms while keeping the agreed terms intact. Because of its flexible approach, it has gained popularity in several jurisdictions and even found a place in various international conventions like CISG (The United Nations Convention on Contracts for the International Sale of Goods) and UPICC (Unidroit Principles of International Commercial Contracts) 2016. The article draws a general picture of the knock-out rule adopted in several countries like the USA, Germany and France. By analysing the advantages and disadvantages of this approach in comparison with those taken under the Contract Act, 1872, the article aims to assess the possibility and challenges in incorporating

[1] 'Standard terms' also known as 'boilerplate terms' usually appears at the end of the agreement and are usually pre-printed. They are usually inserted in the contract forms for repeated use and are barely negotiated between the parties. These terms include (but not limited to): choice of jurisdiction to resolve dispute, warranty provisions, arbitration clause, indemnification clause, force majeure clause, confidentiality clause, price variation clause, interpretation clause etc. These terms are not essential to contract but can have significant impact on other terms of contract. For example, a price variation clause, which is a standard term, can affect the negotiated price of the goods, a term that is essential for the formation of contract. Unidroit Principles of International Commercial Contract 2016, art 2.1.19 defines standard terms as 'provisions which are prepared in advance for general and repeated use by one party and which are actually used without negotiation with the other party.'

[2] Dickered terms include the essential or material terms of the negotiation upon which the parties consciously turn their focus. Most common dickered terms are the price, quantity and identity of the product etc.

[3] See *Uniroyal Inc v Chambers Gasket & Mfg Co*, 380 NE (2d) 571 (1978); Stewart Macaulay, "Non-Contractual Relations in Business: A Preliminary Study" (1963) 28 American Sociological Review 1 at 6.

[4] See Rick Rawlings, "The Battle of Forms" (1979) 42 Modern Law Review 715 at 717.

the knock-out rule into the current regime of contract law in Bangladesh. The article suggests that the present scheme of contract law is obsolete and inadequate to handle the battle of forms arising in modern commercial transactions, and new enactments are necessary.

An overview of contract formation under the Contract Act, 1872

To understand how the Contract Act, 1872, deals with the battle of forms, it is pertinent to look at the sections relating to the formation of contracts under the Contract Act, 1872. The three significant pillars of contract formation under the Act, like English law, are (1) offer, (2) acceptance, and (3) consideration, which are defined under section 2.[5]

An offer (a proposal), when accepted 'thereto', becomes a 'promise'.[6] Again, such a promise or set of promises forming consideration for each other is known as an 'agreement'.[7] It is an agreement enforceable by law, which we call a 'contract'.[8] The battle of form arises due to a conflict between the standard terms of offer and acceptance. Therefore, it will be pertinent to look at what counts as an offer and an acceptance.

> '(a) When one person signifies to another his willingness to do or to abstain from doing anything, to obtain the assent of that other to such act or abstinence, he is said to propose.
>
> (b) When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise.'[9]

Sub-section (b), while defining a promise, points towards the core of the formation of contract theory, that the offeree must signify his assent to the offer 'thereto'. This represents the common law tradition of reducing the contract into an offer and its unqualified acceptance, meaning that the acceptance must correspond with the offer[10].

Attention may be drawn to section 7 of the Contract Act, 1872, which mandates 'absolute and unqualified' acceptance to convert a proposal into a promise.[11] This is the most substantial provision in contract formation. When

5 *The Contract Act*, 1872, s 2.

6 ibid, s 2(b).

7 ibid, s 2 (e).

8 ibid, s 2 (h).

9 ibid, s 2 (a), s 2 (b).

10 *Hyde v Wrench*, (1840) 3 Beav 334; Guenter H Treitel, *An Outline of the Law of Contracts* (Oxford: Oxford University Press, 2004) at 11.

11 Section 7 runs as follows: 'In order to convert a proposal into a promise, the acceptance must-

an acceptance is not unqualified or contains a term different from the offer, the Court deems it a 'counteroffer' instead of an acceptance.[12] Any reservation in the acceptance results in rejection of the original offer, and hence, no contract is formed.[13] To have a valid and binding contract, the offeror and the offeree must agree upon the same thing and in the same sense (*ad idem* of their minds)[14] and unless that is done, one of them is making a counteroffer.[15] The effect it produces is known as the 'mirror-image' rule: the acceptance must mirror the offer made.[16]

However, there are a few exceptions to such a strict theory of contract formation. For example, inquiries and asking for further information do not terminate the original contract because they are not intended to do so.[17] Any additional information which only benefits the offeror does not terminate the contract.[18] Moreover, a statement making expressly what was implied in the contract does not act as a 'counteroffer'.[19] Neither a meaningless term nor a suggestion works as a termination of the original offer.[20] Similarly, a minor alteration is also not considered a counteroffer.[21]

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(1) be absolute and unqualified;

(2) be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted. If the proposal prescribes a manner in which it is to be accepted, and the acceptance is not made in such manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise; but if he fails to do so, he accepts the acceptance.'

12 *Hyde v Wrench*, (1840) 3 Beav 334; See Guenter H Treitel, *An Outline of the Law of Contracts*, 4th ed (Oxford: Oxford University Press, 2004) at 11.

13 *Badri Prasad v State of Madhya Pradesh*, [1970] AIR (SC) 706; Guenter H Treitel, *An Outline of the Law of Contracts*, 4th ed (Oxford: Oxford University Press, 2004) at 11; *Hyde v Wrench*, (1840) 3 Beav 334.

14 *See* M H Whincup, *Contract Law and Practice: The English System with Scottish, Commonwealth and Continental Comparisons*, 5th ed (Deventer: Kluwer Law International, 2006) at 47.

15 D F Mulla, *Mulla: The Contract Act*, ed by Rahul S Sahay, 14th ed (Haryana: LexisNexis, 2014) at 17 [*Mulla*].

16 Corneill A Stephens, "Escape from the Battle of the Forms: Keep It Simple, Stupid" (2007) 11:1 Lewis & Clark L. Rev. 233 at 237; Saloni Khanderia, "International Approaches as Plausible Solutions to Resolve the Battle of Forms under the Indian Law of Contract" (2019) 8 Global Journal of Comparative Law 1 at 14; See *Haji Mohd Haji Jiva v E Spinner*, (1900) 24 ILR Bom 510 (Sir Jenkins, CJ); See *Col. DI Macpherson v MN Appanna*, [1951] AIR (SC) 184.

17 Joseph Chitty, *Chitty on Contracts*, ed by Hugh Beale, 29th ed (London: Sweet & Maxwell, 2004) vol 1 at 138; See *Stevenson, Jacques, & Co v McLean*, (1880) 5 QBD 346.

18 *Re Imperial Land Company of Marseilles*, (1872) 7 LR Ch 587.

19 See Edward J Jacobs, "The Battle of Forms: Standard Contracts in Comparative Perspective" (1985) 34 International and Comparative Law Quarterly 297 at 299.

20 ibid.

21 Maloney, J in *Canadian Market Place Ltd. v Fallowfield*, (1977) 71 DLR (3d) 341 (Ontario).

Apart from the exceptions mentioned, an exceptional phenomenon occurs in a battle of forms, which can be explained in simplified terms in the following:

> When a merchant sends an offer to the other party, he sends it in forms containing both the negotiated and the standard/boilerplate terms of a contract. Unlike traditional contract formation, the other party does not simply reply with an absolute acceptance of both kinds of terms. Rather, he consents to the offer while giving his own terms and conditions in the acceptance form. This leads to a continuous exchange of forms (as counteroffers) between the merchants. Often, mismatches between offer and acceptance transpire within the standard/ boilerplate terms in the acceptance forms. Since the standard/boilerplate terms are pre-printed, it is quite natural that they will not always exactly match each other. Here, both parties assume the contract has been drawn up under their terms and thus start performing on it. This gives rise to a 'battle of forms' situation.

According to the mirror image rule, no contract will be formed between the parties because of a mismatched offer and acceptance. This rule is usually applied when no performance has been initiated yet.[22] But this is practically not the case. Because the performance of 'material terms' by one of them implies the formation of a contract.[23] Thus, the courts do find a contract between the parties in almost all cases.[24] But the perplexing question is 'whose terms shall govern the contract?' The English courts applied the principle underlying mirror image rule to resolve this question. The formula they innovated is known as 'the last-shot rule'.

In these situations, the offer that is sent *in the end* and is acted upon by the other party without unequivocally rejecting some of its terms is usually upheld by the Court as the basis of a contract.[25] This is a derivative of the mirror image rule in that once an offer is not accepted in an unqualified and unambiguous manner, it is an offer dead and buried.[26] The only offer that remains valid in the eye of the law is the final offer sent in the process of the exchange of forms. As we have just seen, the perplexity in a battle of forms appears when either of the parties has received the goods or services despite there being a mismatch between the terms in the

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[22] MP Ram Mohan et al, "Indian Law on Standard Form Contracts" (2020) 62(4) Journal of Indian Law Institute 1 at 18.

[23] *Mukund Ltd v Hindustan Petroleum Corporation Ltd*, [2005] Bom CR 21 at para 31 [*Mukund*]; See Daniel Keating, "Exploring the Battle of the Forms in Action" (2000) 98:8 Michigan Law Review 2678 at 2684; Kaia Wildner, "Art. 19 CISG: The German Approach to the Battle of the Forms in International Contract Law: The Decision of the Federal Supreme Court of Germany of 9 January 2002" (2008) 20 Pace International Law Review 1 at 5.

[24] Mulla, *supra* note 15 at 16; John Adams, "The Battle of Forms" (1979) 95 Law Quarterly Review 481.

[25] *Butler Machine Tool Co. Ltd*, [1979] 1 WLR 401.

[26] *Brogden v Metropolitan Railway Co.*, (1877) 2 App Cas 666; Jack Beatson, Andrew Burrows, and John Cartwright, *Anson's Law of Contract*, 29th ed (Oxford: Oxford University Press, 2010) at 40.

offer and acceptance. If the goods or services were not accepted, there would have been no contract at all according to the general principle of the mirror image rule. It is the acceptance of these goods or services which implies the contract. Hence, no doubt a contract was formed. But the real question is: on whose terms? The court, in this case, views the final form as the basis of the contract, and thus it is the terms in the last shot which shall govern the resultant contract. This is because all other forms sent and received in the form of offers and counteroffers are non-existent according to the mirror image rule. The court will reason that there was no explicit objection to the last shot, which is the only existing offer, hence the contract was formed on the terms of it only.[27] This is the gist of the 'last-shot rule'.

Like the mirror image rule, the last-shot rule keeps no scope but to construe a contract based on the last shot only, which has been acted upon without express rejection of its terms. It appears that a contract is only formed if this last counteroffer is accepted by performance if no express objection to its terms is communicated, and the terms of the contract shall be governed by the terms of this final offer (or counteroffer). [28]

We may look at the *Butler Machine Tool Co. Ltd. v Ex-Cell-0 Corporation (England) Ltd*[29] case for a clear view on this issue. In this case, both parties tried to ensure that their terms prevailed, but they used different devices to achieve it.[30] The seller's clause included a price variation clause and noted that the orders shall be accepted subject to the terms set out in it, which shall prevail over any terms and conditions of the buyer's order.[31] Contrarily, the buyer's form included no price variation clause, which was one of the terms mentioned in the seller's clause. Moreover, the buyer used an acknowledgement slip requiring a sign by the seller with a statement to the effect that the seller accepts the buyer's order on the buyer's terms and conditions.[32] The seller replied, stating its acceptance of the terms and conditions stated in the buyer's form, although its accompanying letter stated that the contract was being made on its terms. Notably, the seller did not mention any clear rejection or objection to any clause in the buyer's form. When

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27 *Mukund*, *supra* note 23.

28 Corneill A Stephens, "Escape from the Battle of the Forms: Keep It Simple, Stupid" (2007) 11:1 Lewis & Clark L. Rev. 233 at 237–238.

29 [1979] 1 WLR 401.

30 See Jacobs, *supra* note 19 at 301–303.

31 The seller's clause stated: 'All orders are accepted only upon and subject to the terms set out in our quotation and the following conditions. These terms and conditions shall prevail over any terms and conditions in the Buyer's order.'

32 The acknowledgement slip read as follows: 'ACKNOWLEDGEMENT: Please sign and return to Ex-Cell-O Corp. (England) Ltd. We accept your order on the Terms and Conditions stated thereon—and undertake to deliver by ... Date . . . Signed . . .' (The court held it as acceptance to the buyer's reply sent against the seller's final offer.)

the machinery was delivered, it asked for payment according to the price clause contained in the seller's form, which the buyer refused to give. The Court held this term in the acknowledgement slip as the last shot, meaning a counteroffer to the seller's original offer, and held that the contract was concluded on the buyer's terms. Thus, this case has affirmed the last-shot rule as an answer to the battle of forms disputes.

As we see from this case, communication of express rejection is a key factor in the last shot rule. It strongly requires the party commencing the performance to clearly express rejection of the specific terms of the form to which he objects before he begins acting on it. Otherwise, he will be bound by the last shot fired (as a counteroffer) by the other party.

Looking at the alternative: The Knock-out Approach

The knock-out rule is known as one of the strongest competitors to the last-shot rule. The rule is widely applied in German and French courts, but it also has a place in Section 2-207 of the Uniform Commercial Code (UCC) of the United States. To assess its prospects as a viable alternative to the last-shot rule, we need to understand what it is and how it works in the first place.

The knock-out rule comes with a limited scope of application. The general principle of the knock-out rule is that it replaces conflicting or different terms with terms of the same substance provided by a statutory law or code.[33] In other words, contrary to the last-shot doctrine, the contents of the contract are not determined by the form last sent (where performance has been initiated), rather it is determined later by the court.[34] This is, overall, the general principle of the knock-out rule, nevertheless, the use of it differs in various jurisdictions where it is applied.

For example, in the United States, the Uniform Commercial Code (UCC) adopts the knock-out rule in its way under section 2-207. The section constitutes a radical departure from the traditional common law approach of the mirror image rule.[35] While there can be no contract at all in the mirror image rule if the acceptance does not mirror the offer, a contract is formed under section 2-207 (1) when a definite and seasonable expression of acceptance or written confirmation

[33] *See* Bruno Zeller, "The CISG and the Battle of the Forms" in Larry A. DiMatteo, ed, *International Sales Law: A Global Challenge* (Cambridge: Cambridge University Press, 2014) 203 at 212; Giulia Sambugaro, "Incorporation of Standard Contract Terms and the "Battle of Forms" under the 1980 Vienna Sales Convention (CISG)" [2009] 2009:1 Int'l Bus LJ 69 at 73.

[34] *See also* Kasper Steensgaard, "A Comparative View on Battle of the Forms under the CISG and in the German and US American Experiences" [2015] 2015 NJCL 1 at 12–13.

[35] Arthur Taylor von Mehren, "The 'Battle of the Forms': A Comparative View" (1990) 38:2 The American Journal of Comparative Law 265 at 279; See François Vergne, "The 'Battle of the Forms' Under the 1980 United Nations Convention on Contracts for the International Sale of Goods" (1985) 33:2 The American Journal of Comparative Law 233 at 244.

is sent within a reasonable time even if additional or different terms are contained in it except that such acceptance is expressly made conditional on assent to the additional or different terms.[36]

When a contract is established in this fashion, it raises a question concerning the terms of the contract. This is because the exchanged forms may incorporate additional or different terms. Subsection 2 of Section 2-207 addresses this issue, stating that additional terms, generally considered 'proposals for addition to the contract,' become part of the agreement between merchants unless the offer explicitly limits acceptance to its terms, materially alters the offer, or a notice of objection has been previously given or is provided within a reasonable time after receiving notice of these additional terms.[37] We may call this part of the section the general rule of contract formation in the battle of forms under the UCC.

However, the most significant feature of this section which is relevant for our purpose is delineated in section 2-207(3) UCC, where it emphasises the parties' mutual recognition of a contract as evidence of the existence of the contract itself even though 'the writings of the parties do not otherwise establish a contract'.[38]

Naturally, it raises the question as to what the terms of that contract will be if the writings do not otherwise establish a contract, but the conduct of the parties does. The following sentence in the subsection answers the question: In such a 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.' This indicates the principle of the 'knock-out rule' as defined above. Thus, this part of the section distinguishes between the application of the knock-out rule and the UCC's overarching contract formation principles, thereby clarifying the scope within which the knock-out rule operates.

But this subsection also highlights a significant distinction made by the UCC

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[36] Uniform Commercial Code, § 2-207 [UCC]. The section goes as follows: A definite and seasonable 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. (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. (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."

[37] ibid.

[38] ibid.

between the contract's formation and its contents. While the terms of a contract are typically those agreed upon by the parties, as is the case with the last-shot rule, the UCC introduces a different approach. The court may determine that a contract has been formed, but the terms of that contract may not necessarily align with the specific terms proposed by either party. [39] Conversely, under the last-shot rule, if a contract is established at all, its terms are invariably all those of the offer that is accepted. This is because a discrepancy in terms would preclude the formation of a contract altogether under the last-shot rule.

One distinguishing feature of the knock-out approach developed by UCC (also by UPICC, and Principles of European Contract) is that it recognises the existence of a contract even though it contains conflicting standard terms, as the knock-out rule automatically eliminates them.[40] To have a better understanding of the knock-out rule's operation under the UCC, we should examine the *Ionics Inc v Elmwood Sensors Inc*[41] case.

In this case, the plaintiff, *Ionics Inc*, which used to manufacture water dispensers, purchased thermostats from the defendant *Elmwood Sensors Inc* on several occasions. In the purchase order, *Ionics* included a term that set forth the remedies available to them in case of a breach with specific mention of the supersession of the terms mentioned therein over any additional or different terms mentioned in the acceptance form.[42] At the same time, *Elmwood* were notified that *Ionics* would assume that the terms are accepted if they did not object in writing. Upon receipt of the purchase order, *Elmwood* dispatched an acknowledgement form delineating its terms, which limited its liability for damages arising from the use of its thermostats and stipulated that the sole remedy available to the purchaser for defective products would be 'repair'.

While the contract's existence was undisputed between them, its terms were a matter of contention. The court found that the terms used by the parties are contradictory, yet the conduct of the parties recognised a contract. Hence, section 2-207(3) UCC applied to this dispute. The court noted, consistent with

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[39] See Vergne, *supra* note 35 at 244.

[40] Steensgaard, *supra* note 34 at 13.

[41] 110 F (3d) 184 (1st Cir 1997).

[42] The purchase order contained the following, among others: '18. REMEDIES — The remedies provided Buyer herein shall be cumulative, and in addition to any other remedies provided by law or equity. A waiver of a breach of any provision hereof shall not constitute a waiver of any other breach. The laws of the state shown in Buyer's address printed on the masthead of this order shall apply in the construction hereof. 19. ACCEPTANCE — Acceptance by the Seller of this order shall be upon the terms and conditions outlined in items 1 to 17 inclusive, and elsewhere in this order. Said order can be so accepted only on the exact terms herein set forth. No terms which are in any manner additional to or different from those herein set forth shall become a part of, alter, or in any way control the terms and conditions herein set forth.'

Official Comment 6[43], where the terms in two forms are contradictory, each party is assumed to object to the other party's conflicting clause. As a result, mere acceptance of the goods by the buyer is insufficient to infer consent to the seller's terms under the language of subsection (1). Nor do such terms become part of the contract under subsection (2) since the conflicting terms operate as a notification of objection to the proposed terms.[44] Thus, by relying on section 2-207(3), the court applied the knock-out rule and held that the contract shall be governed by the terms agreed by the parties through correspondence and the conflicting terms shall be replaced by the supplementary terms incorporated in the UCC.[45]

It is important to notice that the section deals with 'additional' terms extensively, yet it is surprisingly silent on 'different' terms. The additional terms are dealt with by dint of section 2-207(2), where it is either viewed as proposals or as a part of the contract as per the circumstances of a case.[46] Contrarily, there is a consensus in the US in favour of treating different terms as conflicting ones, thus knocking out one another, which are replaced by the default terms of the Code.[47]

On the other hand, a similar approach, though not the same, has been developed by the German courts, which gradually departed from applying the last-shot rule in the early 1970s and had a real application of the knock-out rule in 1980. [48] In 1980, the Court applied the knock-out doctrine explicitly in the

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[43] The pertinent part of the Official Comment 6 is as follows: "…Where clauses on confirming forms sent by both parties conflict,] each party must be assumed to object to a clause of the other conflicting with one on the confirmation sent by him. As a result,] the requirement that there be notice of objection, which is found in subsection (2) of § 2-207, is satisfied, and the conflicting terms do not become part of the contract. The contract then consists of the terms originally expressly agreed to, terms on which the confirmations agree, and terms supplied by this Act, including subsection (2)…"

[44] *Ionics Inc v Elmwood Sensors Inc*, 110 F (3d) 184 (1st Cir 1997).

[45] *Cf Roto-Lith Ltd v FP Barlett & Co* 297 F (2d) 497 (lst Cir 1962), where it was held that '[a] response which states a condition materially altering the obligation solely to the disadvantage of the offeror is an acceptance . . . expressly . . . conditional on assent to the additional terms.'

[46] Uniform Commercial Code § 2-207(2) states: '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.'

[47] Giesela Rühl, "The Battle of the Forms: Comparative and Economic Observations" (2003) 24:1 University of Pennsylvania Journal of International Law 189 at 200; *Daitom Inc v Pennwalt Corp.*, 741 F (2d) 1569, at 1578-80 (10th Cir 1984); *Idaho Power Co v Westinghouse Elec Corp.*, 596 F (2d) 924 at 927 (9th Cir 1979); *Southern Idaho Pipe & Steel Co v Cal-Cut Pipe & Supply Inc.*, 567 P (2d) 1246 at 1253-55 (Idaho 1977)

[48] Giesela Rühl, "The Battle of the Forms: Comparative and Economic Observations" (2003) 24:1 University of Pennsylvania Journal of International Law 189 at 202–3

case of *OLG Köln*[49]. The defendant, in this case, sent a written order stating that they would not enter into a contract except on their terms. On the other hand, the plaintiff replied with a confirmation letter referring to its terms and conditions. The defendant remained silent but accepted the delivery of goods by the plaintiff. The dispute arose concerning the venue clause in the plaintiff's general terms of business. The question was whether there was a contract, and if so, on whose terms.

The court held that the receipt of the conduct of defendant after receipt of the plaintiff's confirmation letter does not suffice to establish a contractual relationship based on the plaintiff's final shot, since mere silence does not amount to an implicit declaration of acceptance. Instead, it was the acceptance of the delivery of goods, which may be construed as acceptance in the given case. Thus, a contract was deemed to have been formed.

But on whose terms? This question arose because the terms given by the parties conflicted, but both rejected any other terms except their own, though their conduct revealed the existence of a contract. The court resolved this gridlock by holding that '[t]hose parts of the general terms which are not in conflict take precedence over dispositive law, which replaces only those clauses which are invalidated by the unresolved conflict'. Thus, it deviated from the general principle of the last-shot rule and instead applied the knock-out rule. The rationale behind the judgment is that, where the parties indicate the existence of a contract, it ought to be taken as a waiver of the insistence of the defence clause, and the contract is thus deemed to be concluded.[50]

Similarly, in *Powdered Milk Case*[51] both the parties (a seller based in Germany and a buyer based in Netherlands) sought to incorporate their respective standard business terms into their contract. However, these terms contained conflicting provisions regarding liability limitations. Despite this inconsistency, the parties proceeded with the transaction, indicating their mutual assent to a contractual relationship. When the dispute arose concerning the quality of the milk, the seller asserted the applicability of liability limitations outlined in both parties' standard business terms.

The court found that the parties had formed a valid contract because their subsequent performance manifested a clear intent to be bound by a contract despite

[49] BB, 19 March 1980, (1980) 1237, online: <https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=1389> [translation] accessed 17 September 2024.

[50] Sieg Eiselen & Sebastian K Bergenthal, "The battle of forms: a comparative analysis" (2006) 39(2) The Comparative and International Law Journal of Southern Africa 214 at 237.

[51] Bundesgerichtshof [BGH] [Federal Court of Justice], Jan. 9, 2002, VIII ZR 304/00 (Ger.), online: <https://cisg-online.org/files/cases/6594/translationFile/651_52762818.pdf> [translation] accessed 18 September 2024.

the lack of agreement between their respective standard terms.[52] But the important question concerned the content of the content that was formed. The court opined that the conflicting standard business terms should be excluded to the extent they are substantially inconsistent. In such cases, the default legal rules would apply. Thus, the court adopted the application of the knock-out rule even under CISG, in which the last-shot doctrine is generally considered as the default rule.[53]

The deviation from the traditional rule under CISG was possible through applying Article 8(1) and (3). The said Article essentially emphasises the interpretation of the statements or conduct according to the intent where the other party could not have been unaware of what the intent was, regard being given to the relevant circumstances of a particular case.[54] However, Article 19 of the CISG will appear to be more in consonance with the last-shot doctrine as it considers any additions, limitations or other modifications in the reply, except they materially alter the terms of the offer, as a rejection of the offer itself.[55]

But it should also be kept in mind that the way German courts have applied the 'knock-out' rule is different from that applied in the case of UCC. Where in UCC, the Court will almost invariably find a contract despite there being a conflicting term and replace them with the Code, the German courts will not enforce a contract with conflicting clause especially when there is a clear indication of objection to be bound by the contract.[56]

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[52] ibid. The court held, 'The Court of Appeal correctly assumed that the partial contradiction of the referenced general terms and conditions of [buyer 1] and [seller 1] did not lead to the failure of the contract within the meaning of Art 19(1) and (3) CISG because of the lack of a consensus (dissent). His judicial appraisal, that the parties have indicated by the execution of the contract that they did not consider the lack of an agreement between the mutual conditions of contract as essential within the meaning of Art 19 CISG, cannot be legally challenged and is expressly accepted by the appeal.'

[53] See Kaia Wildner, "Art. 19 CISG: The German Approach to the Battle of the Forms in International Contract Law: The Decision of the Federal Supreme Court of Germany of 9 January 2002" (2008) 20 Pace International Law Review 1 at 9–10.

[54] Art 8 of CISG runs as follows:

(1) 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. (2) 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. (3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

[55] Wildner, *supra* note 53 at 5.

[56] *See* Eiselen & Bergenthal, *supra* note 50 at 239.

The knock-out rule is thus based on the premise that the parties intend to be bound only by those terms of the contract which they have in common. It not only means that a contract will be formed as soon as the conduct of the parties represents such an intent, even if the terms are conflicting or different, but also that only those portions of the contents of the contract which are reconcilable will form a part of it. The rest are hence 'knocked out'. While the last-shot rule results in a one-sided contract formation,[57] the knock-out rule gives us a fairer solution:[58] the terms that partially differ but do not conflict become part of the contract, while the conflicting terms are then knocked out and replaced by the statutory terms of the same substance.[59] Thus, a distinction is drawn between the form and the content of the contract.

The French law also follows the knock-out approach in dealing with the battle of forms.[60] The only exception is that it applies the knock-out rule even when the parties include a defensive clause explicitly mentioning that the contract is subject to its terms only, and any other terms proposed shall be rejected.[61] Whereas, the German courts will refuse to enforce such a contract on the face of such explicit rejection.[62]

Why a shift towards the knock-out rule is necessary: A comparison between the two doctrines

It is believed that the party knows best which terms serve their interest. Hence it is better to leave the parties to determine what terms will govern their agreement. This is feasible in the last-shot rule, since the party firing the last-shot governs the terms of the contract, meaning that the contract is enforced according to the terms suggested by one of the parties. Whereas, in the knock-out rule, only the terms agreed on become part of the contract, the conflicting ones being replaced by default/statutory terms.

In this sense, the last-shot rule may appear lucrative at first sight. There is no

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[57] *See* Douglas G Baird & Robert Weisberg, "Rules, Standards, and the Battle of the Forms: A Reassessment of § 2-207" (1982) 68:6 Virginia Law Review 1217 at 1232; *See also* Andre Corterier, "A Peace Plan for the Battle of the Forms" (2006) 10 International Trade & Business Law Review 195 at 198.

[58] *See* Imamunur Rahman, "An Analysis of the Application of the 'Last-Shot' Rule to Tackle the 'Battle of the Forms' in English Law" (2015) 7:4 EJCCL 101 at 107.

[59] Michael P Van Alstine, "The Unified Field Solution to the Battle of the Forms Under the U.N. Sales Convention" (2020) 62 William & Mary Law Review 213 at 284. *See* Sambugaro, *supra* note 33 at 73.

[60] Rühl, *supra* note 48 at 205; *Cf* Arthur Taylor von Mehren, "The 'Battle of the Forms': A Comparative View" (1990) 38:2 The American Journal of Comparative Law 265 at 274.

[61] *See* Rühl, *supra* note 48 at 205.

[62] ibid at 204.

need to delve into the distinction between the formation and the contents of the contract, as they are the same in the case of the last-shot rule. [63] In other words, there can be no contract unless the contents are agreed on.[64] If the contract is held to be formed, it is formed under the terms of the last shot. Whereas the knock-out rule will find one and then determine its contents.

This means the last-shot approach is highly formalistic, which makes resolving the disputes easier than the knock-out rule. [65] Because the court does not need to determine the formation of the contract and its terms step by step, as in the knock-out rule. Rather, finding the existence of a contract through offer-acceptance analysis suffices to resolve the battle.

However lucrative as it may appear, the last-shot rule is a highly criticised and controversial doctrine. It imposes a burden on the offeree to communicate the rejection of any term before starting the performance, not to be bound by the terms of the other party. Otherwise, the rule will treat the contract as founded on the terms given by the last shot.[66] Even where the offeree introduces some new terms without clearly rejecting any mentioned in the offer and begins his performance, as we saw in *Butler*[67] case, the offer is deemed by the court to be accepted, and the last shot forms the basis of the contract. Thus, this rule unjustly favours the offeree over the other party in determining the terms of the contract.[68]

But this is not the case in the knock-out approach of dealing with the battle of forms. While performance without communicating explicit rejection of certain terms binds a party to the other party's terms under the last-shot rule, the knock-out approach will treat the contract as having been formed under the mutually agreed terms only; the rest being substituted with statutory terms. Because they are not at risk of being bound by any terms which they do not agree to if they begin performance or receive the goods. Because such terms are knock-out and replaced by default/statutory terms of the same substance.

However, the knock-out rule does require specific communication of objection for not being bound by the contract. But such a requirement is not the same as the last-shot rule. What distinguishes and puts the knock-out rule over the last-shot rule is that, without any clear objection to the offeror's terms, the offeree

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63 Wildner, *supra* note 53 at 6.

64 See Rawlings, *supra* note 4 at 717.

65 ibid; See Stephens, *supra* note 16 at 238.

66 *Union Of India v Peeco Hydraulic Pvt Ltd*, [2002] AIR (Del) 367.

67 [1979] 1 WLR 401.

68 See Caroline N Brown, "Restoring Peace in the Battle of the Forms: A Framework for Making Uniform Commercial Code Section 2-207 Work" (1991) 69:3 North Carolina Law Review 893 at 902–903.

will be bound by the terms of the offeror in case of last-shot rule. Whereas, in the case of 'knock-out rule', the court will refuse to enforce such contracts where an unambiguous indication is given that one or both parties subjectively insist on the inclusion of their standard terms. [69]

Again, since commercial parties routinely refer to their respective standard business terms, the result in the great run of cases is that their exchange of forms will not create a binding contract because of the last-shot doctrine.[70] This is because of the rule of *consensus ad idem* that the acceptance must correspond to the offer *thereto*, unequivocally and in absolute terms (according to section 2(b) read with section 7 of the Contract Act, 1872). Hence, these exchanges will be treated merely as counter-offers, which will invalidate the formation of a contract and put one of the parties at risk.[71] Again, if we zoom in, we will find that the last-shot doctrine contradicts the principle of *consensus ad idem* itself.[72] By enforcing the terms which the other party barely agreed to, merely on the reason that it was in the last-shot and the party initiated the performance, the court only forces the party to perform on terms where consensus was not founded.

Moreover, it creates uncertainty for the merchants because they never know whether a contract has formed or not while negotiating (but not when performed).[73] If one party initiates the performance, then it can be described as an implied acceptance of the offer according to the last-shot and explained accordingly. But when the deal is in a negotiation stage, one party may seek to renege on the contract until the time of implied acceptance, saying that there was no contract at all.[74] Thus, he/she may point to inconsistencies between the purchase order and the acknowledgement to show that the minds of the parties never met enough to form a contract.[75] And even if the parties deem a contract as formed between them, the parties cannot know for sure what its terms are, because of the uncertainty of contracting terms, and may believe that their terms have prevailed.[76] Moreover, when one party takes delivery of goods, this approach will hold that as an implied

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[69] See Eiselen and Bergenthal, *supra* note 50 at 239.

[70] Alstine, *supra* note 51 at 281.

[71] *See also* MPP 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) 10 Pace International Law Review 97 at 116; MG Shanker, "'Battle of the Forms:' a Comparison and Critique of Canadian, American and Historical Common Law Perspectives" (1979-1980) 4 Canadian Business Law Journal 263 at 268.

[72] See Corterier, *supra* note 57 at 198.

[73] Jacobs, *supra* note 19 at 300–301.

[74] See Rawlings, *supra* note 4.

[75] Baird & Weisberg, *supra* note 57 at 1217.

[76] See Jacobs, *supra* note 19 at 300–301.

acceptance of the terms provided by the other.[77] This merely led to unfortunate consequences, which have been pointed out by the German court in 1980:

> 'The real problem ought not to be masked by finding an implied declaration of consent, and the real problem is that the parties never reached any clear and unequivocal agreement, and generally, for fear of endangering the deal, never really meant to. But if the parties conduct themselves in this manner, why should we invest juristic constructions and make hair-splitting distinctions in order to absolve them from the legal consequences, especially if the result is to subject one of them entirely to the other's terms? In any case, it does not square with the habits of tradesmen to treat the acceptance of goods as implicit submission to the other party's terms. Such behaviour really betokens an intention to ignore the conflict of terms, lest the contract be aborted, rather than any intention to accept the terms of the other party.'[78]

In a similar vein, the devil in the 'last-shot rule' lies in the name itself: the last shot always wins. In other words, the boilerplate terms of the party sending the last shot are accepted by the Court to govern the terms of the contract in their entirety only because of the happenstance of his sending the last shot in the exchange.[79] This is quite an arbitrary and unreasonable position.[80] But the situation gets worse when commercial agents, in a race to get the upper hand in the transaction, fire 'salvoes of standard forms at each other for each may hope to fire the last shot and induce express or implied acceptance.'[81] Thus, it makes negotiations a tedious and lengthy process, and inefficient both in terms of time and costs.

The intention-oriented approach adopted by the knock-out rule also helps cure these anomalies, especially by preventing the entire contract from being unenforceable. The root of this uncertainty lies in the discrepancies of the terms, which is an inevitable reality if the parties use pre-printed forms. Use of pre-printed forms with standard terms is a common practice in modern transactions. It is well recognised in the commercial world. Contrarily, the Contract Act, 1872, does not distinguish between the dickered and the 'standard/boilerplate' terms.[82] Rather, if we read sections 2(b) and 7 together, we find that it insists on reading the instrument as a whole. It exposes the archaic nature of the Act. However, recent

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77 Brown, *supra* note 68 at 902.

78 *OLG Köln*, BB, 19 March 1980, (1980) 1237, online: <https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=1389> [translation] accessed 17 September 2024.

79 Daniel Keating, "Exploring the Battle of the Forms in Action" (2000) 98:8 Michigan Law Review 2678 at 2684.

80 Baird & Weisberg, *supra* note 57 at 1232.

81 Rawlings, *supra* note 4.

82 Saloni Khanderia, "International Approaches as Plausible Solutions to Resolve the Battle of Forms under the Indian Law of Contract" (2019) 8 Global Journal of Comparative Law 1 at 14.

decisions in India, where the same Act is followed, has recognised this difference, yet with little difference as to its effects.

Thus, in *M R Engineers & Contractors Pvt Ltd v Som Datt Builders Ltd* [83] the Supreme Court of India (which follows the same Act), for example, held that the standard terms of a contract will be bodily lifted and incorporated in the main contract if the dickered terms are accepted.[84] Hence, the party starting performance or receiving the goods will still be in jeopardy if he has merely performed or received the goods based on the dickered terms. Because he will be construed as bound by the standard terms even if he does not agree with them.

But the knock-out approach acknowledges the current business trends and realities. Moreover, the rule is more in consonance with modern contracting practices.[85] The rule distinguishes between the dickered and standard or boilerplate terms. Dickered terms are those essential terms of the contract, non-acceptance of any of which renders the contract of no effect. Hence, it is assumed that the parties read it with care and assign utmost importance to these terms. But it is not the same case with standard terms. Standard terms are pre-printed, inserted at the back of the contract, often written in small fonts, and are not there for negotiation.[86]

The parties do not usually investigate what is written in tiny letters in the back of the deed in pre-printed forms.[87] That is why the knock-out doctrine will not rule out the existence of a contract because of the difference between them. Instead, it will construe a contract as formed on the terms on which they agree. The presumption behind this doctrine is that when an agreement has standard terms that match and standard terms that contradict, it should be taken that the parties intend to be bound only by those terms that match, not those on which they differ. This approach does not allow a party to renege on the contract based on the discrepancies if the performance does not begin. Thus, it saves the party that has incurred substantial expenditure on performance in contemplation of the existence of a contract. Moreover, a party shall not be subjected to a term that they do not agree to be bound since the conflicting terms are replaced by the statutory

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83 [2009] SCC 696.

84 ibid at para 17.

85 Steensgaard, *supra* note 34 at 13.

86 *Unidroit Principles of International Commercial Contract*, 2016, art 2.1.19.

87 Gregory M Travalio, "Clearing the Air after the Battle: Reconciling Fairness and Clearing the Air after the Battle: Reconciling Fairness and Efficiency in a Formal Approach to U.C.C. Section 2-207 Efficiency in a Formal Approach to U.C.C. Section 2-207" (1983) 33 Case Western Reserve Law Review 327 at 355; See also Rühl, *supra* note 48 at 214–215; Stewart Macaulay, "Non-Contractual Relations in Business: A Preliminary Study" (1963) 28 American Sociological Review 1 at 6.

ones. Again, the incentive to fire salvoes of standard forms in the hope of having the last shot is diminished. Because the party firing the decisive 'last-shot' is no longer in an advantageous place to win the battle under the knock-out approach.

However, the knock-out approach has one serious criticism: it operates as a disincentive to send and read the boilerplate terms that deviate from the codified terms in the statute.[88] A merchant will not use a self-serving form in their respective agreement deeds if the default rules prevail in cases of conflict and the courts ignore them while interpreting the contract.[89] In the mirror image rule, on the other hand, each party has an incentive to propose the terms that the parties would have agreed on if negotiated between them.[90] Thus, applying the knock-out rule means that the winner and loser are predetermined before the exchange has even started. Because if the code favours the buyer, a conflicting term in the seller's exchange form will not help him in any case, and vice versa.[91] On the other hand, the codified terms may not promote the mutual interest of both parties, which was possible through an exchange of forms.[92] It is further argued that the mirror-image rule permits the parties to tailor terms to their circumstances. [93]

However, these allegations are addressed on several occasions. Firstly, the argument that a party cannot influence the other party's term under the knock-out rule is a symmetric one. Because if the marginal buyer can police the seller's terms under the mirror-image rule, the marginal seller can do the same thing to the buyer's terms under the knock-out rule.[94] Secondly, the argument that the knock-out rule disincentivises sending or reading the boilerplate terms is also a symmetric one. Because the last-shot rule also does not induce the use of the standardised forms because the Contract Act, 1872, will view the contract without differentiating between the boilerplate and dickered terms. This will risk the formation of a contract in case of any major discrepancies between the forms remaining undetected. Moreover, the idea of carefully reading the standardised forms may not be economically helpful. The purpose of using pre-printed forms is to reduce the cost of negotiation. These forms are produced once by the lawyers

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88 Mehren, *supra* note 52 at 296.

89 Baird & Weisberg, *supra* note 57 at 1257.

90 Baird & Weisberg, *supra* note 57 at 1257; Victor P Goldberg, "The 'Battle of the Forms': Fairness, Efficiency, and the Best-Shot Rule" (1997) 76 Oregon Law Review 155 at 163.

91 *See also* MPP 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) 10 Pace International Law Review 97 at 116.

92 Baird & Weisberg, *supra* note 57 at 1255–1256.

93 ibid at 1252.

94 Goldberg, *supra* note 78 at 164.

but used repetitively over many similar transactions, which reduces their cost.[95] But reverting to the traditional rules will deprive the parties of such economic benefits. It will require the parties to maintain the lawyers to scrutinise the standard terms every time they send or receive them, because they are obliged to read these mass-produced documents carefully.[96] Hence, the knock-out rule has an edge over the mirror image rule and last-shot doctrine. Moreover, this approach is further supported by the adoption of this doctrine in several international instruments, such as UPICC, PECL (Principles of European Contract Law 1998)[97] and CISG.[98]

Challenges in adopting the knock-out rule

The main challenge regarding the incorporation of the knock-out rule is that the Contract Act, 1872, currently lacks any explicit provision that enables the court to enforce a contract based on the knock-out approach. Having a provision for applying the knock-out rule incentivises, if not obliges, the courts to use them. In the recent case of *Tekdata Interconnections Ltd v Amphenol Ltd*[99]the Court showed laxity in going beyond the four corners of the traditional rule of contract and based its judgment on the last-shot rule. An explicit provision on applying the knock-out rule may help the courts to get rid of the mischief. It is also recommended that a clear distinction between the 'dickered' and the 'standard/ boilerplate' terms is made, noting the exercise of the knock-out doctrine in case of the latter.

An example may be taken from UPICC (Unidroit Principles of International Commercial Contracts) Principles 2016, where a clear distinction has been made between the traditional agreement and agreements where standard terms have been used.[100] The principle above does not completely abolish the last-shot rule since that is still the applicable principle in case of the dickered terms or *essentialia negotii* because the last-shot rule is still applicable in those cases.[101]

As we have discussed above, the knock-out rule works by substituting the conflicting terms between the parties with default/statutory terms of the same substance. It means the pre-existence of a code or statute is required to fill the gap created by the knock-out terms. This points to one of the limitations in our law of contract, which is not having a comprehensive code that includes all the terms

95 ibid.

96 ibid.

97 Principles of European Contract Law, art. 2:208.

98 Andrea Fejos, "Battle of Forms under the Convention on Contracts for the International Sale of Goods (CISG): A Uniform Solution?" (2007) 11:1 VJ 113 at 114.

99 [2009] EWCA Civ 1209 (CA)

100 *Unidroit Principles of International Commercial Contracts Principles*, 2016, art 2.1.19–2.1.22.

101 *Unidroit Principles of International Commercial Contracts Principles*, 2016, art 2.1.1–2.1.18.

relating to contract formation.

However, it is also true that several aspects of commercial transactions may be well covered by the Contract Act, 1872, when coupled with other laws relating to commercial transactions, such as the Sale of Goods Act, 1930. The latter includes some fundamental provisions that may operate as substituted boilerplate/ standard terms in the contractual forms. For example, the Sale of Goods Act, 1930 has provisions relating to warranties and conditions,[102] instalment deliveries,[103] rules regarding delivery of goods,[104] passing of risks[105] and so on. These are valuable provisions in respect of applying the knock-out rules. Because, where conflicting terms are knocked out, and gap-filling provisions are required, these provisions will come in handy to determine the contents of the resulting contract. But it is also important to acknowledge that people contract on a vast number of matters, and there is an inadequacy of laws and provisions that cover such issues. A comprehensive code on contractual matters, like UCC or CISG, may be helpful to supplement the inclusion of a knock-out rule as a gap filler.

However, we should keep in mind that simply inserting such a provision will not provide much help if the parties are not willing to utilise it. The court cannot force a contract on the parties if they are not in consonance. Thus, he will try his best to avoid the knock-out rule, which will again lead the case to a battle of forms. One of the ways to avoid the knock-out rule, for example, is to express a clear statement that the party insists on the inclusion of their standard terms only. In such a case, there will be no contract at all.

Hence, apart from passing an amendment, it is equally important not only to have a 'comprehensive' law of contract, but also a law that puts the parties into an equilibrium– a balanced position for the buyer and seller, an idea which is typically associated with the 'knock-out rule'.[106] But since certain terms are knocked out of the contract, which one party may find essential, the entire contract may be jeopardised.[107]

Moreover, the knock-out rule is applied variedly in different jurisdictions, as we have seen in the differences between the UCC, the German law and the French law. It is up to the policymakers to decide how the knock-out rule may be applied. In general, two possible models can be found: (1) Express Rule, where 'a contract is recognised to have been concluded even though it contains conflicting standard

[102] *The Sale of Goods Act*, 1930, ss 11–17, 59.

[103] ibid s 38

[104] ibid s 32–37

[105] ibid s 26

[106] See also MP Ram Mohan et al, *supra* note 22 at 21.

[107] Steensgaard, *supra* note 34 at 16.

terms as the rule knocks out the conflicting terms'.[108] UCC is an example of this rule, where a contract is enforced, albeit having conflicting and different terms.[109] (2) Consensus Rule, which is applied in the German courts generally. The rule provides that 'nothing but an agreement is required for a contract to come into existence'.[110] It may also be tailored to its own needs and the peculiarity of the legal system. That is a question for the future to decide.

Conclusion:

The traditional rule applies to traditional circumstances. Where the circumstances are exceptional, it is necessary to take exceptional measures. The Contract Act, 1872, is a more than a century-old law which represented the needs of its time. It has adopted the common law principles of offer and acceptance, which still serve the purpose of resolving almost all the conventional disputes. But the law suffers heavily while dealing with 'battle of forms' because of the changed business conditions due to technological advancements and widespread use of printing devices.

In these situations, the law creates several impediments in transacting business deals by causing uncertainty, volatility, delay and unnecessary expenses– the exact opposite of the very purposes for which the law was enacted. Germany, France, the USA, and several other countries had long ago identified the issue with the common law approach of 'absolute and unqualified acceptance' and deviated from it. On the other hand, Unidroit has developed similar principles of contract formation in UPICC, which adequately cover the various aspects of the battle of forms. It is now necessary for us to incorporate and amend the necessary changes to our provisions in contract law to reflect the changed business practices by adopting modern and trendy principles.

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[108] ibid.

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